

JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : AUSTRALIAN REAL ESTATE INVESTMENT LTD
and WESTERN AUSTRALIAN PLANNING
COMMISSION AND CITY OF ARMADALE
[2003] WATPAT 24

CORAM : MR P MCGOWAN
MR J JORDAN
MR L GRAHAM

HEARD : 9 JUNE 2003

DELIVERED : 30 JUNE 2003

FILE NO/S : APP 36 of 2003

BETWEEN : AUSTRALIAN REAL ESTATE INVESTMENT LTD
Appellant

AND

WESTERN AUSTRALIAN PLANNING
COMMISSION
Respondent

FILE NO/S : APP 37 of 2003

BETWEEN : AUSTRALIAN REAL ESTATE INVESTMENT LTD
Appellant

AND

CITY OF ARMADALE
Respondent

Catchwords:

Preliminary issue - Form of application - Consent of owner

Legislation:

Nil

Result:

Appeal by Appellant is competent and Respondents' application dismissed.

Category: B

Representation:

APP 36 of 2003

Counsel:

Appellant	:	Mr L Stein
Respondent	:	Mr C Bydder

Solicitors:

Appellant	:	Galic & Co
Respondent	:	Crown Solicitor's Office

APP 37 of 2003

Counsel:

Appellant	:	Mr L Stein
Respondent	:	Mr A Roberts

Solicitors:

Appellant	:	Galic & Co
Respondent	:	Minter Ellison

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

Pacesetter Homes Pty Ltd v State Planning Commission (1992) 84 LGERA 71
St Ives Pty Ltd v City of Mandurah [2003] WATPAT 28

MR P MCGOWAN, MR J JORDAN, MR L GRAHAM:

- 1 On 15 November 2002 the Appellant (Australian Real Estate Investment Ltd) made application for approval to commence development under the City of Armadale Town Planning Scheme No. 2 (“**TPS 2**”) and the Metropolitan Region Scheme for the redevelopment of the Kelmscott Central Shopping Centre. Each appeal in this matter dated 24 February 2003 was against, in each case, the deemed refusal of the development application of 15 November 2002.
- 2 It should also be pointed out that the appeals when instituted, although in each case it described Australian Real Estate Investment Ltd as the Appellant, purported to be an appeal on behalf of both that company and the Department of Land Administration (“**DOLA**”).
- 3 The inclusion of DOLA as an appellant, albeit in that somewhat odd way, was the subject of an application which was determined by consent on 9 June 2003 when the title of each appeal was amended to delete DOLA as an appellant.
- 4 The matter proceeds on the basis that the only appellant is Australian Real Estate Investment Ltd.

Preliminary Issue - Directions

- 5 Each of these appeals was the subject of Directions made on 2 April 2003. Directions made included the following:
 - (a) The appellant is to provide an outline of the preliminary issue of law and fact to the Respondents by 11 April 2003;
 - (b) The parties are to attempt to reach consensus on the wording of Preliminary Issues by 2 May 2003;
 - (c) If no consensus can be reached the parties have leave to apply for further Directions.
- 6 It appears that although an outline was provided by the Appellant, no agreement had been reached, such that further Directions were required in this matter on 5 June 2003.
- 7 At that stage, the Tribunal further directed:

- (a) As to the Preliminary Issue of law and fact each of the parties is to file and serve by 4pm on 6 June 2003 its outline of submissions and any affidavit on which it intends to rely;
 - (b) The parties are to liaise with a view to agreeing any issue of fact;
 - (c) The matter is to proceed at 10am on 9 June 2003.
- 8 Subsequent to those Directions, the Tribunal has received the following documents which form the basis of the Preliminary Issue which was argued in this matter on 9 June 2003:
- (i) Statement of agreed facts;
 - (ii) Outline of submissions from the Appellant and each of the Respondents;
 - (iii) Affidavit of Louis Bernard Fouche sworn 6 June 2003;
 - (iv) Affidavit of Lawrence Charles Piggott sworn 6 June 2003; and
 - (v) Affidavit of Daniel John Chesson sworn 6 June 2003.
- 9 In outlining the matters for determination by the Tribunal, Mr Roberts posed the Preliminary Issues as follows:
- (a) (i) Is the application of 15 November 2002 to the City of Armadale a valid application?
 - (ii) If invalid, does the Town Planning Appeal Tribunal have jurisdiction to entertain the appeal?
 - (b) (i) Does the absence of consent of development by the WAGR, Minister for Lands and the City of Armadale mean the Tribunal has no jurisdiction?
- 10 As matters unfolded, it appeared that to the extent to which we might be called upon to make a determination as to whether consent in fact had been obtained from the WAGR, Minister for Lands and the City of Armadale, the Appellant wished to file an answering affidavit in relation to the affidavits of Messrs Fouche and Piggott. Given the timetable referred to above and the Directions that were made we indicated during

the course of the hearing on 9 June 2003 that if it became necessary to address that determination, we would invite the parties to make submissions in the course of a Directions Hearing as to how further to proceed with the matter.

- 11 In other words, for the present we will not attempt to make a determination of whether consent in fact has been obtained until such time as the Appellant has had an opportunity to both put in answering material and, as Counsel for the Appellant suggested, to enable cross examination of the deponents of the sworn affidavits. This would be directed to whether in fact there was consent to the application.
- 12 That in itself will involve a mini hearing, if that is the point to which we come.

Statement of Agreed Facts

- 13 The parties have agreed to certain facts which form the underlying premise for consideration of the issues that follow. It is appropriate to set out those agreed facts in full.
- 14 For the purpose of the hearing of the preliminary issues the parties agree the following facts for the redevelopment of the Kelmscott Central Shopping Centre (“**Application**”):
- (a) The City of Armadale TPS 2; and
 - (b) Metropolitan Region Scheme
- 15 The site the subject of the Application included:
- (a) 14 freehold lots in the ownership of various entities;
 - (b) Reserve 22186 which is:
 - (i) Crown land reserved for the purposes of an infant health clinic;
 - (ii) Reserved under TPS 2 for Public Purposes and used for the purpose of an infant health clinic; and
 - (iii) Subject to the care, control and management of the City of Armadale as a management body under the *Land Administration Act 1997* (“**Act**”).
 - (c) Reserve 25940 which is:

- (i) Crown land reserved for the purpose of a library;
 - (ii) Reserved for *Public Purposes* under TPS 2 and used for the purpose of a library; and
 - (iii) Subject to the care, control and management of the City of Armadale as a management body under the Act.
- (d) Reserve 22555 which is:
- (i) Crown land reserved for the purpose of railways;
 - (ii) Reserved for *Railways* under the Metropolitan Region Scheme and used for the purposes of the Kelmscott Railway Station and includes part of the railway corridor; and
 - (iii) Subject to the care, control and management of the Western Australian Government Railways Commission.
- (e) Portions of Streich Avenue, Denny Avenue and Davis Road which are:
- (i) Crown land; and
 - (ii) Subject to the care, control and management of the City of Armadale under the Act.

16 The Application:

- (a) Attached letters from the owners of all freehold lots in which each expressed its consent to being included as part of the Application submitted by the Planning Group on behalf of Australian Real Estate Investment Ltd.
- (b) Was signed by:
 - (i) An individual as agent for the owners of the land; and
 - (ii) The Regional Manager, Metropolitan Region Land Administration Services - Department of Land Administration (no undertaking intended).

- (c) Was not signed by:-
 - (i) The City of Armadale; or
 - (ii) The Western Australian Government Railways Commission.

17 As part of the proposed development the subject of the Application:

- (a) Reserve 22186 (Infant Health Centre) and Reserve 25940 (Library) would be redeveloped for commercial purposes (retail and food outlets);
- (b) The existing infant health centre and library would be demolished and those uses relocated within the new shopping centre;
- (c) The Kelmscott Railway Station on Reserve 22555 would be relocated; and
- (d) Works would be undertaken affecting Streich Avenue, Denny Avenue and Davis Road.

Form 1

- 18 As can be seen from the agreed Statement of Fact the application involved development in respect of certain Reserves which were under the care, control and management of the City of Armadale and the WAGR.
- 19 The Form 1 was signed by both an agent for what is described as the “owners of the land” and the Regional Manager, Metropolitan Region, Land Administration Services of the Department of Land Administration. That signature, bearing the date 7 November 2002 appeared on the Form 1 which was submitted to both Respondents in relation to the proposed development. It is also apposite to note that Attachment A which was submitted with, if not forming a part of, the Form 1 disclosed that in each case the Reserves involved land which was owned by the Department of Land Administration. In Attachment B, again lodged with the Form 1 if not forming part of it, each of those Reserves identified the responsible agency in each case being either the City of Armadale or the Western Australian Government Railways.
- 20 We were taken by Counsel for the City of Armadale, Mr Roberts, to TPS 2. Clause 7.1 dealing with applications for planning consent contains inter alia the following:

“The application shall be in the form in Appendix 1 and such further particulars as the Council may consider necessary to enable the Council to determine the application.”

21 It was contended for the City of Armadale that those words had two effects:

- (a) To necessarily incorporate Appendix 1 into TPS 2; and
- (b) Upon a proper construction of the words there was a mandatory obligation to complete each of the sections in the form in Appendix 1.

22 It seems to use that both propositions are tenuous.

23 In the case of the latter, it is difficult to imagine:

- (a) That the words are intended to or do have that effect; and
- (b) In any event it could not seriously be contended that the failure to complete a section of the form would in that way alone invalidate the application.

24 In the case of the former, again it appears to be tenuous that such an effect is achieved. It is merely noting that there is a printed form in the nature almost of an administrative aid.

Owner of the Land

25 Mr Roberts contended that the definition of owner appearing in TPS 2 necessarily governed the approach to be taken in relation to the application for planning consent and the completion of Form 1. He said that the effect of owner meant necessarily that if there was a party who came within any aspects of the definition of owner then that party was a person who was required, on his argument, to sign the Form 1 or at least to consent to the Form 1 being submitted.

26 The requirement that the form be signed by the owner is, for example, to be found in Reg (4)2(a) *State Planning Commission Regulations 1962* (WA).

27 This particular regulation was the subject of express consideration by Murray J in *Pacesetter Homes Pty Ltd v State Planning Commission* (1992) 84 LGERA 71. There is not in our view any mandatory equivalent in TPS 2 to lead to that conclusion.

- 28 In any event, even if one has regard to the definition of owner one can see that there are some odd aspects to it.
- 29 First, Counsel for the Appellant contended that the proper approach is to read the definition disjunctively so that one need only meet one of the requirements to satisfy owner. Further it was contended that the definition was in effect a cascading definition. That is a person who holds an estate in fee simple in possession has a greater interest in the land than for example a lessee or licensee from the Crown so that the devolution of the various interests ultimately leads to what might be described as an equitable interest as trustee or mortgagee in possession.
- 30 We are satisfied that the view advanced by the Appellant is to be preferred.
- 31 In that regard it seems to us that if the consent of the owner is required then an owner would be met if it is a person who holds an estate in fee simple in possession.
- 32 It would be an odd circumstance where having obtained such consent it would then be necessary to obtain the consent of someone with a considerably lesser interest in the land.
- 33 It appears to have been accepted by Counsel for the Western Australian Planning Commission that notwithstanding that Reserve 22555 was vested in the Western Australian Government Railways such vesting did not of itself change ownership of the land.
- 34 Further he accepted that as such, such land remained owned by the Crown.
- 35 Administration of Crown land is, by section 10 of the Act, granted to the Minister for Lands on behalf of the Crown. We were provided with an Instrument of Delegation gazetted 12 January 1999 by which was granted to WAGR all the powers of the Minister for Lands under section 18 of the Act for Reserves vested in WAGR.
- 36 It is important to point out that section 18 of the Act relates to the sale, transfer or dealing with Crown land interests.
- 37 Neither Respondent seemed to take issue with that distinction.
- 38 Section 27 (1) of the Act deals with the subdivisional development of land. This power had not been delegated to the WAGR.

- 39 The authorised person to sign the Form 1 as owner for the Reserve is the Regional Manager. No issue was taken with this.
- 40 As we have indicated above it was the Regional Manager who signed the Form 1 dated 7 November 2002.
- 41 Although it was not accepted by Counsel for the City of Armadale, the position, it seems to us, is exactly the same in relation to Reserves 22186 (Infant Health Clinic) and 25940 (Library).
- 42 It also applies in relation to a portion of Streich Avenue over which the City of Armadale has care and control and management as a management body under the *Land Administration Act*.
- 43 Argument was advanced before us that, in effect, even if that were so Section 12 of the Act requires the consent of the body in whom the management of the Reserve is vested before power is exercised.
- 44 In this case the distinction was sought to be drawn by Counsel for the Appellant between a step which would involve the lodgement of an application which would go to both Respondents for consideration and a delegation of power to, in effect, carry out or effect the development.
- 45 Before dealing with that issue it is appropriate to say something about the position of the City of Armadale.
- 46 The matter has been addressed before in this Tribunal in circumstances where it is said the consent of the approving authority is required but in addition the approving authority is itself an owner of land forming part of land the subject of the application for approval.
- 47 The matter was canvassed in the Tribunal's recent decision *St Ives Pty Ltd v City of Mandurah* [2003] WATPAT 28. The approach described by the Tribunal in that decision at paragraphs 20 to 23 is in our view correct and we adopt and apply it here.
- 48 In that regard it seems to us that there is reasoning akin to that to be applied in relation to the proper interpretation of section 12 of the Act.
- 49 There is a significant fundamental difference between development being carried out in respect of land which is vested in the City of Armadale for its care and management and simply approving the application for the purpose of initiating the process. If it be the case that the question of the consent of the City of Armadale is a matter to be addressed at a later stage then, equally, it could not be a matter which would preclude the initiation

of the application in respect to land of which the Crown is the owner and in respect to which the Regional Manager has authority to sign, as he did, the Form 1 on 7 November 2002.

- 50 The question really is whether in those circumstances it is proper to dismiss the appeal.
- 51 In our view the point is not made out and we are satisfied that the appeal is both competent and not tainted by any direct or indirect invalidity.
- 52 For those reasons we dismiss the Respondents application in each case and will hear the parties further in relation to Directions for the future conduct of these appeals.