
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

STREAM : DEVELOPMENT & RESOURCES

ACT : TOWN PLANNING AND DEVELOPMENT ACT
1928 (WA)

CITATION : KNIGHT and WESTERN AUSTRALIAN
PLANNING COMMISSION [2003] WATPAT 6

CORAM : MR L A STEIN
MS M WHITE
MR L GRAHAM

HEARD : 22 OCTOBER 2002

DELIVERED : 26 MARCH 2003

FILE NO/S : APP 95 of 2002

BETWEEN : GRACE LORRAINE KNIGHT
Appellant

AND

WESTERN AUSTRALIAN PLANNING
COMMISSION
Respondent

Catchwords:

Subdivision - Rural Zone - Albany Local Rural Strategy - Statement of Planning Policy No.11 - Requirement of re-zoning prior to subdivision is contrary to Town Planning Act

Legislation:

Nil

Result:

Appeal allowed subject to conditions.

Category: B

Representation:

Counsel:

Appellant	:	Mr C Slarke
Respondent	:	Mr A Bastow

Solicitors:

Appellant	:	McLeod & Co
Respondent	:	Crown Solicitor's Office

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

Nil

Case(s) also cited:

Nil

MR L GRAHAM, MR L A STEIN, MS M WHITE:**(Mr L Graham dissenting)**

- 1 This is an Appeal from the refusal of the Western Australian Planning Commission (“**Respondent**”) of an application to subdivide land at Lot 15 of Location 107, Frenchman Bay Road, Big Grove, Albany, more particularly described as:

The whole of the land comprised within Certificate of Title Volume 1668 Folio 859.

- 2 Lot 15 is zoned “Rural” under the *City of Albany Town Planning Scheme No. 3* (“**Scheme**”). The proposal is to subdivide Lot 15, approximately 9.7 ha fronting Frenchman Bay Road, into four lots varying in size from 2.4 ha to 2.6 ha to be used for rural-residential purposes.

- 3 The Respondent refused the application for three reasons:

- (a) the proposal does not comply with General Policy 30 (criteria for support for application of rural land) as contained within the City of Albany’s Local Rural Strategy;
- (b) the proposal fails to comply with any of the exceptions for subdivision of rural land as contained in the Commission’s Sub-Division of Rural Land Policy DC3.4;
- (c) approval to the subdivision would set an undesirable precedent for the further subdivision of surrounding lots.

- 4 Mr Bride, a senior planning officer with the City, explained that an earlier request to amend the Scheme to rezone the land from “Rural” to “Special Rural” was not supported by Council. A concern at that time was for the preservation of the South-Coast Water Reserve where the subject land was within a Priority 1 Groundwater Protection Area. It was accordingly within the Princess Royal Harbour Policy Area No. 6 under the Council’s Local Rural Strategy.

- 5 As a result of improved mapping by the Water & Rivers Commission, the majority of the subject land was taken outside that Reserve with the front third downgraded to Priority 2 Groundwater Protection Area as a buffer to protect a bore situated adjacent to Frenchman Bay Road. It was explained by Mr Bride that once this land (and other land) was excluded from the Reserve there was pressure for rezoning and subdivision. As a result, the

land was placed in a new policy area: Precinct 10, for which the Council decided to restrict development until the Local Planning Strategy could be finalised.

6 The City of Albany subsequently undertook the preparation of a Local Planning Strategy. A Local Planning Strategy is required following the *Town Planning Amendment Regulations 1999* as a Planning Report in support of a review of the Town Planning Scheme and subsequent amendment. In the Local Planning Strategy, the subject land is designated as “longer term residential” development. There is little said in the Planning Strategy as to the significance of this phrase and little comfort can be drawn by either party as to its significance. This is not to fault the Planning Strategy, which is a well-reasoned planning report.

7 The Council did not support the subdivision because it was “Rural” and therefore did not comply with General Policy 30. General Policy 30 is part of the Local Rural Strategy, and sets out criteria for the subdivision of rural land. It provides that subdivision can only occur where the subdivision is within an area zoned for that purpose unless subdivision is for farm consolidation, intensive agriculture or other uses ancillary to the rural use of land.

8 In the Local Rural Strategy, the subject land is included within Precinct 6 where it is stated that Council will consider proposals to rezone the land to Special Rural at a density of one lot per two hectares. Mr Bride says:

“In order to achieve the density as referred to in the Policy Statement there is a need to first re-zone the land ...”

9 Mr Rankin representing the Respondent, relied upon Statement of Planning Policy No. 11 “Agriculture & Rural Land Use Planning,” which is a Statement of Planning Policy pursuant to s.5AA of the *Town Planning Development Act 1928* (“Act”). It is stated in that Policy that it will be used with Policy No. DC3.4 “Sub-Division of Rural Land (2001)” as the basis for determining all applications for the subdivision of rural land. Clause 5.3.1(iii) states:

“The Commission will only support subdivision for rural residential and rural small holdings where the land has been appropriately zoned within the Town Planning Scheme and the provisions of Policy DC3.4 (2001) Clause 6 can be complied with.”

10 This clause must be read down by s.20(5) of the Act which states:

“In giving its approval under subsection (1)(a) the discretion of the Commission is not fettered by the provisions of a Town Planning Scheme except to the extent necessary for compliance with an environmental condition relevant to the land under consideration.”

- 11 The effect of s.20(5) is that the zoning (or the lack of zoning) within a scheme cannot fetter the discretion of the Respondent or the Tribunal. Accordingly, it is not possible to make zoning a precursor to the exercise of discretion under s.20 of the Act. To the extent that this Statement of Planning Policy or the Local Rural Strategy General Policy No. 30 attempt to require rezoning as a precursor to the subdivision of rural land, they are inadequate and incorrect from a town planning and legislative perspective. The Tribunal is directed by s.53(1) of the Act to have “due regard” to a Statement of Planning Policy. However, the Tribunal is not fettered by the Statement of Planning Policy to the extent that it does not serve the higher order goal of orderly and proper planning or is in conflict with the Act. Accordingly, this provision in the Statement of Planning Policy should not be taken to be a proper approach to the resolution of a subdivision application before the Respondent or the Tribunal.
- 12 The requirement of a rezoning prior to subdivision approval also fails because the appropriate question to be asked in each case is whether the particular subdivision under consideration is appropriate at the time it is considered. It is often the case that scheme amendments lag behind the appropriate planning for a locality. To say that a subdivision of rural land into smaller lots is otherwise acceptable but must await a process of formalized rezoning makes no sense. The criteria for subdivision of rural land has much to do with land capability, adequate servicing, fire and land management, the size of lots, the impact on agricultural uses, the relationship of the subdivision to surrounding uses, and other factors such as rural amenity and environmental issues. The list of criteria in paragraph 6.1.1 of DC 3.4, that enumerates these considerations, is the appropriate basis for establishing the efficacy of a subdivision.
- 13 It may be appropriate for larger subdivisions to be based upon, where the scheme so requires, a structure plan prior to Council support for a subdivision. However, in all instances, even where there is a structure plan requirement, the process should always be open to any person to prove that a subdivision is appropriate even though the planning scheme or the planning scheme process lags behind.

- 14 The fact that the Respondent continues to maintain this view is not something that should be accorded weight by the Tribunal. Mr Rankin stated:

“The Subject Land is not zoned as Rural Residential in the scheme, which militates against the Commission from approving the Application.”

- 15 This statement cannot be respected as the sole criterion for refusing the subdivision. Mr Rankin also stated:

“Given that the Application did not meet the rezoning requirements of SPP 11 and Policy 3.4 little weight was given to the factors contained in Clause 6 of Policy 3.4.”

- 16 It is actually to Clause 6 of Policy DC3.4 that the Respondent and Tribunal should look for a more refined analysis of what is appropriate in analysing a proposed rural subdivision.

- 17 It is clear looking at paragraph 6.1.1 of DC 3.4 in relation to this proposed subdivision, that there will be no impact on agricultural productivity as conceded by Mr Bride. Mr Ashley Prout, on behalf of the Appellant, gave detailed evidence that the block is fully vegetated with native species and that in his view the Responder of Soil & Land Conservation would object to clearing of the native vegetation for agriculture because of possible eutrophication of the Harbour. Even if it was cleared, he stated:

“It is certainly my opinion after 32 years in the Department of Agriculture that 9 ha, if it was fully cleared, would not be a viable agricultural unit at all.”

- 18 In his witness statement, Mr Prout concludes the property, in terms of its carrying capacity for sheep or beef, would not yield a viable enterprise. This evidence is uncontroverted.

- 19 Mr Ayton from town planners Ayton Taylor Burrell, analysed the locality in terms of the pattern of uses. There is a caravan park to the north-west as well as a “Special Rural” zone. The lots in the area are generally used for bushland “rural retreats” and are not put to productive rural use. These lots have narrow frontages of approximately 125m facing the road. He states:

“The rural zoning of Lot 15 and much of the locality is an anomaly. It is not an appropriate zoning as it does not reflect the use to which the land in the locality is put.”

- 20 Mr Ayton analysed the Local Rural Strategy and points out that the real purpose of the Strategy is to ensure:

“High quality agricultural land is retained for primary production.”

- 21 As a result, he concludes that the subject land falls outside the Strategy in terms of its intent and objectives as it is not land to which the Strategy is aimed. Accordingly, he argues, it was inappropriate to apply General Policy 30 because that Policy only has application to rural land that has potential to be put to productive use.
- 22 Mr Ayton also agrees with Mr Prout’s view that it is unlikely that there would be City of Albany development permission for extensive clearing or that the Commissioner for Soil & Land Conservation would allow the land to be cleared and put to use for primary production. As a consequence, it is clear to the Tribunal that the subject land is not “agricultural land” as that phrase is used in the Local Rural Strategy and that General Policy 30 does not apply in its intent and provisions.
- 23 As to the ground of refusal on the basis of precedent, Mr Ayton states that land to the north-west is subdivided into lot sizes ranging from 1.3762 ha to 3.1957 ha, Lots 11 and 12 are zoned “Special Rural,” Lots 13 and 14 are zoned “Motel” and Lot Pt 2 is zoned “Tavern”. He indicates that land to the south is being used for rural retreat and hobby farm purposes with lot sizes ranging from 1ha to 10ha and that land to the north, east and south-east are also being used for rural retreat and hobby farm purposes. He concludes, and the Tribunal accepts, that the existing rural zoning is not relevant in terms of the current land uses.
- 24 Accordingly, the Tribunal allows the Appeal and the subdivision of the land into four lots. The Respondent has 20 days to submit to the Tribunal any conditions that it decides are appropriate for the subdivision of the land. If the Appellant agrees, the parties should provide a Consent Order to the Tribunal in respect of these conditions. If the Appellant does not agree with any condition, it may bring the matter on before the Tribunal for determination of that condition. There is no need that the Tribunal be constituted by the same Members for this purpose.