
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : DOHERTY & ANOR and TOWN OF BASSENDEAN
[2003] WATPAT 18

CORAM : MR J A CHANEY SC
MS B MOHARICH
MR D BROWN

HEARD : 12 MARCH 2003

DELIVERED : 12 JUNE 2003

FILE NO/S : APP 145 of 2002

BETWEEN : JOHN DOHERTY
SUE CANTELO
Appellant

AND

TOWN OF BASSENDEAN
Respondent

Catchwords:

Residential development - Setback - Overshadowing - Parapet wall

Legislation:

Nil

Result:

Appeal allowed subject to conditions.

Category: B

Representation:

Counsel:

Appellant	:	Mr J Doherty
Respondent	:	Mr S Ramanathan

Solicitors:

Appellant	:	In person
Respondent	:	As Agent

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

Nil

MR J A CHANEY SC, MS B MOHARICH, MR D BROWN:

- 1 This is an appeal from the refusal by the Respondent to approve a development of a single residence at Lot 200, 45A Hardie Road, Ashfield.
- 2 The basis for the refusal set out in the Notice of Refusal dated 27 September 2002 was that “Council is not prepared to exercise its discretion to allow the setback variation because of concerns about a loss of amenity for the adjoining owners.” The issue of discretion which fell for exercise by the Respondent was whether or not a parapet wall, some 6 m in height and 7 m in length, proposed to be built on the south-western boundary should be permitted. The proposed wall has no major openings, and the Residential Design Codes specify a setback of 1.2 m for walls with no major openings less than 9 m in length.

The nature of the proposed development

- 3 The proposed residence is a two storey house located on the front lot of a battle-axe subdivision. The lot has an area of 431 m² with a frontage to Hardie Road. The south-western boundary of the lot adjoins 47 Hardie Road, a much larger lot of some 1,440 m² on which there is a single storey home.
- 4 The proposed house has been designed with a view to applying energy efficient principles. Mr Allan Davies, the architect for the project, described the building as “skewed through 45° to allow the best of winter sun to enter the main bedroom, and for the north-east side of the house to benefit from the north winter morning sun.” The blank parapet wall on the north-western boundary, which is the element in issue in this appeal, was designed to protect the building from the western sun. Additional skylights have been incorporated facing due north to enable light and sun to penetrate into the centre of the living area of the house.
- 5 The justification for providing the nil setback on the south-western boundary was summarised by Mr Davies as follows:

“The site is small and narrow and we did not wish to waste any of the width of the site by creating a 1 m ‘no man’s land’ on the south-west boundary, as it is wasteful of space, difficult to landscape and keep clear and tidy, and has to be secured against intruders.”

- 6 The Appellants' contention is that there is no significant loss of amenity caused by the parapet wall to the neighbouring property.

The relevant planning instruments

- 7 Lot 2 is zoned "Residential R20" pursuant to the Town of Bassendean Town Planning Scheme No 3 ("TPS 3").
- 8 By clause 3.3 of the Scheme, the Residential Planning Codes together with all amendments, additions or replacements of them, are incorporated into the Scheme and conformity with them is required. The Residential Design Codes are the operative replacement for the purposes of that clause of the Scheme, and apply to this appeal.
- 9 The Respondent drew attention to clause 3.8 of the Scheme concerning the general appearance of buildings. That clause provides:

"3.8.1A person shall not without the written approval of the Council erect a building which by virtue of colour or type of materials, architectural style, height or bulk, ornamental or general appearance, has an exterior design which is out of harmony with existing buildings or the landscape character of the area."

- 10 Not a great deal was made of the application of that provision during the course of the hearing. In his witness statement, Mr Ramanathan suggested that the proposed building is "overpowering and not compatible with the existing streetscape". We do not accept that view. It is true that existing development in the immediate locality is predominantly single storey. Some two storey development has occurred within the street. There is, however, no basis for refusing a proposed two storey development simply because most of the existing development in the locality is single storey. Two storey development is permitted, and it is almost inevitable that as the large blocks in the area are redeveloped over time, two storey houses will replace the existing stock. But for the issue of the setback of the parapet wall, there would be no basis to refuse this development application. The setback of the wall to the side boundary of the property, whether it is the required 1.2 m, or nil as proposed, has no significant effect on the streetscape.
- 11 The other issue which potentially arises in relation to clause 3.8 is the question of colour of the wall, which appears to have been a matter of complaint by the adjoining neighbour, although the neighbour did not give evidence at the hearing, and the complaint was not further developed at

the hearing. In any event, the Appellants have indicated a preparedness to obtain the approval of the Respondent for the colour of the wall. A condition of approval to that effect would seem to remove any potential concerns in that respect.

12 Clause 5.8 of TPS 3 deals with the relaxation of standards. It provides:

“If a development the subject of an application for planning consent does not comply with a standard or requirement prescribed by the Scheme applicable thereto the Council may if it is satisfied that:

- (a) if approval were granted, the development would be consistent with the orderly and proper planning of the locality and the preservation of the amenities of the locality; and
- (b) the non-compliance will not have an adverse effect upon the occupiers or users of the development or the property in or the inhabitants of the locality or the likely future development of the locality;

by an absolute majority grant planning consent to the development subject to any conditions the Council thinks fit notwithstanding the non-compliance with the Scheme.

Prior to granting planning consent the Council may advertise its intention to consider doing so in accordance with clause 5.2.2.”

13 The Residential Design Codes specify the following performance criteria in relation to “Buildings on Boundary”:

“P2 Buildings built up to boundaries other than the street boundary where it is desirable to do so in order to:

- make effective use of space; or
- enhance privacy; or
- otherwise enhance the amenity of the development; and
- not have any significant adverse effect on the amenity of the adjoining property; and

- ensure that direct sun to major openings to habitable rooms and outdoor living areas of adjoining properties is not restricted.”

14 It is clear that the proposed parapet wall does make effective use of the space available on Lot 200. It is also clear that the location of the wall enhances the amenity of the development in the way described by Mr Davies. The question which arises, in considering attainment of the performance criteria, is whether the proposed wall has any significant adverse effect on the amenity of the adjoining property or restricts direct sun to major openings to habitable rooms and outdoor living areas of the adjoining property. That question is encompassed in the considerations which, by virtue of clause 5.8 of TPS 3, must be taken into account in considering a relaxation of the prescribed standards under the Scheme.

The effect of the parapet wall on the adjoining property

15 The adjoining owner expressed objections to the proposed development in four respects. The Respondent adopted those objections as reasons for opposing the appeal. They were:

- “(i) objection to the proposed colour of the parapet wall and concern for the overshadowing effect into the property of 47 Hardie Road;
- (ii) parapet wall creating a claustrophobic effect;
- (iii) extra cost in heating and cooling;
- (iv) less efficient use of the solar heater.”

16 We have dealt above with the question of colour of the parapet wall, and it provides no basis for refusing the application. We do not accept that, given the relative locations of the parapet wall and the adjoining property, there is any substance to the complaint that the wall would create a claustrophobic effect on the property at 47 Hardie Road. There is no substance in the complaint that the development of Lot 200 would impose extra cost in heating and cooling of the adjoining property. The complaint of “less efficient use of the solar heater” raises the question of overshadowing which is part of the first objection.

17 Mr Ramanathan produced as an annexure to his witness statement a plan designed to demonstrate the overshadowing effect of the proposed house. That plan was one of a series of plans prepared by an architect, Mr Ipkendanz. Mr Ipkendanz was not called as a witness. Mr Davies was

able to clearly demonstrate that Mr Ipkendanz' overshadowing plan, which purported to show the shadowing as at 12 midday on 21 June, was significantly inaccurate. That error is apparent on the face of the plan which correctly shows the orientation of the land and the angle of the sun at 21 June, but shows a quite different angle of the shadows on the site plan. Mr Ramanathan, who cast himself as the witness through whom the plans were produced, was unable, and indeed unwilling, to make any comment about the apparent inaccuracy notwithstanding that the error appears obvious. The effect of the error is that overshadowing from the parapet wall over the window of bedroom 2, which Mr Ipkendanz' plan suggests, would not in fact occur.

- 18 It seems unlikely that there will be any overshadowing of the solar hotwater system which is located on the north-eastern side of the adjoining residence, but, if there is any overshadowing, it will clearly have nothing to do with the parapet wall. Any overshadowing which does occur in the area of the solar hotwater system occurs as a result of the portion of the proposed residence which comply with all setback requirements. If the parapet wall were setback 1.2 m, that would make absolutely no difference to the extent of overshadowing by the rear section of the proposed residence.
- 19 Overshadowing from the proposed parapet wall will affect the window of what is described as the "sun room" of the adjoining residence. It was said by Mr Ipkendanz that that window would be in shadow from sunrise until 2.00 pm on 21 June, a contention not in dispute. Mr Ipkendanz accepts that the overshadowing of the adjoining property on 21 June would be 6%. That is well below the 25% prescribed as acceptable development by clause 3.9.1A1 of the Residential Design Codes.
- 20 Mr Davies indicated that moving the parapet wall back 1.2 m from the boundary would reduce the overall shadow area by 6.3 m², or 0.43%. We agree that that change would be insignificant. In our view, the overshadowing effects of the proposed development are not a basis upon which the application should be refused.
- 21 Finally, there was some point made by Mr Ramanathan that the plans submitted in support of the application wrongly dimension the north-eastern boundary on the basis that the actual measurement should be 32.96 m, not 31.96 m as shown on the submitted plans. We are at loss to see how that contention aids the Respondent's case. Assuming the Respondent to be correct, the effect is that the parapet wall occupies a lower percentage of the total boundary than the submitted plans indicate.

If the error is of any significance at all, and in the context of this case we do not think it is, it could only be that the plans indicate a position less favourable to the Appellants than is actually the case.

- 22 In the circumstances, we are not persuaded that there is any reason why the application should not be approved, and the appeal is allowed accordingly. We note that, in the Respondent's Planning Officer's Report to Council that recommended approval, certain conditions were suggested. We do not take those suggested conditions to be in dispute. The approval should be subject to the usual conditions that the Respondent would impose on developments of this nature. The parties should file a minute of agreed conditions within 14 days. If agreement is not reached as to the conditions to be imposed then either party has liberty to relist the matter so that the Tribunal can determine the conditions of approval.