

Grouped Multiple Dwellings Disguised as Single Houses

By

We are regularly asked to advise local governments on development applications for approval of residential developments which the applicant maintains are a single house but which have internal configurations and features more consistent with grouped or multiple dwellings.

Two recent cases have considered this issue. The first is a decision by the State Administrative Tribunal in *Corp and Town of Cambridge* [2019] WASAT 65 (**Corp**). The second is an appeal decision by the Supreme Court of Western Australia in *Fix WA Pty Ltd & Anor v City of Armadale* [2019] WASC 356 (**Fix WA**).

Background to the Corp Case

*The applicant applied to the Town of Cambridge (**Town**) for development approval for a “two-storey single dwelling”. Plans for the proposed development showed two identical ground floor wings with some shared components. Each wing consisted of a living room, kitchen, dining, bedroom, bathroom and study area and the shared components consisted of a common laundry area and toilet. Plans also showed a centrally located two-car garage. The second storey was designed to allow guests or a future carer to stay and included a guest lounge as well as a kitchenette, a bedroom with an en-suite and a gym.*

The Town refused the application on the basis that the proposed development comprised grouped dwellings and not a single house and was therefore, incapable of approval. The applicant sought review of the Town’s refusal by the State Administrative Tribunal. The principal issue before the Tribunal was the proper classification of the proposed residential development. The proposed development was to be located on land within the Residential Zone which was coded R12.5 under the Town’s *Local Planning Scheme No 1 (LPS1)*. Under LPS1 a single house was capable of approval, but both grouped and multiple dwellings were prohibited.

The Town’s Planning Framework

The zoning table under LPS1 contained the following land uses: Dwelling (Single), Dwelling (Grouped) and Dwelling (Multiple). These uses did not precisely match those in the R-Codes. However, the Tribunal and the parties approached the proceeding on the basis that if the proposed dwelling was a single dwelling (i.e. a single house) it was permissible, but if it was either a grouped or multiple dwelling it was not able to be approved.

Under the State Planning Policy 7.3 R-Codes, the following definitions are provided:

Dwelling: A building or portion of a building being used, adapted, or designed or intended to be used for the purpose of human habitation on a permanent basis by a single person, a single family, or no more than six persons who do not

comprise a single family.

Grouped dwelling: A dwelling that is one of a group of two or more dwellings on the same lot such that no dwelling is placed wholly or partially vertically above another, except where special conditions of landscape or topography dictate otherwise, and includes a dwelling on a survey strata with common property.

Multiple dwelling: A dwelling in a group of more than one dwelling on a lot where any part of the plot ratio area of a dwelling is vertically above any part of the plot ratio area of any other but:

- does not include a grouped dwelling; and
- includes any dwellings above the ground floor in a mixed use development.

Single house: A dwelling standing wholly on its own green title or survey strata lot, together with any easement over adjoining land for support of a wall or for access or services and excludes dwellings on titles with areas held in common property.

Contentions

The applicant contended that the proposed development was a single house for two reasons:

1. the absence of a strata scheme affecting the proposed development meant that the proposed development did not fall within the definition of a grouped or multiple dwelling pursuant to the R-Codes; and
2. the proposed development, when properly assessed under the R-Codes, was properly characterised as a single house because ‘the entirety of the proposed development is ‘adapted, or designed or intended to be used for the purpose of human habitation on a permanent basis by a single person, a single family, or no more than six persons who do not comprise a single family’’ and that no portion of the dwelling was going to be put to any other use.

The Town contended that the two ground floor wings each consisted ‘of a portion of a building designed or intended to be used for the purpose of human habitation on a permanent basis by a single person, single family or no more than six persons who do not comprise a single family’. The Town argued that because the ground floor itself contained two separate dwellings, the proposed development could not be characterised as a single house.

The Town also argued that the upper floor was either a third dwelling or alternatively, a component of one or more of both of the ground floor dwellings. If the upper floor was a separate dwelling, the Town submitted that the whole of the proposed development consisted of three multiple dwellings. Alternatively, if the upper floor was not a separate dwelling, the proposed development consisted of two multiple dwellings. On either basis, the development could not be approved.

The Tribunal’s Decision

In construing the terms “single house”, “grouped dwelling” and “multiple dwelling” under the R-Codes, the Tribunal recognised that general principles of statutory construction should be applied including the principle that the R-Codes should be read and applied in a sensible and practical manner.

Contrary to the argument made by the applicant, the Tribunal held that the absence of a strata scheme did not indicate that

the proposed development was incapable of being categorised as a grouped or multiple dwelling under the R-Codes. It reached this conclusion for 3 reasons:

1. As a matter of development control there was no basis or requirement for the strata titling of developments. The creation of strata lots through the creation of a strata scheme is less about the facilitation of residential land use and more about the appropriate tenure for dwellings and the ongoing governance and management arrangements between properties.
2. Strata schemes are often proposed well after a development is completed.
3. A consideration of the R-Codes as a whole and their application in a practical and common sense manner did not lead to the conclusion that the absence of strata titles at the time of a development application meant that a proposed residential development could not be properly classified as either grouped or multiple dwellings.

In determining whether a proposed development is a “single house”, “grouped dwelling” or “multiple dwelling”, the Tribunal had regard to the following principles:

- The proper characterisation of a proposed development raises questions of fact and degree.
- Relevant factors to consider include:
 1. the expressed or inferred intentions of the applicant;
 2. the manner in which proposed development is to be used (based on materials presented by the applicant);
 3. the planning history of the development;
 4. the presence or absence of shared facilities;
 5. the presence or absence of separate entrances and exits; and
 6. the presence or absence of separating structural components such as doors and walls.
- These factors are relevant but are not necessarily determinative.
- ‘The classification of a dwelling that is presented as a ‘single house’ that is to be used by a ‘single family’ should not be approached in a narrow, formulaic way. Planning authorities need to approach the question of what is a ‘single house’ in a flexible, sensible and pragmatic manner.’

Having regard to the principles and factors identified above, the Tribunal found that the proposed development was not a “single house” for the following reasons:

- The development plans submitted by the applicant did not show that a single house was being proposed. Instead, the plans showed two separate but identical dwellings. This was due to the existence of the two kitchens, one in each wing. The Tribunal noted that generally, the existence of a second kitchen is not indicative of a separate dwelling however, because there are two separate and identical kitchens in the context of two separate and identical residential wings, it suggested that the proposed development was not a single house.
- The Tribunal found that there was no evidence that one wing would be used as the primary residence and the other as retreat, as argued by the applicant.
- Although the proposed development contained joint facilities, the presence of joint facilities is not itself determinative as many grouped and multiple dwellings contain shared facilities. Similarly, although the proposed development contained joint access and egress ways and separating doorways, the existence of such factors could not be

determinative as 'the question as to whether the proposed development is a single house is ultimately one of functionality.'

The Tribunal found that the proposed development consisted of at least 2 dwellings, which meant that approval could not be granted. Consequently, the review proceeding was dismissed.

The Fix WA Case

A similar approach to distinguishing between single, grouped and multiple dwellings was adopted by the Supreme Court in *Fix WA*. The case involved an appeal from the Magistrates Court to the Supreme Court concerning a conviction for residential development works carried out on a single residential unit with the effect of creating two separate dwellings within the one unit. In determining that the work undertaken had created another dwelling, the Supreme Court employed principles to those referenced to by the Tribunal in the *Corp* case.

Conclusion

The decisions of *Corp* and *Fix WA* provide useful guidance on the principles to be applied in the determination of dwelling types under the R-Codes. They provide helpful examples of the approach to be adopted where proposals for 'single houses' are made, but issues arise from the internal layout of the development which indicate this may not be the correct use classification.

For further information please contact Alicia Nguyen on 9383 3133 or by email to anguyen@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.

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