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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**CITATION** : KENDALL and TOWN OF COTTESLOE  
[2003] WATPAT 19

**CORAM** : MS W F BUCKLEY  
MS B MOHARICH  
MR E A MCKINNON

**HEARD** : 14 APRIL 2003

**DELIVERED** : 14 APRIL 2003

**FILE NO/S** : APP 21 of 2003

**BETWEEN** : PETER KENDALL AND SUSAN KENDALL  
Appellants

AND

TOWN OF COTTESLOE  
Respondent

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*Catchwords:*

Shade sail - Residential Design Codes - Pergola - Development - Town Planning Scheme

*Legislation:*

Nil

*Result:*

Appeal allowed subject to conditions

*Category:* B

**Representation:**

*Counsel:*

Appellants	:	Mr R Brooks
Respondent	:	Mr S Sullivan

*Solicitors:*

Appellants	:	As Agent
Respondent	:	As Agent

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

Nil

**MS W F BUCKLEY, MS B MOHARICH, MR E A MCKINNON:**

These are the published reasons previously given ex tempore on the 14<sup>th</sup> of April 2003.

- 1      This is an appeal against the refusal by the Town of Cottesloe to grant development approval for the erection of a shade sail at the front of a house at 6A Barsden Street, Cottesloe. The shade sail is to provide some shade to a paved area currently used as off-street carparking.
- 2      Approval for the carparking arrangement was given by the Town of Cottesloe some years ago when the block was subdivided and the rear developed. There is a large but open limestone and iron fence across the front of the property and the proposed shade sail is to sit behind the fence line but within the front setback area at the front of the block.
- 3      The Town of Cottesloe refused development approval and now justifies that decision on a number of bases. The first is that the structure is a building with the Residential Design Codes and a carport within its Town Planning Scheme Policy number 3 “Garages and carports in front setback area”. Therefore, as a carport, it should be designed in character with the residence on the site and in harmony with the surrounding streetscape.
- 4      Second: the Town has prepared new draft planning scheme policies that are contrary to the design proposed.
- 5      Third: that the design of the proposed structure is not in keeping with the character of the existing building which is listed on the municipal inventory.
- 6      We do not agree with these points.
- 7      The definition of “building” in the Residential Design Codes is very widely drafted but there is an exclusion for pergolas, swimming pools and boundary fences.
- 8      A building is defined as:  
  
          “Any structure whether fixed or moveable, temporary or permanent, placed or erected upon land and the term includes dwellings and structures appurtenant to dwellings such as carports, garages, verandahs, patios, outbuildings and retaining

walls but excludes boundary fences, pergolas and swimming pools.

- 9 Pergolas are also defined in the residential design codes. A pergola is defined as being:

“An unroofed, open-framed structure.”

- 10 Carport is defined as being:

“A roofed structure designed to accommodate one or more motor vehicles unenclosed except to the extent that it abuts a dwelling or a property boundary on one side and being without a door unless that door is visually permeable.”

- 11 In our view, this structure falls within the widely drafted definition of a pergola and also within the intent of the Residential Design Codes as set out in the opening paragraphs and in those provisions at element 3.10 for incidental development.

- 12 In part 3.10 of the Residential Design Codes it is said:

“Other common private garden or backyard constructions – pergolas, cubby houses and play fixtures and dog kennels are examples – have not been included in a definition of ‘building’ and are therefore exempted from planning control.”

- 13 This structure does not fall within the definition of a carport in either the Residential Design Codes or the Town Planning Scheme Policy. While the shade sail will provide some shelter to the cars parked below it, the material from which it is made is not sufficiently impermeable to constitute a roof as is required by both of those definitions.

- 14 We do not accept the fact that the original instruction to the architect was for a carport or that it was described as such in the application determines the matter. In our view it clearly falls much more within the definition of a pergola than of a carport.

- 15 However, the structure does require development approval because it falls within the wide definition of “development” in the Town Planning and Development Act and also within clause 7.1.1 of the Town Planning Scheme.

- 16 There is a discretion for Council to exercise in respect to the application for approval. That discretion is guided by clause 5.1.2(C) of the Town Planning Scheme:

“Clause 5.1.2 (C) requires the Council to have regard to and may impose conditions relating to the choice of building materials and finishes where these relate to the preservation of local character and the amenity of the area generally.”

- 17 In our view the shade sail structure not only preserves the local character of the house but of all possible approaches does the least to detract from it. It is simply a very unobtrusive structure that does nothing to hide the house. Further, it does not detract from the amenity of the area, something that the neighbours have also considered to be the case.
- 18 In all the circumstances we would uphold the appeal and grant approval for the erection of the shade sail as applied for. In accordance with the usual practice the Respondent has 14 days to provide the Tribunal with the form of conditions appropriate to development approval.