CASE NOTE - SOUTH AUSTRALIA

Alessio Tarca and District Council of Stirling v James Hambrook and Gwenyth Hambrook
(Unreported). Decision of Land and Valuation Division Supreme Court of South Australia, 27 January 1995.

This case involved an appeal from a decision of the Planning Appeal Tribunal to the Land and Valuation Division of the Supreme Court. The Tribunal had allowed an appeal by third parties ("Hambrook") against the decision of the District Council of Stirling ("the Council") granting planning consent to Tarca to construct three residential flat buildings. The proposal was to demolish an existing large dwelling presently divided into two flats and replace it with three buildings providing four residential units. there was no feature of the proposal indicating that the buildings would be used exclusively for elderly people.

The proposal was within a Country Living Zone where residential flat buildings were a prohibited use. the Council had obtained the concurrence of the South Australian Planning Commission to its consent apparently largely because the proposal replaced existing residential flats. The Country Living Zone as described in the Council's Development Plan was meant to be an area of low density. Indeed the Principles of Development Control specifically provided that residential flat buildings and multiple dwellings should not be erected because they were not in keeping with the zone. However, somewhat inconsistently one principle did recognise that higher density residential development may be considered where it provided "aged accommodation". Debelle J commented that he presumed this expression meant "dwellings for aged people".

The Tribunal had decided that the proposal would be out of character with the surrounding residential allotments, that the density of dwelling units would be more than twice as great as others in the locality and that it would be an overdevelopment of the site. It concluded that the proposal was seriously at variance with the provisions of the Development Plan and thus warranted refusal.

There was a threshold question concerning the classification of the proposal. The developer argued it should be characterised as "aged accommodation or aged persons homes", Hambrook argued that it was "residential flat buildings" and the Council and the South Australian Planning Commission described it as "one residential flat building and two group dwellings".

In delivering his judgment Debelle J held that the definitions of various kinds of development contained in the Development Control Regulations should not be applied in a rigid, inflexible manner. Development must be viewed in a practical common sense way. One must look at the development as a whole and determine its true nature and character. He concluded that the configuration of the four residential units were such that they could fairly be described as

home units or residential flats. There were no physical characteristics of the proposal which supported the argument that it was suitable only for elderly people.

The appellants had relied on the fact that they had entered into a land management agreement (LMA) with the Council under Section 61 of the Planning Act. That provision provided that the Council or the Minister could enter into an agreement with any person relating to the development, preservation or conservation of land of which that person was the owner. The agreement could be registered on the Title to the land and upon transfer of title was binding on and enforceable by or against the successor in title to the owner who entered into the agreement. A similar, although not identical provision is found in Section 57 of the Development Act, 1993 which repealed the Planning Act, 1982 in January 1994.

The agreement in question contained the following clauses:

> "2.1 The owner shall ensure that at least one of the permanent occupants of each dwelling forming part of the proposed development has attained the age of 55 years or greater and has retired from full-time employment.
>
> 2.2 The owner shall ensure that no more than two persons occupy any dwelling forming part of the proposed development".

The Tribunal was not prepared to rely on the agreement when determining the merits of the appeal. The appellant in the Supreme Court appeal argued that the Tribunal had erred in that regard.

In delivering the Supreme Court's decision Debelle J made some interesting observations concerning land management agreements and their use.

1. As a general rule the question whether development should be permitted to proceed should be determined without reference to a land management agreement.

2. The purposes for which land management agreements should be used are limited. They should not generally be used where parties other than the owner have rights of occupation over the land. He also noted:

   (a) Land Management Agreements adversely affect the interests of third parties. They can be amended or rescinded by agreement between the landowner and the Council. they can be used to avoid the regular development control process which may give third parties various rights of objection and appeal. Third parties cannot appeal against any variation or revocation of the agreement or in any other way seek to enforce the agreement.

   (b) It is questionable to what extent, if any, the Council should enforce the terms of the land management agreement against a person who entered into a tenancy agreement in ignorance of the existence of an LMA over the land.

Although not required for the purposes of the issues before it, it is unfortunate that the Court did not examine whether its reservations in Tarca's case about land management agreements were equally applicable under the Development Act, 1993. It is submitted that to a large extent the Court's concerns can be overcome under the new regime.

1. There is now specific provision (Section 57(12)) which provides that the existence of an agreement under Section 57 of the Act may be taken into account when assessing an application for a development authorisation under the Development Act.

2. Third parties now have a right to enforce a contravention or threatened contravention of a land management agreement. The Development Act provides in Section 83 that a reference to a breach of the Act within the legislation includes a reference to a contravention

or threatened contravention of a land management agreement. Section 85 of the Act provides that any person may apply to the Court for an order to remedy or restrain a breach of the Act whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

3. The Court's concern about the ability to enforce the terms of the land management agreement against a tenant have some validity. In practice one means of overcoming this problem has been to incorporate within the land management agreement a clause or clauses requiring the owner of the land to obtain written agreement from any tenant that they will abide by the terms of the land management agreement. It is in the owner's best interest to ensure that this occurs in any event, because ultimately the owner will be held responsible if the terms of the land management agreement are breached. However, to provide as the Court suggested that a land management agreement should not be used where parties other than the owner have rights of occupancy over the land considerably limits the extent and scope of land management agreements. There would be few properties where there is not the possibility of someone other than the owner of the land having occupancy of the land at some stage. This restriction of the nature suggested would make the system of land management agreements almost unworkable.

4. An interesting amendment when the Development Act, 1993 came into force was the deletion of the word "development" from the nature of the matters which could be dealt with by a land management agreement. Now land management agreements can relate to the "management, preservation or conservation of land". The rationale for deleting the term "development" was that many councils were using the land management agreements as a de facto planning policy instrument. Rather than undertake amendments to their Development Plans which would require public notification and input Council's were entering into land management agreements requiring certain undertakings and placing certain restrictions on land. The Government believes this is undesirable and accordingly the term "development" was deleted when Section 57 of the Development Act was drafted.

This issue has not yet been determined but arguably a simple deletion of the term "development" has not limited the scope of land management agreements. The term "management" is a very broad one and arguably development is just one facet of the "management" of land.

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