
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : DEKKER & ANOR and CITY OF CANNING
[2003] WATPAT 16

CORAM : MR P MCGOWAN
MR D BROWN
MR E A MCKINNON

HEARD : 21 MAY 2003

DELIVERED : 13 JUNE 2003

FILE NO/S : APP 184 of 2002

BETWEEN : EDWARD DEKKER
MARIA ZANGARI
Appellants

AND

CITY OF CANNING
Respondent

Catchwords:

Residential Design Codes - Concessions for Aged Person's Dwelling -
Performance Criteria

Legislation:

Nil

Result:

Appeal dismissed.

Category: B

Representation:

Counsel:

Appellants	:	Mr E Dekker and Ms M Zangari
Respondent	:	Mr P Wittkuhn

Solicitors:

Appellants	:	In person
Respondent	:	McLeods

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

Nil

MR P MCGOWAN, MR D BROWN, MR E A MCKINNON:

- 1 The Appellants are the owners of Lot 16 (No 21) Glennon Way, Rossmoyne.
- 2 The land is zoned Residential R17.5 and has an area of 809m². This is the Subject Property.
- 3 On 26 September 2002, the Appellants sought approval from the Respondent under the Respondent's Town Planning Scheme No 40 for two, three-bedroom, two bathroom, aged or dependent persons' dwellings.
- 4 On 18 December 2002, the Respondent refused the application and provided the following reasons:
 - “1 The application does not comply with the "Acceptable Development" provisions of the R Codes for Aged or Dependent Persons' Dwellings.
 - 2 The application does not comply with the "Performance Criteria" or the objectives of the R Codes applicable to Aged or Dependent Persons' Dwellings.
 - 3 The development represents a housing density that is not permitted within the Residential R17.5 Zone.”
- 5 This appeal is brought in respect to that refusal. In the case of the Subject Property and its zoning, R17.5, the minimum land area required for the construction of two grouped dwellings is 1000m². This is apparent from Table 1 of the Residential Design Codes 2002 (“**Codes**”).
- 6 The size of the Subject Property necessarily means that it is 191m² short of what would be required to comply with the Codes. However, under clause 3.1.3A3(i) of the Codes, it is possible to reduce the minimum site area by up to one third (which in this case would bring it down to 666.66m².) To be granted that concession, however, it necessarily must be for the purpose of an Aged or Dependent Persons' dwelling.
- 7 That requires consideration in detail of the Codes and the way in which they apply in relation to aged or dependent persons' dwellings. In doing so, it is important to demonstrate the evidentiary basis upon which the Appellants put their case.

- 8 A written statement was provided by the second-named Appellant on behalf of both Appellants. She was also cross-examined. It appears that the Appellants have four dependent children aged four to ten. It is the intention of the Appellants that if approval is granted, then the two dwellings would be used for their family, that is the Appellants and their four children, and to house the aged parents of Mr Dekker. In addition, and in due course, it is intended to provide for the second-named Appellant's mother.
- 9 Evidence was given that for the present, the second-named Appellant's mother is independent and does not desire, nor require, support by living with her daughter.
- 10 At one level, therefore, the above description of how the two grouped dwellings are to be occupied might seem to represent the housing of an extended family.
- 11 More so, when in cross-examination, Ms Zangari made it plain that neither house had been specifically allocated for any number of those intended to reside in the dwellings, and in particular, neither house was intended nor designed nor provided specifically for either Mr Dekker's parents or Ms Zangari's mother.
- 12 The introduction to that section of the Codes that deals with special provisions, including aged or dependent persons' dwelling, contains the following:
- “To prevent these concessions from being abused – for example the back door way of increasing density for standard housing without recoding an area – the concessions are subject to three constraints:
- There is a limit on the size of such dwellings;
 - They must be purpose-designed;
 - They are subject to a legal agreement to restrict occupancy.”
- 13 The Codes materially provide both Performance Criteria and a statement of Acceptable Development.
- 14 The Performance Criteria represents an intent to set out the criteria against which all applications may be measured. Acceptable Development

essentially represents an example of matters in practice, which, if met, are deemed to meet the Performance Criteria.

15 The philosophy underlying these two categories necessarily implies and recognises that there may be developments other than those which are under the heading of Acceptable Development which meet the Performance Criteria.

16 The Appellants contend that the present application meets the Performance Criteria set out in clause 4.1.2 of the Codes:

“4.1.2Aged or Dependent Persons’ Dwellings

P2 Dwellings that accommodate the special needs of the elderly or physically dependent persons and are designed to allow for “aging in place” taking into account:

- the proportion of dwellings designed to meet Australian Standards for Dependent Persons Dwellings;
- the location of the site in relation to public transport and convenience shopping;
- the topography of the locality in which the site is located; and
- the demand for aged and dependent persons’ accommodation.”

17 For the sake of completeness and although it is not necessarily the basis upon which the Appellants put their case, one should also have regard to the Acceptable Development requirements in order to determine the matter.

“Dwellings for the purpose of aged and dependent persons that comply with the following:

- i. a maximum plot ratio area of:
 - in the case of Single Houses or Grouped Dwellings – 100sqm;
 - in the case of Multiple Dwellings – 80sqm;

- ii. a minimum number of five dwellings within any single development;
- iii. all dwellings to incorporate the standards set out in AS 4299 (Adaptable Housing) to the Adaptable House class B standard;
- iv. at least one wheelchair-accessible parking space for the exclusive use of each wheelchair-accessible dwelling provided;
- v. visitors' car spaces at the rate of one per four dwellings, with a minimum of one space; and
- vi. at least one occupant is a disabled or physically dependent person or aged over 55, or is the surviving spouse of such a person, and the owner of the land agrees to enter into a legal agreement, binding the owner, his heirs and successors in title requiring that this provision be maintained."

18 It can be readily seen that in this case, since the necessity is to comply with each of the six points referred to above, that this particular application could not be said to meet the Acceptable Development standards. Firstly, the plot area of each of the dwellings is far in excess of 100sqm.

19 From the Respondent's case, the proper measure of the plot area would give a result of 182sqm and 188sqm.

20 From the Appellants' case (excluding the al fresco area for this purpose) the result would be 158sqm and 164sqm.

21 It requires no further consideration because in our view the difference is sufficiently great and exceeds the maximum plot ratio area both in fact and in principle.

22 Secondly, the number of dwellings is two as opposed to the minimum of five required. It is not clear to us that there is wheelchair-accessible parking space.

23 Further, there is of course a need for a legal agreement in relation to the occupancy by at least once occupant who is aged over 55.

- 24 It is also important to note, as became plain in cross examination of Ms Zangari, that Mr Dekker is in no way physically disabled. He does desire, however, to retire from his present employment but not for reasons of any physical disability or other limitation.
- 25 That then left the matter on the basis that unless it could be demonstrated that the present application met the Performance Criteria under clause 4.1.2 of the Codes, then the concessions sought by the Appellants would not otherwise be available to them. The plans lodged in support of the application clearly indicated that the layout of each of the proposed grouped dwellings was in a standard format. This included in each case a master bedroom, two other bedrooms, a family room, a dining area, a lounge, a kitchen and a garage.
- 26 There was nothing in the broad layout of each of the proposed grouped dwellings which immediately suggested that they were other than typical housing designs.
- 27 There was some contest during the course of the evidence about whether the design was of a conventional house. The Appellants seemed to be of the view that the measurements of the proposed dwellings necessarily led to the result that they were less than ordinary dwellings and therefore in some way were a departure from that standard and could not be viewed in that way.
- 28 The difference in our view however is inconsequential and the layout and attitude of the proposed dwellings suggests nothing more than accommodation designed to accommodate an extended family or families.
- 29 The Appellants relied upon broad statistical information to justify their being in accordance with the Performance Criteria a demand for Aged and Dependent Persons' Accommodation.
- 30 In our view, such broad based statistical information about Australian society in general, neither specific to the region let alone the locality for which the Respondent is responsible, is neither helpful nor is it evidence which establishes the demand required to be established under clause 4.1.2 of the Codes.
- 31 At the outset, Ms Zangari indicated that certain changes may be open to be effected to the plan if required by the Respondent. By that was understood the changes which appear in paragraphs 5.1 and 5.2 of her witness statement.

- 32 Such changes however are, in the scheme of things, minimal and do not either in fact or in principle satisfy us that the Performance Criteria have been met.
- 33 As we have indicated above, where in essence what is sought is a concession which would ordinarily not be available to a property with this particular zoning, the need to specifically meet the prerequisites to obtain that concession are to be taken seriously.
- 34 In our view we are not persuaded that anything has been put before us to demonstrate why in this case the concession sought by the Appellants should be granted.
- 35 For those reasons we are of the view that the appeal should be dismissed.