

ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT

JUDGMENT NAME: WAKE v CITY OF NORWOOD PAYNEHAM & ST PETERS

CITATION: [2003] SAERDC 24

PARTIES: **Appellant(s)**
DON WAKE

Relevant Authority
CITY OF NORWOOD PAYNEHAM & ST PETERS

FILE NUMBER(S): 589 of 2002

HEARD BY: Commissioner Green

SUMMARY: Development Act 1993 – application to develop single storey semi-detached dwellings – Historic (Conservation) Zone - East Adelaide Residential 600 an Historic Conservation Area – refused by the Council – planning merits – existing dwelling does not a significant contributory item to historic character – intent and desired character of Zone considered – detached dwellings envisaged and semi-detached dwellings for consideration on merit – dwelling density factors considered – replacement semi-detached dwelling building appearance of a single dwelling from the street - access and garaging from the rear – site area per dwelling and site frontage compatible in locality – design, style, appearance of development to enhance historic character of Zone and locality – Development Plan guidelines sufficiently met – appeal upheld and Council decision reversed – conditional provisional development plan consent is granted.

LEGISLATION CITED: *Development Act 1993;*

CASES CITED: *City of Mitcham v Freckmann & Ors* (1999) 74 SASR 56; *Bolto v City of Charles Sturt* [2003] SAERDC 18; *Ellis v City of Norwood Payneham & St Peters* [2001] SAERDC 18; *Nadebaum v City of Mitcham* [1995] EDLR 587 v *City of Mitcham* [1995] EDLR 587 at 591; *M & L Developments Pty Ltd v City of Holdfast Bay* [2003] SAERDC 45

HEARING DATE(S): 28 January 2003 and 18 March 2003

JUDGMENT DATE: 18 March 2003

REPRESENTATIVES: **Appellant(s)** **Solicitors**
MR G MANOS MANOS & ASSOCIATES

Relevant Authority **Solicitors**
MS M SAVVA NORMAN WATERHOUSE

DON WAKE
V
CITY OF NORWOOD PAYNEHAM & ST PETERS
ERDC NO 589 of 2002
[2003] SAERDC 24

THE COURT DELIVERED THE FOLLOWING MEMORANDUM:

1 This matter comprises an applicant appeal against the City of Norwood, Payneham and St Peters (*“the Council”*) in refusing Development Application No. 155/00350/02, for the erection of semi-detached dwellings at 58A Third Avenue, St Peters. The Council gave as its reasons for refusal:

“The proposed development is not considered to accord sufficiently with the provisions of the Development Plan for the following reasons:

1. *The proposed development is at variance with the Metropolitan Objectives 9 and 43 and Principle of Development Control 9.*
2. *The proposed development is at variance with the Council Wide Objective 9 and Principles of Development Control 3, 4 and 24.*
3. *The proposed development is at variance with Historic (Conservation) Zone – East Adelaide Residential 600 Principle of Development Control 11 in that the site area per dwelling will be significantly less than 600 square metres.”*

2 A summary of some of the relevant details in this matter is as follows:

Date of application:	26 April 2002 (registered)
Subject land address:	58A Third Avenue, St Peters
Existing use:	Detached dwelling and ancillary outbuildings
Proposal:	Erect a pair of single storey, semi-detached dwellings in lieu of detached dwelling, with ancillary rear garaging and associated landscaping and side/rear fencing
Relevant authority:	City of Norwood Payneham & St Peters
Appropriate Development Plan:	St Peters (City) consolidated version 30 August 2001
Relevant area/zone:	Historic (Conservation) Zone – East Adelaide Residential 600 and Historic Conservation Area on MAP StP/1 (Overlay 1)
Date of decision:	17 June 2002
Appeal lodged:	30 August 2002 (out of time but order made by Court granting leave to extend time for lodgement of appeal to 30 August 2002)

3 The required pre-trial conference was not successful in settling the matter.

4 Sworn evidence was given by Mr D Batge, MPIA, an experienced town planner, by Mr D Dawson, a qualified and experienced architect, and Mr D Bills, MPIA, a qualified town planner.

5 The Court viewed the subject land and the locality on 28 January 2003 in the presence of the parties and it received amended plans (Exhibit A1), experts’ statements and reports, and copy documents.

The Subject Land

6 The subject land is regular in shape with a frontage to Third Avenue of some 22.86 metres, a depth of approximately 45.72 metres and a total area of some 1,045 square metres. The land has

frontage to Fourth Lane at the rear and this is utilised for access to the garaging. A crossover and driveway also exists on the western side of the site to Third Avenue.

7 The subject land is relatively flat falling slightly away from Third Avenue and is presently occupied by a single storey, “*Californian Bungalow*” style, detached dwelling, constructed of brick with a galvanised iron roof and of average condition externally. The dwelling is not identified as having any heritage significance in the St Peters (City) Development Plan. Several trees exist, mostly in the front and rear areas but none are classed as “*significant trees*”.

The Proposal

8 The proposal is to erect single storey, semi-detached dwellings, each ultimately on its own allotment, with “*Victorian*” styling and detailing (refer amended plans Exhibit A1, post-Council decision). The amendments are minor and can be properly considered and determined by the Court. To enable the proposal to occur, the existing dwelling will need to be demolished and consent has not been sought for that as part of this application, but if the appeal is successful, I assume that such an application and consent would follow.

9 The development has been designed to reproduce dwellings of the “*Victorian*” period, such as those on the perimeter of the locality at 17-23 and 22-26 Winchester Street, by incorporating the key design and character elements and materials used in that period. The proposed building will have the appearance to the street of a single dwelling, matching the appearance in a general sense, of detached dwellings in the locality. It will not “*read*” or present as two semi-detached dwellings and from the front, only a second pedestrian access might confirm this to be the case. The location of two double garages and additional visitor parking utilising the access available from Fourth Lane and reinstating the driveway crossover and driveway to Third Avenue, are also proposed. The proposed building is to have setbacks from the street of 8 metres, from the side boundaries of 2 metres at the front and 1.2 metres centrally and with the proposed garaging setback 3 metres from the laneway. The proposed building incorporates sandstone fronted, heritage style red bricks, slate grey Colorbond roofing, 3.6 metre wall heights and “*Victorian*” period detailing to corners, window surrounds and heads, verandah, gables and eaves.

10 A summary of other details for Dwelling No. 1 (south) and Dwelling No. 2 (north) are as follows:

- Site area of each is 522.5 square metres.
- Floor area of 217 and 214 square metres respectively.
- Site coverage of 41.5 and 41% respectively.
- Open space of 206 and 197 square metres respectively (excluding driveways/garaging, but including open verandah areas).
- One visitor car space for each dwelling.

The Locality

11 The locality is defined as that part of the surrounding area directly influenced by the proposal to a notable degree and conversely that influences the proposal design and development.

12 The locality in this case is to be defined primarily on visual appearance, character perception and vehicle movement to a minor degree.

13 I have had regard to the localities defined by both expert town planners and determine that it is greater than shown by Mr Bills but less than by Mr Batge and it extends for approximately 100 metres to the south (including the frontage and portion of the East Adelaide Primary School and dwellings at Nos. 11B, 13, 17, 19 and 20 Winchester Street). It extends for a distance of some 20-30 metres to the west, including the side of 21 Winchester Street and the rear of Nos. 3-79 Fourth Avenue. It extends

for a distance of approximately 100 metres to the north, including Nos. 60-70, 72 Third Avenue and it extends a distance of some 40-80 metres to the east, including Nos. 61-75 Third Avenue.

- 14 The locality is wholly within the Historic (Conservation) Zone – East Adelaide Residential 600, and includes parts of Third Avenue, Winchester Street and Fourth Lane and part or all of approximately 25 properties (excluding the subject land), containing detached dwellings. Of these some 12 have been identified as places that contribute significantly to the historic character of the Zone, and one is a Local Heritage Place – these are set out on MAP StP/20 as well as in the specific relevant Tables.
- 15 The style, form and scale (though single storey) of dwellings within the locality vary significantly including villa, cottage, bungalow (simple and Californian), Tudor and conventional-modern from the 1960s. There is no consistent or predominant architectural theme or cohesion in the streetscape to be derived from these buildings. Front fencing is a significant streetscape character element and it is diverse and generally inconsistent with the historic flavour of the Zone. Generally, fences are solid, with some brush, but there are also several low brick walls or low mesh fences.
- 16 The character of the locality is derived primarily from the street trees, generally well landscaped front gardens and relatively wide frontages in the order of 15-23 metres (except for No. 73, a contributory item, with a frontage of 10 metres). Building setbacks from the street range from 8-12 metres and 1-4 metres from side boundaries providing a moderate spacing between buildings. Of course the dwellings designated as contributing significantly to the historic character clearly do so. Those detracting, however, include dwellings adjoining at 58 Third Avenue and opposite at 61-65 Third Avenue, as well as 13 and 20 Winchester Street, and to the north 64-68 and 69 Third Avenue.
- 17 In terms of visual amenity, the locality possesses a high standard of amenity derived from street trees, landscaping in generous setback areas and from the appearance of many attractive dwellings. It is marred by much of the fencing, outbuildings and average appearance and/or maintenance of a few dwellings.

Relevant Development Plan Provisions

- 18 I have considered the various provisions referred to by the expert town planners and I find the following to be the relevant provisions in the appropriate Development Plan for the assessment of this matter.

METROPOLITAN ADELAIDE

Objectives: 1, 6, 7, 8, 9, 34 and 43; and

Principles of development control: 3, 4, 8, 9, 10, 11 and 13.

COUNCIL WIDE

Objectives: 1, 3, 4, 6, 9, 16, 17, 19, 24 and 29; and

Principles of development control: 1, 2, 3, 4, 22, 23, 24, 29, 34, 35, 36, 47, 48, 49, 52, 53, 54, 55, 65, 66, 67, 73, 86, 87, 91, 93, 111 and 117.

HISTORIC (CONSERVATION) ZONE – EAST ADELAIDE RESIDENTIAL 600

Objectives: 1 and 2; and

Principles of development control: 1, 3, 6, 7, 8, 9, 10, 11, 12, 13 and 14.

TABLE StP/1, 2, 3, 5 and 6.

MAP StP/1 (Overlay 1) and StP/5 and 20.

Processing

19 The proposal was determined by the Council to be a Category 1 development but notwithstanding, the Council undertook informal notification of the application and received five submissions. No person sought to be joined in this matter. It would appear that no referrals were required to government agencies or nominated persons.

The Evidence

20 Mr Batge was of the opinion that in addition to being of residential use, the proposed dwellings will have an appearance almost identical to that of a detached dwelling, consistent with Objective 2 and Principle 1 of the Zone; have a style, form, proportions, detailing and materials creating a building that positively contributes to the historic character and amenity of the locality replacing a non-contributory building and that this will improve a locality of mixed character and quality; that the design of the development takes full advantage of access from Fourth Lane which indirectly will enhance the appearance of Third Avenue; that the proposal will not have any adverse impacts in terms of size, height, bulk, overshadowing or overlooking; and that the shortfall in site area per dwelling (522.5 compared to 600 square metres), will not affect character and amenity, will be indiscernible outside of the property and in any event have a site area sufficient to enable appropriate open space and all facilities to be provided to meet contemporary housing needs and demands.

21 On the other hand, Mr Bills felt that whilst the proposed dwellings would exhibit an appearance generally incorporating the design guidelines set out in TABLE StP/3, the proposal offends the provisions of the Zone with respect to site area and form of development. In particular reference was made to the site area guideline of 600 square metres, that detached dwellings are the contemplated form of development and that these guidelines carry sufficient weight that on balance, justifies the proposal being refused. He found that the proposal is inconsistent with the character of the locality, he could not support the erection or construction of new semi-detached dwellings, and he noted that an area of open space of twice the floor area of the dwelling was not provided.

Planning Assessment

22 In accord with case law as I understand it, noting there to be some variation, I have approached decision making in this matter mindful of the following:

- considering the Development Plan as a whole and all relevant provisions to the matter in question;
- considering the Development Plan as a flexible, advisory planning policy document, not as a mandatory, legal statute; as a practical guide for practical application, superimposed upon an existing state of development;
- considering the merits of the proposal as a whole, the pros and cons (points of clear compliance with guidelines or departures from them) and the position that scarcely any proposal however good, is likely to meet every provision such that no legitimate objection can be taken to it;
- considering the proposal in question and its alignment with the Development Plan, not comparing it with or testing it against other alternatives or a so called ideal design solution or planning outcome;
- integrating the various criteria, reconciling inconsistencies between them and not considering them in isolation of each other;
- distilling the overall intent, purpose and desired character of the Zone sought to be achieved via the Development Plan and the context of the characteristics and facts about the locality and the subject land (both historical and current) as well as the proposal details and whether it is conducive to achievement of the desired character and amenity of the Zone; and
- assessing the proposal on the above basis, balancing up all relevant considerations, including the evidence, what is seen on the view and the public and private interests, in determining, on a fact and degree basis in each case, whether the proposal is sufficiently in accord with the Development Plan to warrant consent.

23 The most relevant provisions to assessment in this matter are those found in the Historic (Conservation) Zone – East Adelaide Residential 600. These establish the Zone intent and desired future character.

“Objective 1: *Conservation of dwellings and other buildings having a form and style which contribute significantly to the historic character of the area of the zone.*

Objective 2: *Development which enhances the character of the zone established by:*

- (a) the predominance of substantial, single-storeyed detached dwellings on large allotments with frontage primarily to wide roads;*
- (b) substantial, established gardens;*
- (c) fencing to streets in a style compatible with dwellings built in the 1870's and 1880's;*
- (d) consistent set-back of dwellings from the roads to which they have primary frontage; and*
- (e) roads lined with mature exotic street trees where they might practically be grown.*

PRINCIPLES OF DEVELOPMENT CONTROL

1 *Development should comprise the erection, construction, conversion, alteration of, or addition to, buildings of the following kind:*

Detached Dwelling

2 *No building should contain more than two-storeys above the level of the natural surface.*

3 *The details and general character of development should be consistent with and enhance the historic character of the area of the zone in which it is located.*

.....

6 *The development of additional dwellings should comprise:*

(a) infill between dwellings which contribute significantly to the historic character of the zone;

(b) replacement of a building or use of land which does not contribute significantly to the historic character of the zone; or

(c) conversion of an existing dwelling to a residential flat building, or semi-detached dwelling, where such conversion will enhance the historic character of the zone.

7 *All dwellings should have frontage to a road, other than a lane shown on Map StP/1 (Overlay 4).*

8 *Development should include and, where possible, retain, landscaped front garden areas.”*

These provisions are those relating to land use, dwelling type, density and character.

24 In my assessment, the existing dwelling does not contribute significantly to the historic character of the Zone, as a whole, or to the locality, evidenced by its absence from TABLES StP/5 and 6. It is also not a dwelling built in the 1870s or 1880s.

25 Whilst it is clear that detached dwellings in type and form are preferred, the proposal is designed to appear like a detached dwelling in form and siting.

26 Additional dwellings and alternative dwelling type opportunity also exists, having regard in particular to Principle 6(b) and that certain dwelling types are omitted from Principle 14 (non-complying development), including detached and semi-detached dwellings. Clearly the latter is contemplated and therefore may be appropriate, and may be granted consent in certain circumstances, though noting the findings of the Supreme Court in *City of Mitcham v Freckmann & Ors* (1999) 74 SASR 56 and other judgments of this Court, that such development is not automatically appropriate somewhere in the Zone, but must be assessed as to how conducive it is to achieving the desired character and amenity of the Zone and in the locality context.

- 27 Principle 11 establishes the dwelling density guideline of 600 square metres (referred to also in the Zone title) and the proposal does not meet this. However the tangible consequences need to be carefully considered. Site area per dwelling is an important, but one factor only in consideration of density (refer *Bolto v City of Charles Sturt* [2003] SAERDC 18 at para.38 and *Ellis v City of Norwood, Payneham & St Peters* [2001] SAERDC 18 at para.15) and it is one factor only in terms of character perception with a three dimensional perspective being necessary. The degree of variance needs to be considered together with the proposed site frontages, streetscape appearance, site coverage, form/height/setbacks of buildings and landscaping. I have made such an assessment. A site area of 522 square metres and width/frontage of 11.43 metres are still clearly at low density relative to Adelaide and St Peters and are much greater than the higher density Historic (Conservation) Zone – Avenues Residential 300 or Hackney Residential 200 density guidelines. Any perception of site area shortfall is unlikely from the streetscape or public realm and with limited perception of this from over rear fences in terms of a few metres additional depth/width. Other factors such as infrastructure capacity and additional minor traffic generation are considered to be acceptable.
- 28 Whilst there could be a flow-on effect (*Nadebaum v City of Mitcham* [1995] EDLR 587) and some consideration of equity is appropriate (as espoused in *M & L Developments Pty Ltd v City of Holdfast Bay* [2002] SAERDC 45), that is a question of fact and degree, and in this case given the proposed building is to replace a non-contributory item and (refer below) it is likely to enhance visual amenity and perceptions of historic character, and the shortfall in site area is of some 13%, I consider that this aspect of the proposal is acceptable.
- 29 With regard to any flow-on effect, where there might be similar facts and circumstances including non-contributory buildings on sites with widths and areas of a similar size to that in the current proposal, there are only two to three sites out of 25 in the locality that might be in the same position. Overall in terms of dwelling type and density I consider that the proposal will enhance the historic character and maintain amenity, that low residential densities will be maintained and that the dwelling type (semi-detached) will not be obvious to the public realm (rear land excepted) given the rear garaging and driveways and the detail design of the front building elevation and front garden areas. The latter can be confirmed by conditions of consent. On balance, I find that the proposed semi-detached dwellings and on sites each of 522.5 square metres and with a frontage of some 11.43 metres, are acceptable in-principle. If other very similar development follows, in similar circumstances, that is likely also to enhance the historic character of the Zone, replacing non-contributing buildings.
- 30 Turning to detailed design tests in the Plan, including Zone Principles 2, 3, 8, 9 and 10 (including TABLE StP/3), the following are the other key issues that have been carefully considered:
- setbacks – front, side and rear are appropriate to the locality and meet Zone Objective 2(d);
 - site coverage in the order of 40%, is compatible with the range in the locality, meeting Zone Principle 9;
 - style and detailing - generally appropriate, and whilst simple rendered surrounds of windows are preferred, to elaborate projecting quoins, the proposal is sufficiently consistent with contributing items within and on the western fringe of the locality and as a whole reinforces the historic character of the locality as sought by Zone Principle 3 and 10, including TABLE StP/3 clause 3;
 - parking and reversing of vehicles is satisfactory, although both planners suggested, and I agree, that the setback of 3 metres is perhaps excessive and it would be preferable to maximise private open space in the rear of each dwelling by reducing the garaging setback from 3 metres to 1.5 metres and that space effectively transferring to private open space;
 - tree retention and proposed garden development is appropriate to the locality having regard to Zone Objective 2(b) and Zone Principle 8; and
 - whilst fencing is yet to be determined and not included in the application, given the difficulties/alleged errors in the Development Plan in this regard, it is clearly possible to design a front fence to match and complement the historic character of the streetscape and Zone.

31 On my assessment, considering all of the design, appearance and character tests, the proposal is acceptable. Despite its defined dwelling type, namely semi-detached, and that lot size is marginally less than the guidelines, and there is an emphasis on replication of architectural style from the “Victorian” period, I agree with Messrs Dawson and Batge that on balance it will enhance the character of the Zone (Zone Objective 2 and Principle 3) and the locality (TABLE StP/3 and clause 3.7) and that, in my assessment, is to be given particular weight in the redevelopment of buildings/sites that do not contribute significantly to the historic character of the Zone, as is the case in this matter.

Conclusions

32 Whilst detached dwellings are generally envisaged, clearly semi-detached dwellings are also for consideration on merit. Given the perhaps unique design of the two dwellings and the elevation presented to the street, they will appear as one dwelling though in fact they are two semi-detached dwellings. Further, whilst the proposed site areas per dwelling are marginally less than the guideline, I do not consider this to be fatal in the circumstances of the locality and consequences for character and amenity and the historic character of the Zone. Finally, I consider that with one minor amendment (garaging reduced setback to 1.5 metres from Fourth Lane, not 3 metres and with the resultant area transferred to private open space), the detailed design, appearance and character of the proposal, in all other respects, is most satisfactory, will enhance historic character of the Zone as a whole and is in accord with the Development Plan guidelines. In my assessment, the proposal meets Objective 2 for the Zone to a sufficient extent.

33 Accordingly, I determine that the proposal, on balance, is not seriously at variance and sufficiently meets the Development Plan to warrant consent.

34 Having heard the parties further on Tuesday, 18 March 2003 with regard to conditions of consent, I note there was general agreement on them and that in the main they are standard conditions, excepting the amendment I required to the garaging and visitor parking setback to Fourth Lane, and the requirement of an absence of internal fencing at the front. Whilst front fencing is shown on the amended plan Exhibit A4, and it appears to be of an appropriate design for the area, it is to be expressly excluded from the consent due to procedural and processing requirements under the *Development Act 1993*.

Decision

35 The decision of the Court is that the appeal is upheld, the decision of the Council reversed and provisional development plan consent is to be granted to the application, subject to the following conditions.

1. The development shall proceed in accordance with the details of Development Application No. 155/350/02 and the approved plans, prepared by A D’Andrea & Associates and marked ‘Exhibit A4’ except when varied by the following conditions of consent.
2. All stormwater from buildings and paved areas shall be disposed of in accordance with recognised engineering practices in a manner and with materials that does not result in the entry of water onto any adjoining property or any building, and does not affect the stability of any building.
3. The finished floor level shall be at least 300 mm above the top of the Third Avenue kerb level.
4. The garages and visitor parking setback to Fourth Lane shall be reduced to 1.5 metres.

5. Landscaping depicted on proposed plan Exhibit A4, shall be fully implemented in the first available planting season after occupation of each dwelling.
6. Trees shown for retention and proposed planting are to be protected and maintained in good health, and be replaced promptly, in the event of becoming diseased or dying.
7. There shall be no internal dividing fence or other barrier between the front gardens of the two dwellings, other than vegetation or that which is less than 300 mm in height above ground level.
8. The driveway access to each car space is to be hard paved surfaced and completed prior to occupation of either dwelling.
9. Front fencing is excluded from this consent.

36

There will be an order to that effect.