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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**CITATION** : CAPE BOUVARD DEVELOPMENT PTY LTD and  
TOWN OF VINCENT [2003] WATPAT 17

**CORAM** : MR J A CHANEY SC  
MR L GRAHAM  
MS M CONNOR

**HEARD** : 6 MAY 2003

**DELIVERED** : 12 JUNE 2003

**FILE NO/S** : APP 4 of 2003

**BETWEEN** : CAPE BOUVARD DEVELOPMENT PTY LTD  
Appellant

AND

TOWN OF VINCENT  
Respondent

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*Catchwords:*

Development - Retention of existing dwellings - Multiple dwellings - Over intensification relating to bulk, scale, building height, and density - Appropriateness of form - Deficiency of open space - Visual privacy - Amenity of future residents

*Legislation:*

Nil

*Result:*

Appeal dismissed.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr M Hardy
Respondent	:	Mr A Roberts

*Solicitors:*

Appellant	:	Hardy Bowen
Respondent	:	Minter Ellison

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

Nil

**MR J A CHANEY SC, MR L GRAHAM, MS M CONNOR:**

- 1 This is an appeal against the refusal of the Town of Vincent of an application for town planning approval for the development of “twenty-eight (28) two-three storey multiple dwellings, including ten (10) single bedroom multiple dwellings and associated semi-basement carparking, to the existing four (4) grouped dwellings” at Nos 485-495 and 8 (Lot 200) Fitzgerald Street and Menzies Street, North Perth. The development application was refused by the Respondent at its Ordinary Meeting held on 17 December 2002 for the following reasons:

- “1. Consideration of objections received
2. Non compliance to the Residential Design Codes, Town Planning Scheme and Locality Statement
3. Excessive bulk and scale
4. The Fitzgerald (sic) Street properties are not listed on the Municipal Heritage Inventory and therefore bonuses should not apply”

**The Land**

- 2 The appeal site is described as Lot 200 on Deposited Plan 33853 Volume 2528 Folio 182, with a total land area of 4,362m<sup>2</sup>. The appeal site has a 60.95 metre frontage to Fitzgerald Street and a 26.52 metre frontage to Menzies Street. A 5 metre wide sealed right-of-way runs along the western boundary of the appeal site and the Fitzgerald Street boundary of the site abuts a separate, 1.5 metre wide lot (Lot 182), which is reserved for ‘Other Regional Roads’ under the Metropolitan Region Scheme.
- 3 The appeal site generally slopes down and away from Menzies Street from the south west corner to the north east corner of the lot. There is an approximate fall of 3.6 metres across the site.
- 4 There are four dwellings on the appeal site located at Nos 489, 491, 493 and 495 Fitzgerald Street, North Perth.
- 5 An application for approval to commence development on Lots 2, 3, 4, 5, 154, and Part 155 (now known as Lot 200) Menzies and Fitzgerald Street, North Perth was lodged with the Town of Vincent on 3 May 2002, for the retention and refurbishment of the four existing dwellings and the development of the balance of the land for 33 multiple dwellings. The

Town of Vincent received supporting documents on 23 May 2003. The proposal sought to retain and refurbish the four existing houses as grouped dwellings and provide two ground level parking spaces for each house within the front setback area to Fitzgerald Street, serviced by two vehicular access points off Fitzgerald Street. The balance of the site was proposed to be developed for 33, two-bedroom multiple dwellings contained within two buildings ranging in height from two to three storeys incorporating undercroft and ground level car parking for 36 vehicles. Vehicular access was proposed from Menzies Street and egress via the right-of-way.

- 6 As a result of public consultation and meetings between the Respondent and the Appellant amended plans were bddged with the Town of Vincent on 26 September 2002. The amended proposal reduced the number of multiple dwellings from 33 to 30, reduced the plot ratio of the development from 0.81:1 to 0.77:1, reduced the wall heights of one of the buildings encompassing the multiple dwellings, increased provision of car parking to provide 57 bays and modified the vehicle access arrangements to prevent use of the right-of-way.
- 7 The amended proposal was advertised for public comment and further discussions were held between the Respondent and the Appellant. In response to these discussions, further amended plans were lodged with the Town of Vincent on 5 December 2002 and are the subject of this Appeal.

## **The Proposal**

- 8 The proposal before the Tribunal entails the following:
  - (a) the retention and refurbishment of the four existing dwellings as grouped dwellings with the provision of 10 car parking spaces located in the 'Primary Street' setback area to Fitzgerald Street. Vehicle access and egress to the parking area is provided from Fitzgerald Street. One-way access from the parking area to the multiple dwellings is proposed between two of the existing dwellings, referred to as Nos 491 and 493 Fitzgerald Street, North Perth. The proposal incorporates a 20 square metre minimum outdoor living area for each of the four existing dwellings, however, these areas include existing enclosed verandahs.
  - (b) A multiple dwelling development located at the rear of the existing dwellings, with frontage to Menzies Street

and the right-of-way to the west of the appeal site, comprising of 18 two-bedroom and 10 one-bedroom units. The multiple dwellings are contained in two buildings, described as follows:

- (i) Referred to as the 'Western block' - The building generally located at the rear of the existing dwellings referred to as Nos 489 and 491 Fitzgerald Street, with frontage to Menzies Street and the right-of-way. This building is comprised of semi-basement parking capable of providing 32 car spaces and two levels of multiple dwellings, each level containing nine dwellings (8 two-bedroom and 1 one-bedroom). The facade of the building fronting Menzies Street is setback a minimum of 5.548 metres with overhanging balconies on the second level setback a minimum of 4.0 metres from the Menzies Street boundary. The setback to the right-of way on the western boundary of the appeal site varies between nil and 1.9 metres. The wall heights and height to the pitch of roof varies depending on the elevation:
  - internal elevation – wall height varies from 6.250 metres to 7.270 metres; height to pitch of roof is not dimensioned on plans – but, according to the report to Council at its meeting of 17 December 2003, varies from 8.8 to 11.3 metres;
  - ROW elevation - wall height varies from 5.726 metres to 6.029 metres; maximum height to pitch of roof dimensioned on plans as 9.883 metres.
  - Menzies Street elevation – wall height varies from 5.580 metres to 5.899 metres; height to pitch of roof varies from 9.519 metres to 9.946 metres.
- (ii) Referred to as the 'Northern block' - The building generally located at the rear of the existing dwelling referred to as No 495 Fitzgerald Street

and aligns with the northern boundary of the appeal site. The building faces onto the internal accessway and presents a side elevation to the right-of-way. The building consists of two levels of multiple dwellings, each level containing five dwellings (4 one-bedroom and 1 two-bedroom). The building is setback a minimum of 3.2 metres from the northern boundary of the site and a minimum of 1.2 metres from the right-of way. The wall height and height to the pitch of roof varies depending on the elevation:

- northern elevation – wall height varies from 5.337 metres to 5.835 metres; height to pitch of roof varies from 8.187 metres to 9.0 metres.
  - ROW elevation – wall height dimensions are unclear on plan; height to pitch of roof is shown as 8.263 metres.
  - Internal elevation – not dimensioned on plans.
- (iii) The plot ratio calculation over the total site area, according to the Appellant’s planner, Mr Syke, equates to 0.61:1. A further twelve car bays are provided adjacent to the internal accessway, a number of which are proposed to be covered. The total number of carparking bays provided on site is 54 bays.

## **The Locality**

- 9 Witnesses called by both parties gave evidence describing the character of the locality. The consensus was that the area consisted predominantly of single storey houses with the exception of a relatively small number of recently constructed two storey single houses and grouped dwellings. However, attention was drawn by the Appellant to the fact that under the Town of Vincent Town Planning Scheme No 1 (“**TPS 1**”) a number of different zonings covered the surrounding area and that the residential properties that fronted Woodville Street were zoned “Residential R40”, whereas, the appeal site was located in the “Residential R60” zone.

**Planning Scheme Requirements**

- 10 The appeal site is zoned “Urban” in the Metropolitan Region Scheme and residential development is an appropriate use in the “Urban” zone.
- 11 Development of the appeal site is also governed by TPS 1. The property is currently zoned “Residential” with a permitted site density of “R60”, as illustrated on the Scheme Map. In the Zone Table contained in TPS 1, the use classes ‘grouped dwelling’ and ‘multiple dwelling’ are classified as “P” (permitted) uses in the “Residential” zone, and as such, the proposed development is a “P” (permitted) use.
- 12 Clause 32 of TPS 1 establishes the need for planning approval under the Scheme. Clause 18 of TPS 1 requires the development of land to be in accordance with standards and requirements contained the following documents:
- “... Scheme Text, the Scheme Map, the policy applying to the land proposed to be developed, the planning policies and the Residential Planning Codes.”
- 13 Clause 10 of TPS 1 divides the Scheme Area into precincts and notes that for each precinct there is a planning policy contained in the Council’s Policy Manual. The appeal site is located in precinct “P6 Smith’s Lake” and the corresponding planning policy is titled, “Policy No 3.1.6 – Smith’s Lake Precinct”.
- 14 Pursuant to clause 19 of TPS 1, the Residential Design Codes are to be read as part of the Scheme and development of land for residential purposes dealt with by the Residential Design Codes is to conform to the provisions of those Codes.
- 15 Clause 20 of TPS 1 sets out provisions relating to the “Special Application of the Residential Planning Codes”. Under subclause 20(2), the Council, under certain circumstances, may grant an increase to the permitted dwelling density by up 50%. One of the circumstances specified includes:
- “(b) the proposed development conserves or enhances an existing dwelling or existing dwellings worthy of retention;”
- 16 Clause 20(5) of TPS 1 further states:

“The Council will consider variations to Residential Planning Codes where it considers that acceptable levels of residential amenity can be achieved.

- 17 Without limiting the scope of the Council’s discretion to determine an application, subclause 38(5) of TPS 1 sets out the matters that the Council is to have regard to in the determination of an application, which include:

- “(a) the provisions of this Scheme and of any other written law applying within the Scheme area including the Metropolitan Region Scheme;
- (b) any relevant planning policy;
- (c) the Scheme Map;
- (d) any Statement of Planning Policy of the Western Australian Planning Commission;
- (e) any planning study approved by the Council;
- (f) any submission accompanying or related to the application;
- (g) the orderly and proper planning of the locality;
- (h) the conservation of the amenities of the locality; and
- (i) the design, scale and relationship to existing buildings and surroundings of any proposed building or structure.”

- 18 Clause 47 of TPS 1 empowers the Council to make planning policies relating to an aspect or aspects of development control or any other matter relevant to the Scheme, which may be applied to all or part of the Scheme area. The following policies, referred to by the Respondent during the course of the hearing (Exhibit 2 – Annexure 11 to 17), have been formulated and adopted by the Council:

- (a) Policy No 3.1.6 “Smith’s Lake Precinct – Scheme Map 6”;
- (b) Policy No 3.3.18 “Knutsford – Locality Plan 18”;
- (c) Policy No 3.2.1 “Local Character”;
- (d) Policy No 3.2.1 “Street Setbacks”;



- (e) Policy No 3.2.8 “Building Scale”; and
- (f) Policy No 3.2.9 “Privacy”.

### **Planning Issues**

- 19 The Appellant in his opening address to the Tribunal identified the mains issue as to “whether or not the proposal represents an over-intensification of use, having regard, predominantly, to issues of bulk and scale.” Notwithstanding the above, a number of other planning issues were also raised by the Respondent, which included, the appropriateness of the form of the development in regards to the locality, the deficiency in the provision of open space, reduced setbacks, non compliance with visual privacy requirements of the Residential Design Guidelines, the impact on residents of adjoining properties and the amenity of the future residents of the proposed development.
- 20 A number of design elements of the proposed development did not comply with the ‘Acceptable Development’ provisions of the Residential Design Codes and required the exercise of discretion under the ‘Performance Criteria’ of the Residential Design Codes. The matters that required consideration related to density, height, setback, open space, and visual privacy.
- 21 The Residential Design Codes specify that, where necessary an applicant for approval should demonstrate that the elements of the proposed development that were non-compliant with the ‘Acceptable Development’ provisions of the Residential Design Codes satisfied the ‘Performance Criteria’ specified in the Residential Design Codes. The evidence provided by Mr Syke merely identified some areas of non-compliance. No justification was submitted in relation to the proposal satisfying the ‘Performance Criteria’ of the Residential Design Codes.
- 22 Clause 20 subclause (2) permits an increase in dwelling density by up to 50% if the proposed development conserves or enhances an existing dwelling or existing dwellings worthy of retention. The evidence offered in regard this matter is limited and restricted to:
  - (a) the opinion of Mr Bain that the four existing dwellings may be worthy of retention;
  - (b) Mr Ker’s acceptance of the Council officers comments, contained in the minutes of the Ordinary Meeting of Council of the Town of Vincent on 17 December 2002, in

relation to the worthiness of retaining the existing dwellings on the basis that they contributed to the intact streetscape, on the stipulation that the retention did not lead to undue reduction in amenity for the area and the residents of the area; and

- (c) the report to Council contained in the Council Minutes of 17 December 2002 (annexed to a number of witness statements) in which an officer of the Town considered that the four dwellings were worthy of retention on the basis that they contributed to the intact streetscape along this section of Fitzgerald Street. It was also noted that the Respondent's evidence did not deal in any substantial way with the question of whether or not the dwellings are worthy of retention.

- 23 Although there was limited evidence on the point, in our view there is some merit in the retention of the existing dwellings and that the application of subclause 20(2)(b) could be considered. However, the exercise of discretion would be dependent on subclauses 20(5) and 38(5) of TPS 1. In applying subclause 20(2)(b), the determination of the applicable density should be calculated over the whole of land rather than over the area of land reduced by the area occupied by the existing four houses.
- 24 The design, scale and relationship to existing building and surroundings of any proposed building or structure, is one of the matters specified in clause 38(5) of TPS 1 that is required to be taken into consideration in the determination of an application. A significant portion of the material dealt with in the witness statement tendered at the hearing dealt with this matter. There was a consensus that the surrounding locality consists predominantly of single storey houses with the exception of a number of recently constructed two storey single houses and grouped dwellings. The Respondent contended that the scale and bulk of the proposed development is out of character with the locality and is inconsistent with the pattern of development in the area. The Appellant argued that the area encompasses a miscellany of zonings and consequently, the built form and intensity of development will vary within those zones. Mr Syke also suggested that the area was in transition and referred to a number of recent developments that were of a more intense nature than that of the predominant built form in the locality.

- 25 The Respondent contends not only that the scale and relationship to existing buildings would adversely impact on the amenity of the surrounding residents, but that the amenity to be enjoyed by the residents of the proposed development would be diminished given the relationship of the existing buildings on the appeal site with the proposed buildings and the location of the internal street between two of the existing dwellings. There is force in the Respondent's argument.
- 26 The Respondent sought public comment twice in relation to the proposed development. The first invitation for comment, relating to the initial proposal, resulted in a total of 27 submissions opposing the development being received from 39 individuals. The second invitation, relating to the plans submitted on 27 September 2002, resulted in 14 submissions opposing the development. The Council did not seek further comment on the revised plans submitted 5 December 2002.
- 27 According to the minutes of the Council Meeting held on the 17 December 2002, the 14 submissions opposing the amended proposal submitted on 27 September 2002 utilised a "uniform prepared resident submission letter" (refer to Exhibit 2 - Annexure 8). The reasons stated for opposing the proposed development related to non-compliance with TPS 1, Residential Design Code, Planning and Building policies of the Council and other issues related to public health, environmental and social concerns, loss of vegetation, parking and traffic generation. Covering letters also accompanied 10 of the 14 submissions, however, these letters were not submitted into evidence. The minutes of the Council Meeting held on the 17 December 2002 summarised the contents of the letters, which expressed concerns regarding the density, form and height of the proposed development and its impacts in terms of overshadowing, privacy, traffic and carparking.
- 28 Evidence was also called by the Respondent from two local residents who expressed concern about the proposal being out of character with the local area as the scale and bulk of the proposed buildings were significantly out of context with the surrounding area. They were concerned that the proposal would have a detrimental effect on local amenity. Mr Ashton-Graham also produced photographs to demonstrate the character of the surrounding area and the visual privacy impact of the 'northern block' on the properties located on the western side of the right-of-way. Both witnesses raised the issue of community opposition to the proposed development. The Witness Statement by Mr Ashton-Graham (Exhibit 3) also included an annexure (CAG3) which cited that the

proposed development considered by Council on the 17 December 2002 was opposed by 48 residents of 25 nearby properties.

- 29 It is reasonable to conclude that there was a reasonable amount of concern within the immediate local community as to the impacts of the proposed development on the surrounding area. By virtue of subclause 38(5)(f) of TPS 1, some regard should be given to these submissions, particularly in relation to those aspects of the development that are non-compliant with the 'Acceptable Development' provisions contained in the Residential Design Codes or the local planning policies of the Council.
- 30 In order to consider the variations required to the 'Acceptable Development' standards of the Residential Design Codes it is appropriate (pursuant to subclause 38(5)(i)) to consider the design, scale and relationship to existing building and surroundings of any proposed building or structure. The area of land required for the retention of the existing dwellings significantly reduces the effective area of land available for the multiple dwellings. As a result any density bonus for the retention of the existing dwellings has the potential to create a problem of scale and bulk. This is particularly so when, as here, the four dwellings being retained occupy a significant portion of the overall land area. While any density bonus must be calculated by reference to the whole land area, the extent to which any bonus may be appropriate in a given case will be affected by the impact on scale and bulk that may result from the concentration of new development on a reduced portion of the land. The actual bonus sought by the Appellant is four additional dwelling units, or a 14% bonus. That, of itself, appears relatively modest. According to Mr Ashton-Graham's calculations, the proposed development would result in a density greater than R90 if only the "useable" area of 2700 m<sup>2</sup> was taken into account. While Mr Ashton-Graham's approach to the calculation is not the correct approach, it does illustrate an impact of the proposal against which other issues of non compliance with the Residential Design Codes might be viewed.
- 31 In considering the issue of building height, the Tribunal was also cognizant of the building bulk and setbacks relative to the residential properties located on the western side of the right-of-way. The desired building height of buildings in the locality as specified in Policy No 3.3.18 "Knutsford – Locality Plan 18" is:

"A general height limit of two storeys (including loft) can be considered provided the second storey (including loft) is generally setback a minimum of 6 metres from the street and the

amenity of the area is protected in terms of privacy, scale and bulk.

Two storey (including loft) is interpreted in Policy 3.2.8 “Building Scale” as being 6.0 metres to the top of external wall (roof above) and 9.0 metres to the top of pitched roof. These standards are identical to the building height provisions specified in the Residential Design Codes. The building with frontage to Menzies Street and the right-of-way is approximately 52 metres in length and has a width of 20.5 metres and the height of the roof at its apex in Menzies Street varies between 9.519 and 9.946 metres, and the height of the roof at the apex in its presentation to the right-of-way is approximately 9.883 metres (refer to elevation plans contained in the Notice of Appeal). The Appellant argued through Mr Syke’s evidence that although the wall heights for the proposed development were generally non compliant with the requirements of the Residential Design Codes to varying degrees, the non compliance is relatively minor on the external elevations, particularly the western and Menzies Street elevations, but more significant on the internal elevations. However, given the building bulk and proposed setbacks to the right-of-way, we consider that the variations required to the building height only serve to exacerbate the impact of the proposed development on the adjacent properties. There is no doubt that the proposed development in terms of bulk, scale and height would be visually intrusive and impact on the residents of the properties abutting the right-of-way.”

- 32 There were a number of design issues raised by the Respondent in relation to the amenity of the future residents of the proposed development relating to the provision of open space, the impact of the proposed internal street on two of the existing dwellings and the screening of the balconies to resolve the issue of visual privacy.
- 33 In our view, these issues would have a substantial impact on the amenity to be enjoyed by the future residents of the proposed development. The deficiency in the provision of communal open space for the multiple dwellings was considered significant, as the proposed 32 square metres of communal open space, and its location, was not considered sufficient to meet the future needs of the residents. The proposition of screening the balconies to a height of 1.6 metres to resolve the non-compliance issue of visual privacy was viewed as a further erosion of the open space areas as

this design solution would effectively enclose the balconies and negate the intended purpose of the balconies, which is to provide open air space appurtenant to the upper floor dwellings. The location and usability of the private open space for the grouped dwellings was also not considered optimal given the interface with other elements of the proposal and the amenity of the two existing dwellings adjacent to the Fitzgerald Street access would be considerably diminished given the minimal setback of the dwellings to the accessway.

## **Conclusion**

- 34 The appeal site is zoned “Residential” with a permitted site density of R60 under TPS 1. Both grouped dwellings and multiple dwellings are permitted uses within the “Residential” zone. This fact is acknowledged by both parties.
- 35 The character of the locality consists predominantly of single storey houses with the exception of a number of recently constructed two storey single houses and grouped dwellings. The density code pertaining to the appeal site would allow for a more intense form of development than that identified as the predominant built form of the locality. However, the proposed development is non-compliant with a number of ‘Acceptable Development’ standards specified in the Residential Design Codes and a number of local planning policies of the Council that had been formulated under the provisions of TPS 1. The Appellant has failed to show that the elements of the proposed development that do not meet the ‘Acceptable Development’ standards satisfy the ‘Performance Criteria’ of the Residential Design Codes.
- 36 Furthermore, although the retention of the existing dwellings was desirable, the effective area of land available for the multiple dwelling component and the subsequent density bonus creates problems of scale and bulk.
- 37 In our opinion the aggregate effect of the various aspects of non-compliance is to adversely impact on the amenity of the residents of the surrounding properties and of future residents of the proposed development. Under subclause 20(5) of TPS 1, a variation to the Residential Design Codes may be considered where acceptable levels of residential amenity can be achieved. In this case, the proposed variations would not achieve an acceptable level of residential amenity. The variation required to the building height will adversely affect the impact of the proposed building on adjacent properties. The design deficiencies relating to open space for both the grouped dwelling and multiple

dwelling components, visual privacy and the proximity of the accessway between two of the existing dwellings significantly diminish the amenity to be enjoyed by future residents of the proposed development. Given the combination of issues, the Tribunal is not prepared to support the required variations to the Residential Design Codes to permit the proposed development.

38 For the forgoing reasons, the appeal is dismissed.