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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**STREAM** : DEVELOPMENT & RESOURCES

**ACT** : TOWN PLANNING AND DEVELOPMENT ACT  
1928 (WA)

**CITATION** : MILNE and WESTERN AUSTRALIAN PLANNING  
COMMISSION [2003] WATPAT 1

**CORAM** : MR P MCGOWAN  
MR L GRAHAM  
MS M WHITE

**HEARD** : 19 NOVEMBER 2002

**DELIVERED** : 12 FEBRUARY 2003

**FILE NO/S** : APP 106 of 2002

**BETWEEN** : WILLIAM MILNE  
Appellant

AND

WESTERN AUSTRALIAN PLANNING  
COMMISSION  
Respondent

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*Catchwords:*

Subdivision - Residential Design Codes - Variation of 10.6% - Non-compliance  
with average lot size

*Legislation:*

*Town Planning and Development Act 1928 (WA)*

*Result:*

Appeal dismissed.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr M Hardy
Respondent	:	Ms J Hebiton

*Solicitors:*

Appellant	:	Hardy Bowen
Respondent	:	Crown Solicitor's Office

**Case(s) referred to in judgment(s):**

Kyrwood v Western Australian Planning Commission [2002] WATPAT 15  
Marshall v WA Planning Commission (1985) 15 SRWA 170

**Case(s) also cited:**

Nil

**MR P MCGOWAN, MR L GRAHAM, MS M WHITE:**

**Description of the Appeal Land**

- 1 The Appellant is the registered proprietor of 43 Purdom Road Wembley Downs. The full title description is Lot 927 being the whole of the land the subject of Certificate of Title Volume 1193 Folio 203.
- 2 The subject property is at the corner of Purdom Road and Jade Place Wembley Downs. It comprises 875 square metres in area which excludes the corner truncation. If the corner truncation were included (19 square metres) then the total sub-divisible area would be 894 square metres.
- 3 The subject land is zoned urban under the Metropolitan Region Scheme and under the City of Stirling's Town Planning Scheme No. 2 is zoned R20.

**Application for Subdivision**

- 4 On 20 March 2002 the Appellant made application to subdivide Lot 927 into two lots of equal area being 447 square metres (again it should be emphasised this is on the basis that the corner truncation is included in the area the subject of the application for subdivision). On 18 June 2002 the Respondent refused the application for subdivision.
- 5 This appeal is brought from that refusal.

**R – Codes and Residential Design Codes**

- 6 At the date of the application the Appellant accepts that the R-Codes then in place required a minimum lot area of 450 square metres and that at 447 square metres each the lots fell short of that requirement.
- 7 Between the date of the application and its determination by the Respondent and the hearing of this appeal the Residential Design Codes of Western Australia came into effect in October 2002. These, when introduced, replaced the previous R-Codes and equally represent a Statement of Planning Policy to which the Tribunal, by s 53 *Town Planning and Development Act 1928*, must have “due regard”. As the Tribunal expressed most recently “the Tribunal has consistently taken the approach that the R –codes are a matter of sound Town Planning Practice in the principles and will be given the highest weight”. *Kyrwood v Western Australian Planning Commission* [2002] WATPAT 15.

- 8 In opening, counsel for the Respondent expressed the view that the Respondent's position was that the matter was to be determined by reference to the previous R codes and not by reference to the Residential Design Codes.
- 9 In the course of closing however the Respondent appeared to accept that it was open to the Tribunal to deal with this appeal on the basis that Residential Design Codes did apply to this appeal.
- 10 To avoid confusion the Tribunal takes the view that as at the date on which the appeal is heard it must, particularly having regard to s 53 of Town Planning and Development Act, apply the Residential Design Codes then in force. Given that the appeal to this Tribunal is a hearing de novo different considerations obtain than would have been the case when the matter was considered by the Respondent in June 2002.

### **Variation from Table 1 Residential Design Codes**

- 11 Although at that time (ie June 2002) the introduction of the Residential Design Codes was imminent and one could contemplate regard being had to them, nevertheless the approach that the Respondent took to the determination of this application appears to have been primarily driven by reference to the R Codes.
- 12 Clause 3.1.3 of the Residential Design Codes provides (as was the approach in principle in the previous R Codes) for variation from certain nominated requirements in relation to either minimum area or average area.
- 13 During the course of the hearing an issue arose as to the proper relationship between the expression "minimum site area" in clause 3.1.3 and the figures that appear in table 1 having regard to the fact that the subject land was zoned R20.
- 14 In closing, counsel for the Appellant, Mr Hardy, suggested that the expression minimum site area was in effect a global expression incorporating both minimum area and average area as those expressions are used in table 1. There is no definition of minimum site area in the Residential Design Codes. There is a lot to be said for the submission. For our purpose we accept that that is a way in which that expression may be understood and provides a basis to deal with the relationship between clause 3.1.3 and table 1.

- 15 In this case therefore what the Appellant sought was a departure from the limitations contained in table 1. Those limitations seem of themselves to require that the subdivision involved the production of lots of a minimum area of 440 square metres but that the lots produced on subdivision have an average of 500 square metres. In this case what is sought is 2 lots with an average 447 square metres. In fact each lot is 447 square metres. There is therefore compliance with the minimum size but a failure to comply with the average required. In essence therefore this is a difference of 106 square metres (2 by 53) which represents a variation or departure of 10.6% for each lot.
- 16 Clause 3.1.3 of itself allows variation to “no more than 5% less in area than that specified on table 1” plus compliance with one of the 5 other stated criteria.
- 17 It is important however to note that the Residential Design Codes do not of themselves govern the outcome of an application for subdivision. *Marshall v WA Planning Commission* (1985) 15 SRWA 170 in particular at 174.
- 18 The Respondent particularly relied upon and there was much debate about the implications of policy DC 2.2.
- 19 This policy was expressly the subject of discussion by the Tribunal in *Kyrwood v WAPC* [2002] WATPAT 15 at paragraphs 3-8. We repeat the reviews there expressed.
- 20 A result therefore, the Appellant in accepting that he did not formally meet the requirements of the Residential Design Codes, sought to put the case on the basis that “Sub dividing lot 927 would be consistent with the existing pattern of closer settlement that is occurring in the locality and any future subdivision in the surrounding area”.
- 21 That view, expressed by Mr Caddy called on behalf of the Appellant, was then buttressed by photographs taken of built form in the area together with the production of a tax map from which the Tribunal was invited to draw certain conclusions.
- 22 Evidence was advanced on behalf of the Respondent through Mr Guidici that this area of Wembley Downs was from a planning point of view a garden estate.
- 23 Whilst undoubtedly that may well be so, and Mr Caddy accepted that to be the position in cross examination, nevertheless the area appears to be

undergoing some substantial change. For example in the block bounded by Glenelg Avenue, Hale Road, Stockdale and Purdom Road 11 of the 28 blocks have been subdivided. In the blocks surrounded by Purdom Road, Glenelg Avenue and Stockdale Crescent 9 of the 19 blocks have been subdivided. In fact apart from lot 926 (the lot adjoining the subject property) all lots looked at in a clockwise direction from lot 940 to lot 930 on the tax map have been subdivided.

24 What emerges, however, is that, save for lot 943, all such lots were before subdivision in the range 971 square metres to 1080 square metres. The size of lot 927 therefore has its own inherent problems, it being from creation considerably smaller than contiguous lots.

25 It was said that the creation of this subdivision was also driven by the fact that two street frontages could be created from such subdivision.

26 The contrary view expressed by Mr Guidici was:

“To allow a variance of the degree proposed undermines the detailed planning undertaken and would constitute a flawed and ill considered approach to planning. Furthermore the significant departure from the prevailing lot size in the area would also undermine the existing amenity of the area by facilitating higher density development when the properly prepared and reviewed local authority scheme advocates that the area should remain low density with relevantly large lots”.

27 It seems to us that former sentiment has more persuasive effect upon us than the latter of the views expressed by Mr Guidici: We also find that his view, so expressed, is to be preferred over the views of Mr Caddy.

28 Mr Guidici also gave evidence that the R 20 code effects the predominant larger lot size of the locality and the desirability of maintaining the area for single residential low density development and character with much greater distances between houses than in other areas which have been allocated higher density codes.

29 From a planning point of view we are persuaded that this represents an effective statement of principle in this matter.

30 Under the previous R Codes the average for each lot on subdivision would have been 450 square metres. The application of planning principle, correctly highlighted by Mr Guidici, would have required the same. The fact that the Residential Design Codes now require an average of 500 (as

opposed to the previous 450) simply adds to the planning considerations articulated by Mr Guidici.

- 31 For those reasons we are not persuaded that grounds exists in this case to allow a departure from both the Residential Design Codes and their effective incorporation in the City of Stirling's Town Planning Scheme.
- 32 For those reasons the appeal will be dismissed.