

JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : MAXWELL and WESTERN AUSTRALIAN
PLANNING COMMISSION [2003] WATPAT 35

CORAM : MR L GRAHAM

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 15 JULY 2003

FILE NO/S : APP 156 of 2003

BETWEEN : J A MAXWELL
Appellant

AND

WESTERN AUSTRALIAN PLANNING
COMMISSION
Respondent

Catchwords:

Rural residential - Subdivision Guideline Plan

Legislation:

Nil

Result:

Appeal allowed subject to conditions.

Category: B

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

Nil

MR L GRAHAM:

Nature of the Application

- 1 This appeal is against a decision of the Western Australian Planning Commission (“**Respondent**”) of 21 January 2003 to not approve the subdivision of a 15.84ha lot into two lots of 5.116ha and 10.724ha. The property is owned by Mr J A Maxwell (“**Appellant**”) and is zoned “Rural-Residential” in the Shire of Waroona’s Town Planning Scheme No. 7 (“**Scheme**”).

Subject Site

- 2 The subject site is No. 32/34 (Lot 12) Murray Location 793, Tuart Grove Avenue, Lake Clifton in the Shire of Waroona. The Appellant lives on the subject site which is serviced with both power and telephone.

Respondent’s Position

- 3 The Respondent’s position was clearly outlined in its decision of 21 January 2003 when it advised that:
 - “1. The proposed subdivision would be contrary to the Shire of Waroona Town Planning Scheme No. 7 that requires a minimum lot size of 15ha for the subject land.
 2. Approval to the subdivision would set an undesirable precedent for the further subdivision of surrounding lots.
 3. The proposed subdivision conflicts with the Environmental Protection Authority Bulletin No. 864 (Final Criteria of Environmental Acceptability for Land Use Proposals Within the Catchment of Lake Clifton, September 1997) which recommends a minimum average lot size of 5ha for rural residential developments within the catchment of Lake Clifton.”
- 4 In reaching its decision, the Respondent had before it the following Departmental advice:
 - “(a) Under Clause 4.15.1 and Schedule 2 of the Scheme, subdivision must comply with the Subdivision Guideline Plan for the area, which requires a minimum lot size of

15ha in the eastern portion of the Estate where the subject site is located.

- (b) Approval to the proposed subdivision would reduce the average lot size of the *Tuart Grove Estate* significantly below the 5ha average lot size recommended in Bulletin No. 864.
- (c) Similar applications (WAPC Ref 105559 and 108988) have been refused in the past because subdivision was contrary to the intent of the Subdivision Guideline Plan and TPS, and nothing has changed in this regard.
- (d) The personal circumstances of the applicant and Council's aim to improve access in the area are not relevant to a proper appreciation of the planning merits of the application."

Appellant's Position

5 The Appellant essentially argues:

- (a) That as a recent widower, he would like to realize on part of his only asset (ie Lot 12);
- (b) That the Shire of Waroona supports the application; and
- (c) House numbers were allocated in April 2002 for all lots over 10 acres (4.05ha), thereby implying that the Respondent expected future subdivision of the subject lot.

6 At the time when the application for subdivision was made in September 2002, Mr Maxwell indicated that Lots 21 and 22 Location 3168 - Southern Estuary, which abut the rear boundary of the subject site, had been subdivided into about 30 lots. Other examples of large 40 acre (16.20ha) lots within the *Tuart Grove Estate* which had or were being subdivided adjacent to Tuart Grove Avenue were also cited by the Appellant; namely Lots 9 and 44.

7 He also acknowledged at the time that the Shire would like to see a narrow access road linking Tuart Grove Avenue to land at the rear of Lot 12 (ie Lots 21 and 22).

The Issues in the Appeal

8 In the view of this Tribunal, the principal issues to be determined are:

- (a) What weight should be given to the relevant provisions of the various planning documents;
- (b) What planning objectives for the *Tuart Grove Estate* would be at risk if the subdivision was to proceed; and
- (c) What planning objectives would be achieved if the subdivision was to proceed.

Relevant Planning Documents

9 The planning documents relevant to this appeal are:

- (a) The Shire of Waroona Town Planning Scheme No. 7 (Municipal District) December 1996;
- (b) The Environmental Protection Authority Bulletin No. 864 (Final Criteria of Environmental Acceptability for Land Use Proposals within the Catchment of Lake Clifton, September 1997);
- (c) The Coastal and Lakelands Planning Strategy (Ministry for Planning, February 1999).

The Arguments

10 The objectives and policies of the Rural Residential zone are contained within clause 4.15.1 of the Scheme. It states:

“... Council’s objective is to select and appropriately zone areas wherein subdivision and development of small holdings will be permitted to provide for such uses as rural-residential and hobby farms, and also to make provision for retention of the rural landscape and amenity in such a manner consistent with the orderly and proper planning of such areas.”

11 The Tuart Grove area was zoned Rural Residential and the relevant permitted uses and zone control provisions are outlined in Schedule 2 of the Scheme. It states:

- “(i) The objective of Council is to ensure that development within the zone occurs with the least possible detrimental

effect on the rural landscape of the area. In order to achieve that objective, applications for approval to develop must demonstrate concern for the environment and ecology of the area. To retain the rural landscape value, landowners will retain, as far as practical, existing vegetation and Council will encourage additional tree planting;

- (ii) Council shall recommend that subdivision of the area should comply with the subdivision guide plan from the Shire of Waroona Town Planning Scheme No. 5 and Council may require development of lots to be in accordance with the subdivision and development guideline plan.”

- 12 Town Planning Scheme 5 was replaced by the current Scheme and it is clear to this Tribunal that what is being dealt with here is firstly a guideline plan that is not fixed or immutable and secondly a situation where Council recommends to the Respondent. In this case, they have recommended approval, partly on compassionate grounds, but also subject to the ceding of a 10m strip along the northern side of the property for a road reserve; presumably to achieve a desirable transport link between Tuart Grove Avenue and land to the east of Lot 12.
- 13 From the point of view of planning objectives, it is not at all clear why the guideline plan for the Tuart Grove Estate contemplates smaller lots to the west in the vicinity of the Old Coast Road and larger lots to the east. One possibility would be to create a range of lot sizes, but some assistance is found in both the EPA Bulletin 864 and the Ministry for Planning *Coastal and Lakelands Planning Strategy*.
- 14 In both documents, the average lot is set at not less than 5ha with no lot having an area of less than 2ha. It appears that one reason for this approach in the Lake Clifton Catchment Area is a need to limit the amount of water taken from underground bores; however, no objection to the subdivision was raised by the Water Corporation which is the appropriate licensing authority.
- 15 In examining a report to the Respondent dated 21 January 2003 from the Department for Planning and Infrastructure (Peel Office), such statements as:
 - “(i) ... subdivision **must** (emphasis mine) comply with the Subdivision Guide Plan ... and

- (ii) Approval to the proposed subdivision would reduce the average lot size for “Tuart Grove Estate” **significantly** (emphasis mine) below the 5ha average lot size recommended in Bulletin No. 864”.

- 16 Such statements are not substantiated by factual argument. In the view of this Tribunal, there is flexibility in the Guideline Plan and it is not so rigid that subdivisions must comply. Again, to approve the subdivision into two lots as proposed would not cause a “significant” reduction in the overall lot size average in the Estate as argued by the Respondent.
- 17 The suggestion from the Shire of Waroona to achieve an east-west connection from Tuart Grove Avenue eastwards through Lot 12 has merit in the view of this Tribunal; particularly taking into consideration its suggested location and the lack of an east-west road connection in the immediate locality.

Conclusions

- 18 The following conclusions can be drawn from the papers before this Tribunal:
 - (a) The zoning of the subject site is Rural-Residential and a variety of lot sizes could achieve the objectives of the zone, providing they do not fall below a minimum of 2ha as contemplated in EPA Bulletin 864;
 - (b) The Guideline Plan for subdivision and development is not fixed or immutable, as argued by the Respondent, but is there to guide the decision-making process;
 - (c) There are no important planning objectives that would be put at risk if subdivision of the subject site was to proceed into two lots. Accordingly, it is not considered that any precedent effect would, of itself, be undesirable;
 - (d) It is not considered that a two lot subdivision would conflict with EPA Bulletin No. 864 which recommends a minimum average lot size of 5ha for rural/residential lots within the catchment of Lake Clifton;
 - (e) An important planning objective could be achieved if land for an east-west road reserve was obtained as part of this subdivision;

- (f) That if the Appellant was to provide advice to a prospective purchaser as contemplated by Clause 4.15.11 of the Scheme, then that purchaser would be made aware of the special provisions of the Scheme that relate to use, development and management of the land. In this way, matters such as building envelopes, clearing restrictions, conservation areas, fencing, access and fire management would be addressed, as contemplated by the environmental objectives in Schedule 2;
- (g) A subdivision into two roughly equal sized lots with frontage to Tuart Grove Avenue with a 10m east-west road reserve along the northern boundary of the subject lot would help to achieve a necessary transport corridor, maintain the planning intent of relatively large lots towards the eastern boundary of the Estate and still accord with the objectives of the Rural Residential Zone in addressing the environment and ecology needs of the area.

Decision

- 19 That the appeal by Mr J A Maxwell dated 4 March 2003 with respect to Lot 12, Murray Location 793, Tuart Grove Avenue, Lake Clifton, be upheld subject to:
- (a) A 10m wide road reserve from Tuart Grove Avenue eastwards along the northern boundary of Lot 12 to the rear boundary of the lot being ceded free of cost to the Crown;
 - (b) That the remainder of Lot 12 be subdivided into two lots of approximately equal size with both lots having a frontage to Tuart Grove Avenue; and
 - (c) That the Appellant enter into an agreement with the Shire of Waroona in the terms contemplated by clause 4.15.11 of the Scheme.
- 20 The Tribunal so determines.