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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**STREAM** : DEVELOPMENT & RESOURCES

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

**CITATION** : BYAS and SHIRE OF BUSSELTON  
[2003] WATPAT 12

**CORAM** : MR P MCGOWAN  
MS B MOHARICH  
MR E A MCKINNON

**HEARD** : 12 APRIL 2003

**DELIVERED** : 30 MAY 2003

**FILE NO/S** : APP 22 of 2003

**BETWEEN** : MALCOLM BYAS  
Appellant

AND

SHIRE OF BUSSELTON  
Respondent

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*Catchwords:*

Grouped housing development application - Seriously entertained proposal -  
Discretionary power not removed by the draft Scheme amendment

*Legislation:*

Nil

*Result:*

Appeal dismissed.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr H Dykstra
Respondent	:	Mr M Smith

*Solicitors:*

Appellant	:	As Agent
Respondent	:	As Agent

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

Nattrass v City of Perth [2001] WATPAT 2

Nil

**MR P MCGOWAN, MS B MOHARICH, MR E A MCKINNON:**

- 1 The Appellant is the registered proprietor of Lot 484 Lanyard Boulevard Port Geographe (“**subject property**”).
- 2 The subject property is zoned residential and coded R15 under the Respondents Town Planning Scheme No 20.
- 3 The subject property has a Lot area of 1079 square metres and is part of a canal development. The effective dry land area of the subject property excluding the waterway area is 946 square metres.
- 4 In November 2002 the Appellant through Dale Alcock Homes South West lodged a development application with the Respondent seeking approval for a grouped housing (duplex) development on the subject property. On 7 January 2003 the development application was refused by the Respondent by delegated authority essentially for two reasons:
  - (a) That the proposal was inconsistent with clause 13(1)(a)(II) of the Scheme.
  - (b) It was said that such a proposal would set an undesirable precedent for Council to consider similar development applications for group dwelling development pursuant to clause 57 of the Scheme while, in the interim, the Draft Scheme Amendment was being finalised.

**The Geographe Bay Development Area**

- 5 The Geographe Bay Development Area which involves canal development, residential tourist, business and mixed use as part of its permitted uses.
- 6 The subject property is one of 122 standard residential canal lots zoned R15. At the time of purchase there was and remained over the land a restrictive covenant which provided inter alia:

“the land shall not be used for any other purpose other than the construction of a single dwelling, private residence.”
- 7 Clause 57 of the Respondents Scheme provides as follows:

“Notwithstanding any other provision of the scheme:

- (a) The Council may consent to the development for the purposes of the erection of not more than two group dwellings of density R20 on any allotment comprising not less than 900 m<sup>2</sup> within any area coded R10 or greater;
  - (b) ... Council may, for the purposes of urban consolidation, consent to the development of any lot created by the amalgamation of two smaller lots or of any land comprising greater than 1500 m<sup>2</sup> for the purposes of Group Dwellings at density R20, R25 or R30 within any area coded R10-R20 or R20/30 on the Scheme Map.”
- 8 Its important to emphasise that the above mentioned provisions form part of the Scheme and are not limited, subject to matters referred to below, to the Port Geographe area but apply generally throughout the Respondents municipality.
- 9 In September 2002 steps began to be taken to effect a Scheme Amendment to remove the application of the above mentioned clauses of the Scheme from the Port Geographe Development Area (including the subject property). There was first a resolution passed by Council of the Respondent on 4 September 2002:
  - “That the Director Planning and Building Services prepare and advertise for public comment an amendment of the Shire of Busselton District Town Planning Scheme No 20 that effectively removes the provision of Clause 57 of the Scheme where it applies to the Port Geographe Development Area”.
- 10 That led to Draft Amendment No 48 which was prepared and then advertised for a period of 42 days commencing on 3 October 2002.
- 11 Its important to point out that that advertising period had expired by the time that the Appellant’s application was received by the Respondent in November 2002.
- 12 In the material associated with the promotion of the draft Scheme Amendment there also appeared the following:
  - “This amendment is available for public inspection in order to provide an opportunity for public comment and it should not be construed that final approval will be granted”.

13 Finally it was made clear in the Draft Scheme Amendment that:

“Implementation will immediately follow Gazettal of the Amendment to the Scheme”.

14 Against that background evidence was given on behalf of the Appellant by Mr Dykstra, a planner retained to advise the Appellant in relation to planing matters, and by the Appellant himself. The only witness called on behalf of the Shire of Busselton was its relevant Planning Officer Mr Aaron Bell.

15 What seemed to be of significant importance to the Appellant (and which was urged upon the Tribunal) were the circumstances by which the development application for Lot 531 Keel Retreat for group housing approval was approved by the Respondents at its meeting on 30 October 2002.

16 In evidence Mr Bell explained this on the basis that the application had been received in approximately February 2002 and that it had for essentially unexplained reasons taken that long to get to Council for it to be ultimately dealt with.

17 Mr Bell was also at pains to distinguish the position of the application for the Keel Retreat property and the subject property. The point of distinction was, according to him, that when Council came to consider the present application it was after the advertising period for the Scheme Amendment had closed. As at 30 October 2002 that had not been in that position. The difference of 15 days seems of itself difficult to accommodate as the rational basis upon which to distinguish these two matters.

18 In our view however it is not necessary to distinguish the approach in relation to the two matters. This appeal is necessarily a hearing de novo. It is not necessary for the disposition of this appeal to attempt to rationally explain or justify a previous decision of Council not the subject of this or any other appeal. The circumstances by which a matter is dealt with in the context of an appeal to this Tribunal are necessarily not the same as the way in which the matter may have been approached by, in this case, the Respondent.

19 A critical issue advanced on behalf of the Respondent was that however one approaches Draft Amendment 48 it was a seriously entertained proposal. By the time that the Appellants application came to be addressed in January 2003 the amendment had been drafted, it had gone

out for public submission and the advertising period had closed. We were also told that the Draft Scheme Amendment had gone to the Minister for approval on 2 April 2003. As at the date of hearing of the appeal the matter had not yet been finally dealt with.

- 20 The history of the notion of a seriously entertained proposal was the subject of an address to us by Mr Smith. In *Nattrass v City of Perth* [2001] WATPAT 2 the Tribunal made plain that no matter what weight needs to be attached to a seriously entertained proposal, such a seriously entertaining proposal cannot prevail in the face of a scheme provision which provides to the contrary effect.
- 21 Here, as Mr Smith conceded, notwithstanding the progress of the Draft Scheme Amendment, by the time that the matter was dealt with by the Respondent and at the time at which this appeal was heard, clause 57 of the scheme remained unamended and therefore the discretion continues for the purpose of dealing with the present application. Mr Smith was unable to point us to any authority, not surprisingly, to the effect that according weight to a seriously entertained proposal cannot lead to the result that a provision in an existing scheme to the contrary effect could not or would not be exercised.
- 22 Rather because of the discretionary nature of the power in clause 57A the weight to be attached to a seriously entertained proposal may be significant in the determination of the exercise of that discretion.
- 23 It was in that context that counsel for the respondent sought to distinguish the present application from that dealt with by Council on 30 October 2002 in relation to Lot 531 Keel Retreat.
- 24 As we have indicated above, however, it seems to us it is not necessary for such a distinction to be drawn. Nor is it necessary in order to dispose of this appeal that this decision necessarily be consistent with the determination made by Council on 30 October 2002.
- 25 Necessarily no reasons are given by Council for the decision to which it came, as opposed to the process that must be pursued when matters are dealt with by this Tribunal. It is obvious to us therefore what the reasons were behind the decision of 30 October 2002.
- 26 We heard evidence that at present there are 26 lots which have been developed. 22 of those have been developed as single housing and 4 are developed for 2 group dwellings.

- 27 In addition we were told that the development plan provides for 4 lots on which group dwellings may be effected but they are in addition to and not the lots on which development has taken place.
- 28 We were told that Lot 409 Hamelin Retreat and Lot 410 Hamelin Retreat are lots on which group dwellings have been developed but the lots were between 2000 – 1600 square metres. There is also a similar development (Lot 496 Lanyard Boulevard); the lot area is 1232 square metres. The only 2 lots which were in any way comparable were Lots 473 Twine Court and Lot 531 Keel Retreat. The latter we have already dealt with. In the case of the former we were told by Mr Bell that this was an application received on 5 July 1999 and the longstanding matter was dealt with on that basis.
- 29 We accept that a seriously entertained proposal must be given appropriate weight. We accept as is the case that the discretion under clause 57A remains.
- 30 What was missing however was a failure on the part of the Appellant to demonstrate what particular circumstances applied to the subject property which would warrant the exercise of the discretion under clause 57A in his favour.
- 31 The development plan indicates that it was the intention that the preponderance of lots (including the subject property) be for single residential dwellings. The restrictive covenant to which the subject property was subject was to the same effect. The Draft Scheme Amendment is designed to ensure those views are ultimately achieved.
- 32 The discretion under clause 57A is just that, it is not a matter to which the Appellant is entitled as of right.
- 33 Given that the hearing is a hearing de novo its necessary for the Appellant to demonstrate what positive grounds exist to justify the exercise of the discretion. It is not enough on a hearing de novo simply to demonstrate that the Respondent may have erred in the approach that it took in relation to the disposition of the matter. For example to suggest, as Council appears to have done in its decision of 7 January 2003, that the present proposal was inconsistent with the Draft Scheme Amendment is simply to ask the wrong question.
- 34 The question really ought have been that given Council has the discretion under clause 57A and that the subject property meets the factual criteria needed in order to consider the exercise of the discretion, what factors

were advanced in order to justify or demonstrate the basis upon which the discretion should be exercised in favour of the Appellant to permit the development to go ahead as applied for.

- 35 The suggestion, for example, by the Appellant that this application was to be dealt with on the basis that in purchasing the subject property he did so on the basis that it “Meets the relevant criteria for a duplex style residence, or in other words, 2 group dwellings”, entirely ignores the role clause 57A was to play. It was not, as we have emphasised above, a matter to which the Appellant was entitled as of right. It was a matter for which discretion was available to Council to approve the development application provided demonstrable grounds were shown for the discretion to be exercised in favour of the Appellant. Whilst in a limited sense the Appellant may feel aggrieved that the decision made by Council on 30 October 2002 in relation to Lot 531 Keel Retreat has produced a certain outcome different to that which emerged on 7 January 2003, that is not a basis upon which this appeal by reference to relevant planning considerations could or should be disposed of.
- 36 In the end we are not satisfied that there are any or any sufficient reasons advanced by the Appellant to demonstrate why the discretion which still remains under clause 57A should be exercised in favour of approving this development application.
- 37 For those reasons we are of the view that this appeal should be dismissed.