
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : PALUCH HOMES PTY LTD and SHIRE OF
MUNDARING [2003] WATPAT 30

CORAM : MR P MCGOWAN
MR J JORDAN
MR L GRAHAM

HEARD : 10 JULY 2003

DELIVERED : 10 JULY 2003

FILE NO/S : APP 30 of 2003

BETWEEN : PALUCH HOMES PTY LTD
Appellant

AND

SHIRE OF MUNDARING
Respondent

Catchwords:

Group dwelling - Residential Design Codes - Local subdivision and infrastructure plan - Whether a seriously entertained proposal

Legislation:

Nil

Result:

Appeal allowed subject to conditions.

Category: B

Representation:

Counsel:

Appellant	:	Mr A Paluch
Respondent	:	Mr L Kosova

Solicitors:

Appellant	:	In person
Respondent	:	As Agent

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

Natrass v The City of Perth [2001] WATPAT 2

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

- 1 This appeal concerns an application for approval for a group dwelling on certain properties contained within the Respondent's municipality. The appeal has a degree of history going back to the start of 2002 when the Appellant then made application for approval to develop number 19 and number 21 Coongan Avenue, Greenmount on the basis that the property on number 19 would have the existing house which would remain and that on number 21 there would be six new group dwellings.
- 2 Ultimately, that application was refused by the Respondent as a result of a meeting on 27 of August 2002. There was then further contact between the Appellant and representatives of the Respondent as a result of which a modified proposal was submitted in about October 2002.
- 3 We should also point out that during this period the Appellant had made application for and had been granted approval by the Western Australian Planning Commission to effectively amalgamate the two properties 19 and 21 Coongan Avenue to effect a realignment of the boundaries and to make provision for sub-division of those properties. Such approval was granted by the Commission on 11 October 2002.
- 4 The effective result of that was that there was thereafter two lots created, 1094 square metres which incorporated the existing house on number 19 and the re-configured number 21 now being 2750 square metres and, effectively, a battle axe block.
- 5 The application for development proceeded after October 2002 on the basis that it would be for five group dwellings on number 21 and re-configured. Mr Paluch gave evidence and indicated that as a result of the delay in relation to the application for approval and also as a result of approval having been granted by the Western Australian Planning Commission for re-alignment and effective sub-division, he was both in a position to, in one sense and forced to in another sense, effect the sale of number 19 which occurred some time during the course of 2002.
- 6 We are satisfied that the application made on October 2002 is properly before us and we say that because in the initial statement by Respondent dated 13 March 2003, although it is put as a point of clarification it included the following:

“It is noted that the appellant states that the appeal is submitted against the shire's failure to determine the application within 90

days of lodgment. This is actually not correct as clause 6.6(10)A of Town Planning Scheme number 3 states:

“An application for planning approval shall be deemed to have been refused where a decision on the application has not been conveyed to the applicant by the council within 60 days of council’s receipt of the application or within such further time as maybe agreed in writing between the applicant and the council within that period of 60 days.””

- 7 Relative to the above the application was received by the shire on 16 October 2002 and as such a right of appeal against a deemed refusal pursuant to the above clause was actually available 60 days after that lodgment date, that is, 15 December 2002, given that the shire and the applicant had not agreed in writing to an extension of the 60 day period. It was then suggested that, as a result, the appeal be dismissed.
- 8 Where a matter is raised for the tribunal's consideration as to jurisdiction it is not simply resolved by the parties involved agreeing not to press the point. Once the matter is raised it is a matter for the tribunal itself to be satisfied as to whether in fact it has jurisdiction to entertain the appeal in question.
- 9 On the basis that the relevant period is 60 days to establish a deemed refusal then that has the effect of identifying the effective date from which a right of appeal exists to enable the matter to be brought to this tribunal. In other words, there is a further 60 days that runs from the date at which there is deemed to be a refusal.
- 10 On the basis of that calculation we are satisfied that the appeal which was lodged with the tribunal on 13 February 2003 was within, albeit just, the time limit for commencing an appeal in respect of a deemed refusal. Therefore the appeal is properly instituted.
- 11 Having said that the Respondent authority at its meeting on 22 April 2003 did, in fact, deal with and purport to make a substantive decision in relation to the Appellant's application. By that stage this appeal had been instituted and therefore the determination in itself could no longer have legal effect. It does, however, aid in understanding the basis upon which this appeal is contested and aid in understanding the grounds upon which the Respondent relies for the purpose of joining issue with the Appellant in relation to this appeal.

- 12 In refusing the application the Respondent put its case on two bases. First, that the density of development did not comply with the Residential Planning Codes for which we assume is meant the Residential Design Codes. The refusal itself by letter dated 6 May 2003 directed to the tribunal does refer to the residential design codes.
- 13 The second reason offered was that the group dwelling development on the property would be premature and prejudicial to the overall planning of the area in the form of an endorsed local sub-division and infrastructure plan. They are the two issues upon which the present application is opposed.
- 14 We deal with the second of those reasons first. Mr Kosova helpfully pointed out that the suggestion that there were reasons to assume that a local subdivision infrastructure plan had been contemplated by the Respondent since 1994 does not appear to have a factual foundation.
- 15 He referred in the supporting documentation to the report of council of the 22nd of April 2003 to various submissions made by local residents and comments that were then made by council officers in relation to those observations.
- 16 R.S. and J.M. Blight in their submission included the following:
- “Have been aware of proposed LSIP for the area since soon after council's decision on 26 July 1994. Council officers' comments included the following. Council at its meeting on 26 July 1994 did not specifically resolve to prepare an LSIP for this area. Council actually adopted plans prepared by staff depicting 43 areas within the shire requiring comprehensive LSIPs to avoid fragmented development caused by multiple land ownership. The area bounded by Coongan Avenue, Scott Street and Great Eastern Highway was identified on such plan as an area requiring a comprehensive LSIP.”
- 17 That puts the matter in some context. It therefore appears that it was not until towards the end of 2002 that the Respondent took any steps in relation to the preparation of the LSIP.
- 18 We were provided as part of the evidence advanced on behalf of the Respondent with the plan forming part of the LSIP adopted by council at its meeting on 22 April 2003. This is a plan bearing date 22 January 2003. We were also told that there was some narrative in the way of

technical description but this was not tendered as part of the Respondent's case.

- 19 It also appears somewhat ironically that although this appears to have been a matter addressed at the same meeting as the meeting at which the Appellant's application was refused, this appears to have been an agenda item which was addressed after the refusal of the Appellant's application.
- 20 It is also interesting to note that in the report to council by council officers, Mr Brad Gleeson and Ms Denise Morgan, the analysis of the Appellant's application in referring to the relevant history does not advert in any way to any LSIP either as a matter for consideration or as a basis upon which the application could or might be refused.
- 21 There is a reference ultimately to a committee recommendation but it does not appear to be within the body of the report by council officers to such a document, and it may well simply be because at that stage it had not yet gone to council.
- 22 Mr Kosova pointed out that the LSIP had been adopted by council at its meeting on the 22 of April 2003. It has not yet been advertised and no further substantive steps have been taken in relation to adopting implementation.
- 23 Before dealing with the place if any that plays in relation to a consideration of relevant planning instruments, in answer to a question from Mr Graham, Mr Kosova agreed that the only specific implication that this plan, even in a draft form, had for the subject property, was that there would be a possible road reserve on approximately 20 square metres at the northern end of the property.
- 24 The question of a seriously entertained proposal was raised with Mr Kosova. In this tribunal's decision in *Natrass v The City of Perth* [2001] WATPAT 2, the tribunal had occasion to consider what a seriously entertained proposal was. It is not necessary to repeat what is there set out other than to underscore that this history of the development of that concept and the way in which it is to be understood is there set out in detail.
- 25 Having said that two points emerge from the tribunal's decision in that case. First, there would have to be a lot more done than was done here to elevate this LSIP to a seriously entertained proposal.

- 26 Second, a seriously entertained proposal could not be preferred in the face of statutory planning documents which provide to a contrary effect.
- 27 Now, in this case when the matter was first considered it should be said that the land was zoned R5/20 under TPS 3, and that the effect of that and in particular of clause 3.4 of TPS 3, deals with group dwelling. Where a group dwelling is sought then the use is classified as SA, that is, not permitted unless special approval is granted after the proposal has been advertised. In fact the proposal was advertised and that's dealt with in detail in the report to council on 22 April 2003.
- 28 There are some other criteria in clause 4.3(2) which seemed to be read as pre-requisites for consideration of such an application. They include:
- "(1) that the development has to be provided with reticulated sewerage or the Health Department of Western Australia forms the view there are exceptional circumstances to warrant a variation to the requirement for reticulated sewerage;
 - (2) it involves the amalgamation of two or more lots to ensure an integrated development or the subject lot is large enough to accommodate integrated development;
 - (3) retains any existing house which the council considers worthy of retention and, indeed, in all other respects is consistent with the provisions of the scheme."
- 29 Even under the initial application made early in 2002 the recommendation was that the proposed application met such requirements. The fact that there is a variation for that does not, in our view, alter the basis upon which the application is to be entertained and we do not see within the provisions of the scheme any failure on the part of the applicant to meet the requirements of that scheme.
- 30 For those reasons in relation to the question of LSIP we are satisfied it is not a matter which of itself could prevent this application being approved. It is not a seriously entertained proposal and has reached a stage where having regard to the express provisions of the scheme, the scheme themselves predict or determine how this application is to be dealt with.
- 31 The second matter which is raised on which reliance is placed by the Respondent is whether there has been adequate compliance with the Residential Design Codes. The Residential Design Codes were

introduced with effect from October 2002 but they are the codes with which we are concerned and notwithstanding that the application may initially have been entertained by reference to the previous R Codes, the fact of the matter is that at the moment the application, when lodged in October 2002, has been assessed in relation to the Residential Design Codes and we approach the matter on the same basis.

- 32 In the report to council of 22 April 2003, council officers to whom we have already made reference, referred to 13 matters which are contained within the report and in respect to which there is said to be an issue. They comment on each issue. We will deal with them as succinctly as possible.
- 33 In relation to items 1, 4, 5, 9 we are satisfied that they are matters which properly do form part of the conditions of approval and would not of themselves constitute a basis upon which an application for development would or could be refused.
- 34 In relation to items 6 and 8 which deal with manoeuvrability of vehicles on site, Mr Paluch gave evidence that he has prepared overlays which demonstrate that the design and lay out of the proposed group dwelling will, in fact, allow such reversing and manoeuvrability to be achieved.
- 35 These are properly matters for conditions and the extent to which the overlays demonstrate compliance is a matter ultimately of complying with conditions to be imposed. In relation to items 10, 11 and 12, Mr Paluch gave evidence that the design of the units proposed meant that there would not be an issue in relation to any of those matters either because in the case, for example, of unit 1 (and by reference to the plans it appears to be the case) the southern section of unit 1 has no large openings and as a result the reference in this case to 3.8.1 of the Residential Design Codes does not seem to apply.
- 36 The other matters appear to be matters capable of being addressed by consultation and discussion between the parties which of itself raises a further point on which we feel obliged to make some comment. This application, as the Appellant pointed out, is one which had its genesis as long ago as the start of 2002.
- 37 It appears that the matter has taken far far longer than it should have to have reached the point either for resolution ultimately by the Respondent or final disposition by us. If the matter in the end turns upon addressing the issues raised in the Residential Design Codes and if the issues are those which are set out in the report to council of 22 April 2003 they are

obviously matters which the parties should have worked together on as opposed to leaving them to one side.

38 It is obvious, having heard the evidence of Mr Paluch, that each of those matters were capable of being addressed in a way which did not require this tribunal to be drawn into the resolution of such minor matters.

39 For those reasons we are on the view that the appeal should be allowed and approval be granted to the Appellant. Necessarily there are conditions which will attach to such approval. We are prepared to allow the parties 14 days to consult and agree on conditions to give effect to the approval now granted.

40 If agreement is not reached within 14 days the matter is to be brought back to this tribunal on short notice so that we can dispose of this matter as quickly as possible.

41 So there will be orders first that the appeal is allowed. Secondly, that approval is granted to the Appellant to proceed with the application of October 2002. Thirdly, that there be 14 days for the parties to liaise in relation to the conditions of approval. Fourthly, the Appellant have liberty to apply on short notice in relation to conditions in the event that resolution is not reached between the parties.

42 On that basis the tribunal is now adjourned.