
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : TK & LB PTY LTD and CITY OF SOUTH PERTH
[2003] WATPAT 40

CORAM : MR R HOPE-JOHNSTONE

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 22 JULY 2003

FILE NO/S : APP 163 of 2003

BETWEEN : TK & LB PTY LTD
Appellant

AND

CITY OF SOUTH PERTH
Respondent

Catchwords:

Additions to existing building - Residential Design Codes - Reduced setback,
justification - Impact on amenity

Legislation:

Nil

Result:

Appeal allowed subject to conditions.

Category: B

Representation:

Counsel:

Appellant	:	determined on the documents
Respondent	:	determined on the documents

Solicitors:

Appellant	:
Respondent	:

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

Nil

MR R HOPE-JOHNSTONE:

- 1 This is an appeal from the refusal by the City of South Perth (“**City**”) of an application to construct first and second floor walkway additions to an existing multiple dwelling development situated on Lot 6 and Pt Lot 2 (No. 53) South Perth Esplanade, South Perth.
- 2 Both the Appellant and the Respondent have elected to have the appeal conducted entirely on the basis of documents, without any physical appearance by either of them or their representatives or witnesses, as provided for at clause 51(7) of the *Town Planning and Development Act (1928)* as amended.
- 3 The existing development, known as “The Peninsula Apartments”, comprises two separate buildings each containing serviced apartments on three levels. There are already existing external walkways, at similar setbacks as now proposed, for part of the development but there is no pedestrian link between the two buildings on the upper levels and that is what the subject proposal seeks to address.
- 4 The City resolved to refuse the application for the following reasons:
 - “(a) The setback of the proposed walkway is substantially below the minimum setback prescribed by the Residential Design Codes; and
 - (b) Council is not satisfied that the walkway will not adversely affect the amenity of the adjoining property in relation to noise and the visual effect of the additional building bulk.”
- 5 The grounds of appeal provided by the Appellant may be summarised as follows:
 - (i) when the proposal was presented to the Council, it was recommended for approval.
 - (ii) the Residential Design Codes (“the R Codes”) clearly state that if the setbacks are below the required minimums, the Council can approve them providing the relevant Performance Criteria contained in the R Codes have been met. It is the Appellant’s contention that the

criteria have been met and this is reflected in the Planning Officer's Report.

- (iii) the affected neighbouring property at No. 59 South Perth Esplanade has a large car parking and storage area adjoining the proposed walkways and the nearest affected window is 22m away. The car park will be a greater noise generator than the proposed walkways and is significantly closer to the nearest affected window. Building bulk is not an issue given that the walkway will be an unenclosed and light structure.
- (iv) the location of the walkways is determined by the fact that it is the only position available to connect the two buildings. The buildings were completely refurbished in 1996 and are providing short stay accommodation for tourists in a desirable location. The recent addition of a lift has provided a much-needed improvement in circulation across the three levels of the building and the proposed open walkways will complete the latest round of upgrading.

6 The Respondent's case may be summarised as follows:

- (i) while it may be so that the proposed walkways are in the only position available to connect the two buildings, the siting constraints do not provide sufficient justification to depart from the prescribed setbacks and the Council policy expectations.
- (ii) the proposed development seeks a significant departure from the setback requirements of the R Codes.
- (iii) approval of the setback as proposed will unreasonably impact on the amenity of adjoining occupiers as a result of the additional building bulk and noise associated with people using the walkways.

7 Under the R Codes at Table 2b, the proposed walkways would normally require setbacks of 4.4m at the first floor level and 6.1m at the second floor level. The proposal incorporates a boundary setback of 1.0m at both levels.

- 8 Clause 3.3.1 of the R Codes contains a set of Performance Criteria which, if met, could allow for a lesser setback than prescribed in Table 2b. The Performance Criteria are as follows:

- “• provide adequate direct sun and ventilation to the building;
- ensure adequate direct sun and ventilation being available to adjoining properties;
- provide adequate direct sun to the building and appurtenant open spaces;
- assist with the protection of access to direct sun for adjoining properties;
- assist in ameliorating the impacts of building bulk on adjoining properties; and
- assist in protecting privacy between adjoining properties.”

- 9 Clause 3.8.1 of the R Codes deals with visual privacy and sets out the Performance Criteria which must be met to ensure a reasonable level of visual privacy for both new development and adjoining residents. The Performance Criteria are as follows:

“P1 Avoid direct overlooking between active habitable spaces and outdoor living areas of the development site and the habitable rooms and outdoor living areas within adjoining residential properties taking account of:

- the positioning of windows to habitable rooms on the development site and the adjoining property;
- the provision of effective screening; and
- the lesser need to prevent overlooking of extensive back gardens, front gardens or areas visible from the street.”

- 10 On the matter of building bulk, Part 6(a) of the City’s Planning Policy P370_T “General Design Guidelines for Residential Development” states:

“(a) Scale

Building bulk shall be generally distributed to ensure that a proposed building will not have an overpowering impact on neighbours and the street. Unless the Council is satisfied in this respect, approval will not be granted for any variation from the setbacks prescribed in Tables 1 and 2 and Figure 3 of the Residential Planning Codes.”

- 11 The Tribunal notes that the City’s Planning Policy P370_T was adopted by the Council in April 1999 and, as such, still refers to the Residential Planning Codes which were subsequently revoked and replaced by the Residential Design Codes in October 2002. While it will be necessary for the City to review and modify its policies to reflect the change, in respect of this issue of building bulk at least, such change constitutes a technicality which need not affect its application for the purposes of considering the subject proposal.
- 12 The issues needing to be addressed in the determination of this appeal are, as set out in the Performance Criteria detailed previously in paragraph 7 above, protection of sun access, impact of building bulk and privacy protection.
- 13 In respect of sun access, the location of the abutting development relative to the appeal site, being situated to the east of it, means that the proposed walkway additions will not result in any loss of access to direct sunlight by occupiers of the adjoining multiple dwellings.
- 14 On the question of building bulk, the Tribunal notes that the proposed walkways will be adjacent to the car parking area of the adjoining multiple dwellings with the nearest habitable room windows being in the order of 22m away.
- 15 Further, it is stated that the walkway structure will be largely unenclosed and of lightweight construction and, as a consequence, could not be expected to impact on the amenity of adjoining occupiers in terms of its perceived bulk and scale.
- 16 Similarly, given the appeal site’s interface with the adjoining property’s vehicle access and parking area and the considerable separation of the habitable areas, concern about potential impact on visual privacy is not considered to be well founded.

- 17 Given the circumstances peculiar to this case, the Tribunal is not convinced that the Respondent's approach can be reasonably sustained. The evidence presented clearly shows that, notwithstanding the departure from the prescribed minimum setback standards of the R Codes, the proposal meets the necessary Performance Criteria described by the R Codes as having to be met before consideration would be given to a setback variation.
- 18 Accordingly, the appeal is allowed.
- 19 It is noted that the appeal documents included a copy of the planning report presented to the Council which recommended approval subject to several conditions. The Tribunal is of the view that these recommended conditions could constitute the appropriate conditions in relation to the approval granted by this decision.
- 20 In the event that there is any disagreement in respect of these conditions, the Tribunal will receive further submissions from the parties in relation to the conditions to be imposed.