

---

**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**CITATION** : DAINES and CITY OF JOONDALUP  
[2003] WATPAT 27

**CORAM** : MS B MOHARICH  
MR D BROWN  
MR E A MCKINNON

**HEARD** : 15 MAY 2003

**DELIVERED** : 10 JULY 2003

**FILE NO/S** : APP 141 of 2002

**BETWEEN** : ROBERT ARTHUR DAINES  
Appellant

AND

CITY OF JOONDALUP  
Respondent

---

*Catchwords:*

Unauthorised development - Retrospective approval - Masts/antennae - Residential area - Requirements of town planning scheme - Discretion - Impact on residential amenity - Amateur radio - Hobby - Community facility - Impact of radio waves

*Legislation:*

Nil

*Result:*

Appeal dismissed.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr D Jones
Respondent	:	Mr J Skinner

*Solicitors:*

Appellant	:	As Agent
Respondent	:	McLeods

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

Noarlunga City Corporation v Usher 48 LGRA 36

**MS B MOHARICH, MR D BROWN, MR E A MCKINNON:**

- 1 This Appeal is against the refusal of Joondalup City Council (“**Council**”) to grant retrospective approval to unauthorised development consisting of two radio masts and antennae (“**development**”) located at No. 9 Mullion Street, Mullaloo (“**site**”).
- 2 The site can more particularly be described as Lot 310 on Plan 7728 and being the land the subject of Certificate of Title Volume 188 Folio 123A.

**History of Development**

- 3 The Appellant is a licensed amateur radio enthusiast who pursues his hobby from the site. The hobby involves a radio transmitter/receiver and antennae fixed at varying heights to allow worldwide communication. The Appellant’s interest in radio goes back to the 1970s when he first erected a 15 metre high mast with a vertical antenna on top to communicate on citizen band frequencies. The Appellant has since experimented with various antennae configurations aimed at improving communication. He currently holds an amateur radio license which entitles him to use the current facility worldwide for his own use, to provide a voluntary community service, and which obliges him to contribute his services in times of community emergency. Earlier masts and antennae have been replaced with those for which approval is now sought in this appeal (the development), and which consist of:
  - (a) A 9.2 metre high mast topped with a single, upright 5.2 metre antenna (the smaller antenna). This mast is attached to a free-standing outbuilding in the backyard of the site, is fixed in height and was erected in 1997 and;
  - (b) A 12.2 metre high mast (supported by guy wires) on top of which is a square array of four antennae, the tallest of which is about 2.4 metres high. This 14.6 metre high structure (the larger antenna) was erected in June 2002. Although normally operated at its full height, this structure can be lowered to a height of about 7.0 metres above ground level.
- 4 In June 2002 Council received a complaint from a neighbour about a newly constructed mast and antenna (the larger antenna) on the site. An inspection by Council revealed two masts and antennae that were subsequently deemed to be unauthorised development. By letter dated

26 June 2002 Council advised the Appellant that the antennae required planning approval, and of the need for the Appellant to apply for Council approval.

- 5 The subsequent application from the Appellant for approval to commence development indicated that the antennae were in place and were to be used for monitoring sea search and rescue, surf life saving, and for amateur radio. The application was accompanied by letters from three neighbours indicating no objection to the erection of a radio mast for the purposes stated in the application.
- 6 Council advertised details of the application to seven neighbours over a 14 day period and received 5 letters of objection. Two of those objections were from neighbours previously supporting the proposal.
- 7 By letter dated 13 September 2002 Council advised the Appellant that the application had been refused for the following reasons:
  - “1. The proposal would be contrary to the proper and orderly planning of the locality;
  2. The antennas are excessively large and not in keeping with the residential character of the surrounding area; and
  3. The antennas detrimentally impact upon the visual amenity of the surrounding residents.”
- 8 It is this decision that gives rise to the appeal.
- 9 The Appellant relied on a 1981 decision in the South Australian Supreme Court (*Noarlunga City Corporation v Usher* 48 LGRA 36) to argue that amateur radio was a hobby that was entitled to operate from a residence, and that the same principle applied in this case. The Tribunal rejects this argument. The *Noarlunga* decision upheld a decision of the Planning Appeal Board of South Australia that the operation of an amateur radio - with associated masts and antennae - was a hobby, and part of the ordinary residential use of the land. In that case the residential use was permitted and it was held that there was no need for planning consent. There was nothing in local planning law in that case requiring the applicant to seek a separate approval for the erection of masts or antennae.
- 10 As will be shown the Respondent's Town Planning Scheme No.2 (“**scheme**”) makes it clear that the erection of masts and antennae of the type the subject of this appeal are not part of a dwelling and require the

separate approval of Council. In the circumstances, the *Noarlunga* decision is not relevant to this appeal.

- 11 The Appellant also argued that the decision by Council to refuse the development was an attack on amateur radio, and on an activity that the Appellant is licensed to pursue. The Tribunal also rejects this argument and would make it clear at the outset that the appeal is about the development on the site and not the hobby being conducted from the Appellant's home, which he is free to do provided he complies with the requirements of Council's scheme.
- 12 In his evidence the Appellant agreed that the development was not necessary as part of his involvement with surf life saving activities as indicated in the application to Council, and acknowledged that two of his previous supporters now objected to the proposed development.
- 13 The Tribunal accepts Mr Daines' evidence that the antennae as built are the result of experimentation with various heights and configurations and are those best suited to accommodate the range of frequencies in which he operates, are designed to minimise interference with other (particularly TV) transmissions, and are specifically placed to overcome the interference to radio transmissions that would otherwise be caused by surrounding land form and geology.
- 14 Whilst it had been mentioned in objections to Council at the time of advertising, there was nothing in evidence to suggest that the Appellant's amateur radio activities had any impact on TV reception in the area, or that electro-magnetic radiation was a threat to residents or domestic animals. In fact, counsel for the Respondent made it clear that these issues were not relevant in determining the merit of the development, which it submitted should be judged on issues relating to orderly and proper planning generally, and impact on amenity in particular.
- 15 We are of the view that Council has correctly determined that the acceptability of the development turns on the extent to which it impacts on local amenity. While the community benefits to be derived from amateur radio are acknowledged, those benefits do not exempt the activity from the need for a proper assessment of the extent to which associated development impacts on existing amenity and the orderly and proper planning of the area.

## Provisions of Town Planning Scheme

16 The site is zoned Urban in the *Metropolitan Region Scheme* and Residential in Council's scheme.

17 Clause 6.1 of the scheme specifies those uses which require the prior approval of Council before development occurs. The development in this appeal is not one of those uses exempted from the need for prior approval. In fact, whereas clause 6.1.3 excludes the need for planning approval for a 'single house', the term specifically excludes:

“the erection of a mast or antenna where either of its vertical or horizontal dimensions exceeds two metres, the erection of which requires prior planning approval.”

18 The Appellant gave evidence that approval had not been sought from Council for any of the masts/antennae erected on the site. Clause 6.12 of the scheme provides that the City may give approval to an existing development.

19 Schedule 1 of the scheme contains the following interpretation:

“**communications antenna**: means any mast, antenna, aerial, satellite dish and other associated equipment used for the reception or transmission of television or radio signals or for other electronic communication where its vertical or horizontal dimensions exceed two metres but does not include telecommunications infrastructure.”

20 Table 1 of the scheme (zoning table) makes reference to both a 'Communication Antenna' as defined and 'Communication Antenna - Domestic'. There is no interpretation of what the latter means and the Tribunal is of the view that a 'Communication Antenna - Domestic' is two metres by two metres or less in size and associated with the everyday function of a domestic dwelling.

21 While the classification of the use is not in dispute, and would not in any event be subject to appeal, being a matter of fact, and not an exercise of discretion, the distinction between the two uses is important, for completeness, and because it points to the way in which the development in this appeal should be considered. A 'domestic' type of antenna is a permitted (P) use in the Residential zone, whereas the use as classified by the City in this instance is a 'D' use that is not permitted unless the City has exercised its discretionary power and granted approval. Thus, the

masts and antennae in this appeal, and as classified by Council, are of a type requiring special consideration and assessment against prescribed criteria explained below. There was no dispute between the parties about the nature of the development or that it involves two 'communications antenna' for the purpose of the appeal.

- 22 Table 1 of the scheme provides that a "Communications Antenna" is a 'D' use in the residential zone. From Clause 3.2.1 we see that a 'D' use has the following meaning:

""D" = A Use Class that is not permitted, but to which Council may grant approval after following the procedures laid down by clause 6.6.2."

- 23 Clause 6.6.2 of the scheme provides that Council in exercising its discretion with respect to a 'D' use shall have regard to the procedures laid down in Clause 6.8 and may advertise a proposed use in accordance with Clause 6.7.

- 24 Clause 6.8 lists those matters that Council (and the Tribunal) is required to have due regard in making its decision. Those matters relevant to this appeal are:

- interests of orderly and proper planning and preservation of the amenity of the locality;
- relevant submissions by the applicant;
- any planning policy of the Council;
- any other matter which under the Scheme the Council is required to have due regard;
- the comments or wishes of any objectors to or supporters of the application;
- any previous decision made by the Council in circumstances which are sufficiently similar for the previous decision to be relevant as a precedent; and
- any other matter which in the opinion of the Council is relevant.

25 Council has no policy with respect to the erection of masts or antennae, and there have been no decisions by Council in matters of this kind that would assist the Tribunal to determine the appeal.

26 The Residential Planning Codes (now superseded by the Residential Design Codes 2002) (“**Codes**”) are incorporated by reference into the scheme, and are to be read as part of the scheme. The Codes (p.89) contain the following objective with respect to ‘Incidental Development Requirements’:

“To ensure that (a) outbuildings and fixtures attached to buildings do not detract from the streetscape, or the amenity of the development or that of adjoining residents; and (b) adequate provision is made for incidental facilities serving residents’ needs.”

27 The relevant performance criteria for external fixtures is expressed in the Codes as:

“External fixtures that do not detract from the streetscape or the visual amenity of residents or neighbouring properties.”

28 Development that complies with the following is deemed to meet the performance criteria:

“Clause A2.2 Other external fixtures that:

- i. are not visible from the primary street;
- ii. are designed integrally with the building; or
- iii. are located so as not to be visually obtrusive.”

### **Amenity**

29 The scheme provisions make it clear that this appeal turns on the extent to which the development impacts on the existing amenity of the neighbourhood. Applying the test requires the Tribunal firstly to establish from evidence the objective character (amenity) of the neighbourhood, to identify the manner in which the development will affect that amenity, and then to assess the degree of impact of the development on that amenity.

30 Mr Graeme Catchpole (for the Respondent), a professional planner of some experience, gave evidence that the site, and the adjoining and



surrounding properties are residential in nature. Photographic evidence tends to support this view. Mr Catchpole gave evidence that the antennae detrimentally impact upon the streetscape of Mullion Street and Gunida Street (the street to the rear of the site) and upon the visual amenity of the residents surrounding the site “by virtue of their excessive size and visual obtrusiveness”. In his opinion approval to the development would be contrary to the orderly and proper planning of the surrounding residential locality. The Appellant provided no expert evidence to counter this view.

- 31 The Tribunal heard from Ms McCabe (owner of the adjoining site at No. 11 Mullion Street) that the antennae are visible from most points in her backyard and from her outdoor sitting area. She indicated in her evidence that the outlook from the rear of her property was dominated by the larger antenna, “which towers over our backyard”, and that both antennae are visible from Mullion Street and the surrounding area. She indicated that she would not have bought her property had the recently installed (larger antenna) been in place at that time. The extent to which the development is visible was confirmed by the evidence of Ms Eady a neighbour at No 13 Mullion Street.
- 32 The evidence of two neighbours objecting to the development does not of itself provide an objective view of the impact of the development, but helps to confirm the evidence of Mr Catchpole that the development is visually intrusive.
- 33 It is apparent from the evidence that the nature of the development, its height, and the sheer accumulation of masts and antennae, will introduce a non-residential use into a residential area where no other developments of this type exist. The impact of the development when viewed from Mullion Street and surrounding areas, and from neighbouring properties in particular will, in our view, be significant and detract from the existing residential amenity of the area. The resultant diminution in the amenity of the area would be contrary to the orderly and proper planning of the area and the objectives of the scheme.
- 34 The Appellant gave evidence that he was able (and willing) to reduce the height of the larger antenna to about 6.5 to 7.0 metres when not in use (usually during the day-time) and raise it when in use (usually during the evening) to its current height. Notwithstanding the Appellant’s undertaking in this regard his voluntary community service and obligation in times of community emergency would, in our view, require the antennae to be operated at their full height whenever required, and not just in the evening. We see nothing in the Appellant’s willingness to reduce

the height of the larger antenna that would lessen the impact on the existing residential amenity of the area. The reduced height would still make the development higher than a two-storey house and would still be visible from the street and the surrounding area. Lowering the antenna would not change the nature of the development, or reduce its impact when viewed from neighbouring properties.

35      The appeal is dismissed.