
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : WATTERS and TOWN OF COTTESLOE
[2003] WATPAT 34

CORAM : MR L GRAHAM

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 15 JULY 2003

FILE NO/S : APP 39 of 2003

BETWEEN : SIMON WATTERS
Appellant

AND

TOWN OF COTTESLOE
Respondent

Catchwords:

Original proposal - Alternative proposal - Parapet wall - Overshadowing - Residential Design Codes

Legislation:

Nil

Result:

Appeal is:

- (a) Dismissed in relation to condition 1(f)(i); and
- (b) Allowed in relation to condition 1(f)(ii).

The application for costs is dismissed.

Category: B

Representation:

Solicitors:

Appellant	:	Mr S Watters lodged a witness statement and other papers on his own behalf
Respondent	:	Watts and Woodhouse acted as solicitors for the Respondent

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

Nil

MR L GRAHAM:**Nature of the Application**

- 1 In December 2002, a development application for a two-storey single house at No. 29 (Lot 16) Lyons Street, Cottesloe, was lodged with the Town of Cottesloe. The subject site is owned by the Appellant, Mr S Watters and his wife, Mrs C Watters.
- 2 The proposed development (“**original proposal**”) includes the construction of a garage with a parapet wall 7.0m in length and 3.0m in height on the southern boundary of the subject site. The garage is set back 6.0m from the street boundary.
- 3 A revised proposal (“**alternative proposal**”) involves moving the garage forward by 1.5m to a position 4.5m from the street boundary and constructing a single storey storeroom in the 1.5m gap between the ground floor bedroom/study and the rear of the relocated garage. The alternative proposal still includes the parapet wall on the southern boundary of the subject site.
- 4 Both proposals (original and alternative) involve the creation of a raised ground level terrace approximately 6.0m in width and 7.4m in length that is set back 3.0m from the street boundary of the subject site. The finished height of the terrace is proposed at RL 11.8.

Subject Site

- 5 The subject site contains a three bedroom weatherboard home which is proposed to be demolished. Lyons Street has a north-south orientation with all properties oriented east-west. The front of the subject site faces east and has a frontage of 15.75m, depth of 43.53m and a land area of 685sqm. There is a rise from the street to the rear of the property of approximately 1.8m.
- 6 Generally speaking, the lots to the north of the subject site on both sides of Lyons Street through to North Street have a frontage of 15.75m whilst those to the south of the subject site on the same side (west side) of Lyons Street towards Grant Street have a frontage of 11.06m. The subject site is zoned Residential in the Town of Cottesloe’s Town Planning Scheme No. 2 (“**Scheme**”) and has a coding of R20.

Respondent's Position

- 7 On 24 February 2003, the Respondent granted approval for the two storey single house on the subject site in accordance with plans submitted on 17 December 2002 (the original proposal) subject to a number of conditions. These included:
- “1 (f) Revised plans being submitted for approval by the Manager of Development Services showing
- (i) The garage being set back 1 metre from the southern boundary;
 - (ii) The level of the terraced area in the front setback being reduced in height to a relative level of 11.5 metres.”
- 8 In reaching its decision (1(f)(i)), the Respondent had regard to a submission from the owners (Mr D and Mrs T Thomson) of No. 27 (Lot 18) Lyons Street, immediately to the south of the subject site. The submission, dated 20 December 2002, argued that the proposal (original proposal) would cause severe light restriction and overshadowing and cause a boxed-in appearance to the home as viewed from the street frontage.
- 9 In reaching its decision (1 (f) (ii)), the Respondent had regard to the performance criteria of the Residential Design Codes (“**R Codes**”) in relation to excavation or fill. The intent of the R Codes seeks to retain the visual impression of the natural level of the site as seen from the street or adjoining property.

The Decision Appealed

- 10 The decision appealed against specifically relates to conditions 1(f)(i) and 1(f)(ii) imposed by the Respondent on 24 February 2003.

The Issues in the Appeal

- 11 The issues in the appeal are broadly confined to:
- (a) the proposed location of the parapet wall on the southern boundary of the subject site and its overshadowing effect on No. 27 (Lot 18) Lyons Street;
 - (b) the proposed location of the parapet wall on the southern boundary of the subject site and its effect on views from

the ground floor lounge room window of No. 27 (Lot 18) Lyons Street; and

- (c) the planning consequences of constructing the level of the proposed terrace at RL 11.8.

Relevant Planning Documents

12 The planning documents relevant to this appeal are:

- (a) Town of Cottesloe Town Planning Scheme No. 2 (“**TPS 2**”) - gazetted on 23 December 1988;
- (b) Town of Cottesloe Policy No. TPSP 003 (“**Policy 003**”) - adopted by Council on 23 September 1992; and
- (c) Residential Design Codes of W A (“**R Codes**”) - October 2002.

13 The Appellant argues that the original proposal should be approved because:

- (a) It complies with the R Codes;
- (b) If the garage wall was set in 1m from the southern boundary (as required by Council) this would make little difference to the northern light received by Mr Thomson’s house at No. 27 (Lot 18) Lyons Street; and
- (c) If the garage wall was set in 1m from the southern boundary and a 1.8m fence was built on the boundary, the difference in light at the north-east corner of Mr Thomson’s house would be minimal.

14 In accepting that the parapet wall would be directly opposite the north facing ground floor window at the north-east corner of Mr Thomson’s house, the Appellant prepared an alternative proposal which he also argues should be approved because:-

- (a) It complies with the R Codes;
- (b) The main building of the house would remain in-situ - 1.5m from the southern boundary; and

- (c) The garage (with its parapet wall) would move forward 1.5m towards the street and allow for a one storey storeroom set in 1.5m from the southern boundary, like the main building of the house. This would be more beneficial to Mr Thomson than if the garage was set in 1m as required by Council.

15 On the specific question of parapet walls, the Appellant argues:

- (a) The R Codes allow for parapet walls;
- (b) There are new houses in Lyons Street that have parapet walls;
- (c) Lyons Street is an eclectic street where the vast majority of blocks are wide blocks. Therefore a parapet wall would not detract from the streetscape; and
- (d) Moving the garage in 1m would squash the front appearance of the proposed house and detract visually from the streetscape.

16 With respect to the question of the overshadowing from the proposed development onto No. 27 (Lot 18) Lyons Street, the Appellant argues:

- (a) The issue of overshadowing was never raised or determined by the Respondent and as a matter of law the Tribunal is confined to the two issues appealed; namely Conditions 1 (f) (i) and 1 (f) (ii); and
- (b) In the event that the Tribunal does consider the issue of overshadowing, then the following is relevant:
 - (i) the overshadowing that results from the original proposal and the alternative proposal on Mr Thomson's property is 29%, marginally in excess of the 25% required by the R Codes;
 - (ii) because of the narrowness of Mr Thomson's property, even a 1.8m fence along the southern boundary would cast a shadow of 21%;
 - (iii) even if the garage was set back 1m as required by Council, the reduction in overshadowing would be minimal; and

- (iv) any discretion should be exercised in the Appellant's favour.

17 Regarding the question of the proposed level of the terrace, the Appellant argues:

- (a) The terrace is simply a front garden;
- (b) The R Codes permit development that retains the visual impression of the natural level of the site;
- (c) The level of the front garden reflects the natural level of the site; and
- (d) To lower the level of the front garden by 300mm would require an unreasonable tapering from the front edge of the proposed verandah down into the north-east corner of the block.

Arguments of the Respondent

18 The Respondent argues that in considering the original proposal it had regard to clause 5.1.2 (b) of TPS 2; namely:

“Notwithstanding the specific provisions of this Scheme ... Council shall have regard to and may impose conditions relating to the following:-

- (a) the need for limitation of height or location of buildings to preserve or enhance views; and
- (f) the location and orientation of a building or buildings on a lot in order to achieve higher standards of daylighting, sunshine or privacy or to avoid visual monotony in the street scene as a whole.”

19 In relation to the alternative proposal, the Respondent argues that both it, and the Tribunal, must have regard to the provisions of its TPS Policy No. 003 dealing with Garages and Carports in Front Setback Area. Part 3 of that Policy states:

“It is Council's general policy to require carports and garages to be positioned behind the front setback line in accordance with Table 1 of the Residential Planning Codes, that being 6 metres from the street.”

20 The criteria for varying the setbacks include:

5 Criteria

Further the location of the building:

- (a) shall not significantly affect view lines of adjacent properties.

In consideration of variations to setback, Council shall also have regard to:

- (b) the affect of such variation on the amenity of any adjoining lot.

21 On the question of overshadowing, the Respondent argues:

- (a) The applicant's architect incorrectly demonstrated that the development only overshadowed No. 27 (Lot 18) Lyons Street by 21% at mid-day on 21 June (winter solstice). In fact, the actual figure is 31% which exceeds the 25% permitted in the acceptable standards of the R Codes;
- (b) It was the incorrect figure of 21% that was understood and accepted by Council in approving the development. The actual figure (31%) was only discovered as a result of this appeal;
- (c) The overshadowing will affect the primary courtyard area of No. 27 (Lot 18) as well as their lounge room window at the winter solstice. However, by imposing a 1m setback of the garage from the southern lot boundary, a higher standard of sunshine to No. 27 (Lot 18) Lyons Street would be achieved. Such a condition would allow sunlight into the lounge room at midday at the winter solstice.

22 Regarding the outlook from No. 27 (Lot 18) Lyons Street, the Respondent argues:

- (a) The outlook from the lounge room at No. 27 (Lot 18) Lyons Street will be significantly affected if the alternative proposal was approved with the garage moved forward of the 6.0m setback line;

- (b) The R Codes do not support boundary walls forward of the building line as set out in the acceptable standards section 3.3.2 A2;
- (c) The two adjoining properties to the south (Nos. 25 and 27 Lyons Street) have frontages that are approximately 4.7m less than the appeal site and have open carports forward of the building setback line. The carport design, as distinct from a garage design, reinforces the open nature of that section of the street;
- (d) A recently constructed two storey house on No. 31 (Lot 15) Lyons Street, immediately to the north of the subject site, demonstrates that it is possible to construct a double garage on a 15.75m wide lot without the need to vary setback controls and adversely impact the adjoining property.

23 The Respondent argues the following with respect to Condition 1(f)(ii):

- (a) The R Codes do not address the filling of sites between a 3m setback line and a 6.0m setback line. However, Council has considered the Performance Criteria set out in 3.6.1 P1 to assess the impact of the proposed terrace. The Criteria states:

“Development that retains the visual impression of the natural level of a site as seen from the street or other public place, or from an adjoining property”.

- (b) The finished level of the terrace is proposed at RL 11.8 whereas the public footpath in front of the property varies from RL 11.07 to RL 10.8. The adjoining ground level on No. 31 (Lot 15) Lyons Street is at RL 11.18 through to RL 10.83 at the street boundary;
- (c) Condition 1 (f) (ii) seeks to lower the elevated terrace to be more consistent with the ground levels on the adjoining properties.

The Assessment of the Appeal

24 This appeal has resulted from a decision of the Respondent on 24 February 2003 to approve the construction of a two storey single house at

No. 29 (Lot 16) Lyons Street, Cottesloe. The approval comprised seven (7) conditions; two (2) of which are the subject of this appeal ie 1(f)(i) and 1(f)(ii).

25 Prior to assessing this appeal, two preliminary matters need to be determined. The first, as raised by the Appellant, is whether it is open to the Tribunal to address the issue of overshadowing and the second, as raised by Mr Stephen Sullivan, Manager, Development Services on behalf of the Respondent is whether the Tribunal is prepared to consider the alternative proposal in the determination of this appeal.

26 In both instances, I am satisfied from the papers that Council was aware of and considered both matters in reaching its decision of 24 February 2003 and, as a consequence, will form part of the determination of this appeal.

27 In a consideration of the issues in this appeal, it is important to recognise that the traditional housing stock in Lyons Street is currently undergoing a process of change and redevelopment. The subject site is a case in point.

28 It is also important to recognise as part of the consideration of the issues in this appeal that the subject site is the most southern of the 685sqm lots with a 15.75m frontage on the western side of Lyons Street and that the predominant lot size to the south of it on the same side of the road is 481sqm with an 11.06m frontage.

29 The lots in the immediate locality of the subject site slope from west to east and are generally higher than lots opposite on the eastern side of Lyons Street. The public footpath in the immediate locality of the subject site slopes slightly downwards from south to north.

30 Again it is relevant to consider the existing development on No. 25 (Lot 18) Lyons Street and the continued opposition of the owners (Mr D and Mrs T Thomson) to both the original and alternative proposals. In the case of the former, their views were sought in December 2002 under the provisions of Clause 7.1.5 of the Scheme where an applicant is required to inform the adjoining property owners of the proposed development if the development is:

“... other than a single level, low profile single house or extensions thereto ...”.

31 In the case of the alternative proposal the views of the owners were sought in May 2003 in relation to this appeal.

32 From an examination of Attachment SJS3 to the Statement of Evidence of Mr Stephen Sullivan for the Respondent, it is clear that the two storey home on No. 25 (Lot 18) Lyons Street is an elongated east-west development on a narrow lot (11.06m frontage) with both an open courtyard, two bedrooms, a dining room and lounge room located on the northern side. The window on the south-east corner of the lounge room has both a northerly and easterly aspect.

33 In considering the original proposal, which contemplates a garage set back 6.0m from the street boundary and a parapet wall on the southern boundary of the subject site, it must be said that such developments exist in the Town of Cottesloe and indeed in Lyons Street as pointed out in paragraph 26(a) of the Appellant's Witness Statement of 3 June 2003. They are shown in photographs at Attachments A and B of the Appellant's Witness Statement of 9 June 2003 in reply to the Respondent's Witness Statement.

34 However, the question before the Tribunal is not so much whether parapet walls are allowed behind a 6.0m setback but whether it is appropriate on the subject site.

35 In that respect, the question of overshadowing is addressed in the Ministerial Foreword to the R Codes where it states:

“The new R-Codes respond to community concern that residential development should be designed to promote attractive streetscapes, safer streets, and to minimise the extent of overlooking and overshadowing of neighbouring property.”

36 Again, the General Objectives of the Codes state that one of the objectives for residential development (2.1.1 (v)) is:

“To protect the amenity of adjoining residential properties.”

37 Also, under Part 3 of the R Codes with respect to Buildings on Boundary they state that development should:

“Not have any significant adverse effect on the amenity of the adjoining property.”

38 In addressing the question of amenity, it is necessary in this appeal to examine the effects of overshadowing of the original proposal on the adjoining No. 25 (Lot 18) Lyons Street. It is common ground between the parties that overshadowing will exceed the 25% specified in the

acceptable development standards (3.9.1 A1) of the R Codes at midday on 21 June.

- 39 What is relevant are Attachments SJS 6 and 7 of Mr Stephen Sullivan's Statement of Evidence of 4 June 2003 which show the extent of overshadowing to be 31%, but with a reduction in overshadowing by requiring the garage to be set back 1m from the southern boundary. SJS 7 is particularly informative as it shows most of the lounge room window at the south-east corner of the home at No. 25 (Lot 18) Lyons Street receiving sunlight at midday on 21 June.
- 40 In response, the Appellant's Witness Statement of 9 June 2003 (para 6) disputes the 31% overshadowing figure and places it at 29%. Either way, the precise figure is of limited value to the Tribunal, but what is of value is the improvement in amenity and reduction in overshadowing as a result of a 1m setback of the garage from the southern boundary of the subject site. This point is not disputed by the Appellant.
- 41 In considering the alternative proposal the Appellant argues that the R Codes permit a garage being set back 4.5m from the primary street and allows for a parapet wall. These provisions are contained within clauses 3.2.3 (A 3.5) and 3.3.2 (A 2).
- 42 The Respondent argues that by moving the garage forward of the 6.0m set back line and retaining the parapet wall brings into play the amenity provisions of the Scheme, the R Codes and Scheme Policy 003. In other words, approval for the reduced set back cannot occur under the R Codes as of right. This is a position with which this Tribunal agrees.
- 43 The issue again is not so much whether a garage parapet wall on the 4.5m set back line is allowed, because they do occur elsewhere in the Town of Cottesloe, but whether such a provision is acceptable in planning terms on the subject site itself.
- 44 The proposal to move the garage forward 1.5m will certainly allow for a single storey storeroom to be built between the main two storey building and the rear of the relocated garage. It is contended by the Appellant that this will allow more sunshine to reach the north-east corner of the lounge room at No. 25 (Lot 18) Lyons Street than the 1m set back proposed by Council but no data, building elevations or sun angles at midday on 21 June have been provided by the Appellant. All the Council (and now this Tribunal) had before it in reaching its decision on 24 February 2003 was a not to scale alternative plan, and the Tribunal is being asked to accept that the alternative plan will allow a shaft of light onto the

neighbouring lounge room window, with the parapet wall still in place, that exceeds the overall increase in light achieved with the parapet wall being set back 1m.

45 The question before the Tribunal is whether the alternative plan will allow a greater amount of sunshine onto No. 25 (Lot 18) Lyons Street than if the parapet wall is set back 1m as required by the Respondent.

46 It is not possible to draw a conclusion either way from the papers available to this Tribunal.

47 In any event, the alternative proposal requires an examination of the effect it would have on view lines from the ground floor lounge room of No. 25 (Lot 18) Lyons Street. In this respect, Attachment SJS A to the Respondent's response of 9 June 2003 to the Appellant's witness statement is particularly helpful because it shows how the view is improved over the alternative proposal by setting the garage back 1m from the southern boundary and maintaining the garage 6.0m from the street.

48 The Appellant argues that the outlook from the lounge room at the street boundary would only be diminished by 1.6m with the original proposal and 2.4m with the alternative proposal when compared to Council's requirement for the garage to be set back 1m from the southern boundary and remain on the 6.0m setback line.

49 The Tribunal takes the position that although the figures quoted above may be correct, the actual amount of view becomes more significant as the line of sight is extended beyond the property boundary eastwards to the other side of the street. In other words, the boxed-in feeling argued by the owners of No. 25 (Lot 18) Lyons Street would be minimised if Council's Condition 1(f)(i) was enforced and the garage set in 1m from the southern property boundary and not moved forward of the 6m setback line.

50 Regarding Condition 1(f)(ii), the Tribunal acknowledges the arguments presented by the Respondent in 23 above, but it is not considered from the papers before this Tribunal that the proposed terrace at RL 11.8 would significantly diminish the visual impression of the natural level of the site as viewed from the street.

51 Because of the slope of the subject site from west to east and the general downward slope to the east and north in the immediate locality, a person standing on the subject site can automatically overlook in those directions

with or without the construction of the proposed terrace. Again, the position of the southern wall of the double garage on No. 31 (Lot 15) Lyons Street prevents overlooking from the proposed terrace into Lot 31, and there was no objection from those owners to the proposed development on the subject site.

- 52 Council's Condition 1(f)(ii) may accord with the overall intent of the R Codes but, having regard to the specific circumstances of the immediate locality, the small size of the terrace (6.0m by 7.5m) and the small reduction in the level of the terrace from RL 11.8 to RL 11.5, it is not considered by this Tribunal that the overall streetscape, or the amenity of the adjoining property, would be adversely affected by retaining the terrace at RL 11.8.

Conclusions

- 53 The Tribunal concludes from the information available to it on the papers that:
- (a) the proposed two storey development on No. 29 (Lot 16) Lyons Street will cause overshadowing onto the adjacent No. 27 (Lot 18) Lyons Street to the south;
 - (b) the actual extent of overshadowing was not known to the Town of Cottesloe when it considered and determined the development application on 24 February 2003;
 - (c) the overshadowing from the proposed development onto No. 27 (Lot 18) Lyons Street at midday on 21 June (winter solstice) is in the order of 29% to 31%. This figure exceeds the 25% specified in the acceptable development standards (3.9.1 A1) of the R Codes;
 - (d) the amount of overshadowing can be reduced by siting the proposed garage to the north, 1m from the southern boundary of the subject site and 6.0m from the street. Information provided by the Respondent shows that by moving the proposed garage in this way, the north-east ground floor lounge room window at No. 27 (Lot 18) Lyons Street will receive sunshine at midday on 21 June;
 - (e) the alternative proposal by the Appellant to move the garage forward by 1.5m to the 4.5m setback from the street and still retain the parapet wall was not supported

by technical data, proper scale drawings, etc. This absence of information did not allow the Tribunal to assess the beneficial sunshine effects (if any) onto No. 27 (Lot 18) Lyons Street;

- (f) both the original and alternative proposals would restrict the view lines from the lounge room window of No. 27 (Lot 18) Lyons Street in comparison to Council's requirement 1(f)(i) that the proposed garage be moved 1m from the southern boundary;
- (g) the relocation of the proposed garage, as required by the Respondent, will help protect the amenity of the owners of No. 27 (Lot 18) Lyons Street by minimising the so-called boxed-in effect;
- (h) there is sufficient room on the subject site to accommodate the double garage being moved 1m from the southern boundary of the subject site. However, the garage may need to be slightly narrower in width; and
- (i) there are not sufficient planning grounds to require the proposed terrace to be lowered by 300mm from RL 11.8 to RL 11.5.

Decision

54 The Tribunal determines that the appeal lodged by the Appellant, Mr S Watters, on 28 February 2003 with respect to the proposed two storey single house at No. 29 (Lot 16) Lyons Street be:

- (i) **Dismissed** with respect to Condition 1(f)(i) imposed by the Town of Cottesloe on 24 February 2003; and
- (ii) **Upheld** with respect to Condition 1(f)(ii) imposed by the Town of Cottesloe on 24 February 2003.

55 The Tribunal further determines that the Application for Costs by the Appellant against the Respondent be dismissed and costs not awarded.