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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**STREAM** : DEVELOPMENT & RESOURCES

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

**CITATION** : BORDIN & ANOR and CITY OF BUNBURY  
[2003] WATPAT 10

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

**HEARD** : 22 AND 25 NOVEMBER 2002

**DELIVERED** : 21 MAY 2003

**FILE NO/S** : APP 139 of 2001

**BETWEEN** : GIANNI (JOHN) BORDIN  
LORIE (LAURIE) TASMA CETTOLIN  
Appellant

AND

CITY OF BUNBURY  
Respondent

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*Catchwords:*

Development approval - Condition limiting height existing motel -  
Redevelopment two to three storeys above basement carpark

Amenity - Views from subject site - Adjoining residential development - Views  
interrupted - Objections to bulk and scale - Residential development limited to  
two storeys

*Legislation:*

Nil

*Result:*

Appeal allowed subject to variance of condition 1.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr D McLeod
Respondent	:	Mr C Garvey

*Solicitors:*

Appellant	:	McLeods
Respondent	:	As Agent

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

Nil

**Case(s) also cited:**

Nil

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

- 1 This is an appeal against a condition of approval of a development on Ocean Drive, Bunbury. The development consists of the redevelopment of an existing motel known as the Welcome Inn. The existing motel is a single storey development. The proposal seeks to replace the existing motel with a modern tourist accommodation facility of 2 and 3 storeys above a basement car park. The proposed development will consist of 113 motel units serviced by basement car parking of 195 car bays with 8 extra car bays at ground level. The existing administration block, restaurant, swimming pool and bar are to be redeveloped as part of the proposal, and the additional facilities to be provided include a convention centre, sauna and gym.
- 2 Ocean Drive runs just behind the shoreline of the ocean, with no development on its western side. The appeal site is on the eastern side of Ocean Drive, and enjoys extensive ocean views. The appeal site is comprised in two Certificates of Title, with a total land area of 11,294m<sup>2</sup>. The land abuts Baldock Street to the south, and Upper Esplanade to the east, thus having three street frontages. It is apparent that the site was extensively excavated in order to build the existing motel approximately 50 years ago. The natural land form shows a substantial rise from the ocean. To the east of Upper Esplanade there is residential development which enjoys significant ocean views by virtue of relatively steeply rising sand dunes upon which the residences are constructed. At present, some of those residences look across the extensive roofs of the existing motel premises to the ocean.
- 3 The development application was approved by the Respondent on 2 October 2001, subject to a number of conditions. The first of those conditions, against which this appeal is brought, was as follows:
  - “1. Prior to the issue of a building licence three (3) copies of amended plans shall be submitted to Council which should be generally in accordance with the plans originally submitted with the application but modified to show:
    - 1.1 Individual components of the development to be modified to the satisfaction of the Acting Manager for Development Services, so that the building

height measured from natural ground level to apex of roof, does not exceed twelve metres.

- 1.2 The development addressing an integrating with Reserve 497 to the satisfaction of the Acting Manager for Development Services.

Such plans, once submitted and approved, shall be endorsed to accompany the planning approval.”

- 4 On 23 October 2001, apparently by reason of some uncertainty as to the meaning of the term “natural ground level”, the Council of the Respondent resolved:

“That Council define ‘natural ground level’ as stated in Condition 1 in its decision No 426/01 (made 2 October 2001) for any development of Lots 1 and 2 Ocean Drive to be 6.50 metres AHD.”

- 5 The effect of the resolution of 2 October 2001, as explained by the subsequent resolution on 23 October 2001, was that the maximum height that could be achieved by the proposed development was 18.5 metres AHD. The plans as submitted involved the construction of buildings which, at their highest point, reached 23.5 metres AHD.
- 6 The logical consequence of the imposition of Condition 1 was that the whole, or at least parts, of the development would need to be dropped, presumably by further excavation, some 5 metres in order to avoid exceeding the limit of 12 metres above the assumed natural ground level of 6.5 metres AHD. That consequence was unacceptable to the Appellants, and hence this appeal was instituted.
- 7 At the hearing of the appeal, it was apparent that, rather than dropping the basement floor level, what was contemplated by Condition 1 was that some redesign of the development would be undertaken. That redesign might, for example, involve reducing the development by one storey, altering roof construction or somehow otherwise modifying the proposed building. No specific indication was, however, given by the Respondent, either initially or at the hearing, as to how the objective might be achieved. Construed in the way the Respondent contemplated, the condition raises considerable uncertainty as to what it is that has been approved. One suspects that the objective of obtaining a redesign would have been better served by a refusal of the application for the reason of

excessive height, with an invitation to submit a fresh application with an altered design.

### **The Applicable Town Planning Scheme**

8 Development of the appeal site is governed by the provisions of the City of Bunbury Town Planning Scheme No 6 (“**TPS 6**”). The property is currently zoned Special Use – Motel.

9 The site is included within the South Bunbury Policy Area. The Statement of Planning Policy for that area is:

“Whereas the predominant use is single family residential and whereas the ocean foreshore provides rental and resort accommodation and whereas the road pattern serving the area and the Central Business District requires improvement, the following policy shall apply:

- (a) the predominant use shall be residential including group and town housing not exceeding two storeys;
- (b) associated uses shall include rental and resort development along the western edge of the area;
- (c) improved road and pedestrian access through the area shall be developed;
- (d) public purpose facilities, recreation and local shopping will be encouraged in balance with the predominant use.”

10 It should be noted that the 2 storey height limit referred to in the Policy applies to “group and town housing”. There is nothing in TPS 6, or the applicable Statement of Planning Policy, which limits the height of development within the Special Use – Motel zone.

11 Clause 2.3 of TPS 6 specifies that Council may take into account the following issues when considering a development application:

“In determining any such application, Council shall have regard to the objectives and provisions of this Scheme and may take into account:

- (a) the nature of the proposed development in relation to the development either existing or proposed on adjoining land;

- (b) the size, shape and character of the lot upon which the development is to be carried out and the influence which this may have on the siting and nature of any new building;
- (c) the views from any new building and the views which that building may interrupt;
- (d) the design and external appearance (including the exterior cladding) of any new building and its effect upon the amenity of existing buildings in the area generally;
- (e) the representations of any statutory bodies or other interested parties with whom it may confer;
- (f) the existing and likely future amenity of the locality within which the development is to take place in particular and the scheme area in general;
- (g) the nature and condition of roads serving the sites under construction, and the need for car parking, loading and vehicle turning space within the site to adequately serve anticipated developments;
- (h) any other matters relevant to Town and Regional Planning, the public interest in general and the locality surrounding the proposed development in particular.”

12 Under clause 5.35 of TPS 6 it is provided:

“Land within the special use zone may be used for the purpose applicable to that zone and for purposes incidental thereto and for no other purpose.

The site requirements of lot area, minimum effect of frontage, development type, plot ratio, car parking, setbacks, and other development provisions shall be determined by Council in its absolute discretion, providing that such standards are not less than that pertaining to similar uses under the Scheme.”

13 Under the Scheme, motel is defined as:

“A building, group of buildings or place used or intended to be used, designed or adapted for use to accommodate patrons in a manner similar to a hotel or boarding house but in which special

provision is made for the accommodation of patrons with motor vehicles.”

- 14 The Respondent has a draft planning scheme, the Bunbury Town Planning Scheme No 7. It was not entirely clear from the evidence what stage in the process the new scheme had reached. That is of no consequence to the outcome of the appeal, however, because under the proposed new town planning scheme, there was no significant difference in the treatment of the appeal land, and importantly, there was no height limit specified in respect to the appeal land.

### **The meaning of “natural ground level”**

- 15 A significant portion of the material dealt with in the witness statements tendered at the hearing dealt with the issue of Council’s definition of “natural ground level”. The Appellants produced a witness statement from Mr Michael Goble-Garratt dealing with the historical topography of the site, which was designed to establish that Council’s approach to “natural ground level was not consistent with the historical slope of the land”. A number of other witnesses dealt with that issue.
- 16 The notion of “natural ground level” is dealt with in the Residential Design Codes 2002, and is also mentioned in the Western Australian Planning Commission Development Control Policy 6.1 – Country Coastal Planning Policy. The relevance of the Policy is considered below. Putting that to one side, the question of how one might measure natural ground level seems to us to be largely irrelevant to the real issues in this appeal. It is not the case that TPS 6 makes any reference to height above natural ground level. The term arises because of the condition imposed by the Respondent. The Respondent’s resolution might well have made no reference to “natural ground level”, but rather simply said that the development is not to exceed 18.5 metres AHD, or expressed the condition in terms of not exceeding 12 metres above the present assumed level of the existing site of 6.5 metres AHD. Condition 1 does not arise by virtue of the application of any height restriction found in TPS 6, but its justification, if there is any, rather arises from the application of the considerations set out in clause 2.3(b), (c) and (d). In other words, it is the discretion of the Respondent to take into account matters such as the siting and nature of the building, the views from that building, the views that the building may interrupt, and the design and external appearance of the new building, which might find expression in a height limitation.

**The application of clause 2.3 of TPS 6 to this development application**

- 17 The Respondent sought public comment in relation to the proposed development. Just over 100 submissions were received, most of them on a pro forma form of submission, the genesis of which was not made clear at the hearing. A number of those responses expressed concern at the building height, although many also dealt with other issues such as traffic and potential rowdy behaviour, which were not issues in the appeal before us. A tender of response forms without any explanation as to how they have been compiled, or what information was before the Respondents at the time they completed the forms, means that evidence of that nature must be viewed with considerable caution. Nevertheless, it is reasonable to conclude that there was a reasonable amount of concern within the local community as to the height of the proposed development.
- 18 Evidence was called by the Respondent from three local residents who expressed concern about their potential loss of views with a resultant detriment to their amenity.
- 19 There is no doubt that the proposed development would, in varying degree, interfere with the views of properties immediately to the east of the appeal site. The most dramatic impact on views would be to Lot 73 (No 15) Upper Esplanade, which is immediately opposite the appeal land. That lot is developed with a number of single storey strata units which presently overlook the roof of the Welcome Inn, and enjoy views of the ocean. That view would be substantially lost. None of the residents of Lot 3 gave evidence to the Tribunal, and perhaps surprisingly, do not appear to have made submissions to the City in opposition to the proposed development.
- 20 Evidence was adduced by the Respondent from Mr Coote who resides at Lot 4 (No 19) Upper Esplanade, Mr Gard who lives at 35B Hague Crescent to the north-east of the subject site, and Mr Morris of 2 Sherry Street, on the corner of Acacia Street, which runs parallel to Upper Esplanade. Mr Morris' house is to the east of the subject site. Of those three witnesses, the one whose views would be likely to be most significantly affected is Mr Coote. His property is at the top of Baldock Street. The north-west quarter of his view would be obscured by the proposed development, but he would retain his existing view directly west and to the south. A similar situation would exist for the adjoining property at 17 Upper Esplanade. To the north of 15 Upper Esplanade is 13 Upper Esplanade which is developed with a number of two storey residential units. Their views to the west and north-west would remain



uninterrupted, but the development would interrupt the views to the south-west. We note that those units are generally aligned to the north-west so that their predominant views would be largely unaffected by the proposed development. The degree of interruption to more distant properties such as those occupied by Mr Morris would be impacted upon by the proposed development, although they would retain substantial portions of their existing outlooks.

- 21 What is of particular significance about the interruption in views is that a development to the approved height of 18.5 metres AHD would involve a similar impact on views enjoyed by surrounding properties. In particular, the loss of views to Lot 15 would be as great with the approved development as with the proposed development. Clause 2.3(c) of TPS 6 enables the Council (and thus the Tribunal) to take into account “the views from any new building and the views which that building may interrupt”. The proposed height of the new development is undoubtedly designed, at least in part, to take advantage of the views available from the appeal site. Greater use of those views is facilitated by the higher development to the east of the appeal site as proposed. The views from the appeal site are, by virtue of clause 2.3(c) a relevant consideration which, in this case, serves to support the proposal. It is also necessary to consider the views that the building may interrupt, which is a negative factor in consideration of this proposal. However, given that a development to the height approved by the Respondent would have only marginally less impact on the views of surrounding properties, our view is that the condition appealed against cannot be supported on the basis of the interruption to views. Any development on this land which upgrades the motel facilities to the standards likely to be expected by patrons of a seaside motel is inevitably going to impact upon the views from at least some of the surrounding properties.
- 22 Clause 2.3(b) of TPS 6 enables consideration to be given to the “size, shape and character of the lot upon which the development is to be carried out and the influence which this may have on the siting and nature of any new building”. This site is substantially excavated so that its frontage to Upper Esplanade is significantly below the level of that street. The Appellants are concerned that the development should avoid accommodation facilities effectively below ground level. That is a reasonable approach to development of this site. In our view, the siting and nature of the proposed building is appropriate given the size, shape and character of the lot upon which it is to be developed.

- 23 In relation to the design and external appearance of the proposed building and its effect upon amenity of existing buildings in the area (clause 2.3(d)) concern was expressed as to the bulk of the building relative to the residential properties which, by the Statement of Planning Policy for the South Bunbury Policy Area, are limited to two storeys. The portion of the proposed development which fronts Ocean Drive is generally two storey, although at the northern end of that frontage there is a three storey section of accommodation units which run from Ocean Drive along the edge of Reserve 497 through to Upper Esplanade. The units which back on to Upper Esplanade are three storeys (above basement carpark). Apart from the units at the corner of Baldock Street and Upper Esplanade, which are three storey, the frontage to Baldock Street is two storey.
- 24 It is of significance that neither TPS 6, nor the applicable Statement of Planning Policy seeks to confine development of the appeal site to two storeys. The Statement of Planning Policy contemplates rental and resort development along the western edge of the area, and unlike the provision relating to residential buildings, does not mention any two storey limit.
- 25 As mentioned above, clause 5.35 of TPS 6 specifies that development standards should be “not less than that pertaining to similar uses under the Scheme”. That is a generally unhelpful provision, but to the extent that evidence was given at the hearing as to similar uses under the Scheme, there seems no basis for the suggestion that similar uses are limited to two storey development. Mr Van Noort, a Councillor of the Respondent referred in his evidence to a development at Lot 749 Koombana Drive which is a special use zone where a motel development has been approved. He considered that to be “a very good and relevant example” for the purposes of the application of clause 5.35. Development Conditions for this site are set out in Appendix IV – First Schedule to TPS 6. Mr Van Noort referred to Development Condition 9 applicable to the site which specified that:
- “The height of any development or redevelopment for the site shall be generally limited to up to three storeys in height with a portion of the site as determined by the specific approval of Council being able to be developed to a height of four storeys.”
- 26 To the extent that the Koombana Drive example gives content to the considerations applicable under clause 5.35, the standards referred to seem to us to suggest that the proposed development does comply with the requirements contemplated by that clause.

- 27 The proposed development is designed to be a number of separate structures with differing roof heights, rather than a single building. That is true of the portion of the proposed development which faces Upper Esplanade. That design has the effect of ameliorating the bulk and scale of the building.
- 28 In our view, the bulk and scale of the building is not inconsistent with the Statement of Planning Policy, nor TPS 6, nor with the general amenity of the area.

**WAPC Policy No DC 6.1**

- 29 The Respondent drew our attention to Western Australian Planning Commission Policy No DC 6.1, the Country Coastal Planning Policy. That Policy sets out certain objectives and policy guidelines for development in coastal locations. By clause 1.6 of that Policy, it is stated that it is intended primarily to deal with new development and subdivision and may not always be applicable to areas previously developed and subdivided. It specifies that the application of generalisations in coastal planning can lead to serious difficulties, and that consequently each case should be considered on its merits. Clause 3.5.5 of the Policy provides that:

“No building within 500 metres of the coast shall exceed 12 metres in height unless it is approved by the State Planning Commission.”

- 30 The Country Coastal Planning Policy was referred to in the evidence of Mr Gary Fitzgerald, the Manager, Development Services for the Respondent. The thrust of that evidence was that the 12 metre height restriction imposed by the Condition of Approval was, he contended, consistent with clause 3.5.5 of the Country Coastal Planning Policy. The proposed development was not referred by the Respondent to the Western Australian Planning Commission for consideration under clause 3.5.5. It is clear that the statement in that clause of the Policy is not capable of overriding the discretion of the Respondent under its Town Planning Scheme. The introductory words of clause 3.5.5 tend to water down the apparent mandatory terms in which subclause 3.5.5(i) is expressed. The introductory words simply say that “the following should be considered”. We were advised by counsel at the hearing that the Country Coastal Planning Policy is currently under review, and has been since at least 1999. It was also apparent that the development of the Lighthouse Inn, not far to the north of the appeal land, which involved an approval of the development of that site considerably in excess of 12 metres was granted

by the Respondent without reference to the Western Australian Planning Commission, or apparently to the Country Coastal Planning Policy.

- 31 The application of clause 3.5.5 of the Country Coastal Planning Policy does raise the issue as to the proper determination of natural ground level. The object of this portion of the Policy is to avoid obtrusive coastal development. Survey evidence of Mr Stuart McFerran which was tendered by consent established that the existing levels of the appeal land were as follows:

“South-east corner of site – 9.25m AHD

South-west corner of site – 6.0m AHD

North-east corner of site – 11.5m AHD

North-west corner of site – 7.25m AHD”

- 32 Those dimensions demonstrate that the height difference between the western and eastern boundaries of the site are quite substantial. The evidence of Mr Goble-Garratt, which was also tendered by consent, suggests that the original topography of the land was undulating, with a small hillock in its centre and a reasonably steep rise in height in the south-east corner.
- 33 The site now presents as a flat site at the level of Ocean Drive and then significantly excavated at the Upper Esplanade boundary so that the site is at a much lower level than the surrounding land. The proposed development rises from the two levels above carpark at the Ocean Drive boundary to the three levels above carpark at the Upper Esplanade boundary. In that sense, it reflects the surrounding land which slopes upward from west to east. When viewed against the surrounding land, the proposed development, whilst it may be more than 12 metres higher than the present ground level, is not unduly obtrusive. In that sense, the objective of the Country Coastal Planning Policy is met. We do not therefore consider that anything in the Policy should lead to the rejection of this application.

## **Conclusion**

- 34 For the foregoing reasons, the appeal will be allowed. The orders of the Tribunal will therefore be:

(1) The appeal be allowed.

- (2) Condition 1 of the Planning Approval of the Respondent granted 2 October 2002 and amended by a Notice of Grant of Planning Approval dated 24 October 2002 will be varied so as to read:

“(i) Prior to the issue of a building licence three (3) copies of amended plan shall be submitted to Council, which should be generally in accordance with the plans originally submitted with the application but modified to show the development addressing and integrating with Reserve 497 to the satisfaction of the Acting Manager for Development Services. Such plans, once submitted and approved, shall be endorsed to accompany the Planning Approval.”

- 35 They will be the Orders of the Tribunal unless, within 7 days of publication of these Reasons, either party applies to the Tribunal to be heard as to the terms of the proposed Order.