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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**CITATION** : NEWELL NOMINEES PTY LTD and WESTERN  
AUSTRALIAN PLANNING COMMISSION  
[2003] WATPAT 44

**CORAM** : MS W F BUCKLEY  
MR L GRAHAM  
MR R HOPE-JOHNSTONE

**HEARD** : 22 MAY 2003

**DELIVERED** : 28 JULY 2003

**FILE NO/S** : APP 47 of 2003

**BETWEEN** : NEWELL NOMINEES PTY LTD  
Appellant

AND

WESTERN AUSTRALIAN PLANNING  
COMMISSION  
Respondent

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*Catchwords:*

Rural land - Appeal against refusal to allow subdivision into lots smaller than recommended minimum, whether sufficient grounds - undesirable precedent - Turns on own facts

*Legislation:*

Nil

*Result:*

Appeal allowed subject to conditions.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr H Dykstra
Respondent	:	Mr C Bydder

*Solicitors:*

Appellant	:	As Agent
Respondent	:	Crown Solicitor's Office

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

Nil

**MS W F BUCKLEY, MR L GRAHAM, MR R HOPE-JOHNSTONE:**

- 1 This is an appeal from a decision of the Western Australian Planning Commission (“**WAPC**”) to refuse an application by Newell Nominees Pty Ltd to subdivide its land at Lot 111 Soldiers Road, Roleystone being the land contained in Certificate of Title Volume 2129 Folio 428.
- 2 The plan of subdivision proposed that Lot 111 be divided into two new lots of approximately 1.8ha in size of relatively regular shape. Both proposed lots are intended to access Soldiers Road.
- 3 The WAPC’s grounds of refusal were:
  - “1. The Commission is not prepared to approve the subdivision as the resultant lot sizes would be below the minimum indicated by the Local Government’s Town Planning Scheme;
  2. Approval to the subdivision would create an undesirable precedent for the further subdivision of other lots of a similar size in the Rural Zone of the locality;
  3. The land is zoned “Rural” in the Metropolitan Region Scheme and in Council’s Town Planning Scheme. The purpose and intent of this zoning is to preserve the areas (sic) current rural use and diversity of development. Subdivision in the manner proposed would create the potential for additional building development and the introduction of increased non-rural activities in conflict with zoning objectives.”
- 4 The land is indeed zoned Rural under the City of Armadale’s Town Planning Scheme No. 2 (“**TPS2**”). It is common ground that the land is zoned Rural D which is a sub-category of the Rural zoning.
- 5 It is also common ground that subdivision of this land is allowable and that the provisions of table 2.8 TPS2 that are headed “Recommended Minimum Subdivisional Standards” would apply.
- 6 Table 2.8 TPS2 goes on to say that for Rural D the minimum lot size is 2ha and the average lot size is 3ha.

7      Relevantly table 2.8 also provides:

“The preceding standards shall not be departed from unless the Town Planning Board, or the Minister or Town Planning Appeal Tribunal on appeal is satisfied that sufficient grounds exist to occasion such departure.”

8      The Appellant’s case is that:

- (a)    the subdivisional standards set recommended minimum lot sizes not minimum lot sizes (emphasis ours);
- (b)    the WAPC usually applied ‘recommended’ minimum lot sizes rigidly and did so in this case even though it had departed from them in some instances;
- (c)    the proposed lots only vary 10% from the ‘recommended’ minimum lot size;
- (d)    the proposed subdivision would be consistent with the surrounding area;
- (e)    the status of the City of Armadale’s Rural Strategy (on which the WAPC is now relying) is doubtful and in any event demonstrates a broad mapping approach which is not appropriate to the particular site;
- (f)    the development would not be visible from surrounding public areas;
- (g)    the subdivision would result in the City of Armadale being able to more effectively maintain the integrity of the Rural D area as it would have greater control over what was built there; and
- (h)    neither a subdivision guide plan nor an environmental assessment should be required (a matter also now raised by the WAPC).

9      In response to the appeal the WAPC says:

- (a)    There are a variety of Planning documents that have application to the proposed subdivision. In particular TPS2, the City of Armadale Rural Strategy, WAPC

Policy No DC3.4 “Subdivision of Rural Land” and Statement of Planning Policy No. 11;

- (b) TPS2 sets out a minimum lot size of 2ha and an average of 3ha for the zone. It also requires the preparation of a Subdivision Guide Plan which has not been done;
- (c) The City of Armadale Rural Strategy may not have been formally endorsed by the WAPC but it had been adopted by and consistently applied by the City of Armadale with respect to like applications;
- (d) The Subdivision and Development Guidelines in the Rural Strategy, applicable to this land:
  - (i) Require an environmental assessment to demonstrate the suitability of the land for subdivision; and
  - (ii) Provide that subdivision in an area of “low potential” (of which this is one) was not encouraged.
- (e) WAPC Policy DC 3.4 at 3.1.1 contained a general presumption against the subdivision of rural land “unless it is specifically provided for in a town planning scheme, an endorsed local planning strategy or an endorsed local rural strategy”;
- (f) Statement of Planning Policy No. 11 (which is read in conjunction with Policy DC3.4) states at clause 5.3.1(iii), that the Commission will only support subdivision for rural residential “where the land has been appropriately zoned within the Town Planning Scheme and the provisions of Policy No DC3.4 (2001) clause 6 can be complied with.”;
- (g) Statement of Planning Policy No 11 includes in its objectives “discourage development and/or subdivision that may result in land or environmental degradation”;
- (h) The Appellant is obliged, in accordance with those planning documents, to establish sufficient grounds to enable subdivision other than in accordance with the

minimum lot size. In that regard on a proper construction of the provision the minimum standard is a direct statement of statute rather than a recommended standard;

(i) The Appellant has not shown sufficient grounds, indeed not any grounds because:

(i) other equivalent lot sizes were created before TPS2 was put in place;

(ii) a 10% departure doesn't weaken the requirement to show sufficient grounds;

(iii) there has been no environmental assessment;

(iv) no guide plan has been prepared;

(v) because of the Rural Strategy, increased density was not to be encouraged; and

(vi) subdivision may increase the risk of erosion.

10 The planning documents referred to by the WAPC are, in our view, all relevant to the exercise of the discretion that the Tribunal exercises on this matter.

11 However, we do not accept the WAPC's argument that TPS2, Table 2.8, constitutes a direct statement of statute if that has the result that the subdivisional standard is to be read as a minimum standard of 2ha rather than a recommended minimum standard. To apply such a construction would be to ignore the clear heading of Table 2.8 "Recommended Minimum Standards".

12 In any event, even if the WAPC's argument in that regard was correct, it is clear that a very wide discretion to vary the standard is provided in Table 2.8 by the words:

"The preceding standards shall not be departed from unless the Town Planning Board, or the Minister or Town Planning Appeal Tribunal on appeal is satisfied that sufficient grounds exist to occasion such departure."

13 The WAPC concedes that those words "sufficient grounds" impart the widest possible discretion to take into account matters relevant to planning.

- 14 When weighing up whether there are sufficient grounds, it is necessary to take into account any approved statements of planning policy prepared pursuant to s.5AA of the *Town Planning and Development Act* (“**Act**”): s.53(1) of the Act.
- 15 Statement of Planning Policy No 11 is such an approved statement of planning policy. We have referred to the relevant policy objective above at paragraph 9(g). That policy objective needs to be read in conjunction with clause 5.3 that sets out the requirements for Town Planning Schemes to “control the planning and development of rural settlements”. In particular, clauses 5.3.1 and 5.3.2 set out the general Scheme provisions for rural settlement.
- 16 Clause 5.3.1 says:
- “(i) Land identified in the Local Planning Strategy as being suitable for closer settlement in rural areas should be zoned “Rural-Residential” for residential use in a rural environment, as “Rural Smallholdings” for residential use in association with a rural pursuit, or “Residential”, in order for townsite expansion ...”.
  - (ii) In areas zoned “Rural-Residential” or “Rural Smallholdings”, town planning scheme provisions should provide for:
    - (a) The requirement for a sub-division guide plan;
    - (b) Restrictions on the type and scale of any agricultural land uses or rural pursuits;
    - (c) The identification of clearing, land management controls and environmental repair requirements including the retention of areas of remnant vegetation or regeneration of degraded areas;
    - (d) The identification of either a building envelope, or building exclusion area, on each lot to which all development is restricted;
    - (e) The restriction of developments to only one dwelling per lot;
    - (f) The control over the location of development (including the siting of dwellings, ancillary

buildings, service roads and firebreaks) so that it does not significantly detract from any scenic landscape and/or conservation attributes;

- (g) Compliance with State and local government environmental and health standards in respect of dwellings and ancillary buildings and the associated services (ie drainage and wastewater disposal);
  - (h) Requirement for all structures in high bushfire risk areas to be constructed to Australian Standard AS3959;
  - (i) Road design to allow for safe egress in event of an emergency;
  - (j) The preparation and implementation of bushfire management plans; and
  - (k) Any other matter that arises from the preparation of the local government's settlement strategy.
- (iii) The Commission will only support subdivision for Rural-Residential and Rural Smallholdings where the land has been appropriately zoned within the town planning scheme and the provisions of Policy No. DC 3.4 (2001) Clause 6 can be complied with. “

17      **Clause 5.3.2:**

- “(i) In areas zoned “Rural-Residential” the following town planning scheme provisions should apply in addition to those listed in 5.3.1(ii);
- (a) the lot size should range from 1 ha to 4 ha depending on local conditions; and
  - (b) mandatory provision of a reticulated potable water supply to an appropriate standard as determined by the licence holder.”

18      In our view these provisions, when read together, do not discourage the subdivision of rural land as was submitted by WAPC – what is discouraged is subdivision other than in accordance with the relevant



town planning scheme and in an uncontrolled fashion that does not take into account the rural character of the land.

- 19 Policy No DC 3.4 is similarly to be construed. Clause 3.1.1 and clause 4.1.1 make it clear that the subdivision of rural land is presumed against unless it is provided for in the relevant Town Planning Scheme or endorsed local rural strategy.
- 20 Clause 6 also sets out a list of additional information that may also be considered in assessing whether to allow a subdivision. Relevant matters that could have arisen under that clause were not raised independently of other issues raised by the WAPC that we discuss below.
- 21 Here TPS2 allows subdivision of Rural D land, sets recommended minimum standards and sets a wide discretion to allow subdivision outside of those recommended minimums.
- 22 The City of Armadale Rural Strategy cannot be described, in our view, as an endorsed Local Rural Strategy. The evidence of the WAPC's witness, Mr Paul Rosser, was that it had been adopted by the City of Armadale which was in the process of seeking approval from the WAPC to advertise the Strategy and it is only after advertising that the Strategy will go to the WAPC to be endorsed.
- 23 It is always possible that the advertised Rural Strategy may change significantly during the advertising and endorsement process.
- 24 Nevertheless the "Subdivision and Development Guidelines" do, in our view, provide assistance in identifying the types of issues that are of concern in this type of subdivision application and that are of particular concern on this application.
- 25 We have referred to the WAPC's submissions in regard to these guidelines. The guidelines deserve reproduction in full:

"The potential for subdivision and development within this area is to be based on the following:

- An assumption that environmental assessment will be required to demonstrate suitability of land for subdivision.
- An assumption of encouragement for rural residential development in most sectors of the precinct, other than areas categorised Low Potential or Unsuitable.

- An assumption that existing well defined and developed rural residential estates or localities, manifesting a rational structure and basis for existing lot style, should be maintained.
- An assumption, particularly along major transport linkages and along steeper valley sections, that visual impact will be an overriding concern.
- An assumption that there will be a general gradation of lot sizes with larger lots located along valley floors and slopes, smaller lots located on plateaux.
- Consideration of Special Residential in the context of Commission Policy DC 2.5 subject to environmental justification and coupled with innovative design and mechanised to achieve aims of:-
  - immediate landscape enhancement in accord with environmental and visual objectives;
  - ongoing uniform land management undertaken by land proprietor(s);
  - high standards of servicing, amenity and residential quality;
  - maintenance of the primary visual qualities of the rural area;
  - maintenance of a significant open rural landform by off setting more intensive development against desirable broad acre land use which contribute positively to the rural environment and economy.

- 26 The guidelines are drafted in terms of assumptions. In our view assumptions are a starting point and can be displaced in appropriate cases by a consideration of the circumstances particular to the proposed subdivision and the evidence led by the parties.
- 27 The WAPC relied heavily on only the first, second and fourth dot point of the guidelines.
- 28 The WAPC raised two environmental issues based on the information contained in the Rural Strategy at Map 4 and Map 5. The land is noted as

being in an area that is “very high or highly susceptible to water erosion” (map 4) and in an area that contains remnant vegetation (map 5).

- 29 The Rural Strategy at section 2.5 “land degradation” has this to say about water erosion:

“Under agricultural land uses, large cleared areas can be exposed to water erosion and, where rainwater runoff is easily generated, the effects on soil capability and general degradation of the land resource can be significant. Under residential or rural-residential land uses, water erosion is most commonly shown by saltation of roads or drains, and by gully formation where drainage design is inadequate.

Within the City of Armadale areas, the Darling Range and foothills are most at risk of gulying or sheet erosion caused by water, although limited areas on the coastal plain can be affected by streambank erosion during local flood situations.

The Darling Range and foothills sector of the Municipality is subject of much higher rainfall than that normally associated with Perth Metropolitan area. Rainfall events in the hills are also characterised by their intensity and propensity to trigger localised erosion, scouring and flooding. Special care and attention should therefore be given to assessing micro-climate characteristics and resultant rainwater runoff implications to all land use planning and development proposals in the hills area.”

- 30 Mr Dykstra addressed the matter of water erosion in his evidence.
- 31 Mr Dykstra is a qualified and experienced town planner practicing since 1990. He has significant Local and State Government town planning experience in the locality including involvement in the preparation of the City of Armadale draft Rural Strategy while employed by the City.
- 32 Mr Dykstra’s evidence was that he had walked the site and he demonstrated during his evidence that he was well familiar with the site.
- 33 His evidence was that there was clearly the possibility of erosion arising from the steep topography of the site. However, Mr Dykstra said that possibility was lessened when proper building techniques were used. Here the proposed siting of two building envelopes (one on each lot of the proposed subdivision) with a shared road or accessway along the southern

boundary of the lots providing access to each lot minimised disturbance to the property.

34 Mr Dykstra's opinion in that regard seemed to us to be well considered. He had taken into account the steep topography. His evidence was that the proposed building sites were on relatively level areas of the site and the accessway was designed to create as little disturbance as possible to cut along the contours of the steeper parts of the access which would minimise the potential for erosion and earthworks. The accessway would run parallel to the accessway on the adjoining lot which would also minimise the risk of erosion.

35 By contrast, the WAPC's position was a very general one - Extra development would increase the risk of erosion. The WAPC did not lead evidence from witnesses as well familiar with the site nor did it refute by way of evidence the role to be played by appropriate building controls.

36 We are satisfied by Mr Dykstra's evidence arising from his careful consideration of the site that potential erosion to the site can be appropriately managed by building controls.

37 There was also the issue of the remnant vegetation on the site. Once again, Mr Dykstra's familiarity with the site was of great assistance.

38 Mr Dykstra's evidence was that there was certainly remnant vegetation but that when he walked the site it became apparent that there was a lot of overhead canopy but minimum understorey.

39 He said that the two sites proposed as building envelopes and the accessway were designed to achieve as little removal of vegetation as possible. This was supported by photographs.

40 Mr Dykstra's evidence in this regard was not challenged by opposing evidence.

41 We are of the view that there is a risk of environmental damage to the site from water erosion and removal of vegetation however, we accept Mr Dykstra's evidence that those risks can be appropriately managed.

42 It seems to us the Appellant has satisfactorily displaced the assumption that an environmental assessment is required for this site.

43 Turning now to Guideline 2 – it was common ground that the land falls within an area categorised as having low potential for subdivision and development.

- 44 In our view, Guideline 2 does not, on a proper reading, mean that subdivision is to be actively discouraged in areas of Low potential.
- 45 There is simply no assumption that subdivision will be encouraged.
- 46 Here the rating of “low potential” for subdivision has arisen because of the risks of erosion and the desire to maintain remnant vegetation associated with the site.
- 47 We have already dealt with the evidence relating to those matters and are of the view that the risks can be managed and that disturbance to remnant vegetation would be minimal on this particular site.
- 48 We consider that Guideline 3 is of considerable importance to this appeal. The land in question is in the area zoned Rural D bordered by Brookton Highway to the North, Soldiers and Butcher Roads to the East, Stocker Road to the West and the Canning River and a recreation reserve to the South.
- 49 The land itself has frontage onto Brookton Highway and Soldiers Road. Next to it to the West, on Brookton Highway, are two lots of 1.84ha and 1.54ha respectively. To the South on Soldiers Road and Butcher Road are, in order, lots of 1.55ha, 0.27ha, 0.58ha, 0.32ha, 0.67ha and 1.97ha size.
- 50 There are five more lots on Butcher Road that are larger than 2ha and less than 3ha.
- 51 It seems clear to us that the immediate surrounding lots constitute an existing well defined and developed rural locality with a character of lots smaller than the recommended minimum size.
- 52 Further while there are larger lots in the immediate area all are potentially able to be subdivided into lots of or just exceeding the minimum recommended size of 2ha.
- 53 It was put to Mr Dykstra that the average size of Rural D lots over the whole of the City of Armadale was 2.3055ha. TPS2 clearly has, as a preferred outcome in Rural D Zone, lots approaching the average of 3ha but the reality is that across the City the average lot size is significantly below that and, in this locality, the lots are a lot smaller.
- 54 The WAPC contends that those lots of less than 2ha in the area were subdivided before TPS2 came into force. That no doubt is the case.

- 55 However, it is also the case that the proposed subdivision would fit the character or style of the immediate area created by the smaller lots. Guideline 3 asks us to assume that where, as here, there is a rational structure and basis for maintaining the existing lot style, that the lot style be maintained.
- 56 Looking to Guideline 4, there was an issue as to whether houses built on the proposed subdivision would be visible from public areas.
- 57 The evidence of the parties differed as to this point but we prefer that of Mr Dykstra whose familiarity with the site arising from close inspection, was more persuasive. His opinion was that houses built on the proposed building envelopes could not be seen.
- 58 Guideline 5 was not given any attention by either of the parties at the hearing of the appeal. It seems to us that it is concerned with addressing both the sorts of matters we have dealt with above and the maintenance of the rural character and land maintenance.
- 59 Guideline 6 addresses applications for a Special Residential subdivision and is not relevant to this appeal.
- 60 What remains is a consideration of whether there are “sufficient grounds” as referred to in TPS2 to warrant subdivision into lot sizes that are smaller than the recommended minimum size.
- 61 In our view the “sufficient grounds” arise here from:–
- (a) The fact that the established character of the immediately surrounding area is of smaller lot sizes with which these lots would be in keeping; and
  - (b) The variation here is only 10% below the recommended minimum which difference is not so great to be, of itself, prohibitive.
- 62 There are some other matters that require comment. The issue of a subdivision guide plan is one.
- 63 It was common ground that the City of Armadale does not usually require a subdivision guide plan for two lot subdivisions. In those circumstances we do not consider that there is any necessity for such a plan.
- 64 There was an issue about the WAPC having approved three other subdivisions elsewhere in the City where lots were less than the

recommended minimum size for the Rural D zone. The Appellant complained of a lack of consistency by the WAPC.

65 We do not agree. Each application for subdivision should be considered on its merits. We do not consider those other subdivisions created any precedent.

66 In summary, we would allow the appeal but subject to appropriate conditions relating to the siting of the building envelopes, the construction of the accessway, such conditions that will ensure buildings are not able to be viewed from the highway and other conditions that will minimise the risk of erosion and providing for a minimal removal of vegetation. We will hear the parties on those conditions.