

[2013] WASAT 199

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : DEVELOPMENT & RESOURCES

ACT : LOCAL GOVERNMENT ACT 1995 (WA)
PLANNING AND DEVELOPMENT ACT 2005 (WA)

CITATION : REDIRE PTY LTD and SHIRE OF
SERPENTINE-JARRAHDALÉ [2013] WASAT 199

MEMBER : MR J JORDAN (MEMBER)
DR A HINWOOD (SESSIONAL MEMBER)

HEARD : 29 AND 30 OCTOBER 2013

DELIVERED : 9 DECEMBER 2013

FILE NO/S : DR 77 of 2013
DR 311 of 2013

BETWEEN : REDIRE PTY LTD
Applicant

AND

SHIRE OF SERPENTINE-JARRAHDALÉ
Respondent

Catchwords:

Town planning - Development refusal - Proposed extractive industry -
Extraction of sand - Rural zone - Landscape protection area - Impact on visual
amenity - Dust - Plan for excavation and rehabilitation management - Use of
basic raw materials
Extractive industry licence - Refusal - Planning approval first required

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Legislation:

Environmental Protection (Noise) Regulations 1997 (WA), reg 5
Local Government Act 1995 (WA), s 9.7(1)(a)
Metropolitan Region Scheme, cl 32
Planning and Development Act 2005 (WA), s 252(1)
Shire of Serpentine-Jarrahdale Town Planning Scheme No 2, cl 3.2.2, cl 6.4.2
State Administrative Tribunal Act 2004 (WA), s 31

Result:

Application for review allowed
 Planning approval granted for proposed extractive industry (sand) for five years
 subject to conditions
 Extractive industry licence granted for extraction of sand for five years

Summary of Tribunal's decision:

These proceedings involved the refusal of two applications, one for planning approval for an extractive industry (sand) and the second for an extractive industry licence for the sand extraction. Proposed was sand extraction for five years on a Rural zoned lot adjacent to the foot of the Darling Scarp.

The proposal principally raised concerns about adverse impact on visual amenity in a landscape protection area and nuisance dust.

The Tribunal determined that the applicant could adequately address the concerns raised through the management of these factors. The Tribunal therefore allowed the review and granted, subject to conditions, a planning approval and an extractive industry licence for the sand extraction.

Category: B

Representation:*Counsel:*

Applicant	:	Mr I Rogers
Respondent	:	Mr D Nicholson

Solicitors:

Applicant	:	Borello Legal
Respondent	:	McLeods Barristers & Solicitors

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Case(s) referred to in decision(s):

Empire Grazing Pty Ltd and Shire of Bridgetown-Greenbushes
[2010] WASAT 102

Joice Investments Pty Ltd and Shire of Chittering [2007] WASAT 119

PMR Quarries Pty Ltd and City of Mandurah [2010] WASAT 87

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REASONS FOR DECISION OF THE TRIBUNAL:***Introduction***

1 Redire Pty Ltd (applicant) filed applications for review of each of two decisions made by the Shire of Serpentine-Jarrahdale (Shire) in respect of proposed sand extraction from Lots 4 and 5 Transit Road and Lots 6 and 7 Jarrahdale Road, Jarrahdale (site). The applications were:

1. DR 77 of 2013 - an application pursuant to s 252(1) of the *Planning and Development Act 2005* (WA) for review of the refusal of an application for planning approval for an extractive industry (sand); and
2. DR 311 of 2013 - an application pursuant to s 9.7(1)(a) of the *Local Government Act 1995* (WA) for review of the refusal to grant an extractive industry licence for the sand extraction.

2 At a directions hearing on 20 September 2013, the Tribunal ordered that:

Pursuant to s 51(1) of the *State Administrative Tribunal Act 2004* (WA), proceeding[s] DR 311 of 2013 and DR 77 of 2013 are consolidated into one proceeding.

3 The site has an area of 76.75 hectares and sits to the east of, but with frontage to, South Western Highway. It is bounded to the north by Jarrahdale Road, to the south by Transit Road, and to the east by lots that extend to the foot of the Darling Scarp. The site falls from about 130 AHD at the south-eastern corner to about 57 AHD at Jarrahdale Road. The site had previously been used for a pine plantation which has been cleared with limited remnant vegetation remaining.

4 Proposed was extraction of approximately 190,000m³ of sand covering 7 hectares of the site to a depth of 2 metres to 4 metres. Excavation would be over a five year period and the area eventually excavated would be about 150 metres wide extending about 600 metres from between the centre of the western boundary of the site and the south-western corner. The sandpit would be set back about 40 metres from South Western Highway and Transit Road.

5 The proposal involved the construction of a bund of overburden about 2 metres to 3 metres high to screen the operation. The bund was originally proposed adjacent to the northern, western and southern sides of

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the excavated area, and also for about 100 metres at the south-eastern corner.

6 About 200 metres to the east of the excavation area on the southern side of Transit Road is the entrance to a Baptist Youth Camp (youth camp). The youth camp has mature vegetation along its road frontage with recreation buildings closest to the road, beyond which are accommodation buildings. To the west of the southern end of the site across South Western Highway are the sheds of a plant propagation business with an associated house.

7 It was proposed that the site would be excavated from north to south using a front end loader as required to meet specific contracts. It was not anticipated the use would be operational every day. No processing of sand on site was proposed and it was anticipated that the sand extraction would be completed within the five year period.

8 It was proposed that as each stage was completed, it would be progressively rehabilitated, as provided for in an *Excavation - Rehabilitation Management Plan*, May 2013 prepared for the applicant by Mr Lindsay Stephens, an environmental consultant of landform research.

Planning framework

9 The site is zoned Rural under the *Metropolitan Region Scheme* (MRS). In the Western Australian Planning Commission's (WAPC) *State Planning Policy 2.4 - Basic Raw Materials* (SPP 2.4), the site is not identified in Figure 2 as either a priority resource location, a key extraction area or an extraction area. Sand is identified as a basic raw material and, although the site is not identified as a 'known' resource, SPP 2.4 does state that:

A ready supply of basic raw materials close to established and developing parts of the metropolitan region is, therefore, essential in keeping down the costs of land development and contributing to affordable housing.

10 The objectives of SPP 2.4 at cl 5.1 do include ensuring that the development of land for the extraction of basic raw materials does not adversely affect the environment or amenity of the locality during or after extraction.

11 Under the *Shire of Serpentine-Jarrahdale Town Planning Scheme No 2* (TPS 2) the site is zoned 'Rural'. The extraction of sand falls under the defined use class 'Industry - Extractive' under TPS 2. Within the zoning table of TPS 2 this use class has the designation 'AA' which under

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cl 3.2.2 means that there is discretion to permit the use. The proposed use was advertised and submissions received included objections.

12 Clause 6.4.2 of TPS 2 requires that certain matters be considered when determining an application for planning consent and these include the provisions of any policy affecting the land, any comments received in response to public notice of the application and for the preservation of the amenity of the locality.

13 The site is also located within the area of the *Shire of Serpentine-Jarrahdale Local Planning Policy No 8 - Landscape Protection (LPP 8)*. The objectives of the policy are:

1. To preserve the amenity [derived] from the scenic value of the Darling Scarp;
2. To maintain the integrity of landscapes within the Landscape Protection Area;
3. To protect and enhance the landscape, scenic and townscape values through control over ... siting of development and land uses rather than prohibition of development and land use as such;
4. To maintain the integrity of landscapes in the line of sight view corridor along identified scenic routes in the Shire, including but not limited to South West Highway ... Jarrahdale Road ...;
5.

14 The applicant also required a licence for the extractive industry operations under the Shire's *Extractive Industries Local Law (EI Local Law)*.

Refusal by the Shire

15 The Shire considered the application for the extractive industry in February 2013 and again at its meeting on 22 July 2013, when invited to do so under s 31 of the *State Administrative Tribunal Act 2004 (WA)* (SAT Act). At both meetings the Shire resolved to refuse the application on the following grounds (summarised):

- the proposal does not meet the objectives of LPP 8;
- the proposal does not meet the criteria of cl 6.4.2 of TPS 2;

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- the proposal does not fall within the area of SPP 2.4 or any other designated resource area;
- the proposal would have an unacceptable impact on the visual amenity of the locality because of visibility from South Western Highway, Jarrahdale Road and other locations;
- the proposed screening measures would be unlikely to adequately minimise or mitigate adverse visual impact of the excavation;
- management measures for dust outside normal operating hours and during periods of inactivity were inadequate; and
- public submissions were received opposing the application.

16 At the same meetings the Shire also refused to grant an approval for the extractive industry licence for the proposed sand extraction.

17 The Shire further resolved to recommend to the WAPC that the development be refused under the MRS.

The WAPC decision

18 Pursuant to cl32 of the MRS an application for an 'extractive industry' in the Rural zone of the MRS also requires determination by the WAPC. The WAPC granted planning approval for the proposed 'extractive industry - sand' on 20 August 2013 subject to the following conditions:

1. The approval is valid 5 years from the date of approval, after which a new application for planning approval must be obtained.
2. The areas of the site subject to the Metropolitan Region Scheme reservation for the widening of South Western Highway and extension of Tonkin Highway are to remain unaffected/excluded from extraction and the current levels maintained.
3. An Environmental Management Plan is to be submitted and approved by the Shire of Serpentine[-]Jarrahdale, in consultation with the Department of Parks and Wildlife, prior to the commencement of works.

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The issues

19 At the commencement of the hearing on 29 October 2013, it was common ground between the parties that if the development were to proceed certain issues could be managed by conditions in the management plan. These included noise, surface and groundwater management, traffic, emergency management and hazardous chemicals.

20 The substantive issues in contention between the parties were:

- 1) whether the proposed development would have an acceptable impact on the visual amenity of the locality;
- 2) whether the proposed development would be consistent with LPP 8; and
- 3) whether dust emissions from the excavation would adversely affect the local amenity.

21 The respondent said it would not object to an excavation licence being granted if the Tribunal determined that the proposed development was to be granted conditional planning approval.

*Discussion***Visual amenity**

22 Trees have been planted along the perimeter of the site, but the parties agreed that it would be some years before these trees provided any meaningful screening. Ms Elizabeth Bushby, a planner called by the applicant, and Mr Stephen Allerding, a planner called by the respondent, agreed that adequate bunding would screen the extraction pit from most roadways and view locations.

23 Mr Allerding remained concerned however, that although it was not a designated view corridor, Transit Road rose toward the east and there would likely be a view of the workings from the road and particularly from the entrance and buildings of the youth camp. He considered this impact on the visual amenity of the locality would be inconsistent with LPP 8 and suggested that the bunding be extended to the youth camp entrance to screen the operations on the site.

24 Ms Bushby was of the opinion that the sensitive premises to the south-west of the site would be shielded from the view of the excavation by the topography, trees and the bunding. In her opinion, the sensitive

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premises to the south, including the accommodation buildings of the youth camp would not be affected due to the screening by other buildings, vegetation and the sloping topography. In support of her argument Ms Bushby referred to the contours and the cross-section of the site at Figure 8 of the *Excavation - Rehabilitation Management Plan*, May 2013.

25 In the course of the hearing the applicant proposed that the bunding extend around the entire perimeter of the excavation area prior to the commencement of any excavation on, or removal of material from, the site. Mr Allerding said this would address his concerns about the view of the operation from the south and south-east. The respondent said that an appropriate condition would be required.

26 The parties commented to the Tribunal that the intent of LPP 8 would be satisfied if an appropriate condition was imposed to achieve the screening of the works by bunding.

Dust

27 This extractive industry when operating will generate dust. It was Mr Stephens' submission that most of the dust generated would be from the removal of the overburden, and its stockpiling and forming into bunds, and by heavy vehicles using the access road between Jarrahdale Road and the excavation area. Mr Andrew Mack, the environmental expert called by the respondent, and Mr Stephens agreed that the dust mitigation, suppression and management measures described in s 5.4 of the *Excavation - Rehabilitation Management Plan*, May 2013 would be appropriate and adequate when the site was in operation. These measures included the application of water trucks and a complaint based system to deal with dust emissions.

28 The main concern expressed by the Shire was dust generation when the site was not occupied and the subsequent impact on the two neighbouring sensitive residences - the youth camp to the south and the house to the west.

29 The management of dust and the specific dust management actions are guided by *A Guideline for managing the impacts of dust and associated contaminants from land development sites, contaminated sites, remediation and other related activities*, Department of Environment and Conservation, March 2011 (Guideline document). The Guideline document outlines the assessment of risk of dust generation and recommends management action required to address the risk. Both experts used the Guideline document, but generated different risk

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estimates and hence provided different opinions on the management responses considered acceptable to address the issue of dust from the development area.

30 Mr Stephens arrived at a low risk score for dust impact on each of the two sensitive premises. He contended that in periods of inactivity, the use of water on operational and traffic areas would cause these surfaces to bind and for a crust to develop, reducing the potential for dust 'lift-off'. The applicant proposed the use of a complaint based system when the site is not being operated. If a complaint is made of visible dust seen leaving the site, then the applicant would respond and use water tankers to wet areas subject to the dust lift-off.

31 Mr Stephens provided evidence (that was not disputed) that because of the predominantly easterly and south-westerly direction of the prevailing wind, any dust from the site would mostly be blown away from the youth camp, which is located to the south of the site, and mostly away from the house to the west. The site would be excavated in stages as demand dictated and each stage would be rehabilitated when complete. Only the area currently available for extraction would be a dust risk and the required extension and vegetation of the bund would reduce the movement of dust off site.

32 Mr Mack arrived at a medium risk score for dust generation during non-operational times. He said that the higher risk score requires a high level of management and the need for dust monitoring. He noted the difficulty in identifying whether the dust monitored by a machine was from the site, but referred to establishing baseline measurements before the use commenced and the possible deployment of sophisticated monitoring equipment that required regular checking to provide a reasonable response time should an elevated particulate concentration be measured. When questioned, Mr Mack conceded that no other similar sand excavation uses in Western Australia required this type of monitoring, but that there was such a requirement in other States.

33 Mr Stephens, in his witness statement, provided examples of licence conditions used by the former Department of Environment and Conservation. He also said the dust mitigation, suppression and management measures described in s 5.4 of the *Excavation - Rehabilitation Management Plan*, May 2013 have been endorsed as conditions by the Tribunal in *PMR Quarries Pty Ltd and City of Mandurah* [2010] WASAT 87, *Empire Grazing Pty Ltd and Shire of Bridgetown-Greenbushes* [2010] WASAT 102, as well as in

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Joice Investments Pty Ltd and Shire of Chittering [2007] WASAT 119. The developments to which these conditions attached were not examined before the Tribunal for comparability with the current proposal, but the approvals were taken to be examples of sand excavation where conditions did not require equipment based monitoring but did require the applicant to ensure that no visible particulates crossed the boundary of the site.

34 Mr Mack and Mr Stephens agreed that if the development were allowed to proceed, a separate dust management plan should be prepared and submitted to the Shire and the plan should form part of agreed conditions of approval.

35 The Tribunal formed the view, on the evidence before it and the submissions of the parties, that a dust management plan along the lines advocated by the applicant would be appropriate. This was because of the rural location, the relative location of sensitive premises, the topography, local climate factors (particularly prevailing winds), the limited area of excavation and the five year lifespan of the use. Approval conditions of the type requested by the applicant would be consistent with what appears to be the current practice for dust management of sand extraction as proposed for the site.

Conclusion

36 Sand of the type found on the site is a basic raw material, but the site is not identified on the resource protection map (Figure 2 of SPP 2.4). It was not, however, controversial that sand of the type found on this site is a raw material particularly important in the development of new residential subdivisions. There was evidence at the hearing of the ongoing development of suburban areas in the area between Byford and Armadale to the north of the site. Identifying raw materials and determining if they can be excavated prior to a locality being used for urban development is consistent with the intent of SPP 2.4, as well as more generally consistent with the principle of orderly and proper planning. It remains important, however, that raw materials, such as in this matter, should only be exploited when it can be demonstrated that any impact on the local amenity and the environment is properly managed.

37 In this matter, the Tribunal has been satisfied that the proposed excavation of the sand on the site can be managed to address the environmental concerns, particularly dust, and that the impact of the use will be consistent with the objectives of LPP 8, particularly in regard to addressing the impact of the development on the visual amenity of the locality.

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38 The Tribunal has therefore decided to uphold these applications for review. The Tribunal has determined that planning approval is granted for the proposed extractive industry (sand) under TPS 2 and that an extractive industry licence be granted under the Shire's EI Local Law, both subject to appropriate conditions.

39 During the course of the hearing the parties and witnesses made comment on what conditions might be appropriate if the development were allowed. The respondent's original schedule of recommended 'without prejudice' conditions was subject to some modification and the inclusion of a requirement for a dust management plan. An amended set of draft 'without prejudice' conditions was submitted by the respondent on 30 October 2013 (Exhibit 14) and, subject to some minor amendments, accepted by both parties.

Orders

1. The application for review is allowed and the respondent's decisions of 22 July 2013 to refuse the application for planning approval and the application for an extractive industry licence for the extraction of sand on the site (Lots 4 and 5 Transit Road and Lots 6 and 7 Jarrahdale Road) is set aside.
2. In the matter of DR 77 of 2013, planning approval is granted for the proposed use 'extractive industry (sand)' on the site subject to the following conditions:
 - (i) This approval is valid for a period of five years from the date of approval.
 - (ii) The applicant shall submit an amended Excavation - Rehabilitation Management Plan, incorporating a dust management plan as an appendix, for approval by the Shire of Serpentine-Jarrahdale.
 - (iii) Except to the extent inconsistent with any other conditions set out hereunder, all development on the site shall comply with the Excavation - Rehabilitation Management Plan as approved by the Shire of Serpentine-Jarrahdale and any subsequent amendments to that Management Plan as may be agreed in writing

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between the applicant and the Shire from time to time.

- (iv) Operating hours are restricted to 7.00 am to 5.00 pm Monday to Friday, excluding public holidays. The site shall not operate on Saturdays, Sundays or on any public holiday.
- (v) The applicant shall not undertake any screening or washing of excavated material on the development site.
- (vi) The applicant shall submit an annual report to the Shire of Serpentine-Jarrahdale by 31 March each year. The annual report shall include an internal compliance audit of all the development and licence approval conditions and Management Plan requirements, to the satisfaction of the Director Planning. The annual report shall also provide details of complaints and complaint responses.
- (vii) The applicant shall ensure that all vehicle loads of sand, soil or other particulate material leaving the premises are to be enclosed or completely covered by a secure impermeable tarpaulin or some other effective mechanism used to prevent or minimise dust nuisance.
- (viii) The applicant shall implement dust management measures in accordance with the approved Management Plan, so as to minimise dust emissions and ensure that visible dust is not emitted beyond the boundaries of the development site.
- (ix) In the event of the bunds being determined by the Director Planning to be unstable and leading to sand movement, measures are to be taken by the applicant to stabilise the sand by the use of appropriate measures such as windbreaks, vegetation planting or soil amendments.

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- (x) The applicant shall at all times ensure sufficient water is accessible on site to undertake dust management measures pursuant to condition (viii) as required, including, if necessary and required, by means of water transported by tanker onto the site.
- (xi) During periods of inactivity when excavation is not being undertaken, the applicant must ensure, prior to and during the period of inactivity as required, that the access road to all trafficable areas and other operational areas on the site, are watered down or treated in a manner which prevents or minimises the generation of visible dust crossing beyond the boundaries of the site.
- (xii) The applicant shall implement noise mitigation measures in accordance with the Noise Assessment Report (Herring Storer Acoustics, May 2013) and the management plan, so that no unreasonable noise (as defined in reg 5 of the *Environmental Protection (Noise) Regulations 1997* (WA) is emitted from the development site. If a second front end loader is required on site, the applicant shall submit to the Shire of Serpentine-Jarrahdale a revised noise assessment report demonstrating the management of noise emissions, and that compliance with *Environmental Protection (Noise) Regulations 1997* (WA) can be maintained to the satisfaction of the Director Planning.
- (xiii) The applicant shall implement the water management measures detailed in the approved Management Plan so that the development does not adversely affect groundwater or surface water quality in any manner.
- (xiv) All stormwater is to be disposed of within the property. Direct disposal of stormwater onto the road, neighbouring properties, water courses and drainage lines is prohibited.

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- (xv) No earthworks, including batters, shall intrude into any buffer areas described in the Management Plan, unless otherwise approved by the Director Planning.
- (xvi) The perimeter of the area to be worked must be pegged and clearly marked to ensure that all earthworks are contained within the approved area.
- (xvii) A plan showing the location and design of the access and crossover to the site from Jarrahdale Road is to be submitted and approved by the Director of Engineering prior to commencement of any excavation or removal of materials from the site. During operations, signs are to be erected on Jarrahdale Road warning 'Caution - trucks entering'.
- (xviii) The applicant shall implement suitable fire protection measures in accordance with the Management Plan.
- (xix) No onsite fuel storage or major servicing of equipment shall take place on the site.
- (xx) The applicant shall implement measures to minimise the risks of spills or leaks of chemicals including fuel, oil or other hydrocarbons in accordance with the Management Plan and shall ensure that no chemicals or potential liquid contaminants are disposed of on site.
- (xxi) The applicant shall keep a register of the extent, location, environmental implications and remedial actions taken for any accidental contamination of soil or water resources in a logbook to be kept on site and available for immediate inspection by the Shire of Serpentine-Jarrahdale.
- (xxii) The applicant shall provide a 40 metre buffer from the western and southern boundaries of the site to the edge of the excavation area and as

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shown on Figure 2 (proposed extraction area) in the Management Plan. The buffer area shall be planted with three rows of trees prior to the first winter following the grant of approval. The applicant shall maintain and replant the trees which die after the first planting.

- (xxiii) Prior to the commencement of excavation or the removal of materials from the site, the applicant shall undertake the construction of landscaped bunds as described in the Management Plan around the entire perimeter of the excavation area, to screen the excavation area from South Western Highway, Jarrahdale Road and the entry to Transit Road.
- (xxiv) Notwithstanding anything contained within the Management Plan, no excavation is to occur within 2 metres of groundwater.
- (xxv) The applicant shall control declared weeds throughout the site to the satisfaction of the Shire of Serpentine-Jarrahdale.
- (xxvi) The excavation area is to be no larger than 3 hectares at any one time.
- (xxvii) The excavation area shall be progressively rehabilitated when final contour levels and grades for each stage are achieved and within six months of the closure of each stage, with such rehabilitation being in accordance with the Management Plan.
- (xxviii) The applicant/operator is to provide a copy of the dust management plan (comprising an appendix to the Management Plan) to the operators of the premises located at No 22 (Lot 1) Transit Road (Baptist Youth Camp) and No 1908 (Lot 99) South Western Highway (WA Cactus and Succulent Supply Company). During operations a sign displaying telephone and email contact details of the

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applicant/operator is to be displayed at the entrance to the site.

3. In the matter of DR 311 of 2013, an extractive industry licence is granted for the site, subject to the following conditions:
 - (i) The applicant shall undertake the extractive industry operations in accordance with the Shire of Serpentine-Jarrahdale's *Extractive Industries Local Law*.
 - (ii) The applicant shall pay the annual extractive industries licence fee on or before 31 December each year as determined by the Shire of Serpentine-Jarrahdale from time to time.
 - (iii) The extractive industry licence is granted for a term of five years from the date of approval.

I certify that this and the preceding [39] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

MR J JORDAN, MEMBER