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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**CITATION** : TOH & ANOR and SHIRE OF MUNDARING [2003]  
WATPAT 47

**CORAM** : MR J JORDAN

**HEARD** : 23 JUNE 2003

**DELIVERED** : 24 JULY 2003

**FILE NO/S** : APP 95 of 2003

**BETWEEN** : TECK CHYE TOH  
ELSIE KANG  
Appellants

AND

SHIRE OF MUNDARING  
Respondent

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*Catchwords:*

Use not listed - Setback - Retrospective approval - Consistent with objectives of scheme.

*Legislation:*

Nil

*Result:*

Appeal allowed.

*Category:* B

**Representation:**

*Counsel:*

Appellants	:	Mr T Heng Ee
Respondent	:	Mr L Kosova

*Solicitors:*

Appellants	:	T Heng Ee & Associates
Respondent	:	As Agent

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

Nil

**MR J JORDAN:**

- 1 This is an appeal against the Council's decision to refuse planning consent for an existing development at Lot 5 Thomas Road, Glen Forrest. Lot 5 is owned by the Appellants, Mr Teck Chye Toh and Ms Elsie Kang. The refusal refers to the development as a 'catchment dam'.
- 2 Lot 5 is zoned *Rural Landscape Living* under *Shire of Mundaring Town Planning Scheme No. 3 – District Zoning Scheme* ("TPS 3"). It has an area of approximately 1.23ha with a frontage of 80 metres to Thomas Road at the southern boundary. The lot slopes down from Thomas Road to a winter creek about 100 metres from the front boundary. The winter creek crosses the land from east to west.
- 3 The Appellants' house is set back 20 metres from Thomas Road. Behind the house there is a landscape feature comprising points for the collection of rainwater runoff from the hard surfaces on and around the house, an artificially created 'creek' winding from the collection points down the slope to the 'catchment dam', or 'ornamental pond' as it is described by the Appellants. There is a pump to return the water to the top of the system and a bore to supplement water supply. A channel has been included to direct any overflow into the winter creek.
- 4 The 'catchment dam', or 'ornamental pond', is irregular in shape but has been described as having an area of 256m<sup>2</sup> and a depth of up to 650mm. Earth excavated to create the depression for the water body has been used to construct a bank along the lower, northern and north-western edges.
- 5 It is agreed between the parties that the 256m<sup>2</sup> 'ornamental pond' or 'catchment dam' (the development) at the foot of the landscaping is the only part of the landscaping feature for which the Council has required a planning application and to which the refusal refers.
- 6 Council's reason for refusal states:

"The existing catchment dam does not conform to the setbacks as required in Town Planning Scheme No3 (TPS 3)."
- 7 In a covering letter to the owners dated 15 April 2002, the Shire included the advice that:
  - (a) the foot of the dam is located 2.0 metres from the western property boundary instead of the required 20 metres; and

(b) it is setback 4.2 metres from the watercourse instead of the required 100 metres.

- 8 Clause 4.17(5)(b) of TPS 3 states that for all development, in the Rural Landscape Living zone, setback from side and rear boundaries shall be 20 metres unless varied by Council. Clause 4.17(11)(d) states that:

“no buildings or earthworks shall be permitted within 100 metres from the bank of any river, creek or watercourse ...”.

- 9 The development already exists. The Appellants are seeking what is known colloquially as ‘retrospective planning approval’. Clause 6.6(16) of TPS 3, Approval of Existing Development, provides power to grant such an approval.
- 10 Counsel for the Appellants raised considerable argument in support of the contention that the development is not a dam and should be called an ornamental pond. In response Mr Kosova, who is Executive Manager, Statutory Services, for the Council, advised that the development was dealt with as a ‘use not listed’ and was referred to as a dam for ease of reference. The application, Mr Kosova said, would have been dealt with as a use not listed regardless of whether it was referred to as a dam or a pond.
- 11 TPS 3 does not provide a definition of either a ‘catchment dam’ or an ‘ornamental pond’ and neither use is in the Use Class list of ‘Table 1 - Zoning Table’.
- 12 Clause 3.2(4) of TPS 3 is concerned with applications for uses not mentioned in the list of use classes of the Zoning Table. Under this clause Council is first required to determine whether or not the use is consistent with the objectives of the relevant zone.
- 13 When questioned, Mr Kosova was not able to direct the Tribunal to any evidence that the Council had rejected this application because of non-compliance with the objectives of the Rural Landscape Living zone. The Council has proceeded to the point of assessing the merits of the development relative to the empirical development standards of TPS 3. The refusal reason and covering letter do not mention conflict of the proposal with the zone objectives. The development was refused simply because of non compliance with the setback standards of TPS 3.

- 14 The Appellants are seeking to have the setback requirements of TPS 3 modified. Clause 8.15(1) of TPS 3 provides discretion to modify development standards provided the Council is satisfied that:
- (a) approval of the proposal would be consistent with stated objectives and policies in the Scheme and the orderly and proper planning of the locality; and
  - (b) the non-compliance will not have any adverse effect upon the occupiers or users of the development or the inhabitants of the locality or upon the existing and future amenity of the locality.
- 15 Clause 8.15(1) refers to the objectives of the TPS 3. The objectives of the *Rural Landscape Living* zone are listed at clause 3.1(8). The points relevant to the development are:
- (a) to protect the rural environment and landscape;
  - (b) to ensure that land use and development do not adversely affect the landscape quality and scenic values;
  - (c) to limit the visual impact of development and conserve and enhance the existing landscape quality and scenic values;
  - (d) to restrict unlimited removal of natural vegetation and encourage revegetation where appropriate;
  - (e) to protect sensitive areas, especially the natural valley and watercourse system from damage; to sustain and enhance the buffer areas between urban cells, to reduce the instance of salinity, stream turbidity and nutrient enrichment and other pollution; and to minimize any other ecological or environmental damage;
  - (f) to encourage land use and management practices compatible with landscape conservation.
- 16 Also considered relevant to the development is cl.4.17(11) of TPS 3, which sets out that all development along river valleys, creeks and watercourses comply with particular requirements. The requirements are:

- (a) the status quo of the stream flow shall be maintained to ensure the protection of the biota and the aesthetic quality of the steam system;
- (b) all existing vegetation along water courses shall be retained;
- (c) sensitive development practices shall be employed to minimize run-off and erosion as follows;
  - (i) provision of contour banks to intercept stormwater run-off; and
  - (ii) planting of indigenous vegetation parallel to the stream to act as a barrier to seepage and run-off
- (d) no buildings or earthworks shall be permitted within 100 metres from the bank of any river, creek or watercourse and no landfill shall be undertaken within such area or its associated flood plain area;
- (e) no dam shall be constructed or the flow of water artificially retarded without the approval of the Water Authority of Western Australia (WAWA) and Council; and
- (f) if, in the opinion of Council, any land within 100 metres from the nearest bank of a river, creek or water course is denuded of vegetation and contains disturbed surfaces, the Council may serve notice on the registered proprietor who shall, within the period specified in such notice, cause the land to be revegetated and the disturbed surfaces stabilized to minimize stormwater run-off and erosion.

- 17 Ms Linda Epton was called as a witness by the Appellants. On cross examination by Mr Kosova, Ms Epton said she did not know the legislative controls under which the Council had carried out the process of determining this matter. Ms Epton also made general statements about ornamental ponds elsewhere in the Shire but again was not familiar with the circumstances of their approval. The evidence of Ms Epton did not assist the Tribunal.

- 18 Ms Elsie Kang was called as witness in support of the appeal. Ms Kang described in clear terms the landscaping that had been carried out on her lot and in particular the development in dispute. Ms Kang supported her evidence with a series of coloured photographs of the site. The photographs show the site at the commencement of work and as it appeared at the time the appeal was lodged.
- 19 Ms Kang used the photographs to show that the development is located in a position that was cleared of vegetation by a previous owner. It could be seen that the landscaping also included the planting of additional vegetation, mainly native species, which blend in with the natural vegetation on the lot. It was common ground that the development was not built across the winter creek, did not interfere with the flow of the winter creek and did not rely on it as a water source. The development is mainly an excavation and the constructed bank, which is now vegetated, does not appear in the photographs as a dominant feature. The mainly native vegetation landscaping allows the development to blend with the remainder of the naturally vegetated lot.
- 20 Ms Kang pointed out that to have no development within 100 metres of the creek would prevent any development proceeding anywhere on the lot. The existing house is within approximately 60 metres of the creek. To place the development 20 metres from the boundary would have required the felling of existing trees. The Appellants produced a letter from a next-door neighbour, at No. 1535 Thomas Road, supporting the development.
- 21 Using the photographs, sketches and information provided by Ms Kang, Mr Heng EE measured the development against the objectives for the *Rural Landscape Living* zone as set out in cl.3.1(8) and against the requirements for development along a creek in cl.4.17(11). Mr Heng EE said that, other than the setbacks, the development did not conflict with the objectives and requirements respectively. The Tribunal agrees.

## **Conclusion**

- 22 From the evidence presented, the Tribunal has concluded that the development satisfies the requirements for modifying setback requirements as provided for in clause 8.15(1). The Tribunal is satisfied that the development is not in conflict with the objectives of TPS 3. It is concluded that the development will not have any adverse effect upon the occupiers or users of Lot 5, the inhabitants of the locality or the existing and future amenity of the locality.

- 23 The appeal is therefore allowed and planning approval is granted for the existing development, as provided for under cl.6.6(16) of TPS 3. The development approved includes the reduced setbacks of 2 metres from the western boundary to the outer edge of the constructed bank and 4.2 metres from the winter creek to the outer edge of the constructed bank.