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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**CITATION** : WESTGATE PROPERTY INVESTMENTS PTY LTD & ANOR and CITY OF ROCKINGHAM  
[2003] WATPAT 23

**CORAM** : MR P MCGOWAN  
MR L GRAHAM  
MR E A MCKINNON

**HEARD** : 18 AND 19 DECEMBER 2002 AND 14 FEBRUARY 2003

**DELIVERED** : 30 JUNE 2003

**FILE NO/S** : APP 117 of 2001

**BETWEEN** : WESTGATE PROPERTY INVESTMENTS PTY LTD  
COLONIAL PORTFOLIO SERVICES PTY LTD  
Appellants

AND

CITY OF ROCKINGHAM  
Respondent

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*Catchwords:*

Town Planning - City Centre - Development Policy Plan whether endorsed by WAPC - Land identified for road widening and realignment - Built form

*Legislation:*

Nil

*Result:*

Appeal dismissed.

*Category:* B

**Representation:**

*Counsel:*

Appellants	:	Mr M J McCusker QC and Mr P McQueen
Respondent	:	Mr C B Edmonds SC and Mr J Woodhouse

*Solicitors:*

Appellants	:	Phillips Fox
Respondent	:	Watts Woodhouse

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

Nil

**MR P MCGOWAN, MR L GRAHAM, MR E A MCKINNON:**

- 1 The appeal concerns an application for development in relation to land contained within the Rockingham City Centre.
- 2 The land is owned by the Appellants and is more particularly described as Part of Lot 201 on Plan 14224 being the whole of the land contained in Certificate of Title Volume 2129 Folio 853 (“**subject land**”).
- 3 By application dated 12 June 2001 the Appellants applied for approval to develop:
  - (a) A free standing showroom (8581sqm);
  - (b) Four other showrooms (324sqm, 324sqm, 324sqm and 459sqm);
  - (c) Two shops (both 152sqm);
  - (d) Access to the site from Whitfield Street;
  - (e) Car parking bays;
  - (f) Landscaping and paving.
- 4 In addition, the Appellants lodged a Development Concept Plan which, although not forming part of the application, was intended to demonstrate how the remainder of the site was to be developed in the future.
- 5 The application was dated 12 June 2001. On 10 September 2001 the Respondent wrote to the agent for the Appellants and advised that the Respondent had, at its meeting on 28 August 2001, refused the application. The refusal was for the following specific reasons:
  - “(i) The proposal does not reflect the future reconfiguration of Goddard Street and Simpson Avenue;
  - (ii) The street front development does not reflect the rationalised alignments of Goddard Street and Simpson Avenue;
  - (iii) The proposal does not incorporate an area to be set aside for a future public car parking station.”
- 6 This appeal is brought from that decision.

- 7 The subject property is zoned City Centre under the City of Rockingham Town Planning Scheme No. 1 (“**TPS 1**”).
- 8 The contemplated development consists of uses which are AA uses within the City Centre zone under TPS 1.
- 9 The parties accept that all development within the City Centre zone is subject to clause 3.5 of TPS 1. In particular, clause 3.5.1 provides as follows:

**“OBJECTIVE**

The objective of the City Centre zone is to contribute to the development of integrated retail, office, commercial, residential, civic and cultural facilities in the Strategic Regional Centre generally in accordance with the objectives and principles outlined in the Rockingham City Centre Development Policy Plan or any other Plan or Policy that Council and the Western Australian Planning Commission adopt from time to time as a guide to future development within the zone.”

- 10 This will be addressed in more detail, but it is apposite to note at this stage that the Respondent and the Western Australian Planning Commission have adopted the Rockingham City Centre Development Policy Plan (“**DPP**”).
- 11 Of acute significance in the resolution of the matters the subject of this appeal is the fact that the DPP shows portion of the subject property as being within the land identified for a major widening and realignment of Goddard Street.
- 12 As a result, the Respondent contends that the proposed development is inconsistent with the DPP and objective 3.5.1 of TPS1 and, as a result, would prejudice the implementation of the widening and realignment of Goddard Street.
- 13 Whilst accepting that TPS 1 and clause 3.5 apply and accepting the role to be played by the DPP the Appellants nevertheless contend, by way of alternative, that the Respondent is not constrained in approving the application merely because it is inconsistent with the DPP and is required to determine the application on its merits.
- 14 The Appellants contend that as a result the Respondent in refusing the application has not had regard to the merits of the application.

15 Other material provisions of the DPP include:

- (a) Clause 3.5.4 which indicates that Council should take all reasonable steps to encourage a mixture of uses within individual building developments with the establishment of a lively and attractive street front environment as a priority objective.
- (b) Clause 3.5.5 (a) indicates the Council shall have regard for the likely contribution (positive or negative) to the development of quality public spaces and desirable day and night time pedestrian activities.
- (c) Clause 3.5.6 which is set out in full.

“In assessing applications for planning approval, Council shall take account of and shall ensure that the following principles are generally adhered to;

- (a) Development shall contribute to the framing up of a coherent structure of public streets defined by street front buildings in general conformity with the provisions of the Development Policy Plan.
  - (b) Development shall contribute to the establishment of a traffic-calmed, pedestrian friendly environment in both Civic Boulevard and Simpson Avenue.
  - (c) Traffic circulation, vehicle access points and car parking shall be arranged to minimise impact on the core of the City while maintaining essential kerb side parking consistent with the provisions of a Development Policy Plan.
  - (d) As a general principle, car parking shall be clustered behind buildings which front the public street.”
- (d) Clause 3.5.7 which underscores the fact that in considering planning applications the Respondent was to

take into account the objectives of the City Centre zone and the principles and policy as set out in the DPP.

- 16 The DPP was the subject of Amendment 207 to TPS 1.
- 17 There was an issue during the course of the Hearing as to whether the WAPC had in fact endorsed the DPP as required by clause 3.5.2 (a) of TPS 1. The relevant steps seem to be:
- (a) The DPP was endorsed in principle by the WAPC on 23 March 1993;
  - (b) The Commission granted conditional consent to advertise the Amendment on 19 April 1994;
  - (c) The WAPC recommended approval to Amendment 207 on 20 December 1994 and 17 May 1995.
- 18 The Appellants contend that endorsed should be understood as meaning ratification or confirmation whereas the evidence only goes so far as to establish that the earlier version of the DPP was accepted in principle. The Appellants contend that there was no evidence that a final version of the DPP had ever been confirmed or ratified by the WAPC.
- 19 It appears to us however that the steps described above irresistibly lead to the conclusion that the DPP was endorsed by the WAPC in the way in which it is contended by the Respondent. We therefore accept that clause 3.5.2 (a) of TPS 1 has been complied with and as a result the DPP is to be treated as a statutory policy as opposed to an internal policy of the Respondent. We are required to give proper genuine and realistic consideration to the DPP.

### **The proposed alignment and widening of Goddard Street - History**

- 20 There was considerable evidence led in relation to this issue.
- 21 The Respondent has helpfully in its closing submission set out the history. That history, to the extent to which it is uncontested, is reproduced. We acknowledge the assistance of Counsel for the Respondent and his instructors for preparing such history.
- 22 There has, since 1978, been a proposal for a north-south connection between Leghorn Street (now Chalgrove Avenue) and Council Avenue. At this time, Louise Street was a reserve or proposed reserve. Formal subdivision was effected in 1981.

- 23 More detailed proposals to widen and realign Louise Street and extend this south into Goddard Street were made in 1982 in the Rockingham Regional Centre Development Plan. Such proposals also included extending Louise Street north to Patterson Road.
- 24 By 1986, in accordance with these proposals, Goddard Street south was built and Simpson Avenue west (now Whitfield Street) was aligned into a T junction at Goddard Street.
- 25 In 1992, Mr Uloth was commissioned to prepare a current report to evaluate the transport aspects of the city centre for inclusion in the DPP. The Rockingham City Centre Traffic and Parking Study confirmed that the boundary roads would remain Council Avenue, Read Street, Chalgrove Avenue and Goddard Street. It was again recommended that Goddard Street be realigned as a four lane divided road with a second T junction at Simpson Avenue (east). It was again planned to downgrade Simpson Avenue.
- 26 In March 1993, the DPP was endorsed by the Respondent in principle. This showed the proposals for the alignment of Goddard Street as a continuous route with Louise Street and its widening to allow a divided four lane road.
- 27 Following the Respondent's adoption of the DPP, Amendment No. 207 was prepared to incorporate the concepts and general and specific initiatives of the DPP into the TPS.
- 28 In September 1994, BSD provided a report for the major land owners (including Westgate) in response to Amendment No. 207 and the DPP. This provided for five alternative road scenarios all of which provided for the realignment of Goddard Street. Scenarios 4 and 5 would, however, not require the widening of Goddard Street in that its traffic would be shared with Whitfield Street.
- 29 In 1994, Mr Uloth provided a response to the BSD report. This emphasised the need to use Goddard Street as a future district distributor and the undesirability of distributing traffic evenly between Goddard Street and Whitfield Street.
- 30 Also in 1994, the Respondent commissioned an Infrastructure Development Report which documented and costed the road proposals reflected in the DPP including for Goddard Street.

- 31 On 20 July 1995, the Minister approved Amendment No. 207. In August 1995, the Amendment was gazetted.
- 32 In 1997-98, Simpson Avenue between Whitfield Street and Civic Boulevard was reconstructed and street scaped.
- 33 In 1999, Mr Uloth prepared a further report for the Respondent commenting on the proposals for Goddard Street and confirming its status as a District Distributor.
- 34 Before going further, it is worth noting Clause 5.3 TPS 1:

“If a development the subject of an application for planning consent does not comply with a standard or requirement prescribed in the Scheme, the Council may, notwithstanding that non-compliance, approve the application unconditionally or on such conditions as the Council thinks fit.

The power conferred by this clause may be exercised if the Council is satisfied that approval of the proposed development would be consistent with the orderly and proper planning of the locality and the preservation of the amenities of the locality and non-compliance will not have adverse affect on the occupiers or users of the property or the habits of the locality or likely future development of locality and the spirit and purpose of the requirement or standard will not be unreasonably departed from thereby.”

### **Indicative Development Plan**

- 35 As Senior Counsel for the Appellants pointed out in opening, it is somewhat confusing to refer both to the Development Policy Plan and the Indicative Development Plan. The former, already referred to as the DPP, includes the latter which is truly a plan and is referred to as the IDP.
- 36 In support of the contention that the DPP and, necessarily the IDP, is a flexible document, the Appellants pointed to the following departures from the IDP.

“(i) Courthouse and police station complex

On the IDP these are shown on the subject property but in fact have been built on the opposite side of Whitfield Street. Further the police station is now on a site identified as religious/community building on the IDP



while the site of the Courthouse was originally referred to as community/market.

(ii) Inner city housing

There are a number of inner city housing sites shown on the IDP. The first of these to which the Appellant made reference is that on the east side of Whitfield Street south of Simpson Avenue. However, this has been developed for commercial and community purposes. The site of the mixed use lots at the Court junction of Whitfield Street and Leghorn Street is also shown as inner city housing. Again, if developed solidly for commercial purpose and for mixed purpose uses, this would, as the Appellant contends, constitute a departure from the IDP.

(iii) Commercial development south-east corner of Clifton Street and Whitfield Street

The site located on the south side of Clifton Street between Whitfield and Goddard Streets is designated as street front shops, offices and entertainment. In fact the portion of the site fronting Whitfield Street is shown as an open-air car park. However, buildings have been constructed with direct frontage and nil setback to Whitfield Street.”

37 It does seem to us, however, that the fact that some development may have occurred, in the way described above, which is not exactly as predicted by the IDP or the DPP, does not, as the Appellants contend, denigrate the status of the DPP and the IDP.

38 In fact, in relation to the precise question of road layout or pattern, Mr Jeans, the Respondent’s City Centre Development Manager, gave evidence that having regard to the provisions of clauses 6.5, 6.5.5 and Appendix A3, his view was that the DPP and IDP indicated a road layout, as there indicated, which was effectively unchangeable.

39 Therein lies the essential point of difference between the Appellants’ and the Respondent’s contentions.

40 The Appellants effectively contended that the status of the DPP and therefore the IDP was less than that contended by the Respondent. It also asserted, in any event, that there was sufficient flexibility in the document

to enable this application to be considered on its merits and thirdly, as a result, the road layout contained within the IDP was not immutable or unchangeable and that therefore, again, the application would have to be addressed on its merits.

- 41 The Respondent's essential contentions were that: the history of the matter, as set out above, is that the development in relation to the Rockingham City Centre has proceeded on the basis that the road layout requires the re-aligning of Goddard Street to effect what the IDP depicted; and the question of the road layout and traffic flows impacts greatly upon the concept of the IDP and its implementation.
- 42 To that end, the Respondent relies upon the evidence of and the reports generated by Mr Friederich Uloth. The Appellants rely equally on the report of and evidence given by Mr Behnam Bordbar. Both are traffic engineers.
- 43 They offer differing views in relation to this important issue. It is necessary to consider their respective opinions and the evidence they gave in some detail.
- 44 Given the longer association with the matter, it is appropriate to first consider Mr Uloth's reports. Mr Uloth obtained his engineering qualification in Bonn in Germany in 1960. He has been a traffic engineer in practice in Western Australia for a considerable period. For 21 years until August 1999, he was the Managing Director and traffic engineer of Uloth & Associates Pty Ltd. As such he provided consultation and advice in relation to traffic and transport matters over that period to a wide variety of government and commercial enterprises.
- 45 He undertook semi-retirement in August 1999 but continues on a semi-retired basis to be a consultant traffic engineer operating on his own account. In his statement, after recounting some historical development in relation to the Rockingham City Centre, he said that his first personal involvement was in relation to the preparation of a 1992 Rockingham City Centre Traffic and Parking Study (1992 Study). In that 1992 report, the following appears:

“In planning for Rockingham's City Centre, a balance must be found between car park location, ease of vehicular access, pedestrian amenity and pedestrian safety. However, as the size of the City Centre increases, pedestrian amenity and safety must be given an increasing precedence over driver convenience; direct vehicular access to car parks is relinquished and car

drivers will be required to drive longer routes to and from City Centre car parks. The City Centre core is then designed for the pedestrian and not the car.

Hence, Simpson Avenue cannot remain an important east-west route for vehicular traffic. It is obvious that Council Avenue, Read Street, Leghorn Street and Goddard Street-Louise Street bore reliance to the important boundary roads of the City Centre. The secondary routes, from a driver's point of view, are the section of Simpson Avenue between Read Street and the new road between Simpson Avenue and Leghorn Street."

- 46 One issue which was put to Mr Uloth in cross-examination was quite apart from the question of the re-alignment of Goddard Street why it was necessary to have a 40 metre reserve on the basis that that would effectively provide for two lanes each way. Whilst Mr Uloth rejected that necessarily that was controlled by traffic forecast figures, in the end the matter was left on the basis that in 1982, he proposed that there would be a four-lane road but as that was 20 years ago, he now can not provide the reason for why that was the recommendation. He offered the following:

"I can only say that if you have a City Centre as large as that area was, that you need a boundary road along the eastern side and that this boundary road, to lay it out as a two-lane road, would not do the job."

- 47 In addition, he offered the view in relation to the main function that would be served by widening this street:

"The main function of the Goddard Street alignment from Council Avenue to Patterson Road is to bring traffic to and from the City Centre, distributed to minor streets and link, you know, Patterson Road which is an important road, to Council Avenue, which is the other important road."

- 48 In the steps dealing with the question of traffic, one now needs to have regard to a document described as 1994 Rockingham City Centre - Ultimate Road Network Investigation, which was prepared by BSD Consultants Pty Ltd, retained on behalf, effectively, of the owners of the subject property.
- 49 As became evident during the course of the hearing, included in that report were what were described as five road network scenarios. Those five network scenarios were reproduced as part of Mr Uloth's statement.

- 50 What is of interest is the fact that all five scenarios show the re-alignment of Goddard Street into Louise Street in accordance with all the previous studies including the reports and investigations carried out by Mr Uloth.
- 51 This BSD report was the subject of cross-examination of Mr Bordbar. As it transpired, Mr Bordbar was a Director of BSD and undertook the supervision of the production of the BSD report.
- 52 In the course of cross-examination, Mr Behnam Bordbar seemed to be at pains not to accept the thrust of the proposition being put to him, namely that the five scenarios referred to above were not a response to scenarios put to BSD but rather were proposals that BSD themselves put up on behalf of the property owners as suggested outcomes.
- 53 Further, as became clear in cross-examination, scenarios 1, 2 and 3 involved, in effect, a recommendation that Goddard Street would be upgraded to dual-carriageway standard. However, even scenario 4, which was promoted as the most attractive option, again does not suggest for one moment that the road would not be re-aligned and tacitly seems to accept that even if the dual-carriageway was not put in, road alignment would be taken as a given.
- 54 In relation to traffic considerations in the BSD 1994 report, the following appears:
- “The task was to evaluate the road network proposed in the Rockingham City Centre - Development Policy Plan prepared by Max Margetts & Associates, in June 1994, for the Council and to test alternative road network options. The study included extensive research of existing traffic movements and sophisticated computer modelling techniques to forecast future traffic flow.”
- 55 In that regard, we reject the suggestion by Mr Bordbar that the five scenarios were the result of some constrained instructions provided in relation to the preparation of the report.
- 56 We find as a fact that the scenarios proposed were as a result of investigation carried out by BSD on behalf of their clients and do not expressly imply or contain such a limitation.
- 57 As a result, we are satisfied that they represent the result of their own investigations in relation to traffic considerations and find the explicit

acceptance of re-alignment a compelling matter in the historical consideration of the area adjacent to the subject property.

58 In those circumstances, it is somewhat odd to find reference in Mr Bordbar's statement to not having access to the 1992 Uloth report, when quite clearly it appears as Appendix 1 to the BSD report of 1994.

59 In other words, by 1994, investigations and consideration of a variety of issues had consistently and exclusively lead to the conclusion that the re-alignment of Goddard Street formed a necessary part of the future development of the Rockingham City Centre.

60 In Mr Bordbar's report, the subject of his evidence in these proceedings, he seemed mainly directed to address the question of re-alignment based upon whether there was a nexus between the proposed development and the need for alignment and road widening.

61 It is important to emphasize that at no stage was that the case advanced on behalf of the Appellants.

62 Mr Uloth accepted in cross-examination that traffic flow figures predicted in 1984 and 1992 had not come to fruition and that the actual figures now being generated may not of themselves have justified widening the roadway in question to a 40 metre reserve.

63 To the extent to which, however, such re-alignment and widening is consistent with the DPP and the IDP and the long-term development of the Rockingham City Centre, the relevance is clear. Further, one can readily appreciate that the adherence to what is said to be an important and integral part of the DPP and the IDP in respect of the development of planning instruments, which are of statutory significance, in respect to which the Appellants have effectively provided input over a considerable period of time, must lead to the result that the long-term future outcome as identified in the IDP will result in both the alignment of Goddard Street and its widening.

64 In fact, evidence was given that the failure to re-align and widen Goddard Street has implications for safe entry points into the City will continue to cause difficulty in relation to traffic flow and causes confusion in relation to the location and identification of Goddard Street.

65 In this context, it was contended by the Appellants that the Respondent had no present intention of effecting either the re-alignment or the widening of Goddard Street. Mr Jeans accepted that it remained an

important strategic planning objective but accepted equally that there were no funds in the present or in the future budget for the Respondent to effect the works to be carried out.

66 In that context, the Appellants contended that there was an ulterior motive in relation to the refusal by the Respondent of this development application. It was suggested that in so doing, the Respondent was simply avoiding the possibility of having to pay for compulsory acquisition of the subject property.

67 Further, it was contended that, in some way, that was a matter with which we need be concerned in the resolution of the appeal, the subject of these proceedings.

68 It seems to us that:

- (a) No evidence was lead to demonstrate the basis upon which it was suggested that the Respondent had such an ulterior motive; and
- (b) in the absence of such evidence this is not an issue which will aid this Tribunal to determine the appeal before us.

69 The issue effectively being advanced by the Appellants was that if the Respondent did not have the money, then ipso facto its refusal by reference to adherence to such re-alignment and widening must be because there was an ulterior motive.

70 The statutory and planning framework going back more than twenty years militates against an acceptance of such an argument.

71 The adherence to this position by the Respondent is entirely consistent with documents dating back to the 1980's, documents which in the main have been made plain to the Respondent and which by their very nature were specifically addressed by the BSD report in 1994. (A report again we hasten to emphasize where the five traffic scenarios accepted in each instance the re-alignment of Goddard Street.)

72 For those reasons, we reject the suggestion that there is any ulterior motive.

73 In any event, the evidence is quite to the contrary and demonstrates a continued and consistent adherence by the Respondent to the objectives in the DPP and to the specific outcomes identified in the IDP.

74 In addition and of considerable importance, was the reference in the evidence of Mr Uloth and Mr Jeans, for the planned major link for Rockingham to the Kwinana Freeway via Dixon Road and Mundijong Road, which is not a matter which seems to have found its way into Mr Bordbar's report.

75 As the Respondent contends, and as we accept, this would appear to have the effect that traffic coming from the north, whether from Perth or elsewhere and going to the City Centre, would in high probability travel along Dixon Road and then south into Goddard Street in order to access the various sections of the City Centre.

### **Proposed development - encroachment onto proposed road**

76 The effect of the development will, as a result, encroach upon the contemplated road reserve for the re-alignment of Goddard Street. It is not clear to us on what basis, given the history of this matter going back more than twenty years, why this should all be put at odds to allow this development to proceed. To approve this development would necessarily prevent forever the possibility of the re-alignment being effected.

77 For those reasons it appears to us that there is a proper basis to refuse the application, located as it is in a position which would encroach upon the proposed road.

### **Built Form**

78 At the commencement of the hearing of the appeal, Senior Counsel for the Respondent gave notice of intention to amend the Statement by Respondent by clearly exposing an issue in relation to built form. An amendment was effected to paragraph nine of the Statement by Respondent so that after amendment it read as follows:

“Having regard to the inconsistency of the proposed development with the objective of the City Centre's zone and the RCC plan as to the proposed widening and re-alignment of Goddard Street and as to the built form for the area including the appeal site, the Respondent submits that the Tribunal should dismiss this appeal.”

79 The amendment was objected to by Counsel for the Appellants on the basis that it did not emerge from the Statement by Respondent and had clearly not been a ground relied upon by the Respondent as a reason for rejection of the application. We allowed the amendment and granted to

the Appellants, if required, to recall any witnesses in order to obviate any prejudice.

80 In essence, the issue, as put by Counsel for the Appellants, was the contention is that the proposed building form, because it has a warehouse type frontage in one section, does not constitute an active frontage and therefore is within the spirit of the policy.

81 Arguably, at one end of the spectrum was Mr Rowe, called as a witness for the Appellants, who made plain that although he rejected the issue as a matter of principle, nevertheless said that it was a conceptual sketch that had been provided and that the Appellants were prepared to work with the Respondent to effect such design changes as were necessary in order to meet the Respondent's concerns.

82 At the other end was Mr Max Margetts, an architect who has had long involvement with the development of the DPP and IDP. His view was that no change contemplated by the Appellants could in any way satisfy the concerns that he held.

83 Somewhere in the middle was Mr Jeans where the question of big box construction was not, as far as he was concerned, an issue and would have made no difference.

84 Whilst it is the case that Clause 46.2.3 of the DPP, encourages contiguous and active street front facades, it is difficult to accept Mr Margetts categorical rejection that there was any possibility of a design being conceived on behalf of the Appellants which would in relation to this site meet those objectives.

85 It does appear to us to be a somewhat entrenched position to adopt.

86 To the extent to which it is necessary to consider it further, we are of the view that such issues are capable of being addressed by conditions attaching to any grant of approval.

87 However, in the light of our conclusion that the application, as submitted, encroaches upon the land the subject of the proposed road and that as a result, this appeal should be dismissed, it is not necessary to consider this issue further.