
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

STREAM : DEVELOPMENT & RESOURCES

ACT : TOWN PLANNING AND DEVELOPMENT ACT
1928 (WA)

CITATION : BRESNAHAN and SHIRE OF MUNDARING
[2003] WATPAT 11

CORAM : MR P MCGOWAN
MR L GRAHAM
MR D BROWN

HEARD : 8 MAY 2003

DELIVERED : 30 MAY 2003

FILE NO/S : APP 19 of 2003

BETWEEN : DANIEL JOHN BRESNAHAN
Appellant

AND

SHIRE OF MUNDARING
Respondent

Catchwords:

Commercial vehicle parking

Legislation:

Nil

Result:

Appeal allowed.

Category: B

Representation:

Counsel:

Appellant	:	Mr D Bresnahan
Respondent	:	Mr B Gleeson

Solicitors:

Appellant	:	In person
Respondent	:	Agent

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

Nil

Nil

MR P MCGOWAN, MR L GRAHAM, MR D BROWN:

- 1 The Appellant is the owner of No 46 (Lot 121) Balfour Road Swanview. The property is zoned residential under the Respondent Town Planning Scheme No 3 and is zoned urban under the Metropolitan Region Scheme.
- 2 The Appellant is a self employed truck driver/contractor. In connection of his employment he owns and operates an 1980 Kenworth Prime Mover. As a self employed truck driver/contractor he ordinarily works for Toll Transport his premises are located Fenton Street Kewdale. He has worked as a contractor for them for approximately 10 years. He has had this particular truck for 10 years. He has resided at the subject property for 2 to 3 years.
- 3 When the truck is not at use it is parked at the subject property which is the Appellant's residence. The truck is 3.5 metres in height and the Prime Mover is about 4-6 metres long.
- 4 The Appellant has been parking the truck on the subject property for the whole of the time that he has resided there.
- 5 As a result of the complaint (the details of which were not the subject of any evidence before us) caused a representative of the Respondent to attend at 46 Balfour Road Swanview. That attendance confirmed that the appellants truck was parked on the property. Approval so to do had not been obtained from the Respondent. Such an approval was necessary (according to the Respondents contention).
- 6 As a result an application for planning approval to commence development was lodged by the Appellant with the Respondent on 1 July 2002. On 26 November 2002 the Respondent resolved to refuse the Appellants application and provided the following reasons:
 - “(I) It does not comply with Councils Commercial Vehicle Parking Policy;
 - (II) The parking of the commercial vehicle on an exposed (unscreened) part of the property is not considered to be consistent with the objectives of the Residential zone.”
- 7 The present appeal is brought from that refusal.

Relevant planning instruments

- 8 At the outset it should be remembered that this appeal is concerned with the parking by the owner of the subject property of his vehicle on that property. In broad concept that would not one would have thought have given rise to the present proceedings.
- 9 However it is the nature of the vehicle which triggers the need, according to the respondent, to make application for approval and as such the refusal of that application gives rise to this appeal.
- 10 In the Respondents Town Planning Scheme No 3 the following materially appears:

“4.46 PARKING OF COMMERCIAL VEHICLES

(1) No person shall, on privately owned land within a residential Zone:

(a) Park or allow to remain stationary for more than two hours consecutively -

(i) more than one commercial vehicle unless it is housed in a domestic garage or domestic outbuilding;

(ii) any vehicle which, due to size or load, is not capable of being completely housed within a domestic garage or domestic outbuilding having a maximum floor area of 46 square metres and in which no horizontal dimension is more than 7.5 metres; and

(iii) a vehicle which, together with the load thereon, exceeds 2.7m in height;

unless:

A the vehicle forms an essential part of the lawful occupation of an occupant of the dwelling and that occupation, if carried on upon the lot, does not contravene the provisions of the Scheme; and

B The vehicle is not brought or taken from the land between the hours of midnight and 6.00 a.m.”

11 At the outset its important to note that when the present application was considered by the Respondent the report of the Respondents planning officers appeared to accept that the present conduct of the Appellant is not caught by clause 4.46.

12 This appeared to be the basis upon which in refusing the application the Respondent was driven to consider the application of the Commercial vehicle Parking Policy.

13 The matter however requires a little more consideration.

14 Mr Bresnahan gave evidence that as a self employed truck driver/contractor he operated for the purpose of securing work from the subject property. He had a house on the premises in which was contained his office to maintain all book work and paper work in relation to the conduct of his business.

15 In that sense we are satisfied:

- (a) That the vehicle forms an essential part of Mr Bresnahan’s occupation
- (b) That occupation is essentially carried on upon the subject property
- (c) There was no evidence to suggest nor is it otherwise open to us to conclude that the contravenes the provisions of the Scheme

16 Finally there was no egestion that the vehicle was brought to or from the subject property between the hours of midnight and 6.00 am.

17 On the face of it therefore the provision for clause 4.46 of TPS 3 would by implication seem to permit the parking by an owner of his vehicle on the subject property. Clause 4.46 is quite specific in the limitations otherwise available.

18 In that regard concepts of use may not necessarily answer the point that’s being raised by this application.

- 19 One then must have regard, because it was raised as the issue in this appeal, to the Commercial Vehicle Parking Policy of the Respondent. There are aspects of this policy which on their face do not appear to be either consistent with or consequential upon the provisions of clause 4.46 of TPS 3.
- 20 To the extent it which the statutory scheme is inconsistent with the policy in our view the scheme must prevail.
- 21 For example clause 3.1 of the policy materially provides “No commercial vehicle is permitted to remain on privately owned land within the “Residential” or “Rural landscape living” zones for a longer period than is necessary for looing or unloading unless the Council has issues a planning approval permitting the parking of a such a vehicle.”
- 22 For example on any reading of clause 4.46 there are any number of instances which would lead to conduct being properly permitted (or alternatively at least not prohibited) but which by reason of the application of clause 3.1 of the policy would now require a planning approval application.
- 23 It seems to us that the proper interpretation and construction of clause 4.46 leads to the result that if the vehicle in question is not caught by that provision then there is no prohibition upon the Appellants conduct then no basis therefore upon which one would readily conclude that it was necessary to make application for planning approval.
- 24 Alternately if we are in error in so concluding then it would fall to consider the Respondents Commercial Vehicle Parking Policy. In considering that policy the following in our view are appropriate matters:

Location of the subject property

- 25 Mr Bresnahan gave evidence that:
- (a) the subject property is situated across the road of the main East West train line where trains pass at all hours of the day and night;
 - (b) the subject property is across the railway line on the western side is a light industrial area;
 - (c) there are refrigerated vans which operate 24 hours a day with small engines running;

- (d) there is then parkland adjacent to the area;
- (e) the subject property is in one of the main flight paths for Perth airport;
- (f) there are main powerlines which run overhead (these are high tension powerlines which are disenable in the photographs which we received as part of the evidence in this matter).

Neighbours

- 26 There was no evidence that the parking of Mr Bresnahan's truck cause any impact upon the surrounding properties. In fact in support of his application for approval Mr Bresnahan obtained positive support from his neighbours at 44 Balfour Road Swanview and 1 Reeves Place Corner Balfour Road Swanview. There was no countervailing evidence.
- 27 In addition by reason of the trees which grow on the subject property it was to us reasonably clear that the vehicle when parked was not obvious except at the point one was immediately adjacent to the subject property.
- 28 Further Mr Bresnahan made plain that he in parking the vehicle backed it in to a position which was approximately 11 metres from the road. That appears to be consistent with the position shown in the photographs which have been produced in support of the application.

Conclusion

- 29 For the reasons set out above we are of the view that clause 4.46 of the TPS 3 governs the position. For those reasons we are of the view that this appeal should be allowed and Mr Bresnahan be entitled to continue to park his vehicle in the way that he has done so for the last 2-3 years.