

JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : BOONDEE BROOK PTY LTD and SHIRE OF
AUGUSTA-MARGARET RIVER
[2003] WATPAT 36

CORAM : MR P MCGOWAN

HEARD : 15 JULY 2003

DELIVERED : 15 JULY 2003

FILE NO/S : APP 132 of 2002

BETWEEN : BOONDEE BROOK PTY LTD
Appellant

AND

SHIRE OF AUGUSTA-MARGARET RIVER
Respondent

Catchwords:

Development - Meaning of Site - Costs - Whether the Respondent behaved unreasonably in relation to the Appeal

Legislation:

Nil

Result:

Appeal allowed.

The Respondent to pay \$1000 towards Appellant's costs.

Category: B

Representation:

Counsel:

Appellant	:	Mr D Beere
Respondent	:	Mr C Reid

Solicitors:

Appellant	:	Beere May & Meyer
Respondent	:	As Agent

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

ABC Learning Centre Ltd v City of Gosnells [2003] WATPAT 13

MR P MCGOWAN:

- 1 This appeal relates to an approval granted by the Respondent authority dated 16th of September 2002. The application was for development of a winery and a restaurant on Sussex location 1921, Blain Road, Margaret River.
- 2 The property is the entire property, location 1921, and is 40 hectares in area. Of that 40 hectares Mr Richardson, who gave evidence in this matter, indicated that 24 hectares had been cleared of which 22 were under vine.
- 3 The area the subject of the development application is approximately 1 hectare in area. An aerial photograph produced by Mr Richardson assisted in understanding the matters to which I refer. In addition, photographs were produced showing the relative position of the area the subject of the development application, the present position of the vines and the general set up and lay out of the entire property.
- 4 When the matter was dealt with by the Respondent in September 2002 it approved the application but subject to a number of conditions. There were 35 conditions together with a number of footnotes.
- 5 Amongst those conditions was the following: condition 32 which read as follows:

“The land owner shall prepare and enter into a covenant at the land owner’s expense and to the satisfaction of council for the retention of all remnant vegetation on the site prior to undertaking any land use pursuant to this approval.”
- 6 That condition was the subject of this appeal. It is the only condition which is in issue.
- 7 In responding to the notice of appeal the Respondent formally relied upon a number of matters. When I say formally relied upon, I mean the statement by Respondent refers to a number of matters. I should hasten to add that in the course of this matter no evidence was led by the Respondent authority in relation to matters the subject of this appeal. The only evidence being led was that from Mr Richardson.
- 8 The issues that at least are raised in the statement by Respondent include under the following headings first, Designation of Land Within Public

Drinking Water Source Area. The implication of this in paragraphs 4 to 6 inclusive of the statement by Respondent would seem to suggest that there was some consideration at play which provided a proper, rational and justified basis for the imposition and retention of clause 32 of the conditions of approval.

- 9 However, as Mr Beere pointed out in closing, the officer report to council for its meeting identified that the relevant agencies had been contacted, input had been sought and in relation to such matters each of the relevant departments indicated that they had no concerns. In fact, the preparation of the conditions, or at least the proposed conditions, were consequent upon a consideration by council's planning officers of input from the relevant government agencies. So, for example, the Waters and Rivers Commission reported as follows:

“Wineries identified as a compatible use within P3 areas subject to waste management practices being compatible to resource protection objectives. Restaurants being a compatible use within P3 areas except where not complying with a current government sewerage policy.”

- 10 That is, there is no evidence to suggest that there is a basis from the relevant authority that this would be a concern upon which this condition could properly be justified.
- 11 Secondly, it suggests under the heading Government Agency Advice that there may be some issue in relation to declared rare flora. Again, the matter was the subject of a report by council's planning officers and again included the results of consultation and dealings with government agencies, none of which, including CALM, suggested that there was any such difficulty. Again, there is no evidence before me to suggest that this is an issue which would justify the imposition of this clause.
- 12 Thirdly, there was a reference to the Shire of August Margaret River Strategic Vision. This policy is not before me but, in any event, my attention was drawn by Mr Beere, counsel for the Appellant, to the provisions of clause 4.3.1(a) of the Respondent's Town Planning Scheme number 11 which includes the following zoning objectives within a rural zone which is the relevant zoning of this property.

“To foster and encourage the use and development of land for broad acre farming, viticulture and intensive horticulture in all of their facets”

- 13 Consistent with that objective council quite properly approved this application. Further, that which is intended seems to be more akin to the specific objectives of TPS 11.
- 14 To the extent to which there may be reference in the strategic plan of the council of Augusta Margaret River to preserve, rehabilitate and enhance the natural environment of the Shire, first it does not seem necessarily to militate against the application of the zoning objective to which I have referred, and secondly it is certainly arguable that the scheme's objective would take priority.
- 15 Again, I am not satisfied that that is a basis to justify the imposition of this condition.
- 16 Finally, note should be made of how the matter was attended when the full report went to council by council's planning officers. That report recommended approval subject to a number of conditions. The report to council as framed included the following as the draft of the condition which is in essence the subject of this appeal.

“The applicant shall preserve remnant vegetation existing on the site at the time of this approval.”

- 17 One can see that is in slightly different and perhaps less constrained terms than the condition when finally drafted appearing as part of the development approval. However, in the statement by Respondent, the Respondent seeks to elevate the position by now seeking “a restrictive covenant” as required by the disputed condition on the basis that it is said this is the most, reasonable and effective means of preserving remnant vegetation on the subject land in perpetuity.
- 18 No evidence has been led to demonstrate a justifiable basis first for the imposition of such a condition in such a way; second, that even if such a condition was to be imposed why it should be said to apply to the whole of the property.
- 19 It seems to me that the use of the word “site” is punctuated throughout the various conditions which are the subject of the development approval. It seems to me that in each instance the use of the word “site” is consistent with an understanding of and a use of the expression on the basis that it is the development application site not the whole of the property. After all, the whole of the property has already, to some extent been developed for the purpose of viticulture but this application was not concerned with that, rather it was concerned with approval in relation to a specific application,

namely, a winery and a restaurant. It is in that sense, and given that the word “site” is consistent with the designation appearing on the plan in support of the application, that in my view the proper construction of that word is to be limited to and defined by reference to the area in the plans which form part of the development application.

- 20 The remaining question, therefore, is if it is a relevant condition, and in that regard it should be emphasised that the Appellant is prepared to accept the imposition of such a condition provided it relates to and is limited to the area the subject of the development application, the question remains whether the way in which that covenant should take effect should be by way of restrictive covenant.
- 21 A restrictive covenant necessarily binds the land and the land owner. There is no evidence led to justify such a burden to be imposed upon the Appellant. For those reasons I am satisfied that clause 32 of the conditions of approval should stand, that is, that there is an obligation on the part of the applicant, the present Appellant, to prepare and enter into a covenant at his expense and to the satisfaction of council but not in the form of a restrictive covenant, and that the word “site” is to be understood and meant and therefore limited to the area the subject of the development application.
- 22 For those reasons I am satisfied that the appeal should be allowed and the development should proceed on the conditions to which I have made reference.
- 23 The Appellant now seeks an Order that the Respondent pay its costs. The issue is this, that the grounds which appear in the statement by Respondent for the moment both seem to be at variance to and contradicted by the report by planning officers when the matter was considered by council.
- 24 In other words, there did not then appear to be material which objectively was going to provide an arguable basis as to why it was said that “site” was to mean the whole of the property rather than the site the subject of the development application.
- 25 Section 65(2) *Town Planning and Development Act* speaks directly to the question of the conduct in relation to the appeal. In a recent decision *ABC Learning Centre Ltd v City of Gosnells* [2003] WATPAT 13, we had occasion to address whether, in effect, because it was argued there was really no basis to resist the appeal, it could be said that the fact that the

appeal was resisted was a basis upon which when the Appellant was successful that the Respondent should pay the Appellant's costs.

- 26 The issue to be crystallised here is that it is not a case of criticising council for the decision to which it has come, because the process that council undertakes is quite different in nature to the process which is the subject of an appeal to and before the Tribunal, and that is why section 65(2) is not concerned with, in effect, what went before the institution of the appeal but rather what happened once the appeal was issued.
- 27 This jurisdiction is essentially a cost-free jurisdiction in the sense that each party is to bear its own costs save for the exceptional circumstances set out in section 65(2).
- 28 Here, what the Appellant has raised is an argument that says two things: first, that simply by resisting and offering no evidence, that is a basis upon which section 65(2) should come into play. That is not so. In this case it could not be said that the cost of the appeal was necessarily enlarged or exaggerated by that conduct. The Respondent called no evidence, and as it happened the Tribunal was able to attend at the Shire of Augusta Margaret River's office for the purpose of this hearing.
- 29 The more pressing question, the more pressing argument seems to me, however, to be this; was there ever a basis upon which this appeal could have been substantively contested? Was there a basis upon which upon reflection that it could be said that there really wasn't any evidence that could be offered as opposed to an instance where no evidence was, in fact, not offered? The difference is this, as Mr Reid has pointed out, there are present circumstances which impose themselves upon the Respondent so as to limit the Respondent's present response to this appeal.
- 30 In this case it is material to note that the three issues in relation to the statement by the Respondent are matters which appear to have been specifically the subject of investigation by council's planning officer who investigated the matters which ordinarily would be the subject of input from relevant government agencies.
- 31 That being the case, there never, it seemed to me, appeared to be a basis upon which the specific issue the subject of this appeal has been the subject of a logical or factual basis; in other words, there does appear to be force in what the Appellant says in relation to the way in which this appeal has been resisted given that it was limited to not only an argument

as to one condition but really as to an argument as to what the word “site” meant.

32 If the argument was one which was as to interpretation only then that is one issue. If it was an argument which depended upon establishing underlying facts to demonstrate why the imposition of the condition was reasonable when applied in relation to the whole of the property, that necessarily would have been a matter which would have on closer analysis appeared from council’s file.

33 I am not satisfied in the circumstances that council has a basis for resisting this appeal. It therefore seems to me that there is an argument that costs should be awarded under section 65(2), and I am prepared to make an order although I need to hear further submissions as to the extent to which those costs are now sought on the basis that it is a matter for the Tribunal to determine.

34 Section 65(2) not only deals with the limited circumstances to which I have referred of which this is one but also empowers the Tribunal to make an award for costs in its determination. Mr Beere has suggested that an appropriate figure may be \$2000.

35 There are various ways in which one may approach the matter. The first is to emphasise that the intention is not to penalise necessarily but really to recognise in this instance, the way in which the Respondent’s conduct falls foul of what section 65(2) contemplates.

36 Secondly, there is no formal scale to which the costs in question are subject. It is a matter for submissions and a matter ultimately for determination by the Tribunal.

37 Thirdly, given that section 65(2) talks about in relation to the appeal, it is a case then of critically analysing the conduct of the Respondent in relation to the appeal at various stages to see to what extent in total or in part it has behaved unreasonably, vexatiously or frivolously in using that determination to assist in understanding where the appropriate range of costs may lie.

38 Mr Beere suggested, as I say, that the figure should be \$2000. It seems to me that there are some limitations in relation to the criticism of the Respondent. One point that Mr Beere makes which I think is appropriate was that when the matter was the subject of a directions hearing by telephone on the 11 July 2003, Mr Reid on behalf of the council, then made plain that limitations within the council had led to the result that

council, in effect, would not be leading evidence at this hearing today, but was not able then to offer a basis upon which the matter would be resisted nor able, it seems, to be able to indicate why the matter was proceeding in those circumstances.

39 For those reasons I am satisfied that \$1000 is an appropriate figure. So I will make an order that the Respondent pay \$1000 towards the Appellant's costs.

40 So there will be formal orders that the appeal is allowed and that "site" within clause 32 means the area of the development application. Condition 32 otherwise will otherwise stand and the Respondent is to pay \$1000 towards the Appellant's costs.