
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

STREAM : DEVELOPMENT & RESOURCES

ACT : TOWN PLANNING AND DEVELOPMENT ACT
1928 (WA)

CITATION : I WALLACE & ASSOCIATES PTY LTD and
WESTERN AUSTRALIAN PLANNING
COMMISSION [2003] WATPAT 9

CORAM : MR P MCGOWAN
MS M WHITE
MR C PORTER

HEARD : 17 DECEMBER 2002

DELIVERED : 17 DECEMBER 2002

PUBLISHED : 17 APRIL 2003

FILE NO/S : APP 53 of 2002

BETWEEN : I WALLACE & ASSOCIATES PTY LTD
Appellant

AND

WESTERN AUSTRALIAN PLANNING
COMMISSION
Respondent

Catchwords:

Subdivision - Public open space - Reasonableness of condition - Council
without funds to carry out work

Legislation:

Nil

Result:

Appeal dismissed.

Category: B

Representation:

Counsel:

Appellant	:	Mr A S Derrick
Respondent	:	Mr C Bidder and Ms J Hebiton

Solicitors:

Appellant	:	Phillips Fox
Respondent	:	Crown Solicitor's Office

>ZNil

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

Love v Western Australian Planning Commission [1999] WATPAT 4

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MR P MCGOWAN, MS M WHITE, MR C PORTER:

1 This matter was heard by the Tribunal on 17 December 2002. After
hearing evidence including submissions from counsel we determined then
that the appeal would be dismissed. At the time we indicated reasons for
so determining would be published later. These are those reasons.

2 Goldcape Investments Proprietary Limited is the registered proprietor of
Augusta Lots 2-7 being the whole of the land contained in Certificate of
Title Volume 1806 folio 510 (the subject land). The Appellant has entered
into a contract to purchase the subject land. The subject land is zoned
residential under the Shire of Augusta- Margaret River Town Planning
Scheme Number 19. On 3 August of 2001 the Appellant lodged a
subdivision application for subject land with the Respondent.

3 The application sought subdivision of the subject property into 18
residential lots. On 23 April 2002 the Respondent granted an approval to
the requested subdivision. This approval was subject to 26 conditions.
Condition 11 provided as follows

“10% of the gross subdivisible area, in a position to be agreed
between the subdivider and the Local Government, being shown
on the Diagram or Plan of Survey as a “Reserve for Recreation”
and vested in the Crown under section 20A of Town Planning
and Development Act 1928, such land to be ceded free of cost
and without any payment of compensation by the Crown.”

4 This appeal is brought from the imposition of this condition as a condition
of subdivisional approval. In addition it should be emphasised advice
note 3 to the conditions of subdivision approval provided as follows:

“In respect to condition 11 of this approval the Commission
hereby approves of the cash in lieu contribution according to
section 20C of the Town Planning and Development Act, 1928.
Following the Commission’s endorsement of the Outline
Development Plan for Overall Planning Area No 2 of Scheme
No 19 in accordance with commission policy DC1.1
“Subdivision of Land – General Principles” and DC2.3 “Public
Open Space on Residential Areas,” the Commission supports a
cash-in-lieu contribution equivalent to the total application area.
Support is on the basis that the funds are to be spent on the
Flinders Bay beachfront reserve, including the upgrading of the

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beach foreshore dual use path access and associated recreational facilities.”

- 5 The Appellant challenges the imposition of condition 11 on the following bases:
- (a) Condition 11 does not fairly and reasonably relate to the proposed development.
 - (b) Condition 11 is unreasonable given the extent of the recreation reserve already prevailing in the area.
 - (c) Further contribution of public open space in this area is not necessary given the abundant recreation opportunities immediately available to the future residents of the proposed subdivision.
 - (d) The proposed development will not, of itself, generate the need for additional public open space.
 - (e) The existing public open space in the vicinity is yet to be developed by the relevant statutory planning authorities.
 - (f) The fact that there is an adequate provision of public open space in the area has been recognised by the Shire of Augusta Margaret River in its adoption of the Outline Development Plan for the land.
 - (g) Condition represents an inflexible application of Western Australia Planning Commission Policy DC2.3 without consideration of the merits of this particular application.
- 6 In the context of the application it should be noted that the public open space requirement required the provision of 1,376sqm of POS. The effect of the provision of such space would result in the loss of at least two of the proposed lots the subject of the application for subdivision.
- 7 In a detailed written statement of evidence Mr Vincent McMullen outlined in considerable detail the history and development of public open space policy in this State. The result of that development is now reflected in Commission Policies DC2.2 and DC2.3. Both of these form part of Statement of Planning Policy number 8 which by reason of sections 5AA and section 53 Town Planning and Development Act represent planning matters to which this tribunal is to have due regard.

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- 8 Mr Martin Richards gave evidence on behalf of the Appellant. Mr Richards is a planner who was involved in the preparation of the Outline Development Plan for the area including the subject land. On 10 August 2001 that Outline Development Plan was submitted to the Shire of Augusta Margaret River. In that plan, prepared by Mr Richards, the following comment appears

“It is proposed to provide for the 10% public open space contribution as cash-in-lieu given the extent of the recreation reserve already prevailing in the area.”

- 9 Mr Richards was at pains however to play down the significance of such a statement as in anyway involving an acceptance that the imposition of such a condition as part of a subdivisional application would be appropriate. Nevertheless the tenor of the document and the fact that it was presented to the Shire of Augusta Margaret River without such qualification appears nevertheless to represent an acceptance of the approach by the Appellant.
- 10 The subject land lies between Turner Street and Albany Terrace Augusta. Albany Terrace abuts Flinders Bay. Consistent with advice note (iii) there appears to be endorsements made on the plan accompanying and forming part of the Outline Development Plan which not only indicates an acceptance, as indicated above, that 10% public open space is to provided in the form of cash-in-lieu, but also specific identification of where it is suggested that that money may be expended “upgrade beach access with cash-in-lieu for POS.”
- 11 An issue which was raised by the Appellant is that even if there had been a desire to require public open space (instead of cash-in-lieu) the local authority would have no funds to develop the land for recreational purposes. As a fact this appears to be so (see report to council dated 28.11.2001).
- 12 The practicalities being that notwithstanding that it is the Respondent which determines the conditions for subdivisional approval, when it comes to the question of local or regional public open space, it is for the local authority to then deal with (in this case) its designation and the use to which such public open space when identified, can be put.
- 13 An issue agitated by the Appellant was that there were already sufficient areas of public open space within easy access of the subject land and that therefore there was no need in fact for such public open space. Mr Richards gave evidence that there are approximately 37.8 hectares of land

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within a 400m radius of the subject land. Of that area about 23% is currently reserved for parks and recreation under the Town Planning Scheme with 1.8% comprising the Flinders Bay foreshore area. He identified the main recreational opportunities within 400m of the site as including the following:

- (a) Flinders Bay and the beach;
- (b) Lions Memorial Park at the corner of Osnaburg Street and York Street;
- (c) The old cemetery and Pioneers Memorial at the Corner of Osnaburg Street and York Street.

- 14 In response Mr McMullen, who holds the position of coordinator in the Respondent's Policy and Legislation Directorate, Statutory Services Division, gave evidence as follows

“Revision of the design to provide onsite public open space would result in a ‘pocket park’ of a size that was immediately accessible to and useable by future residents of the subdivision itself and the locality generally. Such an area of open space would enhance the subdivision and locality. A well sited and developed area of open space would also ameliorate its amenity impacts, which will arise from clearing and filling of the site and servicing and construction of the subdivision, followed by housing development.”

- 15 Evidence was also given for the Respondent by Marc Halsall. Mr Halsall is the senior planning officer in the Planning Department of the Shire of Augusta Margaret River. In such role he is of course necessarily familiar with areas of public open space administered by the Shire of Augusta Margaret River and provided the following in response to the claims made by the Appellant:

“Whilst the majority of the land was not in a useable state for active or passive recreation before subdivision works commenced, the POS could be provided with a view to development later while the subdivider may choose to landscape and make useable the allocated public open space area to improve the appearance of the subdivision. The following areas appear to be suitable for contribution as POS.

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The area of land between both cul-de-sac heads, which would provide a pedestrian link and POS. The area of land covered by proposed lots 12 and 13 accessible to all lots in the subdivision and providing an open appearance to the subdivision when viewed from Albany Terrace.”

- 16 However in addition Mr Halsall gave evidence that the estimated costs of upgrading existing access to the foreshore and facilities would appear to run to approximately \$56,000.
- 17 In addition to the planning instruments referred to above, the Respondents Planning Bulletins numbers 18 and 21 (Developer contributions for Infrastructure and Cash-in-Lieu of Public Open Space) its Livable Neighbourhoods Community Design Code and its Statement of Planning Policy: State Coastal Planning Policy when read with policies DC2.2 and 2.3 together with the history of the development in relation to public open space in planning as articulated by Mr McMullen satisfies us that the imposition of such condition has a proper planning purpose. *Love v Western Australian Planning Commission* [1999] WATPAT 4. We agree, as counsel for the Respondents submitted, that the condition is directed to securing public open space that will assist and provide infrastructure needed to meet the increased demand for active and passive recreational opportunities. There is, and we agree, therefore a nexus between condition 11 and the subdivision.
- 18 Much was made by the Appellant of the proximity of the subject land to regional open space. The functions and purposes of regional as opposed to local open space were addressed in some detail by Mr McMullen in his evidence. The fact that there may well be regional open space accessible to the subject land does not take away the planning purpose or principle that underlies the imposition of the condition of subdivision approval involving the ceding of 10% for public open space.
- 19 We agree with the following expressed by Mr McMullen:
- “It is important to note that the mere fact of proximity of a residential area to regional open space does not at all reduce recreation demand. If the local open space function, which is quite different to that served by regional open space, is not met in such a situation, then additional demands are placed on the regional open space, which may not be easily reconcilable with the function of the regional open space.”

- 20 We reject entirely the suggestion that the imposition of condition 11 was done without consideration of the competing arguments relevant to the application. The evidence demonstrates entirely the opposite. This is not only reflected in the development of the Outline Development Plan but the detailed consideration undertaken and effected by Shire of Augusta Margaret River. The relationship and liaison between the Appellant's planners and the Shire of Augusta Margaret River demonstrate the effort that was put in, in order to consider that which was proper having regard to relevant planning principles in determining the application. In turn recommendations made by the Shire of Augusta Margaret River to the Respondent were reflected in the conditions imposed by the Respondent in relation to the subdivision application. In so seeking input from the relevant local authority the Respondent acted properly and consistently with the provisions of DC2.3.
- 21 Although it is the case that Mr Richards identified current recreational opportunities to which we have referred above, use of those is quite limited either because of poor access or lack of attraction for the purpose of passive recreation. The matter is more extensively dealt with in the evidence of Mr Guise who is the regional manager in the Department of Planning and Infrastructure South West Planning Services (Bunbury) Office. Underlying the determination of this issue was a contention by the Appellant on the one hand that this would serve no purpose (that is the imposition of this condition) because the local authority had no funds to give effect to the purpose that underlay the condition and on the other hand the view expressed by the Respondent that it is at the time of subdivision that the securing of public open space can be effected and if not secured now there will be greater problems later.
- 22 For that reason we are satisfied that the fact that the council does not have funds to effect, immediately, works on the subject land to give effect to the purpose behind the public open space requirement does not of itself mean that there is neither a planning purpose behind the imposition of the condition or that the imposition of such a condition is an undue burden upon the Appellant.