
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : ILHA PTY LTD AS TRUSTEE FOR OSBORNE
TRUCK RENTALS UNIT TRUST and CITY OF
FREMANTLE [2003] WATPAT 38

CORAM : MR P MCGOWAN
MR J JORDAN
MR R HOPE-JOHNSTONE

HEARD : 25 AND 26 JUNE 2003

DELIVERED : 21 JULY 2003

FILE NO/S : APP 54 of 2003

BETWEEN : ILHA PTY LTD AS TRUSTEE FOR OSBORNE
TRUCK RENTALS UNIT TRUST
Appellant

AND

CITY OF FREMANTLE
Respondent

Catchwords:

Town Planning - Development Application - Noise - Amenity

Legislation:

Nil

Result:

Appeal allowed subject to conditions.

Category: B

Representation:

Counsel:

Appellant	:	Mr M Flint
Respondent	:	Mr J Skinner

Solicitors:

Appellant	:	Phillips Fox
Respondent	:	McLeods

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

Nil

MR P MCGOWAN, MR J JORDAN, MR R HOPE-JOHNSTONE:

- 1 Mr Antonio Bartolone is the owner of 218 to 220 South Street, White Gum Valley. The Appellant is the owner of land at 222 South Street, White Gum Valley. The two properties together are referred to as the subject site. On 218 to 220 South Street there had been a service station since 1961. For the period 1961 to 2001 it operated as a service station site. At its peak, there were six bowsers and five tanks.
- 2 The Appellant in relation to 222 South Street has used such premises for the purposes of its business. Its business is vehicle rental. Planning approval for 222 for a motor vehicle rental and repair business was granted in April 1994.
- 3 In addition, on 218 to 220 there was a mechanical repair business which had been conducted by Wilding Mechanical Repairs since the 1970s.

Application to the Respondent

- 4 On 8 February 2002, the Appellant lodged an application for planning and building approval with the Respondent. What in essence was proposed was to modify and improve certain existing buildings on the service station site (218 to 220 South Street) and relocate the Appellant's business (Thrifty Car Rentals) office to those buildings which are currently located on 218 to 220 South Street.
- 5 In addition, it was intended to retain the existing service station and mechanical repair business. The mechanical repair business operates independently of the Appellant's business.
- 6 On 11 February 2003, the Respondent wrote to the Appellant advising that its application had been refused.
- 7 In refusing the application, the Respondent provided the following reasons:
 - “1. The proposed development would prejudice the orderly and proper planning of the locality and the preservation of the amenity of the area.
 2. The intensity and nature of the proposed use is incompatible with the future character of the area as envisaged by Council's plans.

3. The proposed development is contrary to clause 36 of the Scheme in that it would adversely impact on the residential amenity of the surrounding area due to increased truck and vehicle movement and the associated noise and disturbance on both subject site and nearby residential streets.
4. The proposal is contrary to provisions of DGW 3 South Street Local Centre Local Area Policy, specifically clause 4, which seeks the reduction in parking bays or car moments (sic) in areas adjacent to residents, and clause 6 as the development does not demonstrate any identifiable improvement, and clause 7, as the development does not provide well defined street frontages and unified setbacks.

8 This appeal is brought from that decision.

9 At the outset, it was made clear that the fourth reason referred to above would no longer be relied upon and the first three represented in essence the joinder of issue between the parties.

History in Relation to Operation of Thrifty Car Rentals

- 10 It became clear during the course of this hearing that there had been a history of complaints in relation to Thrifty Car Rental's business as conducted from 222 South Street. The complaints in essence were noise from the operation of the car wash bay and noise in relation to the movement of vehicles at hours which were said to be inappropriate by local residents.
- 11 Changes were effected as a result of those complaints (made in 1995/96). There appears to have been no complaints made until the present application was advertised and promoted locally.
- 12 Annexure 13 to the statement of Mr Bedell (Managing Director of the Appellant) demonstrates in detail what it is that the Appellant contemplates.
- 13 In summary terms, the development and the changes from the existing operation can be described as follows:
 - (a) The wash bay is to be located on the western boundary of 218 South Street.

- (b) There is to be a full height wall at the northern end of the wash bay to operate a sound absorptive barrier.
- (c) Access to the wash bay will be from the South Street entrance.
- (d) The existing wash bay canopy at the north east corner of 222 South Street will be lowered (this is to deal with the fact that the land slopes considerably from south to north away from South Street).
- (e) In closing, Counsel for the Appellant indicated that trucks to be parked on the premises would be located in the area identified as rental truck parking in the north east portion of 222 but south of the provision for Wilding parking.
- (f) In addition, there will be provision for two parking bays for trucks at the rear of the existing building, but those bays will be the bays most adjacent to the building.
- (g) The Thrifty office on 222 will be removed and will now be part of the existing structure which appears on 218.
- (h) A canopy which appears at the front southern section of 218 will be partly removed as will the existing sign on the most south west corner of 218 although the sign on 222 which exists will be replaced.

Planning Considerations

- 14 The subject site is zoned Local Centre R20 under the Respondent's Town Planning Scheme No. 3 ("**TPS 3**").
- 15 The subject site was also within an area covered by the South Street Local Centre Local Area Policy ("**Local Centre Policy**").
- 16 As a result of recent changes, the uses contemplated by the Appellant make this an AA use. As Counsel for the Respondent pointed out, previously this had been an area where such uses would have been P uses. As such therefore, he contended, it represented a change in policy by the Respondent so as to not automatically encourage such uses within this Local Centre area.

Amenity Issues

- 17 It is therefore a question of amenity. Counsel for the Appellant made plain in closing that the extent to which visual amenity was an issue the proposed changes to be undertaken by the Appellant would undoubtedly improve the visual amenity of both the subject site and of the area generally. From the evidence led we agree.
- 18 The critical issue in relation to amenity which was the subject of the appeal was in relation to noise. The question of noise arises in relation to three separate but related matters:
1. Use of the wash bay;
 2. Movement of vehicles generally;
 3. Movement of large trucks in particular using the wash bay.
- 19 As we have indicated above, the position of the wash bay has been moved from the existing location adjacent to the north east boundary of 222 South Street.

Wash Bay

- 20 When complaints were received in 1995/96 they related to the use of a pressure cleaner. The use of that pressure cleaner was abandoned as a result of complaints that were received.
- 21 The present proposal involves its reintroduction albeit in relation to the wash bay being in a different location and with a physically different configuration in order to minimise the impact of noise.
- 22 There was some debate in closing as to what sort of high pressure cleaning machine would be used. The Appellant led evidence, without objection, of certain tests that were carried out by a company Lloyd Acoustics Pty Ltd in relation to *the washing equipment conducted at your Osborne Park premises*. From that we understand it to be the Osborne Park premises of Thrifty Car Rentals. Certain tests were then carried out on the basis that in relation to Fremantle (White Gum Valley) it was assumed that similar washing equipment would be used.
- 23 Counsel for the Respondent contended that there was no evidence to indicate what machines were going to be used at the subject site and that as a result, such tests were effectively meaningless. In closing, Counsel

for the Appellant indicated that the machine the subject of the test (that is at the Osborne Park premises of the Appellant) would be the type of machine proposed to be used.

- 24 Although in that sense the evidence is far from complete and in some respects a little unsatisfactory, it is nevertheless the evidence before us. There is no countervailing evidence and, although we have some reservations, we proceed on the basis that it is sufficient for present purposes to provide a basis to make the findings that follow.
- 25 The significance of the test undertaken by Lloyd Acoustics Pty Ltd is that the results were then accepted and relied upon by Mr Storer. Mr Storer is the Managing Director of Herring Storer Acoustics. He is a private consultant acoustician. He has had considerable experience with noise and in particular with the *Environmental Protection (Noise) Regulations 1997*. Mr Storer provided a detailed analysis of predicted noise levels from the operation of the wash bay. These were the subject of considerable cross examination by Mr Skinner.
- 26 In the end, as Mr Skinner himself accepted, such measurements were a guide but were not determinative of the question with which we are dealing namely whether in the exercise of discretion the impact on the amenity of the local residents was such as to militate against grant of approval for that which was sought by the Appellant.
- 27 In any event, we are satisfied that the exercise undertaken by Mr Storer, encapsulated in Table 4 of his report, demonstrates that with the assigned level and the predicted level based upon the operation of the wash bay equipment on which Lloyd Acoustics rely, the noise would not be in breach of the relevant regulations. Mr Storer was confident that the presence of the wall at the northern end of the wash bay would be sufficiently sound absorptive to achieve the desired result. Further, the location of the wash bay in the centre and to the west of the site aids in minimising the impact upon surrounding residences.
- 28 It is also important to note, as Mr Storer observed, that South Street itself is a major road. Based on MRD recent figures traffic flow past the subject site was in the range of 12,000 to 19,000 vehicles per day. Mr Lange (Co-Ordinator Environmental Health) was called as a witness for the Respondent. He also agreed in cross examination that South Street adjacent to the subject site was properly designated as a Major Road.
- 29 We are satisfied therefore that the operation of the wash bay will not generate noise in such a way as to unduly impact upon adjoining

residences. In so saying however, further comments need to be made in relation to the hours of operation which we deal with later.

Vehicle Movements Generally

- 30 Mr Bedell gave evidence that in relation to the operation of the Appellant's business at the subject site, although there may be up to 70 vehicles which are leased out from the site, new rentals on average occur 10 times a day. From that we understood (having regard to utilisation figures for April to July 2002) that there would be on average 10 vehicles which would come on to the site per day and 10 vehicles which would leave the site per day.
- 31 Mr Bedell was cross examined as to the extent to which, if approved, this development would increase the number of vehicle movements on the site.
- 32 We are not satisfied on the evidence that if approved, there would be a significant increase in the number of vehicle movements to and from the site on any given day. Such level of vehicle movement does not in our view lead to the result that there is an adverse impact upon the amenity of surrounding residents.

Movements of Trucks in Particular

- 33 This was the subject of more detailed evidence. Since 1996 trucks greater than 5 tonnes available for rental by the Appellant have been stored at the Peak Service Station in Hampton Road, South Fremantle. As a result, the subject site is presently only being used for storage and rental of motor vehicles and smaller trucks up to 5 tonnes.
- 34 The present proposal would contemplate allowing all vehicles available for rental by the Appellant to be stored on the site from time to time.
- 35 Again the utilisation figures provided by the Appellant indicate that the preponderance of vehicles leased by it are motor vehicles. A small proportion of their business is in relation to the rental of trucks.
- 36 Mr Storer undertook a noise emission assessment to determine what affect the movement of such vehicles would have in terms of measurable noise. Again he concluded on the basis of Table 4 that the limited number of movements justified the use of L1 in accordance with the regulations and that the assigned level arising as a result when measured against the predicted level would mean that there was not excessive noise having regard to the regulations.

- 37 Again, we accept his evidence in that regard.
- 38 Again, however, we underscore the point that such regulations and the exercise undertaken by Mr Storer are to be used as a guide to assist in determining the question with which we are concerned.
- 39 As we have indicated above, the Appellant is prepared to limit the areas in which such large vehicles may be parked. The parking of vehicles in such areas will have the result that such noise will be limited in those ways.
- 40 Again, we are satisfied subject to views being expressed in relation to the Management Plan that such steps will not adversely impact upon the amenity of the residents.

Intra Site Movements

- 41 Counsel for the Respondent was at pains to point out that of greater concern was the likelihood of a number of vehicle movements within the site. Mr Benham Bordbar, Traffic Engineer, gave evidence on behalf of the Appellant in relation to likely movements that could be expected in and out of the subject site. Such exercise was undertaken in reliance upon observations that he had conducted at the Welshpool site of the Appellant. This site was at all times considerably larger than the subject site (even taking into account the expansion consequent upon the application made to the Respondent).
- 42 It is true that such observations and the report of Mr Bordbar were essentially directed to movements of vehicles in and out of the subject site.
- 43 It is also accepted by the Appellant that there will be movements within the site as vehicles are either moved to the wash bay for the purpose of washing or moved within the site as access is required from time to time for certain vehicles required for rental or delivery to other premises of the Appellant.
- 44 No empirical evidence was led in relation to the extent of such movements. It was accepted, however, as we have said above, that there will be such movements.
- 45 Again, it does not seem to us that the extent of such movements would reach a level where it could be said that there would be, by reason of that alone, an impact upon the amenity of the residents. However, it is also apposite to point out that no direct evidence was led by the Respondent in relation to impact upon amenity. The only witnesses called on behalf of

the Respondent were Mr Lange, in his formal capacity as Co-ordinator Environmental Health, dealing with the question of noise measurements and Mr Jackson, who essentially dealt with planning and other issues to which we refer later.

- 46 Absent direct evidence from residents and given, as was accepted by both Counsel, that technical evidence led by Mr Storer in the end only aids as a guide to the way in which noise impacts upon amenity, the evidence of Mr Storer essentially convinces us that there is no impact upon residents in relation to noise which would satisfy us that there is an adverse impact upon amenity.

Local Centre Policy

- 47 In the course of cross examination of Mr Jackson (Manager, Development Assessment, City of Fremantle) his attention was drawn to the fact that the Local Centre Policy on which he relied may well at least in terms of the copy provided be in draft, since clause 5.6.1 provides as follows:

“5.6.1 Statement of Character

... to be inserted upon completion of character studies”.

- 48 Mr Jackson was unable to explain the position.

- 49 He relied in particular upon clause 5.6.3:

“South Street Local Centre

- (d) The South Street Local Centre is in need of an upgrade to improve the physical environment (footpaths, pedestrian crossings, signage, landscaping etc) amenity and performance of the centre to promote it as a “community hub” for Beaconsfield and White Gum Valley residents.
- (e) Any new development in this centre should be encouraged to include shop-top housing to contribute to housing choice and vitality of the Centre.”

- 50 However, in addition he relied upon the following objective:

“Facilitate the development of the Watkins Street Neighbourhood Centre and the South Street Local Centre as vibrant community hubs which serve the day to day needs of nearby residents and to facilitate the redevelopment of major

sites in the local centre that contribute to a high standard of design and amenity as well as a distinctive architectural character”.

- 51 The Appellant’s application to the Respondent, in various modified forms, had been the subject of three reports by the Respondent’s planning officers to it. Mr Jackson supervised the preparation of each of those three reports. Each of those three reports categorically recommended rejection of the Appellant’s application. There was a fourth report in December 2002. Mr Jackson prepared a significant proportion of this report and it included inter alia the following:

“Amenity Assessment

- The overall site has accommodated motor vehicle trades business for many years and it as (sic) acknowledged that these have caused amenity impacts.
- In more recent years the particular businesses have improved their operations to reduce impacts. This includes the present Thrifty business and the downgrading of the service station to a mechanical repair workshop in anticipation of the expansion of Thrifty.
- The proposed expansion of Thrifty is not so much an actual intensification of use as a spreading out of current operations to utilise the overall site and in so doing to address and further reduce amenity impacts.
- Improved amenity is proposed to be achieved by a combination of revised layout, modified access and circulation, upgrading of the buildings and grounds, better signage and enhanced operational practices in accordance with a refined Management Plan/Policy.
- Whilst Thrifty would occupy the entire site, the physical appearance of the property would be bettered as part of the local centre.
- The alternatives of an expanded mechanical repair business or reinstatement of a fully-fledged service station could be expected to have greater amenity impacts than the proposal.

- The Management Policy and recommended conditions of approval address the critical operational issues being the wash bay and truck beepers.”

52 Mr Jackson then went on by way of conclusion to provide a recommendation that approval be granted subject to a number of conditions.

53 When however he came to give evidence in these proceedings, some six months later, he no longer subscribes to recommending approval of the present application. He puts this on the basis of now taking into account the strong views expressed by Council and residents in relation to the local centre.

54 Mr Jackson occupies a very significant position in the City of Fremantle. In terms of planning, he is a person with considerable experience.

55 Evidence from persons with considerable planning experience is invariably an aid to this Tribunal in dealing with planning principles and issues. There was no clear planning basis offered for Mr Jackson’s apparent change of mind between December 2002 and June 2003. Rather, the fourth report appears to be the result of considerable analysis of the three previous reports, the response by the Appellant to the issues raised and negotiations that had taken place between the parties with a view to seeing whether it was possible to find a workable solution which considered both the planning framework within which they were required to work and the expectation of the residents as far as amenity was concerned.

56 It seems to us there is a lot to recommend the approach undertaken by Mr Jackson and we are similarly of the view that the matter from a planning point of view is permissible but the reservations to which Mr Jackson referred, which in broad terms we share, are matters which are to be addressed by way of conditions.

Conclusion

57 For the reasons which we have outlined above, we are of the view that the Appellant’s application for planning approval should be granted. We are also of the view that the conditions of approval referred to by Mr Jackson and forming part of his report to Council in December 2002, would represent in general terms conditions which we would consider appropriate to impose in relation to such granting of approval.

- 58 In closing, Mr Skinner, Counsel for the Respondent, indicated that he was not in a position to offer a view in the event that that was the conclusion to which we came.
- 59 One of the issues which was canvassed during the course of the Hearing was a Management Policy prepared by the Appellant in relation to the Subject Site. This Management Policy, which was an annexure to Mr Bedell's statement, appears to be current as at 10 January 2003.
- 60 In closing, however, Counsel for the Appellant, as we have indicated above, indicated specific concessions that the Appellant was prepared to make in relation to the parking of trucks on the Subject Site. That would have to be a matter which would find its way specifically into the Management Policy.
- 61 From time to time, doubt is expressed as to the utility and enforceability of such Management Policies in relation to development applications.
- 62 It does seem to us, however, that if a Management Policy was a condition of approval, which is our intention, then its enforceability would be governed by the provisions of section 10(1)(v) *Town Planning and Development Act 1928*.
- 63 For that reason, we are prepared to allow the parties fourteen days to consider the detail and content of the conditions to be imposed in relation to the grant of approval to the Appellant.
- 64 In the event that agreement is not reached, we will hear further submissions from the parties in relation to the conditions to be imposed.