
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : PATRICK & ANOR and SHIRE OF SERPENTINE-JARRAHDAL
JARRAHDAL [2003] WATPAT 28

CORAM : MS M CONNOR

HEARD : 23 JUNE 2003

DELIVERED : 10 JULY 2003

FILE NO/S : APP 162 of 2003

BETWEEN : HUGH PATRICK
JULIE GAYE HOEY
Appellants

AND

SHIRE OF SERPENTINE-JARRAHDAL
Respondent

Catchwords:

Change of use - SPP No 9 'Metropolitan Centres Policy' - Orderly and proper planning - Draft structure plan - Seriously entertained proposal - Commercial ribbon development

Legislation:

Nil

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

| | | |
|------------|---|------------------------------|
| Appellants | : | Mr H Patrick and Ms J G Hoey |
| Respondent | : | Mr B Gleeson |

Solicitors:

| | | |
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| Appellants | : | In person |
| Respondent | : | As Agent |

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

Agnew Clough Ltd. v Town Planning Board (unreported, appeal No 1 of 1979,
delivered 1 May 1980
Food Plus Limited v City of Perth (1982) 5 APA 288
Tang v City of Stirling (1982) 5 APA 161

Case(s) also cited:

Lloyd Sales Pty Ltd v Subiaco City Council (1982) 4 APA 270

MS M CONNOR:

- 1 This is an appeal against the refusal of the Shire of Serpentine-Jarrahdale of an application for town planning approval for 'Change of Use from Residential to Consulting Rooms' on Lot 105 South Western Highway, Byford. The development application was refused by the Respondent at its Ordinary Meeting held 24 March, 2003. In refusing the application, the Respondent gave the following reasons:

- “1. Proposal for a change of use from Residential to Consulting Rooms has a potential to create a precedent for adjoining property owners to apply for similar approvals.
2. Proposed development is not in accordance with the requirements of the State Planning Policy No. 9 – Metropolitan Centres Policy.
3. Proposal for establishment of Consulting Rooms within the designated Base Residential R 20 area is not in accordance with the draft Byford Structure Plan;
4. Proposed development has the potential to have an adverse effect on:
 - The orderly and proper planning of the residential area;
 - The health, amenity, safety or convenience of the existing future occupants.”

- 2 The grounds of the appeal can be summarized as follows:

- (a) The proposal will not set a precedent, as there are other commercial developments along the highway in close proximity.
- (b) The Council's previous approvals of retail and commercial developments along the highway also conflicts with SPP No 9 'Metropolitan Centres Policy' and the draft Byford Structure Plan.

- (c) The change of use is consistent with Strategy 1.2 ‘People and Community’ of the draft Byford Structure Plan, which states:

“Plan and develop towns based on compatible mixed uses, local employment opportunities, and walkable neighbourhoods clustered in order to minimise car dependency.”

- (d) There are various businesses located along the highway. The proposal is not out of character or out of place in the area.
- (e) Residential living on a highway is undesirable because of the associated noise.
- (f) The change of use will not create a safety concern as the street setback area, some 30 metres, allows for ample car parking and visibility along the highway is good.
- (g) The required car parking bays can be provided onsite.

3 The Respondent opposes the appeal on the basis that:

- (a) The proposal has a potential to affect the preparation of the Byford Structure Plan and the orderly and proper planning of the locality and may have a negative impact on the amenity and safety of the residents in the area.
- (b) The proposed change of use will create a precedent for adjoining properties along the South Western Highway, within the Residential zone, to seek similar approvals, resulting in a spread of office/commercial ribbon development along the South Western Highway, which is contrary to the objectives of the Western Australian Planning Commission’s SPP No 9 ‘Metropolitan Centres Policy’ (“**Policy**”).
- (c) There is insufficient land for the provision of the required car parking spaces and boundary landscaping as required under the Shire of Serpentine-Jarrahdale Town Planning Scheme No 2 (“**TPS 2**”).
- (d) The proposal is not in accordance with the draft Byford Structure Plan.

The Locality

- 4 The appeal site is 1105m² in area and is located on the eastern side of the South Western Highway, north of the designated town centre for Byford. There is an existing residence on the appeal land, which is setback approximately 30 metres from the South Western Highway.
- 5 Mr Hoey, in his evidence, produced a series of photographs, cross-referenced on a plan, showing the extent of the commercial and office uses along the South Western Highway. Mr Hoey drew attention to the fact that two existing businesses, a Naturopathic practice operating three properties south of the subject lot and a Dentist, operating a further two properties south of the subject lot, are also located on land zoned “Urban Development” under TPS 2.
- 6 Apart from the two commercial uses mentioned above, the remaining lots within the street block encompassing the appeal site are utilised for residential purposes.

Planning Scheme Requirements

- 7 The appeal site is zoned “Urban” under the Metropolitan Region Scheme and “Urban Development” zone under the Respondent’s TPS 2.
- 8 Clause 5.17 of TPS 2 sets out the purpose of the Urban Development zone, which is:

“to provide for the orderly planning of large areas of land in a locally integrated manner and within a regional context, whilst retaining flexibility to review planning with changing circumstances.”
- 9 It is intended that the objectives of the area would be facilitated through the establishment of Structure Plans to ensure that development takes place in conformity with those Plans (subclause 5.17(a) second part).
- 10 At present, a draft structure plan referred to as the “draft Byford Structure Plan”, has been prepared for the area. According to the Respondent, this plan has been adopted by the Council but is yet to be advertised for public comment.
- 11 Under the draft structure plan, the appeal site is located within the area designated as Residential R20.

- 12 Both the Appellants and the Respondent have referred to the use as “Consulting Rooms”, however, as the proposal is purported to involve the establishment of three consulting rooms, the proposal does not fall within the definition of ‘Consulting Rooms’ as defined in ‘Appendix 1 – Interpretations’ of TPS 2, which read as follows:

“Consulting Rooms - means a building (other than a hospital or medical centre) used by no more than two practitioners who are legally qualified medical practitioners or dentists, physiotherapists, chiropractors and persons ordinarily associated with a practitioner in the prevention, investigation or treatment of physical or mental injuries or ailments, and the two practitioners may be of the one profession or any combination of professions or practices.”

- 13 This fact was raised during the hearing. The Appellants responded by indicating their preparedness to modify their application to facilitate two practitioners. The Respondent also suggested that if planning approval was to be granted, this matter could be addressed by imposing a condition limiting the use to two practitioners.

- 14 In ‘Table 1 – Zoning Table’ of TPS 2, all uses in the “Urban Development” zone are referred to subclause 5.18.6.3 of TPS 2, which relates to the operation of Structure Plans. In regards to use permissibility, subclause 5.18.6.3 reads:

“Without limiting the generality of clause 5.18.6.2, under a Structure Plan:

- (a) in the areas designated as zones, the permissibility of uses is to be the same as set out in the Zoning Table as if those areas were zones under the Scheme having the same designation;”

- 15 Given that there is no “approved” Structure Plan clause 5.18.6.3 does not have any application. However, the provisions contained in Clause 5.18.7 of TPS 2 are relevant as it contains provisions pertaining to circumstances where development maybe approved prior to the approval of a Structure Plan within the “Urban Development” zone. Subclause 5.18.7.3 states:

“Council may approve the development or use for other than a single house within the Urban Development zone subject to Council being satisfied that the nature or scale of such development or use will not have an adverse effect on:

- a) the preparation of a Structure Plan for, or
- b) the orderly and proper planning of, or
- c) the health, amenity, safety or convenience of the future occupants of,

the area intended for the preparation of a Structure Plan, and subject to the proposed development or use being advertised for public inspection in accordance with Clause 6.3.”

- 16 According to Mr Gleeson the proposal was advertised for public comment and one submission was received from an owner of an adjoining residential property objecting to any change of use on the subject lot due to possible noise from the parking of customers’ vehicles.
- 17 In addition to the matters raised in subclause 5.18.7.3, subclause 6.4.2 also lists matters that are required to be taken into consideration in determining an application, which include:
- “(a) the purpose for which the subject land is reserved, zoned or approved for use under the Scheme;
 - (b) the purpose for which land in the locality is reserved, zoned or approved for use under the Scheme;
 - (c) the size, shape and characteristics of the land, and whether it is subject to inundation by floodwaters;
 - (d) the provisions of the Scheme and any Council policy affecting the land;
 - (e) any comments received from any authority consulted by the Council;
 - (f) any submissions received in response to giving public notice of the application;
 - (g) the orderly and proper planning of the locality;
 - (h) the preservation of the amenity of the locality.”
- 18 In this instance, subclause (a), (b), (d), (f), (g) and (h) are the appropriate considerations in regard to this application.

- 19 Table V – Parking Requirements specifies the required carparking requirements for particular uses. In the case of ‘Consulting Rooms’, the minimum number of parking space to be provided is 6 spaces for 1 practitioner plus 4 spaces for each additional practitioner.

Consideration of Planning Issues

- 20 The main planning issues relate to whether the proposal will have an adverse effect on the preparation of a Structure Plan, the orderly and proper planning of the area or the health, amenity, safety or convenience of the future occupants of the area.
- 21 The Appellants submitted that the Respondent has not consistently implemented the draft Structure Plan as there are numerous other commercial/office uses approved along the South Western Highway. Specific references were made to a recent approval for a change of use from Residential to Office on the corner of South Western Highway and Clifton Street and two commercial activities operating in the same street block as the appeal land. The Appellants further contend that the highway location is not suitable for residential purposes and that the amenity and safety of the area would not be adversely affect by the proposed development as the required car parking bays could be provided on site and visibility along the highway is good.
- 22 The Respondent submitted that approval of the proposed development will result in the spread of office/commercial ribbon development along the South Western Highway, which is contrary to the objectives of the draft Byford Structure Plan, and the Policy. The Respondent contends that commercial development is predominantly located on the western side of the highway, which is reflected in the draft Structure Plan, and that the proposal would be better placed in one of the several commercial zones identified in the draft Byford Structure Plan. The Respondent addressed the locational differences between the subject site and the lot recently approved for officer purposes. The Respondent also considers that further commercial development on the eastern side of the South Western Highway may create a precedent for other property owners in the residential area to seek similar approvals.
- 23 The Respondent conceded during the hearing that there would be sufficient area onsite for the provision of the required car parking spaces. The Tribunal accepts this position. Mr Gleeson also clarified his stance in regards to the issue relating to safety of the area by explaining that the proposal may have a negative impact on safety of the residents in the area

by further increasing traffic on the highway. No evidence was produced to substantiate this claim.

- 24 During cross-examination, Mr Gleeson also acknowledged that the reference in his witness statement to “Controlling the Spread of Commercial Development in the Inner Suburbs” is not relevant, as Byford could not be considered an inner suburb in the context of the metropolitan region.
- 25 The Policy is a State policy formulated under Section 5AA of the *Town Planning and Development Act 1928* (as amended) which lends considerable weight to the Respondent’s argument.
- 26 In considering the Appellant’s application in the light of the requirements of orderly and proper planning, the Tribunal is required to take into the account the provisions of TPS 2, which should give guidance to the planning intentions for the area. However, in this instance, the appeal land and a significant portion of area surrounding the site is zoned “Urban Development” and requires the subsequent development of a Structure Plan to provide for the orderly and proper planning of the area. At present, there is no such “approved” Structure Plan. The Council has adopted a draft Structure Plan but this has not been advertised for public comment, however, according to the Respondent, public participation was involved in the formulation of the plan.
- 27 The Tribunal in several decisions (*Agnew Clough Ltd. v Town Planning Board* (unreported, appeal No 1 of 1979, delivered 1 May 1980; *Tang v City of Stirling* (1982) 5 APA 161 and *Food Plus Limited v City of Perth* (1982) 5 APA 288 has recognized the need to take into consideration a “seriously entertained” planning proposal and that the weight to be given to the planning proposal will in each case depend upon the degree of likelihood of its being finally adopted (*Food Plus Limited v City of Perth* (1982) 5 APA 288).
- 28 Given that the draft Byford Structure Plan has not been advertised for public comment, although the formulation of the plan involved public participation, it is difficult to consider the plan as a “seriously entertained” proposal. However, given the zoning of the land under TPS 2 there is the need for some guidance as to the intended purpose of the area, and in this instance, it is considered appropriate to give some credence to the plan in order to determine the orderly and proper planning for the area.

Conclusion

- 29 The evidence clearly demonstrates that there are already numerous commercial/office uses located along the South Western Highway, many of these are located within areas that are currently zoned for commercial uses or in areas designated similarly in the draft Byford Structure Plan. However, a number of businesses exist, such as those referred to by the Appellant, which are located along the highway adjacent to residential areas that are situated on land designated “Residential” zone in the draft Byford Structure Plan.
- 30 There is a notable distinction between the lands on either side of the South Western Highway in that the land on the western side is located adjacent to the railway reserve, whereas the land on the eastern side abuts residential properties.
- 31 The Policy does not support adhoc commercial ribbon development along major roads unless located in centres, and the draft Byford Structure Plan identifies considerable areas west of the highway suitable for commercial development of the type proposed. The Tribunal is of the view that the proposal represents further encroachment of commercial activities into the residential area, which will result in increase pressure for further similar developments to locate on the eastern side of the highway. It is considered that the change of use of the subject land from ‘Residential’ to ‘Consulting Rooms’ will prejudice the orderly and proper for the area and, as such, the Tribunal is not prepared to support the proposal.
- 32 For the forgoing reasons, the appeal is dismissed.