
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : BASSO-BRUSA and CITY OF WANNEROO
[2003] WATPAT 29

CORAM : MS M CONNOR

HEARD : 23 JUNE 2003

DELIVERED : 10 JULY 2003

FILE NO/S : APP 91 of 2003

BETWEEN : MARK BASSO-BRUSA
Appellant

AND

CITY OF WANNEROO
Respondent

Catchwords:

Change of use - Compatibility of use with its setting - Preservation of amenity -
Refusal of a "P" use

Legislation:

Nil

Result:

Appeal dismissed.

Category: B

Representation:

Counsel:

Appellant	:	Mr M Basso-Brusa
Respondent	:	Mr C Slarke

Solicitors:

Appellant	:	In person
Respondent	:	McLeods

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

Camfield Nominees Pty Ltd v Town of Claremont (unreported, TPAT Appeal
No 22 of 1979 delivered 31 January 1980)
Food Plus Limited v City of Perth (1982) 5 APA 288
Tang v City of Stirling (9\1982) 5 APA 161

MS M CONNOR:

1 This is an appeal against the refusal of the City of Wanneroo of an application for town planning approval to operate a chainsaw on No 50 (Lot 46) Triumph Avenue, Wangara for a period of two hours per day with intermittent use between 6.00am and 6.00pm. The development application was refused by the Respondent at its Ordinary Meeting held 19 March 2002. In refusing the application, the Respondent gave the following reasons:

- “1. The proposed use of the chainsaw is contrary to clause 6.8(i) of the City’s District Planning Scheme No.2, which requires that Council give due regard to the compatibility of a use or development within its setting.
2. The proposed use of the chainsaw is contrary to clause 6.8(n) of the City’s District Planning Scheme No.2, which requires that Council give due regard to the preservation of the amenity of the locality.
3. The proposed use of the chainsaw is contrary to the provisions of orderly and proper planning.
4. The proposed use of the chainsaw is contrary to clause 6.8(y) of the City’s District Planning Scheme No.2, which requires that Council give due regard to any relevant submission received on the application, including any relevant submissions received by the applicant.”

2 The grounds of the appeal can be summarised as follows:

- (a) The zoning of the subject lot would permit the proposed use;
- (b) The existing sawmill only accepts timber logs to a maximum length of approximately 6m. In order to get the logs into the sawmilling shed, it is necessary to dock the logs to a maximum length of 6m using a chainsaw. The use of the chainsaw is for short periods only, it is not a continuous use.

- (c) Other businesses in the near vicinity use chainsaws on a daily basis;
 - (d) The dust from sawing is minimal and has little impact on the surrounding properties.
- 3 The Respondent opposes the appeal on the basis that:
- (a) notwithstanding that the proposed use falls within the ‘industry – general’ definition, the use is not compatible with surrounding businesses as the noise and dust emissions from activity injuriously affects surrounding businesses and adversely impacts on the amenity of the area. As such, the use is contrary to clauses 6.8 (i), (n) and (y) of the City of Wanneroo District Planning Scheme No 2 (“**DPS 2**”) and contrary to the provisions of orderly and proper planning;
 - (b) no measures have been taken to ameliorate the impacts of the use on the surrounding businesses; and
 - (c) necessity is not a valid planning argument;

The Land

- 4 The appeal site is described as Lot 46 on Deposited Plan 17245 Volume 1860 Folio 507, with a total area of 7,599m². The shape of the appeal site can be described as being a regular pentagon. It has a 48.95 metre frontage to Triumph Avenue and bounded by six lots on its remaining four boundaries.
- 5 There is an existing colorbond shed located adjacent to the southwest boundary of the site, which houses a timber sawmilling machine.
- 6 The City of Wanneroo on 21 January 2001 granted approval to a:
- “shed for sawmill machine and use of site for storage of timber and timber logs”.
- 7 Eleven conditions were attached to this approval, one of which stated:
- “2. The timber storage area as highlighted in red on the approved plan shall only be used for timber storage purposes. No timber sawing to be carried out from this portion of the site.”

The Proposal

- 8 The proposal before the Tribunal entails the use of a chainsaw suitable for cutting timber up to 800mm in diameter for a period of two hours a day on the appeal site. Mr Basso-Brusa indicated in his evidence that the activity would primarily take place outside the existing shed, but included all other areas excluding the parking and landscape areas as shown in Exhibit 3 Annexure RDJB6. According to Mr Basso-Brusa the need to chainsaw the timber logs has arisen as the sawmilling machine only accepts timber logs to a maximum length of approximately 6m.
- 9 The proposal is in effect, an attempt to remove condition 2 of the Respondent's approval of 21 January 2001 for a:
- “shed for sawmill machine and use of site for storage of timber and timber logs”.

Planning Scheme Requirements

- 10 The appeal site is zoned “Industrial” under the Metropolitan Region Scheme and “General Industrial” under DPS 2.
- 11 Clause 1.6 of DPS 2 specifies the aims and objectives of the Scheme, which includes:
- “(f) To encourage development which will:
- Provide high standards of amenity, safety and welfare, ...”
- 12 The intent and specific objectives relating to the “General Industrial” zone are contained in subclauses 3.11.1 and 3.11.2 of DPS 2, which states:
- “3.11.1 The General Industrial Zone is intended to provide for industrial development which the Council considers would be obtrusive in or detrimental to the amenity of the Service Industrial Zone.
- 3.11.2 The objectives of the General Industrial Zone are to:
- (a) accommodate a wide range of industrial activities, including those generally involving production, processing storage, wholesaling or distribution processes;

- (b) minimize adverse visual and environmental effects of industrial uses on surrounding areas.”

- 13 Subclauses 6.1.1 and 6.1.2 of DPS2 establishes the need for planning approval under the Scheme.
- 14 The City of Wanneroo in its deliberations of the application did not specifically specify the “Use Class” classification of the proposal to determine the permissibility of the use under the “Zoning Table”. Counsel for the Respondent addressed this issue in his closing argument and advocated the view that the proposed use fell within the definition of “industry – general” as contained in Schedule 1 (clause 1.9) – Interpretations of DPS 2, which is classified as a “P” (permitted) use in the General Industrial zone. I would concur with this view.
- 15 Under clause 6.6.1 of DPS 2, the Council shall not refuse a “P” use application by reason of the unsuitability of that use. However, the Council may in its discretion impose conditions upon the Planning Approval and if the application proposes or necessarily involves any building or other work, the Council upon considering that building or other work may exercise its discretion as to the approval or refusal and the conditions to be attached to the proposed development.
- 16 Clause 6.8 of DPS 2 sets out the matters that the Council is to have regard to in the considering an application for planning approval. The relevant matters relating to this proposal include:
 - “(a) the aims and provisions of this Scheme and any other relevant town planning scheme(s) operating within the Scheme Area;
 - (b) the requirements of orderly and proper planning including any relevant proposed new town planning scheme or amendment, or region scheme or amendment, which has been granted consent for public submissions to be sought; ...
 - (i) the compatibility of a use or development within its setting; ...
 - (n) the preservation of the amenity of the locality; ...

- (y) any relevant submissions received on the application including any relevant submission received by the applicant.”

Planning Issues

- 17 As the chainsaw activity began shortly after the commencement of the sawmill the Respondent was able to produce evidence concerning the impacts of the operation on the surrounding properties. The Respondent called Mr Halliday, Compliance Officer of the City of Wanneroo and Mr Heffernan, the proprietor of Vale Panel and Paint, Automotive Restoration of Unit 5, 46 Triumph Avenue, Wangara to describe the impacts of the activity on the surrounding area.
- 18 Mr Halliday produced a photomontage and an aerial photograph to demonstrate the extent of the operations in relation to the existing businesses and a video of a person chain sawing a very large log on the subject site to show the plume of sawdust and the quantity of residual material resulting from the activity. This evidence, which would not otherwise have been available if the use had not previously been operating in breach Council’s approval, was very helpful in understanding the dynamics of the activity in context with the surrounding properties.
- 19 Mr Halliday also indicated that he had surveyed a number of businesses in the locality and established that noise, log dropping and dust were issues for some of the businesses located on Lot 8, while the business on the opposite side of Triumph Ave directly adjacent to the subject site (Modern Group) and the MTT Bus Depot considered dust to be an issue dependent on wind conditions. Mr Halliday’s survey was incomplete in that he did not canvas any of the lots at the rear of the appeal site, which may have been because Mr Basso-Brusa owned two of the four lots.
- 20 Mr Heffernan in his evidence asserted that saw dust from the cutting and clean up operations drifts from the appeal site onto the adjoining site (Lot 8) causing problems for his panel beating and spray painting business. Mr Heffernan also found the noise from the chainsaw to be disruptive, particularly during telephone conversations. Mr Basso-Brusa during cross-examination conceded that sawdust drifts from the appeal site.
- 21 A witness statement was submitted by a Mr Daryl Cook, the proprietor of Dial-a-glass Glazing of 56 Triumph Avenue, Wangara stating that he did not have any objection to the operation of the sawmill and that the chainsaw did not interfere with his business nor did he have a problem

with sawdust. Mr Cook did not appear before the Tribunal and as such, the Respondent did not have the opportunity to cross-examine the evidence. The witness statement was taken into evidence and its contents noted, however, given the circumstance, little weight is attributed to the evidence.

- 22 During the course of the hearing, both parties alluded to possible solutions to the amenity impacts, however, as these were only speculative and no firm proposal was offered in evidence as a solution, there was no opportunity to further explore this matter at the hearing.
- 23 There is no doubt from the evidence submitted that the sawdust emissions from the chainsaw activity adversely affects surrounding businesses.
- 24 Mr Basso-Brusa contends that there are many other businesses in very close proximity to the appeal site that use chainsaws on a daily basis.
- 25 These sites were identified by Mr Halliday and shown on Exhibit 5. According to Mr Halliday who visited the sites, with the exception of one site where Mr Basso-Brusa has now relocated his operations, the saws and the scale of operations are significantly smaller than that carried out by the Appellant's business. Mr Halliday's explanation as to why the other chainsaw operations did not cause problems for surrounding businesses related to the nature and industrial character of the surrounding area, the differences in the scale of industry and one of the businesses being located adjacent to vacant land.

Conclusion

- 26 The appeal land is zoned 'General Industrial' under DPS 2. The proposed use is considered to fall within the definition of 'industry – general' and as such is a "P" (permitted) use.
- 27 The fact that the proposed use is a "P" use is not the end of the matter. The general provisions of DPS 2 apply to all proposed uses, whether they are permitted or not. Clause 6.8 of DPS 2 sets out in some detail specific matters to which regard is to be given in the consideration of a planning application, and in this instance, the pertinent matters are:
- “(i) the compatibility of a use or development within its setting; ...
 - (n) the preservation of the amenity of the locality; and ...

(y) any relevant submission received on the application including any relevant submission received by the applicant.”

- 28 There is an obligation under DPS 2 and the Metropolitan Region Scheme to consider the impact of the use on amenity and orderly and proper planning (see *Camfield Nominees Pty Ltd v Town of Claremont* (unreported, TPAT Appeal No 22 of 1979 delivered 31 January 1980); *Tang v City of Stirling* (9\1982) 5 APA 161 and *Food Plus Limited v City of Perth* (1982) 5 APA 288.
- 29 The Respondent effectively demonstrated that the use is not compatible with surrounding businesses as the noise and dust emissions from the activity injuriously affects surrounding businesses and adversely impacts on the amenity of the area.
- 30 The fact that there are other similar businesses operating in the near vicinity does not in anyway negate the consideration of the impact on the amenity in relation to this application.
- 31 In having regard to the preservation of the amenity of the locality and the compatibility of the use within its setting, the Council acted in accordance with sound town planning principles in refusing the application. For the foregoing reasons, the appeal is dismissed.