
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

STREAM : DEVELOPMENT & RESOURCES

ACT : TOWN PLANNING AND DEVELOPMENT ACT
1928 (WA)

CITATION : CHEN and TOWN OF CAMBRIDGE & ANOR
[2003] WATPAT 4

CORAM : MR J A CHANEY SC
MR E A MCKINNON
MR C PORTER

HEARD : 20 NOVEMBER 2002

DELIVERED : 26 FEBRUARY 2003

FILE NO/S : APP 98 of 2002

BETWEEN : CHIEN CHANG CHEN AND CHANG FENG CHU
CHEN
Appellant

AND

TOWN OF CAMBRIDGE
First Respondent

DAVID ROBERTS
Second Respondent

Catchwords:

Residential development - Substantially compliant with applicable planning instruments - Bulk and scale - Subjective view - Appeal allowed

Legislation:

Nil

Result:

Appeal allowed subject to conditions.

Category: B

Representation:

Counsel:

Appellant	:	Mr Woon
First Respondent	:	Mr N Myers
Second Respondent	:	Mr M Hardy

Solicitors:

Appellant	:	As Agent
First Respondent	:	As Agent
Second Respondent	:	Hardy Bowen

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

Nil

Case(s) also cited:

Nil

MR E A MCKINNON, MR J A CHANEY SC, MR C PORTER:

- 1 This appeal arises from the refusal by the First Respondent to grant approval for the construction of a three storey single residence on Lot 135 (No 14) Tara Vista, West Leederville. At the time that the Council of the First Respondent considered the application on 18 June 2002, the application complied in all but two minor, and relatively insignificant, ways with the requirements of the Residential Planning Codes. At the time of the hearing of the appeal, the Residential Planning Codes had been replaced by the Residential Design Codes, but that change did not result in any additional non-compliance with any standards or requirements of the Residential Design Codes.
- 2 The central issue in this appeal is whether the bulk and scale of the proposed development, notwithstanding its substantial compliance with the relevant Codes, should provide a reason for refusal of the application.

The Background

- 3 An initial application with accompanying plans was made to the First Respondent on 26 February 2002. In response to that application, the First Respondent wrote to the Appellants foreshadowing a recommendation against approval of the proposed development for various reasons, principal among them a concern about the proposed wall heights.
- 4 There followed a series of meetings between the Appellants' representative and Mr Myers, a Planning Officer of the First Respondent. The result of those meetings, and variations to the plans which followed them, was that a set of plans were eventually drawn up which complied with the requirements of the RCodes and the Scheme. In the form that the plans had been amended, they were capable of approval under delegated authority by the First Respondent's officers.
- 5 Because objections to the proposed development had been received from two neighbours, the First Respondent's officers determined that it would be appropriate that the decision to grant or refuse the application should be made by the Council rather than under delegated authority. A report was prepared recommending approval. That recommendation was first considered by the Development and Environmental Services Committee of the Town on 18 June 2002. The Committee did not accept the officers' recommendation, but rather resolved to recommend to Council:

“That in accordance with Part IV of the Town of Cambridge Town Planning Scheme No 1, and matters required to be considered under the Scheme generally, and in particular, as the proposal would be contrary to the orderly and proper planning of the locality, Council refuses the application submitted (the Appellants) for a three level dwelling at Lot 701 (sic 135) (No 14) Tara Vista, West Leederville as shown on the amended plans dated 29 May 2002 for the following reasons:

- (i) non compliance with side setback requirements under Residential Planning Codes – Table 2;
- (ii) non compliance with the secondary street setback requirements under the Residential Planning Codes – clause 1.5.8(c); and
- (iii) the bulk and scale of the development and the extensive earthworks required to accommodate the dwelling will result in the dwelling having an adverse impact on the streetscape and the overall amenity of the area.”

- 6 At its meeting on 25 June 2002, the Council of the First Respondent considered the application and resolved to accept the recommendation from the Development and Environmental Services Committee. The appeal is against that decision.

The relevant planning regime

- 7 The land is zoned Residential R30 under the Town of Cambridge Town Planning Scheme No 1 (“**TPS 1**”). Under TPS 1, Council may make planning policies to assist with development control within the Scheme area. The First Respondent has adopted Precinct Statements and Development Requirements, titled “Residential Design Guidelines”, as planning policies applicable to the locality of the appeal site.
- 8 The Residential Planning Codes are applied to developments within the Scheme area by clause 19 of TPS 1. The Residential Design Codes which replaced the Residential Planning Codes now apply to developments within the Scheme.

The arguments against approval

- 9 The original refusal of the application, set out in detail in paragraph 5 above, identified two areas of non compliance with the Residential Planning Codes. Those areas of non compliance were seen as being of no

particular significance by the officers who assessed the plans prior to submission to the counsel of the First Respondent. We agree with that assessment. The non compliance with the side setback requirements relates to an undercroft garage which would not be visible across the side boundary to which the setback requirement applies. Similarly, the non compliance with the secondary street setback applies to an undercroft area. There is no interference with the adequacy of site lines for traffic, and no effect on the amenity of the area by the non compliance with the side setbacks.

- 10 The Respondents at the hearing of the appeal, did not seriously rely upon those technical areas of non compliance which were never the subject of any expression of concern by neighbours who objected to the proposal.
- 11 The principal issue in the appeal was the third ground of rejection of the application by the First Respondent. Essentially, the objection is to the bulk and scale of the development on the basis that that bulk and scale is likely to have an adverse impact on the streetscape and overall amenity of the area. That was the concern expressed by the Second Respondent, whose property is immediately adjacent to the subject site.
- 12 The Second Respondent called Mr Ken Adam, a town planner and architect whose firm had been involved in preparation of the Residential Design Guidelines applicable to the locality of the appeal site. Mr Adam made reference to a number of passages in the Residential Design Codes and the Residential Design Guidelines adopted by the First Respondent pursuant to its Town Planning Scheme. He observed that the objectives of the Guidelines include:

“compatibility of scale, including reasonable consistency of building height and perceived building bulk, within a given locality.”

- 13 Element 12 of the Guidelines dealing with building height and bulk expresses its aim as “to avoid excessive disruptions in building scale”. Mr Adam identified other passages in the Guidelines which he relied upon as an indication that “the Guidelines identify height and bulk as the two main elements of scale and provide comment on both aspects.” He concluded his evidence with an expression of opinion that:

“the proposed building, which presents to the street as a full three storeys in height and with considerably greater width than other houses in the locality, must by definition be excessive in

scale and bulk and contrary to the provisions to the Guidelines noted above.”

- 14 Mr Adam also made reference to passages in the Guidelines which identify the desirability of retaining as much as possible of the sense of the original topography so that cutting and filling of sites should be kept within reasonable limits. He expressed the view that the extent of cutting required to construct the proposed development is contrary to the Guidelines in the sense that the original topography is being lost.
- 15 We do not agree with Mr Adam’s assessment of the position. We accept that what is proposed is a substantial house that will be prominent in the streetscape. However, the Tribunal had a view of the locality, and observed that it was characterised by a variety of architectural styles. A significant number of substantial houses, some at least as imposing, if not more imposing, to the streetscape than the proposed development, are already constructed. The Residential Design Codes and the Residential Design Guidelines identify a number of performance criteria designed to regulate, amongst other things, bulk and scale. This development complies in all material respects with those specific requirements. In our view, the objections which have been taken to the proposed development by the Second Respondent, apparently endorsed by Mr Adam, are essentially subjective views for which no real support can be found in the applicable planning instruments.
- 16 As to the preservation of the topography, it is inevitable that any development of a residence on this land will involve significant earthworks. The slope on the land is very considerable. That is a common feature of lots in this particular locality which is on the side of a relatively steeply sloping hill. The alternative to cutting into the lot would be to build it up, and retain it, at the boundary, a design solution which has been used in other parts of the subdivision. It is at least arguable that that solution is more imposing on the streetscape than cutting into the lot with the result that the height of the development across the lot is reduced. In our view, the proposed development, when constructed, viewed against surrounding development, and that portion of the lot which will maintain the natural contour of the lot, will preserve the sense of the original topography of the locality.

Conclusion

- 17 The appeal will be allowed subject to such conditions as the First Respondent would normally apply in the a development of this nature. The First Respondent should notify the Appellants of any

conditions which it would impose upon the development. If the conditions are agreed, then the parties should lodge with the Tribunal a Minute of Agreed Conditions within 21 days of the date of delivery of this decision. If agreement as to the conditions is not reached within that time, then the Appellants have liberty to have the matter relisted so that the Tribunal can determine the conditions to be applied to the approval.