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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**CITATION** : WISE and SHIRE OF MURRAY [2003] WATPAT 26

**CORAM** : MR J JORDAN

**HEARD** : 1 JULY 2003

**DELIVERED** : 10 JULY 2003

**FILE NO/S** : APP 111 of 2003

**BETWEEN** : BARRY WISE  
Appellant

AND

SHIRE OF MURRAY  
Respondent

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*Catchwords:*

Canal - Mooring pole - Boat mooring - Mooring area

*Legislation:*

Nil

*Result:*

Appeal allowed.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr B Wise
Respondent	:	No appearance

*Solicitors:*

Appellant	:	In person
Respondent	:	

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

Nil

**MR J JORDAN:**

- 1 This is an appeal against the Council's refusal to grant planning consent for the development of what is termed a mooring pole in the canal at Lot 39 (No. 8) Willow Gardens, South Yunderup.
- 2 Lot 39 is owned by the Appellant and Mrs S A Wise and has road frontage to Willow Gardens. The rear boundary of Lot 39 has frontage to the Willow Gardens Canal of Murray Waters Estate.
- 3 Lot 39 is near the head of the Willow Gardens Canal. It was explained that each of the lots around this canal extends approximately 3 metres into the canal to the rear boundary of the lot. For Lot 39 the width of water from the top of the canal wall to the rear boundary is 2.84 metres at the eastern boundary and 2.87 metres at the western boundary. The width of Lot 39 across the top of the canal wall is 20.2 metres and it narrows slightly to 18.7 metres width at the rear lot boundary in the canal. The location sketch supplied with the appeal shows Lot 40 to the west at the head of the canal has a frontage within the canal of just 3.54 metres.
- 4 The application is for a 100mm x 100mm post within the water portion of Lot 39. About midway along the canal frontage of Lot 39 is an L-shaped jetty. The mooring post is to be about 3 metres from the boundary with Lot 40, 3 metres from the head of the jetty and 2.4 metres from the bank in line with the head of the jetty.
- 5 Council's reasons for refusing the application are expressed in the following terms:
  - "a) Approval to the mooring pole would effectively create two mooring envelopes on adjacent Lot 39 where only one is supported due to the narrow and restrictive nature of the canal.
  - b) Approval to the mooring pole in the proposed position will restrict the use of the approved jetty located at Lot 40 Willow Gardens."
- 6 In response to a request that it reconsider its decision, the Respondent advised Mr Wise in a letter dated 26 July 2002 that the Council had again dealt with the matter and had resolved that:

“Council advise the applicant that it is not prepared to grant approval to the proposed mooring pole at Lot 39 Willow Gardens, South Yunderup and reiterate the refusal reasons as outlined under the delegated authority decision with the additional requirement that boat moorings are only permitted adjacent to Lot 26 under Schedule 3-2 of Council’s Town Planning Scheme No. 4.”

- 7 This appeal was initially lodged with the Minister for Planning and Infrastructure in 2002. The appeal was referred to the Town Planning Appeal Tribunal (the Tribunal) for determination in April 2003 as provided for in s.17(4) of the Planning Appeals Amendment Act 2002.
- 8 The appeal was set down for a Directions Hearing at 9.00 am on Monday 26 May 2003, both the Appellant and Respondent being advised of the time, date and location. Mr Wise attended the Directions Hearing. The Respondent failed to appear. At that Directions Hearing the matter was set down for a half-day Hearing on 1 July 2003, with Witness Statements to be filed and exchanged by 21 June 2003. The Appellant and the Respondent were advised accordingly.
- 9 The Appellant’s Witness Statements were received on 19 June 2003. In the absence of any receipt of Witness Statements from the Respondent, the Tribunal office contacted the Respondent and was advised by an officer that the Council would not be sending any Witness Statements. This was on 30 June 2003.
- 10 At the scheduled Hearing time on 1 July 2003, Mr Wise appeared on his own behalf. The Respondent again failed to appear. Mr Wise, at personal cost and inconvenience, had prepared himself and absented himself from his work to attend the Tribunal for the Hearing of this matter. It was noted that this was the second occasion on which the Council had behaved poorly having failed to have a representative appear without any explanation.
- 11 In a letter dated 1 October 2002 addressed to the Minister’s Planning Appeals Office, the Respondent advised that Council had resolved to respond to the appeal in terms of the recommendation adopted by the Planning and Development Committee on 17 September 2002. The Respondent attached from the minutes of the Committee meeting of 17 September a copy of item 4.1 Appeal to the Minister for Planning - Proposed Mooring Pole – No. 8 (Lot 39) Willow Gardens, South Yunderup. Item 4.1 contains a report on the proposed development and

the recommendation adopted by Council in response to the appeal (17 September 2002 response).

- 12 The Council response to the appeal adopted from Item 4.1 and advised in its letter of 1 October 2002 states:

“(i) the mooring pole as proposed is not a permitted use within the Murray Waters/Willow Gardens Canal Development Zone; and

(ii) approval to the proposal will result in an undesirable precedent for the establishment of Mooring Poles within the Willow Gardens Canal, which may further restrict the available clear water available for navigation.”

- 13 The Tribunal also received from the Council a letter dated 23 June 2003 in which it is said that the purpose of the letter is to clarify the advice of Council in its letter of 1 October 2002. Attached to that letter are extracts from Town Planning Scheme No.4 (TPS 4). These are copies of clauses 6.2.6 to 6.2.12, Schedule 3-2 “Murray Waters” Permitted Uses 1 to 7 and a page of Appendix 1 – Interpretations.

- 14 Section 49(2) of the Town Planning and Development Act 1928 provides that:

“If a person, including a party, to whom notice has been given in accordance with the Regulations or Rules fails to attend, the Hearing may be held in the absence of that person.”

- 15 Given that the Council had provided written responses to the appeal the Hearing proceeded in the presence of Mr Wise and in the absence of the Respondent.

- 16 The Council’s letter of 23 June 2003 states that:

“The Subject land is located in the “Murray Waters” Canal Estate and as such the use and development of the land is restricted by the provisions of Council’s Town Planning Scheme No 4, with particular reference to Schedule 3-2 (copy attached). As shown on this Schedule, a ‘Boat Mooring’ is a permitted use, but only adjacent to Lot 26. Town Planning Scheme No 4 defines “Boat Moorings” as any freestanding structure to which a boat is moored.”

17 The letter went on to say:

“Given the above, the proposed mooring pole can only be defined as a Boat Mooring, which is not legally permissible in the Murray Lakes Canal adjacent to Lot 39.”

18 Appendix 1 of TPS 4 Interpretations states:

“Boat Moorings” – means any freestanding structure to which a boat is moored.

19 This definition presents difficulties of interpretation. It refers to any freestanding structure rather than one purposely constructed for the mooring of boats. A freestanding structure is simply one not supported by another structure. This can include any structure associated with the use of the dwelling in the vicinity of the water of the canal to which a boat could be moored. If a lot has no jetty no boat can be moored unless it is to a structure that is not freestanding according to the Council interpretation.

20 TPS 4 does not include a definition of ‘mooring pole’. The difficulty with including a mooring pole in the definition ‘Boat Mooring’ is identifying a single pole as a ‘structure’. The Concise Oxford Dictionary defines a structure as a whole constructed unit. Construct is to make by fitting parts together; build, form (something physical or abstract). If the ‘mooring pole’ applied for is absent any attachments it is considered the pole is simply a pole and not a structure.

21 As indicated above, there is on Lot 39 an L-shaped jetty about 7m from the western boundary. The photographs supplied with the appeal show a jetty constructed perpendicular to the bank in the canal section of Lot 40. The jetty on Lot 40 appears to be about one metre wide.

22 Mr Wise explained that the canal is tidal. At low tide the water depth at the foot of the sloping canal wall is about 300mm or less such that boats must be moored away from the canal wall if they are not be aground at low tide. The presence of the jetties to provide mooring away from the canal wall supports this opinion.

23 In the 17 September 2002 response it states that the proposed pole ... would create a mooring area in excess of the normal 8m by 3.5m envelope. Mr Wise said he has no knowledge of how a mooring area is defined for each lot, or how its boundaries are fixed and use controlled. Council has provided no explanation of how this is done. There appears to be no document identifying the mooring area for each lot or policy for

mooring areas in Murray Waters. If mooring areas are fixed then any action by Mr Wise cannot extend that area without Council approval. If the mooring area is not fixed, it is difficult to determine how mooring areas are allocated to lots such as Lot 39, which has the largest canal frontage in the vicinity and to Lot 40, which has a very small canal frontage.

- 24 It is clear that any mooring area of 8 metres by 3.5 metres adjacent to a jetty would necessitate boats being moored partially in the public area of the canal and partially in the water on private property. It also appears from the sketches and photographs supplied with the appeal that a 'normal' mooring area for Lot 40 adjacent to the jetty and away from the canal wall would extend across the boundary into the neighbouring private area of Lot 39, and into the canal, because of the very narrow canal frontage of Lot 40.
- 25 The Appellant pointed out that, while each lot did in fact extend into the water of the canal, there was no visible means of identifying where each lot began and ended.
- 26 The Appellant, in his grounds of appeal, submitted that the pole has two purposes. One is to tie a stern rope for a dinghy attached to the jetty, the second was to provide a marker to make clear to any boat owner manoeuvring to moor at the jetty on Lot 40 that they are in fact manoeuvring on an area which is part of Lot 39. The Appellant says, and it appears to have some substance, that a boat manoeuvring to tie up at Lot 40 must cross the area of water within Lot 39 and once tied to the jetty on Lot 40 the boat sits across the boundary into Lot 39. The Appellant said he recognised this situation but wanted to make it clear by way of a marker that this access to his area should have some limit.
- 27 A mooring pole is not considered to be a structure if it is simply a pole. Such a mooring pole is considered to not come within the definition "Boat Moorings".
- 28 Mooring areas have not been defined for lots fronting the Willow Gardens Canal. The mooring pole applied for is within the boundaries of Lot 39. In this instance it is considered that the pole would not significantly alter the mooring arrangements for Lot 39 or the impact they have on the canal and the neighbours.
- 29 Private property boundaries at the canal are not identifiable because the boundaries are in water. A jetty has been approved on adjoining Lot 40 such that access to that jetty is across an area of privately owned canal on

Lot 39. The 'normal' mooring area for Lot 40 is considered to extend into Lot 39. At present there is no marker to indicate how far into Lot 39 the intrusion will be tolerated. The pole applied for would identify such a point in Lot 39, would not prevent access to the jetty on Lot 40 and would not prevent there being a reasonable mooring area for Lot 40.

- 30 It is therefore determined that this appeal is allowed and planning approval is granted for the 100mm x 100mm post embedded in the canal within Lot 39 in the location applied for. The post is to have no fixtures or attachments.