

# Water use considerations in developmental approvals

26 October 2022

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Worthwhile read for: Town Planners, Local Governments, Property Developers, Environmental Consultants

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Water, or the lack of it, is increasingly becoming an issue in our drying climate, particularly where intensive agricultural activities are being pursued.

In *Britza and Shire of Gingin [2022] WASAT 58 (Britza)* the Applicant commenced review proceedings in the State Administrative Tribunal (**Tribunal**) pursuant to section 252(1) of the *Planning & Development Act 2005 (P&D Act)* with respect to conditions imposed associated with potato growing and an avocado farm, requiring surface water monitoring and compliance with an operating strategy, notwithstanding an entitlement to exercise riparian water rights. Riparian water rights are regulated pursuant to the *Rights in Water and Irrigation Act 1914 (RiWA Act)*. Section 20 of the RiWA Act provides that where a watercourse is situated on land, the owner/occupier may take water from it for any purpose, provided downstream flows are not sensibly diminished.

In *Britza*, the Applicants prepared an operating strategy which was approved by the Department of Water and Environmental Regulation (**DWER**), developed to maintain downstream flows. When asked by the Shire to respond, DWER replied that it did not have a mechanism available to it to ensure the proponents complied with the operating strategy and requested the Shire to impose conditions. Generally, DWER developed operating strategies are imposed as conditions on water licenses granted pursuant to the RiWA Act.

The Shire's Local Planning Policy 1.6 – Agriculture Intensive – provided that development applications were to be assessed without regard to viability considerations, such as water licensing. The Applicants contended that imposing conditions requiring compliance with an operating strategy straitjacketed their riparian water rights and was otherwise the subject of regulation pursuant to the RiWA Act.

The Tribunal considered the RiWA Act and the P&D Act and concluded that nothing in the P&D Act indicated that water resources were to be excluded from land use planning considerations, that neither Act prevailed over the other and that both Acts were capable of co-existing due to their different purposes. The Tribunal considered its role was to balance land use objectives, while ensuring downstream flows were maintained for the life of the development. The Tribunal determined that the purpose of the conditions were not to regulate water use, but rather were to ensure that the planning principles of maintaining and protecting the environment were maintained. The Tribunal considered that in the unusual circumstances of the case, the Applicant was to report to both the Shire and DWER with respect to compliance with the operating strategy and the Title was to be endorsed with a statement that the land use was subject to compliance with an operating strategy.

The decision is significant as it:

1. effectively curtails the exercise of riparian water rights;
2. imposes development conditions akin to compliance with a water licence where water licensing was not required; and
3. there was no evidence to suggest that downstream flows would be sensibly diminished due to the development.

During 2020, 12 Water Deficiency Declarations were made. There is nothing unusual about a drying climate and unreliable water sources. Since coming into power, the McGowan Government's \$1.08 billion investment into critical water infrastructure and initiatives like the WaterSmart Farms project and the Farm Water Supply Planning Scheme are welcomed, but moving forward, proponents for intensive agricultural purposes and perhaps development approvals generally, may be subject to greater scrutiny and conditions, requiring proponents to adopt a well-defined water conservation and environmental management plan, which could require production to be scaled back during dry periods. Local governments are also likely to play a greater role in monitoring compliance with water management strategies imposed as a condition on development, a role previously required of DWER.

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