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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**CITATION** : PARFITT and CITY OF MANDURAH  
[2003] WATPAT 42

**CORAM** : MS W F BUCKLEY  
MS B MOHARICH  
MS M CONNOR

**HEARD** : 5 MAY 2003

**DELIVERED** : 28 JULY 2003

**FILE NO/S** : APP 112 of 2002

**BETWEEN** : GEOFFREY M PARFITT  
Appellant

AND

CITY OF MANDURAH  
Respondent

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*Catchwords:*

Appeal against conditions - Direct access to Foreshore Reserve - Turns on own facts

*Legislation:*

Nil

*Result:*

Appeal dismissed.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr H Sklarz
Respondent	:	Mr E Samec

*Solicitors:*

Appellant	:	Henry Sklarz
Respondent	:	Kott Gunning

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

Nil

**MS W F BUCKLEY, MS B MOHARICH, MS M CONNOR:**

- 1     This is an appeal by the Appellant against a condition imposed by the Respondent when granting approval to commence development by building a house on land at No. 19 (Lot 855) Beachview Court, Wannanup (“**Lot 855**”).
- 2     Development was approved on 5 July 2002 and was subject to a number of conditions. The condition specifically appealed against is No. 5 which reads as follows:

“No steps or access shall be permitted from the rear of the subject lot to the adjacent Foreshore Reserve unless the written approval of the City of Mandurah is granted”.
- 3     The Appellant, through his solicitor, sought the prior written approval of the Respondent to construct steps and access through an existing built wall to the foreshore by facsimile on 7 August 2002. Approval was refused on 8 August 2002 and the Appellant thereafter appealed against the imposition of the condition.
- 4     The grounds of appeal are lengthy but can be summarised as:
  - (a)   Other lots in subdivision (Lots 271-296 (inclusive)) have rear access gateways to the adjacent Foreshore Reserve which access was included by the developer in the rear walls built by it;
  - (b)   The rear access would provide safe, convenient and direct access to the beach;
  - (c)   The developer, Menzies Court Holdings Ltd, approved the building plans on 21 May 2002 and those plans included the proposed steps, gate and access way through the existing rear wall;
  - (d)   The proposed rear access will not compromise the integrity of the existing rear wall which wall operates as both a retaining wall and fence;
  - (e)   Rear access will aesthetically complement the existing development and construction; and

- (f) The developer built the rear wall, the dual access path running behind the wall on the Foreshore Reserve and landscaped the area of the reserve immediately behind Lot 855 so any suggested environmental damage to that area would only be to construction “infill” and not to an environmentally sensitive area.
- 5 The Appellant also offers to construct a path from the proposed access gate across the Foreshore Reserve to a dual use path running behind the Appellant’s property, as required by the Respondent.
- 6 The Respondent opposes the appeal on the basis that:
  - (a) The Appellant has convenient and safe access to the beach without resorting to steps and an access gate in the wall at the rear of Lot 855;
  - (b) Access to the Foreshore Reserve through the rear of Lot 855 would directly affect a small area but would have a significant impact given the small amount of native vegetation in this area of the reserve.
  - (c) More importantly, access could encourage short cuts from the dual use path to the beach and create a precedent for other lots in the immediate vicinity of Lot 855 for rear access to the beach. Increased access was likely to have significant adverse environmental and amenity effects on the area; and
  - (d) Lot 855 falls within sector 4 of the subdivision while Lots 271-296 fall within sector 1. Different subdivisional design and topography mean that the rear access gates through the rear walls of Lot 271-296 should not be considered a precedent.

### **Background of subdivisional process and description of area**

- 7 Lot 855 falls within a large subdivision known as “Northport” that runs from immediately adjacent to the Dawesville channel in a north easterly direction along the coast.
- 8 Between the subdivision and the ocean is an area of land classified as “Conservation and Foreshore Reserve” (“**the Foreshore Reserve**”) ceded to the Crown by the subdivider as part of the conditions of subdivision.

- 9 It is strongly anticipated that the Foreshore Reserve will be gazetted as a Crown Reserve and vested in the City of Mandurah.
- 10 The Foreshore Reserve is subject to the Northport Foreshore Management Plan (“FMP”) which plan was produced as part of the conditions of subdivision.
- 11 The FMP is a detailed plan that plans, inter alia, for:
- (a) the recreational enjoyment of the beach by the community and the immediate residents by way of the provision of infrastructure to support that use, such as car parks, dual use walking/cycling paths, beach access paths and toilets and change rooms; and
  - (b) the rehabilitation and maintenance of the dunal system that forms part of the Foreshore Reserve.
- 12 The Northport subdivision has been undertaken in stages. The first stage, Sector 1, was approved in September 1996.
- 13 Sector 1 covers the southern most coastal section of the subdivision. It runs from the Dawesville Channel to Westview Parade. Lots 271 – 296 (inclusive) are in Sector 1.
- 14 Sector 4 is a more recently approved area of the subdivision. It covers the northern most coastal section of the subdivision. Lot 855 is included in Sector 4. The final design for Sector 4 was approved in April 2002.
- 15 The design of the two sectors varies significantly. Sector 1 incorporates conventional subdivisional design. The result of this is that, but for the rear access gates, the residents of Lots 271 – 296 would have to walk considerable distances (up to 500m) along Voyager Close, Abroholos Quays, Hartog Pass and Westview Parade before gaining access to the beach.
- 16 Sector 4 has been designed using different principles. Beachview Court, the street on which Lot 855 is found, is about 150 metres long. It links to a public carpark providing foreshore access at the south and to the dual use path servicing the Foreshore Reserve at the north.
- 17 Lot 855 is the second most northerly block on Beachview Court. Only Lot 856 lies between Lot 855 and a part of the dual use path which runs along the side boundary of Lot 856 before joining that part of the dual use

path that runs along the Foreshore Reserve roughly parallel, but not immediately adjacent to, the rear of the Beachview Court lots.

- 18 Lot 855 is a 502m<sup>2</sup> residential lot zoned R20. The front and rear boundaries are approximately 17 metres in length. From the plan supplied, Lot 856 is a similarly sized lot although it is not quite rectangular and so the front boundary is a little longer than 17 metres. It is the Respondent's evidence that it is no more than 30 metres from Lot 855 along the road reserve or verge in front of Lot 856 to access the dual use path alongside Lot 856.
- 19 In common with lots adjacent to it, Lot 855 has at its rear boundary a wall built by the developer of the subdivision as part of the subdivision approval.
- 20 A similar wall has been built by the subdivider at the rear of all lots whose rear boundaries abut the Foreshore Reserve.
- 21 As stated above in the case of Lots 271 to 296 the walls have gaps to provide access from the rear of the lots to the Foreshore Reserve.
- 22 In the case of Lots 271 to 296 the wall forms a fence between those lots and the Foreshore Reserve. A limestone path runs adjacent to the outside of the wall and links to another concrete dual use path from which there is beach access.
- 23 Behind Lots 271 to 296 the Foreshore Reserve is a steeply sloped and well covered with dense coastal heath vegetation. It falls sharply down to the beach.
- 24 In contrast the topography of the Foreshore Reserve behind Lot 855 is very different to that found behind Lots 271 to 296.
- 25 Lot 855 is on a higher level than the Foreshore Reserve and the existing rear wall is both a retaining wall up to a height of 2 metres and above that a fence.

### **The Appellant's Proposed Steps and Access to the Foreshore Reserve**

- 26 The Appellant's proposal is to build steps inside the existing wall down to the level of the adjacent Foreshore Reserve, to cut the wall to provide access and to install a gate. Immediately outside the wall on the Foreshore Reserve is an area of rehabilitated dune some 13 metres wide and then the dual use path.

- 27 At the appeal the Appellant proposed, in order to minimise interference to the Foreshore Reserve between the gate and the dual use path, that he would, at his expense, build either:
- (a) a limestone path roughly parallel with the rear of the existing wall joining up to the concrete dual use path;
  - (b) a limestone path over the shortest distance to the concrete dual use path roughly perpendicular to the wall; or
  - (c) an above ground timber decking pathway, over the shortest distance to the concrete dual use path, perpendicular to the wall.
- 28 In each case the path would be on the Foreshore Reserve and not on the Appellant's land.

### **Decision**

- 29 The Appellant says the proposal will have the following outcomes:
- (a) to provide safe and convenient access to the beach for the Appellant and his family without the inconvenience of walking along the front of Lot 855, on either the road or the verge (the road reserve) then onto the concrete dual use path alongside Lot 856;
  - (b) to improve the amenity and facility of Lot 855 by giving direct beach access; and
  - (c) to greatly appreciate the value of this home as it would be considered a beachside residence.
- 30 We do not doubt that the proposal for stairs and access will have the outcomes desired by the Appellant but there is a very real risk that those outcomes will be gained at the expense of damage to the Foreshore Reserve and the enjoyment by the general community of the Foreshore Reserve and beach.
- 31 The Respondent led evidence of Dr Paul Van Der Moezel who holds the qualification of Bachelor of Science (Honours) majoring in botany and Doctor of Philosophy (major in botany). Dr Van Der Moezel has worked as a full time environmental consultant since 1991 in the area of environmental impact assessment of urban land development. Much of his work has been in the area of land development in coastal areas and he

has prepared numerous coastal surveys, planning strategies and foreshore management plans including the original FMP for this submission.

- 32 Dr Van Der Moezel's evidence addressed several main points: the first was the likely effect on that part of the Foreshore Reserve immediately outside the rear wall of Lot 855 if access was allowed; second, the possible environmental effects of rear access from other lots in Sector 4; and last, the differences between Sector 4 and Sector 1.
- 33 Dr Van Der Moezel's evidence confirmed the Appellant's assertion that the vegetation between the rear of Lot 855 and the dual use path was replanted in fill. The area had been earthworked in the past and the native vegetation removed but, Dr Van Der Moezel said it had been rehabilitated using native vegetation appropriate to that part of the coastal environment. Dr Van Der Moezel inspected the area on 16 April 2003 and it was his opinion that rehabilitation was going very well and in due course the area would be rehabilitated to a natural coastal heathland.
- 34 Dr Van Der Moezel's opinion is supported by the photographic evidence in this matter. The Appellant put into evidence photographs annexed to this notice of appeal which is dated August 2002. The Respondent also put into evidence photographs taken on 24 April 2003. A comparison of those photographs show significant growth to the area in that 8 month period.
- 35 Dr Van Der Moezel conceded that access across that area, especially if access could be controlled by the building of a connecting path, would have only a minor impact on the immediate area behind Lot 855.
- 36 He pointed out, however, that the Foreshore Reserve was, at this point of the subdivision, narrow. There was as little as 40 metres between the line of permanent vegetation and residential lots.
- 37 Dr Van Der Moezel said that if all of the lots abutting the Foreshore Reserve had direct access vegetation clearing would be considerable especially in the context of the narrow strip that was there.
- 38 Dr Van Der Moezel also expressed doubts, based on his experience, that the building of a connecting path would control or minimise ongoing interference with existing vegetation because access tracks could and probably would be made in several directions by pedestrians who wanted to link to the dual use path.



- 39 Finally, he said that it was his experience that the result of providing such direct access was that people enjoying it would often not then use the dual use path provided to access the beach but would continue in a straight line, a short cut, through to the beach. Such uncontrolled access had the potential to cause significant damage to the coastal heath by weed increase and wind erosion.
- 40 If uncontrolled access was also undertaken by other adjacent land owners directly accessing the beach the problems would be magnified.
- 41 Dr Van Der Moezel also gave evidence about the differences between the position of Lot 855 and Lots 271-296.
- 42 With respect to Lot 855 once outside the rear wall, the land is relatively flat and there is no deterrent to taking a short cut. Lots 271-296 differed because:
- (a) no vegetation needed to be removed to build the limestone path that runs along the rear walls of those lots which connects to the dual use path;
  - (b) the steep fall away from the rear of those lots to the beach discouraged taking shortcuts through the coastal heath and encouraged the use of the dual use path; and
  - (c) the subdivisional plan of Sector 1 (where Lots 271-296 are found) did not allow for readily alternative access to the dual use path.
- 43 Dr Van Der Moezel did admit that it still remained to be seen if the direct access from Lots 271-296 would work as most of those lots had not yet been built on.
- 44 Dr Van Der Moezel's evidence was supported by the evidence of Ilyia Jane O'Malley, an environmental planning officer employed by the Respondent. Ms O'Malley was an impressive witness. She was well familiar with the site and is among other things, the Project Manager for the development of a Mandurah Coastal Management Plan for the whole of Mandurah's coastline.
- 45 Ms O'Malley's evidence is that access through foreshore areas needed to be controlled to ensure "that conservation, recreation and aesthetic integrity of the foreshore is maintained".

46 Ms O'Malley said that the Northport FMP that was in the process of being implemented which included:

- (a) the closure of redundant tracks and general rehabilitation of the vegetation in the Foreshore Reserve;
- (b) eroded dunes were being stabilised;
- (c) new formal (ie concrete) dual use paths were being established to control access; and
- (d) signs were being erected.

47 The result was, she said, healthier and denser vegetation cover that was essential to long term stability of the foreshore.

48 Ms O'Malley said that in this area there had been erosion of approximately 50 metres of the coastal strip over the preceding 50 years and the best way to prevent such erosion was to stabilise the dune system through vegetation coverage. The single biggest threat was erosion due to the removal of vegetation.

49 Ms O'Malley confirmed Dr Van Der Moezel's experience that in her experience there was a tendency in people with direct foreshore access to take a short cut across the dunes to get to the beach, regardless of the damage caused.

50 Ms O'Malley said that in the Northport FMP access to the beach had been designed to take account of pre-existing tracks to the beach. These pre-existing tracks showed the route preferred by people and allowed the building of more formal paths with minimal removal of vegetation.

51 Ms O'Malley agreed with Dr Van Der Moezel as to the differences between Lots 271-296 and Lot 855.

52 Ms O'Malley was also able to say that the Respondent had spent over \$800,000 in the preceding 6 years on coastal protection and a large part of that budget was to provide controlled beach access in order to reduce erosion.

53 Ms O'Malley said that to date people were using the formal access to the beach provided by the Respondent, except in one particular place close to Lots 271-296. So, to date, there had been no need to fence the formal access paths. Should off path beach access become more prevalent fencing of the paths may need to be undertaken.

- 54 In Ms O'Malley's view the stairs and access gate proposed by the Appellant were inconsistent with the good work of rehabilitation carried out in the area over the preceding few years.
- 55 The Appellant led no expert evidence that was contrary to the evidence of Dr Van Der Moezel or Ms O'Malley.
- 56 The Appellant contended that his proposal would minimise interference with the vegetation on the Foreshore Reserve because it would be easier for him to control access to the dual use path with stairs, a gate and a path, than to control his teenage children's friends from dropping over the rear fence and having access to the dual use path in that way.
- 57 The wall at the rear of Lot 855 is some 2.85 metres high on the outside of the Lot and there are brick pillars and wire between them above that. The wall is only 1 metre above the ground inside Lot 855.
- 58 With the greatest respect to the Appellant the Tribunal considers the possibility of such ad hoc access via a 2.85 metre drop from the fence to be less problematic to the Foreshore Reserve than continual access from a stairs and gate. This is purely because there are less people likely to hazard the drop than will use the stairs. Further, bicycle access across the reserve is unlikely if it involves a drop or climb of 2.85 metres with bike in tow.
- 59 The Appellant's offer to build an accessway between the proposed gate and the concrete dual use path is not an appropriate solution.
- 60 While the offer shows that the Appellant clearly understands that his proposal brings with it the risk of environmental degradation, in our view it would not be acceptable to impose on the Respondent that it have such an accessway built on land for which it will ultimately have responsibility.
- 61 The Appellant also relied heavily on his personal concerns about safety in accessing the Foreshore Reserve along the roadway. We have described above the access from the front of the lot to the Foreshore Reserve. The Tribunal finds that those current access arrangements are convenient and the distance to be saved by allowing direct access is minimal.
- 62 The Tribunal accepts the Respondent's evidence that access to the dual use path across the verge or road reserve at the front of the adjoining lot without having to cross a road should prove to be safe especially given that Beachview Court is a no through road.

- 63 The Tribunal considers that allowing direct access to the foreshore at Lot 855 will give rise to an expectation of such access from other nearby lots.
- 64 Unlike Lots 271-296 the Beachview Court lots were clearly not sold with direct Foreshore Reserve access, there is no stairs or gap in the fence. The Appellant had no expectation of direct access until it was suggested by his architect.
- 65 The Tribunal also does not consider that Lots 271-296 form a precedent for direct access. The considerations pertaining to those lots is sufficiently different to those pertaining to Lot 855 for the reasons discussed above.
- 66 Indeed there is good reason to limit direct access to the Foreshore Reserve and the Tribunal accepts that access should be so limited.
- 67 In all those circumstances the Appellant's appeal must fail. The appeal is dismissed.