
JURISDICTION : TOWN PLANNING APPEAL TRIBUNAL

CITATION : COENEN and CITY OF NEDLANDS
[2003] WATPAT 45

CORAM : MR D BROWN

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 23 JULY 2003

FILE NO/S : APP 121 of 2003

BETWEEN : M COENEN
Appellant

AND

CITY OF NEDLANDS
Respondent

Catchwords:

Definition of storey - Height of residential building - Nature of basement use - Town Planning Scheme height restrictions - Building Codes of Australia - Lack of Discretion to vary standards

Legislation:

Nil

Result:

Appeal is dismissed.

Category: B

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

Nil

MR D BROWN:

- 1 This appeal is against the refusal of the Council of the City of Nedlands (“**Council**”) to grant planning approval to a three-storey house (“**development**”) on Lot 58 (Number 46) Robinson Street, Nedlands (“**site**”).
- 2 The site is zoned Residential in the City of Nedlands Town Planning Scheme No.2 (“**scheme**”).

The Proposal

- 3 The development proposes the demolition of the existing dwelling on the site and construction of a three level house. The Appellant describes the development as a two-storey house with an ‘undercroft’ containing a theatre and rehearsal room. According to the Appellant the undercroft is located wholly below ground level to prevent noise from the proposed uses in that part of the house from impacting on neighbours. The ground and upper level will present as a conventional two-storey house, similar to neighbouring development. According to the Appellant the theatre and rehearsal room on the lower level are a basic requirement of the new residence, and for the use and enjoyment of the Appellant’s children who are involved in the performing arts.

The Decision

- 4 By notice dated 30 August 2002 the Respondent notified the Appellant that planning approval had been refused for the following reason:

“Non-compliance with Clause 5.11 of the City’s Town Planning Scheme which only permits two storeys directly above each other in the case of residential use. The proposed dwelling contains three storeys directly above each other (for residential purposes as described below) hence contrary to this Scheme:

Undercroft floor Plan

The dwelling proposes an undercroft theatre and Rehearsal Room (Residential Uses) (and a Cellar – an ‘ExcludedUse’).

Ground Floor Plan

The ground floor plans (directly above the undercroft floor) depict a Family Room, Kitchen, and Dining Room (Residential Use); and a Stairwell and Powder Room, (Excluded Uses).

Upper Floor Plan

The upper floor directly above the undercroft floor and ground floor is part of Bedroom 4, a Sewing Room and Bedroom 3, (Residential Uses); and the Stairwell and Powder Room ('Excluded Uses')."

Grounds of Appeal

5 The Appellant's submission can be summarised as follows:

- (a) The proposal complies with all of the height provisions of clause 5.11 of the scheme; and the Respondent's interpretation of the basement as a 'storey' is "questionable";
- (b) There have been no objections from neighbours;
- (c) Placing the performing arts uses in the basement is the best way of sound-proofing the uses, and protecting the amenity of neighbours;
- (d) Clause 5.11 of the scheme aims to protect amenity by restricting height; and the development will present like any other two-storey house; and
- (e) The scheme refers to the Building Code of Australia (BCA) for the definition of 'storey', and the BCA should be used to determine 'effective height' and 'rise in storeys'.

Town Planning Scheme Height Restriction

6 Clause 5.11 of the scheme contains a restriction on maximum building height expressed as:

"No site shall be developed or building constructed:

- (i) to contain more than two storeys directly above each other in the case of residential use or three storeys in the

case of other uses, excluding areas for plant and equipment, storage, toilets and the parking of wheeled vehicles;

- (ii) with the height of any part of an exterior wall greater than 8.5m from mean natural ground level at the base of the walls;
- (iii) to exceed 8.5m in overall height facing the primary street frontage, measured from the mean level of the lot boundary at the primary street frontage; and
- (iv) so that any point of the building exceeds a height of 10m, measured from the mean natural ground level around the base of the building or from such other level determined by Council.”

- 7 There is no argument between the parties that the development complies with paragraphs (ii), (iii) and (iv) of clause 5.11, and nothing in evidence to suggest that the three levels of the building are not “directly above each other”.
- 8 The Respondent makes the point (correctly) that the application was required to comply with all four parts of clause 5.11, and questions whether it is within the power of the Tribunal to grant approval to the development, having regard to its nature and the provisions of clause 5.11(i) of the scheme. The Respondent does not otherwise oppose the granting of planning consent.
- 9 Both parties agree that the appeal turns on the interpretation of paragraph (i) of clause 5.11, and the meaning of the word ‘storey’ in particular.

Definition of a Storey

- 10 The Appellant argues that the undercroft is not a storey for the purposes of the scheme because the undercroft is wholly below ground level, and consistent with both the provisions of the BCA and the intent of the scheme. To this end the Appellant provided extracts from the BCA relating to:

“Figure A 1.1 (EH)

Elevation Showing Effective Height of a Building”

This part of the BCA shows how to calculate the **effective height** of a multi-storey building. The effective height of the development is not in question, and the evidence is not helpful in determining the meaning of ‘storey’ as referred to in clause 5.11(i) of the scheme; and does nothing to support the Appellant’s argument that the development should be defined as ‘two-storey’ only.

“Figure C 1.2(2)

Examples of Calculating the Rise of Stories of a Building”

This part of the BCA shows how to calculate the ‘rise in storeys’ of a building for the purpose of determining fire resistance and stability, and gives examples of how the ‘rise in stories’ is to be calculated depending on the extent to which part of a building is below ground level. It confines itself to ‘rise of storeys’, and offers nothing that would put a different interpretation on the definition of ‘storey’ expressed in the BCA as follows:

“**Storey** means a space within a building which is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but if not –

- (a) lift shaft, a stairway or meter room; or
 - (ii) a bathroom, shower room, laundry, water closet, or other sanitary compartments; or
 - (iii) accommodation intended for not more than 3 vehicles; or
 - (iv) a combination of the above; or
- (b) a mezzanine.”

- 11 There is nothing in the extracts from the BCA supplied by the Appellant to suggest that the undercroft in the development the subject of this appeal is not a storey of the building. In fact, far from supporting the Appellant’s argument, the BCA definition of ‘storey’ demonstrates quite clearly that

the undercroft level of the development is a ‘storey’, at least for the purpose of the BCA.

- 12 The Respondent submits that the term ‘storey’ is not defined in the scheme or relevant planning instruments such as the former *Residential Planning Codes*, *Residential Design Codes*, *Town Planning Regulations* (1967) or *Model Scheme Text*, and that the term should be given its ordinary and natural meaning in the context of clause 5.11(i) of the scheme.

- 13 The Respondent goes to some length to demonstrate the meaning of the word ‘storey’ by referring to:

(a) The Shorter Oxford Dictionary:

“Each of the stages or portions one above the other of which a building consists; a room or set of rooms on one floor or level.”

(b) The Macquarie Dictionary:

“1. A complete horizontal section of a building, having one continuous or approximately continuous floor. 2. The set of rooms on the same floor or level of a building. 3. Each of the stages separated by floors, one above the other, of which a building consists.”

- 14 Whilst these definitions are helpful in determining the ordinary meaning of the word ‘storey’, and might otherwise be helpful in determining the appeal, it is not necessary to look any further than the scheme and the Residential Design Codes for the meaning of the word. Clause 1.8 (Interpretation) of the scheme provides that the terms used in the scheme have “the respective interpretations set out in the *Town Planning Regulations 1967* (“**Regulations**”) and the *Residential Planning Codes* (now superseded) except where the terms are separately defined in Clause 1.8.” The term ‘storey’ is not defined in the scheme, the Regulations or the *Residential Planning Codes*. However, it is defined in the *Residential Design Codes* (Codes) which were gazetted as a Statement of Planning Policy under Section 5AA of the Town Planning and Development Act 1928 (as amended) in October 2002. The Codes replace the *Residential Planning Codes*.

15 At clause 5.2 the scheme incorporates the *Residential Planning Codes* by reference. Since those provisions have been replaced by the Codes, and in the absence of anything in the scheme to the contrary, it is to the Codes that we must look to determine whether the undercroft is a storey for the purposes of interpreting clause 5.11(i) of the scheme.

16 At page 22 the Codes provide the following definition:

“Storey

That part of a building between floor levels. If there is no floor above, it is the part between the floor level and the ceiling.”

17 The development consists of three levels, one above the other. From the evidence, each of those levels is a ‘storey’ for the purposes of the scheme.

18 On the Appellant’s evidence the theatre and rehearsal room are intended to be part of the normal residential use of the house and for the enjoyment of the family. Given this, Council is correct in interpreting these uses as part of the normal residential use of the site. Council’s classification of the undercroft uses as residential is not in dispute and, in any event, is not a matter giving rise to an appeal to this Tribunal.

19 In my view the development is a three-storey building for the purposes of clause 5.11(i) of the scheme and, as such, is not permitted. Furthermore, there is nothing in the scheme that would have allowed the Council to exercise discretion and to approve the development. In the circumstances, it is not open to the Tribunal to allow the appeal.

20 The appeal is dismissed.