JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	PLANNING AND DEVELOPMENT (DEVELOPMENT ASSESSMENT PANELS) REGULATIONS 2011 (WA)
CITATION	**:**	SITA AUSTRALIA PTY LTD and WHEATBELT JOINT DEVELOPMENT ASSESSMENT PANEL [2015] WASAT 40
MEMBER	**:**	MR P McNAB (SENIOR MEMBER)
HEARD	**:**	27 MARCH 2015
DELIVERED	**:**	10 APRIL 2015
PUBLISHED	**:**	16 APRIL 2015
FILE NO/S	**:**	DR 127 of 2014
BETWEEN	**:**	SITA AUSTRALIA PTY LTD Applicant AND WHEATBELT JOINT DEVELOPMENT ASSESSMENT PANEL Respondent

Catchwords:

Town planning - Development application - Review of refusal of a major waste landfill facility - Rural land - Application for leave to amend development application - Amendments followed mediation in Tribunal - Amendments purportedly addressing local amenity and related concerns - Proposed use not changing - Alleged reduction in impact of operation of landfill site by amendments - Significant changes to watercourse management and by creation of extensive borrow pits - Tribunal's jurisdiction to consider proposed

amendment - Whether amended proposal amounted to a new proposal - Tests to be applied in determining whether essence or substance of the original proposal altered - Held: leave granted to amend development application - Amendments and variations not so extensive as to amount to a new development proposal

Legislation:

Nil

Result:

Leave granted to amend development application

Summary of Tribunal's decision:

The applicant, SITA Australia Pty Ltd (SITA) applied to the Tribunal for leave to amend its development application for a proposed major waste management facility. The proposed development was proposed to be located on the Allawuna Farm Landfill site in the Shire of York. The respondent, the Wheatbelt Joint Development Assessment Panel, had refused to approve the original development application.

Following mediation in the Tribunal, SITA had modified its original proposal, in part to address concerns raised by local objectors (including the Shire of York) and also, it appeared, in response to the requirements of the Department of Environment Regulation. On the face of it, there were significant reductions in the potential impact of the amended proposal.

The amendments to the development application were opposed by the Shire of York, the Environmental Defender's Office (representing the Avon Valley Residents Association) and by two residents living in the Shire of York. The amendments were contested upon the basis that, in truth, SITA was proposing a substantially new development from what had been previously proposed.

The respondent, the Wheatbelt Joint Development Assessment Panel, remained neutral on the question of leave to amend.

Two particular areas of alleged major alteration or variation were identified: first, in respect of the proposed changes to managing the effects of the development on a watercourse on the subject land and, secondly, the creation of certain 'borrow' pits (for the taking of soil) on the subject land.

After considering the leading authorities on the issue (that is, rulings of the Tribunal in other cases, and cases from interstate), the Tribunal overruled the objections and granted leave to amend, holding that the substance or essence of

the original proposal was not so altered or varied by the proposed amendments so as to amount to a new proposal.

Category: B

Representation:

Counsel:

Applicant	:	Mr P McGowan
Respondent	:	Ms C Ide
Shire of York	:	Mr D McLeod
Avon Valley Residents Association	:	Mr P Pearlman

Solicitors:

Applicant	:	Freehills
Respondent	:	State Solicitor's Office
Shire of York	:	McLeods
Avon Valley Residents Association	:	Environmental Defender's Office WA

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

Ervin Mahrer and Partners v Strathfield Municipal Council (No 2) (2001) 115 LGERA 259
Kidd v Brisbane City Council [1984] QPLR 34
Matus v Cairns City Council (1981) 3 APA 224
Moore River Company Pty Ltd and Western Australian Planning Commission [2006] WASAT 269
North v Ipswich City Council (1974) 30 LGRA 267
Pacesetter Homes Pty Ltd v State Planning Commission (1993) 84 LGERA 71
Yaksich v Town Planning Board (Unreported; Town Planning Appeals Tribunal; Appeal No 15 of 1979; 19 December 1979)

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The applicant, SITA Australia Pty Ltd (SITA), has through its counsel, Mr P McGowan, applied to the Tribunal for leave to amend its development application for a proposed waste management facility. That development application is currently before the Tribunal for review in proceedings DR 127 of 2014.

2 The Tribunal received written and oral submissions from various parties, opposing leave to amend. These submissions came from the following organisations and persons.

3 First, the Shire of York (through its counsel, Mr D McLeod); secondly, the Environmental Defender's Office (EDO) (through its counsel, Mr P Pearlman, and representing the Avon Valley Residents Association) and, finally, from the Davies sisters (in person), both of whom reside in the Shire of York.

4 The respondent, the Wheatbelt Joint Development Assessment Panel, has remained neutral on this aspect of the case.

Background to the review

5 The review concerns the respondent's refusal for the development of the Allawuna Farm Landfill site, a major waste management facility proposed to be located in the Shire of York. As the Tribunal understands it, the applicant has modified its original proposal, in part at least, to address concerns raised by local objectors (including the Shire of York) but, it seems, mainly in response to the requirements of the Department of Environment Regulation (DER). In any case, the proposed modifications follow mediation in the Tribunal.

6 In the result, and for the reasons that follow, the Tribunal has decided to accede to the applicant's application for leave to amend its development proposal.

7 Of course, this conclusion does not indicate anything in terms of the final judgment to be made on the merits of the proposal.

8 What follows is a formally revised and edited version of the reasons for decision delivered orally by the Tribunal.

Principles controlling a grant of leave for amendment

9 The Tribunal will commence by restating the relevant legal principles for determining such an application.

10 First, there is no question that the Tribunal has jurisdiction to consider and determine the application for leave to amend. A long series of cases in this Tribunal and in other courts and tribunals, both here and elsewhere, have established this beyond any doubt. See, for example, ***Moore River Company Pty Ltd and Western Australian Planning Commission*** [2006] WASAT 269 (***Moore River***) a decision of Chaney DCJ, as he then was.

11 Secondly, the issue is one of looking at the *substance* of the amendment or variation sought. The authorities suggest, speaking generally, that the issue of substance is to be approached liberally, and with a 'broad brush'. To some extent also a *pragmatic* approach may be taken on the issue of whether the amended development application remains in essence the same proposal as was considered by the decision-maker below.

12 The formulations as to whether a proposed amendment or variation of the original proposal passes muster as a permissible alteration are discussed, for example, in ***Matus v Cairns City Council*** (1981) 3 APA 224 at 228. There His Honour Judge Row said (internal citations omitted):

> In considering the nature of a proposed amendment or variation, the proposal ought to be looked at broadly and fairly for the purpose of determining whether the amendment or variation is of such consequence that notice should be given thereof.
>
> When the amendment contains "immaterial variations" or is not a "markedly different concept, or a building of a different character" or is not "a development different or substantially different at any rate from that proposed" [then] it is not necessary to lodge an amended application to the local authority to readvertise the amended proposal. A variation or amendment providing for a materially larger or different development, or introducing a new or enlarged factor which may cause interference with residential amenity, or with other lawful uses being conducted in the locality would undoubtedly require a fresh application and advertisement. In *Belsham v Brisbane City Council (No 2)* (1979) *Planner* 203, [Judge Blyth] said:
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> > "However, the main question for me to decide is whether it is a substantially different application to such a degree that a new town

> planning application is needed. I say it is a matter of degree because the use it not to be changed."
>
> …
>
> The question whether a variation or amendment constitutes a substantially different development is one of fact and degree: *Donnelly v Marrickville Municipal Council* (1973) 28 LGRA 276, at 286.

13 A similar test applies in this jurisdiction and reference may be made, for example, to ***Yaksich v Town Planning Board*** (Unreported; Town Planning Appeals Tribunal of Western Australia; Appeal No 15 of 1979; 19 December 1979) (***Yaksich***), cited with approval in ***Moore River***. The former Tribunal said (emphasis added):

> In our opinion it would be manifestly inconvenient if an appellant were unable to amend [their] application or plan in any respect in the course of or for the purposes of an appeal to the Tribunal. *The question in any particular case must be whether the amendment if made will constitute a new proposal or whether the proposal as amended remains in substance the same proposal.* That is a question of degree. We consider that the amended proposal in this case does not constitute a new proposal. We note that the practice of the Town Planning Appeal Tribunal of Victoria has consistently been to allow the substitution of modified plans where the modification does not in the opinion of the Tribunal amount to a new proposal: *Clissold v Shire of Winchelsea* (1978) 10 VPA 24.

14 In ***Moore River***, at [13], His Honour also noted the apparent approval of ***Yaksich*** by Murray J in the Supreme Court of Western Australia in ***Pacesetter Homes Pty Ltd v State Planning Commission*** (1993) 84 LGERA 71 (***Pacesetter Homes***). Justice Murray had there also spoken of a test in terms of whether the nature of the amendment was '*so sweeping* as to effectively convert the proposal … into a new proposal' (at 85, emphasis added).

15 In ***Moore River***, His Honour concluded, at [33], that a 'significant' change in a plan did not of itself 'render the revised plan a different proposal'. Importantly, his Honour also observed that, at [32]:

> The fact that there may be arguments as to the planning merits of the configuration of the revised plan does not mean that the revised plan amounts to a substantially different proposal.

16 Thus, in a New South Wales case, Bignold J could say (see, ***Ervin Mahrer and Partners v Strathfield Municipal Council (No 2)*** (2001) 115 LGERA 259 at 226) that despite 'numerous and extensive changes to the proposed development' the essential character of the

proposed development was unaffected. Further, His Honour embraced an 'impressionistic evaluation' in resolving apparently complex differences between the amended and the original plans. It may be that an 'impressionistic evaluation' is a useful, perhaps necessary, tool to assist any decision-maker on the judgment to be made on an amendment question as regards complex or large scale developments.

17 Dr Alan Fogg, in his major work *Land Development Law in Queensland* (Law Book Co, 1987) cites ***Kidd v Brisbane City Council*** [1984] QPLR 34 where considerable alterations did not require re-advertisement. In effect, this was because the essence of the proposal remained the same. Importantly, the court there noted that the proposed alteration would arguably *enhance* local amenity. Dr Fogg also cites ***North v Ipswich City Council*** (1974) 30 LGRA 267 where the court noted that no 'new material factors' had been introduced by the various changes to the entrances, boundaries and buffer areas of a 550 car drive-in theatre. The court observed that the amendment would not have 'provoked an objection from any person not otherwise disposed to object'. Dr Fogg concluded, at page 216 (emphasis added):

> Both [of these cases] are representative of the majority of decisions on the judicial tests. *It is not surprising that amended applications are frequently accepted as not requiring re-advertisement*. Many amendments *result from the applicant's attempts to meet objections* which have been lodged with the Local Planning authority or the authority's own perception of the effect of the original proposal on the amenity of the locality.

18 Arguably, the reference to 'meet[ing] objections' sums up the situation in this case, at least in part.

The proposed amendments

19 In this case, the applicant submits, by reference to its supplementary report's 'Key outcomes' (which is a summary description of the amended proposal), that significant *reductions* are to be achieved in the proposed landfill footprint (reduced by 31%); that the maximum height of the waste deposited will be reduced (down 4.5 metres in height); that there will be a reduced overall volume of waste material (down 46%); that the floor of the landfill pit will be raised so as to increase the separation distance to the underground water table; and that there will be reductions in the size of the leachate ponds and the stormwater dam.

20 As the Tribunal understands the situation, the objectors do not necessarily accept, at least from a practical point of view, that the proposed impact of the operation has been 'reduced' to the extent that

these figures might otherwise suggest. It is unnecessary for the Tribunal to reach any final conclusion on this topic because of the findings of the Tribunal on the central points of contention.

21 Putting aside a raft of more minor or more amenity based objections to the amended proposal, the objectors identified two major areas of particular concern. These were:

1) The proposed changes to managing the effects of the development on a watercourse on the subject land; and

2) The creation of certain 'borrow' pits.

22 The Tribunal turns first to the proposed modifications to the watercourse on the site. In short, Mr McLeod, for the Shire, directs attention to the apparent scale of the proposed changes, and the importance of water management on the site.

23 Nevertheless, the applicant's amended proposal, in my view, continues to seek, as did the original proposal, *to manage the interaction of the landfill development with the existing watercourse on the subject land*. This is so regardless of the precise classification of the nature of the watercourse. That objective, as a matter of substance, has not materially changed. This is so even if the engineering and related details have altered as a consequence of other amendments to the proposal. On the tests outlined above, such modifications do not change the essence of what was considered below - they are, in particular, not 'so sweeping', to use the words of Murray J in ***Pacesetter Homes*** (at 85), as to amount to a new proposal.

24 In effect, the same points on the watercourse were taken by Mr Pearlman from the EDO and, with respect, the same conclusion applies to his submission.

25 In the case of the borrow pits, it is now proposed to 'add' to the development what appears to be, on its face, a significant expansion of the overall site area by the creation of three borrow pits for soil removal (such material to be used elsewhere on the site) creating an area of up to 20 hectares, to operate, it appears, from year 10 of the proposal onwards.

26 On these additions, Mr Pearlman characterises them as 'very large excavations' that, if permitted, would significantly affect the site's wider landform. Over many years it is estimated that between 1.3 million to 1.45 million tonnes of earth may need to be removed from the pits.

Mr McLeod makes similar points. However, it is not challenged that the need for this additional soil flows directly from the reduction in the soil originally proposed to be removed from the landfill cells themselves.

27 It is true that such pits, if approved, will change both the landform and the management regime for the subject land. But, with due respect for those who take another view, these are matters for the merits review itself, and will be fully considered at the hearing.

28 In any event, Mr McGowan for the applicant, characterised the borrow pits as incidental to the landfill operation and, as we have seen, as a direct consequence of the applicant's other modifications to the proposed landfill. These matters must be judged in terms of the scale of what was originally proposed. The Tribunal accepts SITA's propositions.

29 We have already seen that 'numerous and extensive' and 'significant changes' to a proposal do *not* mean that its essence necessarily changes. In addition, the fact that modifications might lead to new arguments as to the planning merits of the amended proposal does not mean that a new proposal has eventuated. Again, whether taken together or separately, in this case the proposed amendments, although 'significant', are not, in the Tribunal's view, 'so sweeping' as to amount to a new proposal. And, of course the proposed use does not change.

30 In my view, applying, where necessary, an impressionistic approach to the proposed changes to the applicant's landfill proposal leads to the conclusion that the essence of the proposal remains unchanged. Leave should be granted for the proposed amendments to the development application under review.

31 In conclusion, the Tribunal again emphasises that this result does not say anything about the final decision to be made in the Tribunal about the proposed landfill operation and whether or not it should be approved on its merits.

Final orders

32 For the reasons given above, the Tribunal makes the following orders:

1. Leave is granted to substitute the plans of the proposed development with Drawings D001-D013, as described and discussed in the Supplementary Report (which supplements the original Planning Report lodged with the

Shire in December 2013) which contains SITA's Fire Management Plan (as Appendix 1 to the Supplementary Report), as filed with the Tribunal and served on the Respondent and proposed interveners on 6 March 2015 and again on 13 April 2015.

2. The respondent is invited, pursuant to s 31 of the *State Administrative Tribunal Act 2004* (WA), to reconsider the decision under review by no later than 15 July 2015, noting the applicant's indicative 'Section 31 Timeline' document, varied to substitute a later reconsideration date to accommodate the Shire of York.

3. The matter is adjourned for further directions at 10 am on 4 August 2015.

I certify that this and the preceding [32] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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MR P McNAB, SENIOR MEMBER