
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

STREAM : DEVELOPMENT & RESOURCES

ACT : TOWN PLANNING AND DEVELOPMENT ACT
1928 (WA)

CITATION : WRIGHT and SHIRE OF CHITTERING
[2003] WATPAT 14

CORAM : MR D BROWN

HEARD : 22 MAY 2003

DELIVERED : 11 JULY 2003

FILE NO/S : APP 14 of 2003

BETWEEN : WAYNE COLIN WRIGHT
Appellant

AND

SHIRE OF CHITTERING
Respondent

Catchwords:

Unauthorised development - Earthmoving business/parking of machines -
Restriction on Home Occupation use - Special Rural zone - Requirements of
Town Planning Scheme - Classification of Use - Use not listed - Amenity -
Discretion to grant retrospective approval

Legislation:

Nil

Result:

Appeal dismissed.

Category: B

Representation:

Counsel:

Appellant	:	Ms D Baum
Respondent	:	Ms C Wooldridge

Solicitors:

Appellant	:	As Agent
Respondent	:	As Agent

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

Tempora Pty Ltd v Shire of Kalamunda (1994) 10 SR (WA)

Case(s) also cited:

Nil

MR D BROWN:

- 1 This Appeal is against the refusal of the Chittering Shire Council (“**Council**”) to approve an ‘Application for Planning Consent to Proposed Development’ for a use described in the application form as “Earthmoving - Parking of Machines” on Lot 160 Powderbark Road, Lower Chittering (“**site**”).
- 2 The site is zoned ‘Special Rural’ in Council’s Town Planning Scheme No.5 (“**Scheme**”) and forms part of an area known as the ‘Wandeena Estate’.

Background to the Application

- 3 Council required the Appellant to make an application for planning consent for unauthorised development on the site comprising a concrete batching plant, an earthmoving business involving the parking of vehicles and machines, and construction of a dam. This appeal relates only to the refusal to allow the earthmoving business and parking of machines (“**development**”).
- 4 Council staff determined that the earthmoving business and parking of machines was a use not listed in the Scheme, but that it met in part the requirements of a Home Occupation as defined in the Scheme and should be classified as such. For reasons that will be explained later this classification of use was incorrect, but not material to the outcome of the appeal.
- 5 The application was advertised for public comment. The public response included a petition signed by twenty-two people supporting the earthmoving use, seven letters of support, four letters expressing general concern about the development, and two letters containing objections of one sort or another. Evidence from the parties indicates that the concrete batching plant operating on the site at the time of advertising the proposal the subject of this appeal (but since discontinued) was the cause of much of the public concern. The bulk of concern related to the impact of industrial type uses in a rural environment, and the fact that the Scheme provisions (and conditions of sale of land in the Wandeena Estate) precluded the development.
- 6 By letter dated 5 October 2002 the Appellant submitted additional supporting information to Council regarding the earthmoving business that made (inter alia) the following points:

- (a) The site was purchased for the express purpose of conducting the proposed use. Enquiries in this regard had been made with Council staff. No concerns were raised about the use then, or later, when the Appellant sought to build a shed associated with the earthmoving business;
- (b) When the Appellant moved to the site in January 2000 other similar uses were operating in this and other parts of the Shire. No action has been taken against those other unauthorised uses;
- (c) There have been no objections (presumably from the public) to the use; and
- (d) The use does not create noise, is environmentally friendly, visual impact is low, and any impact can be lessened by planting.

7 The use was presented to Council as a 'Home Occupation' and, by letter dated 28 November 2002, Council advised the Appellant:

"That Council refuse to grant approval to the proposed use of Home Occupation - Earthmoving Business (on the site) for the following reasons:

- a. The application does not meet the definition of Home Occupation as defined in (the scheme) as it involves the parking and calling of several vehicles in excess of 2 tonnes;
- b. The application involves activities, which are not in keeping with the nature and function of a Special Rural Zone;
- c. The application involves the use of a residential dwelling as a node of employment at a level far exceeding the provisions of the Scheme; (and)
- d. The approval of such a business will establish precedence (sic) for other such businesses to be approved."

8 Council's decision letter contained an order that the Appellant remove the earthmoving equipment within 28 days.

9 The Respondent gave evidence that, at the request of the Appellant, Council had since reconsidered this matter and confirmed its refusal.

10 The Appellant gave evidence that:

- (a) The use has been in place for nearly 3 years, and involves the on-site parking and servicing of the following vehicles:
 - (i) Prime-mover and trailer;
 - (ii) Tip truck;
 - (iii) Low-loader trailer;
 - (iv) Front-end loader;
 - (v) Backhoe;
 - (vi) Grader;
 - (vii) Water trailer;
- (b) Vehicles and machinery are used off-site and returned at the end of the day, or when a job is completed;
- (c) The Appellant is a sole operator and only occasionally employs another person when 2 machines are required to work together;
- (d) Machinery usually starts up about 6.45 am, leaves the site by 7.00am and returns when jobs are completed or by 5.00pm;
- (e) The business normally operates Monday to Friday, and only occasionally on a Saturday;
- (f) The business is conducted through client telephone contact and use of the home computer to keep records and prepare accounts;
- (g) Other similar vehicles and uses exist in the immediate area; and
- (h) There are no suitable alternative sites available for this use.

Classification of Use

- 11 Ms Carol Wooldridge (a senior planning officer with Council) gave evidence that the development was categorised as a 'Home Occupation' for the purpose of advertising, and was presented to Council as such. Council determined that the use "did not meet the definition of Home Occupation as defined in the Scheme as it involves the parking and calling of several vehicles in excess of 2 tonnes". This conclusion correctly reflects the restriction contained in the definition of "Home Occupation" shown in Schedule 1 of the Scheme relating to weight of vehicles, and that prevents the development from being classified as 'Home Occupation'.
- 12 Ms Wooldridge gave evidence that, having determined that the development did not satisfy the definition of 'Home Occupation', it was open to Council to consider the application in terms of clause 3.3.3 of the Scheme where provision is made that:
- "If a person proposes to carry out on land any use that is not specifically mentioned in the Zoning Table and cannot reasonably be determined as falling within the type, class or genus of activity of any other use category the local government may:
- (a) determine that the use is consistent with the objectives and purposes of the particular zone and is therefore permitted; or
 - (b) determine that the use may be consistent with the objectives and purpose of the zone and thereafter follow the procedures of clause 4.2.2 (procedures for advertising) in considering an application ...; or
 - (c) determine that the use is not consistent with the objectives and purpose of the particular zone and is therefore not permitted."
- 13 By applying the provisions of clause 3.3.3 Council has, in effect, classified the development as a use not listed, and one that does not reasonably fit any of the listed uses. This classification of the use is not in dispute and would not, in any event, give rise to an appeal to this Tribunal, being a matter of fact and not a use of discretion.

- 14 Clause 3.3.3 points to the need for the appeal to be determined in terms of the extent to which the development satisfies the objectives and purpose of the Special Rural zone of which the site forms part.

Objectives and Policies for Special Rural Zones

- 15 The site is zoned Special Rural in the Scheme, the objectives for which are stated in clause 3.8.1 as:

“Council’s Objective is to ensure that development within Special Rural Zones, resulting in increased residential, rural and recreational use, (emphasis added) takes place with the least possible detrimental effect on the Shire’s social and economic structure, its rural landscape and the environment generally.”

- 16 Clause 3.8.1 is not particularly helpful in determining the intent of the Scheme with respect to suitable uses in this or other Special Rural Zones and, read in its entirety, clause 3.8 appears to be more a guide for identifying land for Special Rural purposes, than a measure of the uses to be allowed in the zone once established. The key to specific provisions for controlling land use in a particular zone is to be found by reference to clause 3.8.15 and its reference to Schedule 5 which sets out specific provisions for controlling land uses and development on specific parcels of land within the various Special Rural zones in the Shire.

- 17 Schedule 5 of the Scheme (p.58) indicates that within the Wandeeena Special Rural zone no use will be permitted other than:

- (a) Single Dwelling House; and
- (b) Rural Pursuit.

- 18 That the following additional uses may be permitted with the consent of Council:

- (a) Home Occupation;
- (b) Private Recreation;
- (c) Public Utility; and
- (d) Veterinary Consulting Rooms.

- 19 The use is not a ‘Rural Pursuit’ as defined in Schedule 1 of the Scheme, or any of the other uses prescribed in Schedule 5 for this estate, and does not

satisfy the test of home occupation because of the weight of vehicles involved.

- 20 As provided for in clause 3.3.3 of the Scheme the merit of the development must be determined on whether it is consistent with the objectives and purpose of the zone. To this end it is necessary to determine the extent to which the development will impact on the amenity of the Special Rural zone in which it is situated.

Amenity

- 21 In order to determine whether the use satisfies the requirements of clause 3.3.3 it is necessary to establish from the evidence the objective character (amenity) of the neighbourhood, to identify the manner in which the development will affect that amenity, and then to assess the degree of impact of the development on that amenity. (*Tempora Pty Ltd v Shire of Kalamunda* (1994) 10 SR (WA)).
- 22 The evidence indicates that the site is located in an undulating rural setting where single houses are located on large (2.0ha.) lots. Half of the lots in this stage of the estate are developed with houses and related uses. The area is quiet and well vegetated with native trees. The keeping of animals in this and surrounding areas, and adjoining rural land reinforces the rural character of the estate and reflects the intent of the Scheme as expressed in clause 3.8.
- 23 Ms Wooldridge gave evidence that the use can be seen from the street and approaches and, because of its industrial nature was visually intrusive; because of the number and type of vehicles and machines, the use was incompatible with the character and amenity of a rural-residential area; introducing an industrial type use into the area had the potential to create excessive noise in a quiet rural environment. As such, it was contrary to the intent of the Scheme.
- 24 Ms Wooldridge acknowledged that other commercial vehicles are kept in the area; a seven tonne truck and wood-chipper had been approved by Council, as have a number of commercial vehicles that are small, do not create noise, and have no impact on the amenity of the area. There are also other uses that are unauthorised and the subject of action by Council. The respondent expressed concern that approval to the development would create a precedent for further commercial-industrial type uses to establish in the area.

- 25 The Appellant did not challenge the views of the Respondent regarding the existing character of the area, although did point to existing noise from an adjoining excavation site, and from loud domestic and recreational vehicles in the estate to counter the argument that the development would create an unreasonable level of noise. The Appellant also sought to show that further screening with vegetation would lessen the impact of the development.
- 26 The unsworn public support for the development arising from advertising was of little value in identifying the existing amenity of the area, or the impact on that amenity that would result from the development.
- 27 In the absence of any expert evidence to the contrary I accept the evidence of Ms Wooldridge regarding the character of the area, the impact that the use will have on the existing 'rural-residential' amenity, and the need to protect that amenity from commercial and industrial type uses. The fact that Council may have approved other commercial type uses in the area, or that current vehicle noise may be a nuisance in no way justifies the further diminution of the predominant character of the area.
- 28 The site is part of an area set aside in the Scheme (Schedule 5) for uses that are 'rural-residential' in nature, or compatible with those uses. The Scheme aims to ensure that no development detracts from the existing rural character and amenity of the area. Notwithstanding the Appellant's willingness to plant further trees to screen the development, the use has the potential to be viewed from some parts of the estate. It also has the potential to add significantly to the level of noise that would normally be expected in a quiet rural-residential environment, and would add unnecessary heavy vehicle movement. By its very nature the use is incompatible with the intent of the Scheme for this area, and would act to the detriment of owners who have bought into the area with the expectation that the area will develop according to the provisions of the Scheme.
- 29 In my view the parking of the number and type of vehicles and machines in question would create the very situation that the Scheme sets out to prevent. As such the development is contrary to orderly and proper planning.
- 30 The Appellant pointed to other uses of a similar nature in this and other rural areas, and to the fact that he was lead to believe when buying the site that the proposed use was permitted. However, on the Appellant's own evidence he was aware when buying the site of the Scheme restrictions on

use in this area, as evidenced by the restriction attaching to the purchase of the property that reflected the Scheme provisions. He was also aware of the need for Council approval to uses other than those prescribed in the Scheme. There was nothing in evidence to support the Appellant's claim that he was lead by Council to believe he could establish the use.

- 31 The fact that there are limited opportunities for the intended use in the Shire is not something that should influence a decision in this appeal. In fact, a lack of available sites for the development would appear to be more an argument in favour of zoning an appropriate site elsewhere in the Shire, than an argument in favour of allowing an incompatible use on the subject land.

Retrospective Approval

- 32 Clause 3.4.1 of the Scheme requires that:

“...a person shall not commence or carry out (emphasis added) development of any land zoned under the scheme without first having applied for and obtained the planning consent of the Council (emphasis added) under the Scheme.”

- 33 Schedule 3 of the Scheme contains the form of application to be made for planning consent for “Proposed Development” and requires information relating to “the name of the owner of the land on which development is proposed”, “the type of building proposed, or description of the “proposed development”. The form also requires details of the cost of development and the “estimated time of completion”. From this it is clear that the Scheme establishes a need for Council approval before development is undertaken.
- 34 Clause 3.4.2 of the Scheme contains exceptions to the need for Council approval to development. The development in this case is not one of those exceptions.
- 35 There is nothing in the Scheme that would allow Council to approve an existing use.
- 36 The Respondent made reference to Council's proposed Town Planning Scheme No. 6 that has been the subject of advertising and endorsement by Council. This new scheme has been forwarded for the Minister for Planning for approval, and according to Ms Wooldridge approval of the scheme is imminent. Notwithstanding, there was no evidence to suggest that in some way the new scheme might allow what is clearly not allowed

MR D BROWN

in the current Scheme. Even if this were so, the appeal would fail any reasonable test of impact on amenity.

37 The appeal is dismissed.