

**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**CITATION** : TAYLOR and CITY OF SWAN [2003] WATPAT 33

**CORAM** : MR P MCGOWAN

**HEARD** : 23 JUNE 2003

**DELIVERED** : 14 JULY 2004

**FILE NO/S** : APP 6 of 2003

**BETWEEN** : RAYMOND WILLIAM TAYLOR  
Appellant

AND

CITY OF SWAN  
Respondent

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*Catchwords:*

Town planning - Telecommunications Facilities - Incidental Use Amenity

*Legislation:*

Nil

*Result:*

Appeal allowed subject to conditions.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Ms L Simpkin
Respondent	:	Mr D McLeod

*Solicitors:*

Appellant	:	Minter Ellison
Respondent	:	McLeods

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

Foodbarn Pty Ltd v Solicitor General (1975) 32 LGRA 157 at 161  
Lizzio v Ryde Municipal Council (1984) 155 CLR 211

**MR P MCGOWAN:**

- 1 The Appellant is the owner of 30 Marshall Road (“**Lot 1 Marshall Road**”), West Swan. The Appellant has entered into an arrangement with Hutchison 3G Australia Pty Ltd to lease a portion of Lot 1 Marshall Road for the purpose of erection thereon of a 35m steel monopole, associated antennas and cabling for the purpose of giving effect to H3GA’s 3G network.
- 2 The application for approval to effect the development on Lot 1 Marshall Road in that way was considered by the Respondent at its meeting on 18 December 2002.
- 3 At that meeting, the Respondent resolved to refuse the application and offered the following reasons for refusal:
  - “1. The proposal is considered to be inappropriate due to the site’s location within the MRS Urban Area and would be incompatible with the future residential development on the surrounding lots;
  2. The approval of such a development may create an impediment to the future conversion of the land to Urban as envisaged by the Metropolitan Region Scheme; and
  3. The proposal does not meet the requirements of the relevant Council Policy in respect of setbacks from boundaries and distances from nearby residences.”

**Land Description and Location**

- 4 Lot 1 Marshall Road is 2.8924ha in area and runs between Ward Street and Arthur Street in West Swan.

**Present Use**

- 5 Evidence establishes that there is a nursery business being conducted on Lot 1 Marshall Road. It appears to have been conducted on that property for some considerable period. As part of the conduct of that business there are glass houses, shade houses, a shed and a residence all located on the western half of Lot 1 Marshall Road.
- 6 Evidence was also given that the eastern portion of Lot 1 Marshall Road had at some previous time been used as a paddock for deer. There

appears at the present time to be a number of alpacas on Lot 1 Marshall Road. How they fit into the commercial structure was not explained during the course of the hearing.

### **Detailed Description of the Proposal**

- 7 The Appellant called Mr Lawrence Green and Mr Aditya Bhalla as witnesses. Both of them are employed by H3GA. Both gave evidence explaining the circumstances by which the present application came to be made, provided details of the contemplated improvements on the site and addressed various questions in relation to amenity.
- 8 To understand the technical evidence, it is necessary to explain in some short terms the nature of H3GA's business and what it intends for the network that it is now seeking to introduce. Mr Green indicated that the import of H3GA's business is to bring to Western Australia a third generation wire free data communications network.
- 9 H3GA is a subsidiary ultimately of the Hutchison Whampoa group of companies from Hong Kong.
- 10 At present, H3GA exists in Sydney and Melbourne but only in relation to a residential market. The network, explained in more detail below, it is now seeking to establish is ultimately designed for a mix of both commercial and residential uses.
- 11 The matter was explained by Mr Green this way:

“The network consists of a number of base transmitter stations (BTS) which link mobile telephone and devices into the rest of the network via a main switching site. BTSs use transmitters and receivers via the antennas, to provide coverage to a geographical area which is known as a cell and many are connected to a transmission hub. Digital transmission systems are used to link all the BTSs to the main switching centre either by point-to-point microwave links or optical fibre.

In broad terms, the 204 facility installation sites in Western Australia are comprised of “transmission hubs” and “downlink sites”.

- 12 In cross examination, Mr Green explained that whilst there are other commercial providers of mobile telephone services, including Telstra, Optus and Vodafone, what H3GA seeks to concentrate on is data transfer. An example was that by the use of a hand held device, video

pictures could be communicated on a point-to-point basis. In that sense, his evidence was that H3GA's intent was to make voice communication of secondary concern.

- 13 He gave evidence of the equipment and the set up that is required in order to complete the network. It includes:
- (a) A 35m steel monopole;
  - (b) Prefabricated steel equipment shelter with dimensions of 3m x 2.5m and 3m in height surrounded in a secure compound by a chain wire fence with dimensions of 9m x 5m;
  - (c) Three panel antennas flush mounted to the monopole at 34m above ground level;
  - (d) Two parabolic antennas attached to the monopole at 32m above ground level;
  - (e) All cabling and conduits are to be deployed in a narrow trench not more than 450mm wide where not more than 100m of excavation is left open at any time and vehicle access is not lost for more than eight hours in total;
  - (f) The draw pits are to be located underground and have a surface area of not more than 1.01sqm.
- 14 All of the above are designed to meet the requirements set out in Telecommunications (Low Impact Facilities) Determination 1997 (the determination) even though in fact this, as Mr Green outlined, is not a low-impact facility.

### **Network Coverage - Black Holes**

- 15 Mr Bhalla gave evidence that at present H3GA has network coverage in areas surrounding West Swan, including to the north at Whiteman and at Henley Brook A, to the west at Malaga east and Lockridge and to the east at Midland and to the south at Guildford. Attachment 3 to Mr Bhalla's statement indicates the black hole in the network that would occur if the present application were not permitted.
- 16 Whilst the BTS is referred to in the previous paragraph Mr Bhalla, indicated that all were co-located with other telecommunications providers. Co-location involves one telecommunications provider

erecting the tower and then permitting other telecommunications providers to locate their equipment on the same tower so that in that sense the equipment is co-located.

- 17 Both Mr Green and Mr Bhalla gave evidence that the nature of H3GA's network and the facilities offered meant that the BTSs would need to be closer together than in the case of mobile phone towers.
- 18 As a result, users of the H3GA network would find themselves in a position where, if they passed through the West Swan area, there would be no coverage or if they lived in the West Swan area they would be unable, effectively, to access the H3GA network.

### **Planning Considerations**

- 19 As I have indicated above, Lot 1 Marshall Road is presently being used as a nursery. The property is zoned General Rural under the Respondent's Town Planning Scheme No. 9 ("**TPS 9**").
- 20 As indicated above, the subject site is zoned Urban under the MRS. This was as a result of rezoning which took place on 18 October 2002. The effect of rezoning was to rezone the land under the MRS from Urban Deferred to Urban.
- 21 Section 35A Metropolitan Region Town Planning Scheme Act 1959 obliges the Respondent to commence rezoning under its own town planning scheme within three months of the land under the MRS. Notwithstanding that, Council has, apparently, on 2 April 2003, resolved to initiate an amendment to TPS 9 to introduce residential development zoning as the zoning of the land which includes Lot 1 Marshall Road.
- 22 Some evidence was given as to the anticipated time it would take to effect rezoning under TPS 9. Evidence was given by Ms Natalie Goode who is a planning officer employed by the Respondent. Ms Goode prepared a report which went to the Respondent in which she recommended that approval be granted to the application, but that it be for a period of five years only. That seems to have been premised on a belief that that may be how long it would take to effect rezoning under TPS 9.
- 23 By the time Ms Goode gave evidence in this appeal she seems to have changed her view and now thinks that the relevant time period may be as little as two years.
- 24 Further discussion of that will follow.

**Incidental use**

25 As I have indicated above, Lot 1 Marshall Road is zoned General Rural. The nursery which is conducted on that property is an AA use. The Respondent's use class table in TPS 9 also makes provision for "Radio and TV installation: small scale commercial and radio" and "TV installation: large scale commercial".

26 The Appellant contends that the nature of that which is contemplated is the former. The Respondent contends it is the latter.

27 Having regard to Table 3 which is the use class table under provisions of clause 2.2.3 it would appear that:

- (a) "Radio and TV installation large scale commercial" is not permitted in the General Rural zone;
- (b) "Radio and TV installation small scale commercial" is permitted as an IP use in the General Rural zone;
- (c) The definition of IP in TPS 9 is as follows:

IP "means that the use is not permitted unless it is determined by the Council to be incidental to a use determined by the Council to be the predominant use and is approved as such by the Council".

28 There appeared little argument in the course of the appeal that the predominant use of Lot 1 Marshall Road is as a nursery. That being so, the question then is whether the use now proposed in respect of Lot 1 Marshall Road is incidental to that predominant use.

29 The Appellant's argument effectively was that the structure and layout of the use class table is to be understood as identifying in respect of each occasion where IP appears that Council has, in effect, predetermined that such a use is permissible so long as it is incidental to a permitted use within that zone.

30 In fact the Appellant's argument went further:

"The zoning pattern in TPS 9 has disposed of the need for legal arguments about incidentality. Uses are placed together with no obvious links where, if consistency of use were a pre-requisite, it would be unlawful. For example, by placing a service station

zone together with a “radio and TV installation: small scale commercial” use class as “IP” in that zone (refer Table 3B) the scheme helpfully indicates what is incidental. (There are many such examples). It only remains under clause 2.3.3 for the respondent to decide what the predominant use might be. This is a factual determination.”

- 31     There seem to be some obvious errors in the logic of such an argument.
- 32     First, there are two steps in the determination of incidental. The first is to determine what is the predominant use and the second and equally important is to determine the extent to which the IP use is, in fact, incidental to that predominant use.
- 33     If there was a basis for the Appellant’s argument, one would have expected the use class table to have itself reflected that and equally expected the text of TPS 9 to bear out the way in which it is proposed to be interpreted by the Appellant. Neither is the case.
- 34     The test for incidentality therefore remains the same. Merely because there is an IP use identified in Table 3B which in a linking fashion might be linked with an AA use in the relevant zone cannot, without further investigation and determination, lead to the result that such use is incidental.
- 35     As I have indicated above, the importance of this exercise is because unless approval can be granted on the basis that the use is incidental, it cannot be approved because in its own right it is not a permitted use.
- 36     What is contemplated here is to lease 45sqm of the Appellant’s property for the purpose of the installation of a tower and the various equipment referred to above to be operated as part of the H3GA network. The issue, as a matter of fact, remains the same - to what extent can it be said that such a use is incidental to the operation of the nursery.
- 37     The provisions of clause 2.2.3 of TPS 9 suggest the approach to this matter would be governed by the following oft quoted statement:

“Where the whole of the premises is used for two or more purposes none of which subserves the other, it is, in my opinion, irrelevant to inquire which of the multiple purposes is dominant.” *Foodbarn Pty Ltd v Solicitor General* (1975) 32 LGRA 157 at 161 (cited with approval by Gibbs CJ in *Lizzio v Ryde Municipal Council* (1984) 155 CLR 211 at 217.



- 38      Incidental is defined to mean happening or likely to happen in fortuitous connection with something else:

“incurring casually and in addition to the regular or main amount.” Macquarie Dictionary.

- 39      Thus, that appears to be the case here. There is no suggestion that location of the H3GA pole and ancillary equipment is other than incidental to the conduct of a nursery on Lot 1 Marshall Road I so find.

- 40      The Respondent has adopted a policy entitled *Telecommunications (Mobile Phone) Facilities Policy* (“**policy**”). This policy was adopted by the Respondent on 3 April 2002. The policy was introduced in an endeavour to deal with the actual or possible circumstances by which telecommunications providers would be seeking to establish BTSs within the Respondent’s municipality. Included in that policy was clause 7.2.1(b) that there be a setback of a minimum of 200m from any dwelling or residential zoned land.

- 41      No evidence was led to establish the rationale from any field of discipline to show the basis for such a figure. Without such direct evidence it can only be seen to be arbitrary and in any event Council, as a policy, has a discretion in order to deal with the particular circumstances of each development application.

- 42      Evidence was led that there were two dwellings less than 200m from the proposed facility. That is two dwellings excluding the Appellant’s own dwelling.

### **Amenity**

- 43      The Respondent opposed the application on the basis of the affect that the proposed structure would have upon amenity.

- 44      This needs to be understood in the way in which the argument was run by the Respondent. The Respondent called a number of witnesses including Mr Zannino, Ms Silla, Mr Pattinson, Mr Brush, Mr Ryan and Mr Oud all of whom (with the exception of Mr Brush) own property in the immediately adjacent area to Lot 1 Marshall Road. Mr Brush is the agent for the owner of two properties which are contiguous to Lot 1 Marshall Road.

- 45      Each of them was keen to impress upon the Tribunal the fact that if this facility were installed, it would impact adversely, in their view, upon the

likely sales to be effected of their subdivided properties consequent upon rezoning under TPS 9.

46 In other words, the concern was not with amenity per se but with the commercial and financial implications, untested, of what might happen in the event that TPS 9 proceeded through the rezoning process so that this area was then zoned residential development and in turn that the lots were subdivided and sold off.

47 At the outset I sought to clarify with Counsel for the Respondent whether this appeal raised scientific or medical or engineering evidence in relation to the location of this tower in the context of the issue of amenity.

48 Counsel for the Respondent made plain that it was not raised as an issue in this appeal but if it was found to be necessary to consider such matters the Respondent did not concede the issue.

49 It seems to me that absent formal evidence led to demonstrate that the location of the proposed facility has implications for amenity based upon medical or scientific grounds it is not my view to postulate, when the issue is not raised.

50 It is simply not an issue in this appeal. The question of amenity raises an issue of whether or not the location of the facility will be unobtrusive or not. Mr Kotsoglo is a planner of some experience who was called as a witness on behalf of the Appellant. He sought to create by computer imagery the likely view that would be discerned at the facility site if installed.

51 This at best could be described as indicative only on the basis that no formal tests were carried out to ascertain the precise site before the exercise was undertaken.

52 Nevertheless there was common ground that Lot 1 Marshall Road is surrounded on three sides by quite heavy vegetation. It is accepted by witnesses called for the Respondent that the trees were 15 to 20m in height.

53 In addition, there is a high voltage power line which runs down Marshall Road at a height of approximately 30m.

54 Mr Kotsoglo, on behalf of the Appellant urged that I find that the tower, when erected, would be unobtrusive.

55 As I have indicated above, there is no doubt that the height of the trees effect a degree of screening. However, the computer exercise undertaken by Mr Kotsoglo does not of itself try to determine the relevant height and position of the tower. I note it is intended that the tower be painted a greyish colour in order both to comply with the Respondent's policy and to endeavour to achieve a degree of unobtrusiveness.

56 Accordingly, I am satisfied that approval should be granted to the Appellant to erect its telecommunications facilities on Lot 1 Marshall Road.

57 In so saying, however, I am conscious of:

- (a) the views expressed by Ms Goode and her recommendation to Council for its meeting on 18 December 2002 and
- (b) the implications for future residents of this area in the event, as is extremely likely, that in accordance with the provisions of TPS 9 there will be a rezoning of the surrounding area, including Lot 1 Marshall Road, to residential development.

58 It is worth repeating the recommendation made by Ms Goode to Council:

“Amenity related issues, amongst other things, is one factor that is taken into consideration when determining property values in the area. As discussed previously, it is considered that due to the siting of the development, proposed noise and visual screen landscaping, topography of the lot and designs of buildings, the proposal is unlikely to have an adverse impact on the rural amenity of the area.”

59 In addition, as part, effectively, of a split recommendation the following also appears in of the report:

“That the Council resolve to:

- (1) temporarily approve the application for a telecommunications facility on Lot 1 (No 30) Marshall Road, West Swan, for a period of five years subject to the following conditions:
  - (1.) a Building Licence must be issued prior to any work commencing on site

- (2.) a telecommunications facility shall be of slimline construction and designed to allow co-location by a minimum of three carriers
- (3.) should the facility no longer be required or become redundant, the monopole, and antennas, equipment shelter and any associated facilities shall be removed from the property
- (4.) the antenna panels shall protrude no further than 1.5m from the monopole as detailed in the approved plan
- (5.) the applicant providing an Engineers Certificate to demonstrate the pole is able to accommodate a minimum of three carriers.”

60 I am satisfied the above represent appropriate conditions of approval in the circumstances I have described above.

61 To the extent to which it may be said that those conditions are not complete, I will allow the parties fourteen days to liaise in relation to other conditions which are said to be necessary to give effect to this decision.

62 If there is no application from the parties then orders will be made in this matter as follows:

- (a) Appeal allowed.
- (b) Application for development approval granted.
- (c) Such approval be subject to the following conditions:
  - (i) a Building Licence must be issued prior to any work commencing on site;
  - (ii) a telecommunications facility shall be of slimline construction designed to allow co-location by a minimum of three carriers;
  - (iii) should the facility no longer be required or become redundant, the monopole, and antennas, equipment shelter and any associated facilities shall be removed from the property;

- (iv) the antenna panels shall protrude no further than 1.5m from the monopole as detailed in the approved plan;
- (v) the applicant providing an Engineers Certificate to demonstrate the pole is able to accommodate a minimum of three carriers.