
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

STREAM : DEVELOPMENT & RESOURCES

ACT : TOWN PLANNING AND DEVELOPMENT ACT
1928 (WA)

CITATION : DEPARTMENT OF HOUSING AND WORKS and
TOWN OF VICTORIA PARK [2003] WATPAT 3

CORAM : MR J A CHANEY SC
MR L GRAHAM
MR C PORTER

HEARD : 24 OCTOBER 2002

DELIVERED : 27 FEBRUARY 2003

FILE NO/S : APP 87 of 2002

BETWEEN : DEPARTMENT OF HOUSING AND WORKS
Appellant

AND

TOWN OF VICTORIA PARK
Respondent

Catchwords:

Aged and dependent persons accommodation - Density bonus - Discretion under scheme to approve non-complying application - Distance to shops and facilities - Access to public transport

Legislation:

Nil

Result:

Appeal allowed subject to conditions.

Category: B

Representation:

Counsel:

Appellant	:	Mr R Easton
Respondent	:	Ms R Lavery

Solicitors:

Appellant	:	As Agent
Respondent	:	As Agent

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

Department of Housing and Works v Town of Victoria Park [2001] WATPAT
13

Case(s) also cited:

Nil

MR L GRAHAM, MR J A CHANEY SC, MR C PORTER:

- 1 This appeal arises from the refusal on 28 May 2002 by the Respondent of an application for three aged persons units at No 6, Lot 401 Boundary Road, St James. The application constituted the second stage of a total development consisting of four grouped dwellings (“**Stage 1**”) and the three aged persons dwellings (“**Stage 2**”). Stage 1 has been previously approved by the Respondent.
- 2 The appeal site is zoned Residential R20 under the Town of Victoria Park Town Planning Scheme No 1 (“**TPS 1**”).
- 3 By clause 21 of TPS 1, development of land for residential purposes is required to conform to the provisions of the Residential Planning Codes or any amendments thereto. The Residential Planning Codes were replaced by the Residential Design Codes (“**Design Codes**”) in October 2002, and thus the Design Codes apply to the proposed development.
- 4 Under the R20 coding, the appeal site can accommodate up to six grouped dwellings. However, under the Design Codes, a density bonus is available in relation to aged or dependant persons dwellings. It is on that basis that the Appellant seeks approval for a total of seven units rather than the six grouped dwellings which would otherwise be permitted. Interestingly, but for the fact that there are only three proposed aged persons dwellings, rather than the minimum of five referred to in clause 4.1.2A2 of the Design Codes, the proposed development would have been deemed to meet the relevant performance criteria stipulated by the Design Codes. Because the proposal involves only three units, the proposed development is required to be assessed under the performance criteria specified in sub-clause 4.1.2P2 which states:

“Dwellings that accommodate the special needs of the elderly or physically dependant persons are designed to allow for ‘aging in place’ taking into account:

- the proportion of dwellings designed to meet Australian Standards for Dependant Persons Dwellings;
- the location of the site in relation to public transport and convenience shopping;

- the topography of the locality in which the site is located; and
 - the demand for aged and dependant persons accommodation.”
- 5 TPS 1 comprises the Scheme Text, precinct plans for each precinct within the Scheme area, planning policies adopted under the Scheme and certain registers kept by the Council under the Scheme. Clause 46 of TPS 1 makes provision for the making by Council of planning policies. Sub-clause 3 of clause 46 provides that the procedure for Council advertising and adopting a planning policy requires the Council to undertake a Town Planning Scheme amendment in accordance with the provisions set out in section 7 of the *Town Planning and Development Act*. Sub-clause 4 provides that a planning policy adopted by the Council may be altered or rescinded only by following the procedure set out in sub-clause (3).
- 6 A policy has been adopted by the Respondent as contemplated by clause 46 of TPS 1 dealing with the development of aged and dependant persons dwellings.
- 7 The relevant portions of that policy are as follows:

“3.3.1. AIM

- a) To ensure that aged or dependent persons’ dwellings are developed in locations and designed in a manner that takes into consideration the diverse and special needs of aged or dependent persons.

3.3.2. POLICY

- a) When considering development applications for aged or dependent persons’ dwellings in the Town consideration is to be given to the following:
- i. an ‘aged or dependent person’, as defined in the Residential Planning Codes, is someone who is aged 55 years and over or has a recognised handicap or disability requiring special accommodation.

- ii. each dwelling should be occupied by at least one aged or dependent person. The Council will therefore require as a condition of approval that:
 - each dwelling is occupied by at least one Aged or Dependent Person or the surviving spouse of that person; and
 - the registered strata plan of the development endorse the occupancy requirement above.
- b) The Council may grant a density bonus of up to 50 per cent for developments of aged or dependent persons' dwellings, subject to one of the following criteria being satisfied:
 - i. the development accommodates specialised facilities on-site, such as medical consulting rooms, specialised nursing and personal care services or social and recreation facilities; and
 - ii. the development is within a 300 metre radius of a district or neighbourhood shopping centre which provides a range of services and facilities that are considered to adequately cater for the day to day needs of aged or dependent persons and where access to those services is not unduly restricted for aged or dependent persons.
- c) Aged or dependent person dwelling proposals should take into account the diverse and special needs of their occupants in the areas of location, support services and design. The Council, therefore, requires developers to demonstrate that the proposal addresses these needs and the following matters will be taken into consideration.

3.3.3. LOCATION CRITERIA

- a) Assessment of the development application will take into consideration the availability of health and commercial services. The development should be conveniently located and within easy walking distance (preferably on a relatively flat gradient of 1:20), or accessible by regular special transport or direct public transport to community facilities, to facilities such as shops, medical facilities, post office and banks. A location plan of surrounding community facilities should be submitted with the application.”
- 8 In view of the increase in dwelling density in the construction of a retaining wall along the common boundary with an adjoining property in Upton Street, affected owners and occupiers were consulted in accordance with clause 35 of TPS 1 and the Council’s “Community Consultation” Policy.
- 9 Two submissions were received, one stating that there was no objection to the development, and the other, an objection from the owner of a property in Upton Street (although not the property to which the retaining wall abuts). That person did not give evidence at the hearing of the appeal, although his letter of 21 May 2002 was produced. The essential basis for the objection was that the land would be overcrowded by the construction of the proposed three aged persons dwellings. Little reliance was placed upon that objection at the hearing of the appeal by the Respondent, and in our view the letter adds little to the considerations applicable from a planning prospective as to whether or not the proposed density bonus should be permitted.
- 10 The Respondent’s grounds of refusal of the application were as follows:
- “1. non compliance with the maximum number of dwelling units permitted under the Residential Density provisions of the Town Planning Scheme;
 2. non compliance with criteria identified in clause 3.3.2(b) of Policy 3.3 ‘Development of Aged or Dependant Persons Dwellings’ contained in TPS 1 Policy Manual;
 3. approval of the application could result in future users of the development being adversely affected by constrained

access to shopping facilities to cater for their day to day needs;

4. the proposal is likely to be cited as a precedent for further similar proposals exceeding the density provisions of the Town Planning Scheme.”

- 11 Although the original proposal was assessed under the provisions of the Residential Planning Codes, as mentioned above, those Codes were replaced by the Design Codes by the time the appeal was dealt with. The essence of the Respondent’s objection to the proposal is incorporated in the following paragraph of Ms Lavery’s witness statement. That paragraph reads:

“The Residential Design Codes incorporate special provisions relating to ‘special purpose dwellings’ which includes Aged or Dependant Persons Dwellings. This section contains both ‘Acceptable Development’ requirements and ‘Performance Criteria’. As previously stated, the proposed development does not meet all the ‘deemed to comply’ provisions contained in the Residential Design Codes and as such, is required to be assessed under the Performance Criteria contained in the Codes. Under the Performance Criteria approach, the discretion of Council is required against the specific Performance Criteria associated with the area of non compliance. In this instance, Policy 3.3 ‘Development of Aged or Dependant Persons Dwellings’ defines Council’s discretion relating to the location of the site in relation to public transport and convenience shopping. In order to obtain the 50% increase in density under the Performance Criteria approach, compliance with the locational criteria is considered to be essential and any variation would not be consistent with the orderly and proper planning of the locality and the conservation of the amenity.”

- 12 The Respondent relies upon the provisions of clause 3.3.2(b) of Policy 3.3 as supporting that position.
- 13 There was some disagreement between the parties as to the distances to various facilities from the appeal site. On the corner of Chapman Street and Victoria Street is a pharmacy and doctor’s surgery, which on the plan prepared by the Appellant appears to be within a radius of 200 metres of the appeal site. The Respondent measured the distance to those facilities as 318 metres. The difference appears to be that the Appellant has applied

a radius (being the method suggested by clause 3.3.2(b) of the Policy) whereas the Respondent has measured the walking distance.

- 14 There is a supermarket, newsagency and deli on the corner of Chapman Road and Pitt Street which appears to be within a 400 metre radius of the site, or on the Respondent's evidence a walking distance of 524 metres. A short distance further down Chapman Road, on the corner of Palmeston Street is a hairdresser, takeaway shop and restaurant that would appear to be approximately a 500 metre radius from the site, but a walking distance of around 644 metres.
- 15 The Appellant observes that there are four bus stops within 200 metres which provide access to the City and local and regional shopping centres.
- 16 There was some issue between the parties as to the extent of the gradient for persons walking to those facilities. Although at certain points, such as crossovers from the appeal site, the gradient may be greater than 1:20, we are satisfied that the gradient over the distances to the various facilities is relatively flat and generally less than 1:20.
- 17 The substance of the Respondent's objection to the proposal turns on consideration of the location of the site in relation to public transport and convenience shopping (clause 4.1.2P2 of the Design Codes) and the significance of the 300 metre radius specified in clause 3.3.2(b) of the Policy.
- 18 The Appellant argued that, given the advent of the Design Codes, the relevance and applicability of the Policy was now questionable. However, the Policy remains part of TPS 1, and it is appropriate for the Respondent to have regard to, and apply, the Policy in appropriate circumstances. The fact that a proposed development does not satisfy the 300 metre radius test referred to in clause 3.3.2 of the Policy does not mean, however, that the grant of a density bonus is not an available option.
- 19 This appeal involves very similar considerations to an earlier appeal dealt with by the Tribunal – see *Department of Housing and Works v Town of Victoria Park* [2001] WATPAT 13 delivered 8 November 2001. Although at that time the Residential Planning Codes were applicable to the proposed developments, rather than the Design Codes, the issues for consideration were virtually identical. In the earlier case there were more retail facilities available within a 500 metre radius, although the nearest doctors surgery was in fact further away in that case. The earlier decision was disposed of by the Tribunal exercising the discretion under clause 38

of TPS 1 to approve a “non complying application”. Clause 38(3) provides:

“The Council cannot grant planning approval for a non complying application unless –

- (a) if so required by the Council under clause 35(2), the application has been advertised; and
- (b) the Council is satisfied by an absolute majority that –
 - (i) if approval were to be granted, the development would be consistent with –
 - the orderly and proper planning of the locality;
 - the conservation of the amenities of the locality; and
 - the Statement of Intent set out in the relevant precinct plan; and
 - (ii) the non compliance would not have any undue adverse affect on –
 - the occupiers or users of the development;
 - the property in, or the inhabitants of, the locality; or
 - the likely future development of the locality.”

20 In our view, this case, like the earlier case, should be determined exercising the discretion under clause 38(3). There is nothing in the proposal which is inconsistent with the orderly and proper planning of the locality, the conservation of the amenities of the locality or the Statement of Intent set out in the relevant precinct plan.

21 It was contended by the Respondent that the development may have undue affect on future occupiers or users of the development, namely aged persons, because of the inaccessibility of appropriate facilities. It is appropriate to have regard to the location of the site in relation to public transport and convenience shopping. That consideration is prescribed both by the Design Codes, and by the Respondent’s Policy in clause 3.3.3(a). The relationship between the stipulations as to locality in

clause 3.3.2 to the stipulations in clause 3.3.3 is unclear. That was a matter discussed in the earlier decision (paras 20-22). Our conclusion in this appeal is the same. In our view, the other considerations stipulated by clause 4.1.2 of the Design Codes, the proximity of public transport leading to major shopping facilities, the general topography of the locality and the demand for accommodation of this nature which the Appellant is seeking to fulfill all lead to the conclusion that the proposed development is consistent with the orderly and proper planning of the locality, and that no undue adverse affect on the occupiers or users of the development is likely to result.

- 22 The concession sought by the Appellant is relatively small. It amounts to a density bonus in the vicinity of 7.7% by the addition of one more dwelling than would be possible if ordinary grouped dwellings were constructed. The Design Codes and the Policy contemplate a density bonus of up to 50%. In our view, it would be an error to elevate the stipulation in clause 3.3.2(b) of the Policy for facilities within 300 metres to some absolute requirement. Rather it is necessary to view each particular application on its planning merits having regard to the totality of the provisions of the applicable planning instruments.
- 23 For the foregoing reasons, the appeal will be allowed subject to normal conditions imposed upon such developments. The Respondent should identify the conditions which it would seek to impose upon the development to the Appellant within 21 days with the view to the parties agreeing the conditions and filing a Minute of Proposed Conditions. In the event of a dispute the matter should be referred back to the Tribunal for adjudication on the precise terms of the Conditions.