South Australia

The Display of an Advertisement (On Wheels) - an Act or Activity in Relation to Land?

The Gawler and Barossa Jockey Club Inc and Others v Corporation of the Town of Gawler

(ERD 513/94 delivered 16 March 1995).

The issue of whether moveable advertising signs constituted development and thus required authorisation was considered by the ERD Court in this case.

Despite disputing that it needed approval, the Jockey Club applied to the Council in August 1994 on a without prejudice basis to place what the application described as "three-sided trailerable advertising signs" on the Gawler Racecourse in positions so as to enable the signs to be seen by traffic passing along Adelaide Road. Each advertising space was proposed to have dimensions of 4.9m wide by 1.2m high. It was proposed that the six advertising spaces would be provided on each side of three trailers. The trailers which had been constructed had a frame as a base with inflatable wheels on either side of the rear of the base.

It was intended that the signs would be positioned in the "1600m chute" on the racecourse land except on days when race meetings took place and when the chute needed mowing. Therefore, on all but three days per month the advertisements would be positioned in that location.

The matter was brought before the Court as a preliminary point as to whether the proposal constituted "development" within the meaning of the Act.

The Council argued that the proposal constituted development as it represented either a change in the use of land or was an activity deemed by regulation to constitute development.

The relevant part of Schedule 2 for the purposes of this submission was as follows:

"The following acts or activities constitute development:...

(7) other than within the City of Adelaide, the commencement of the display of an advertisement, but not including a change made to the contents of an existing advertisement if the advertisement area is not increased."

The Jockey Club argued that the proposal did not constitute development and that therefore authorisation was not required.

While the Court accepted the submission that the advertising signs were not in the nature of fixtures to the land and that therefore they did not involve building work pursuant to the authorities of *Keane v. Kleem* (1988) 50 SASR 66 and *Corporation of the City of Noarlunga v. Fraser* (1986) 42 SASR 450; it went on to find that the proposal was development because it fell within the provisions of paragraph 7 of Schedule 2 and in any event, constituted a change in the use of the land.

The Court rejected the Jockey Club's argument that when reading paragraph 7 of Schedule 2, the act or activity had to have a nexus with the land to constitute development and that therefore the "display" in paragraph 7 of Schedule 2 should be read as "advertising display". The Court said that the definition of development as contained in paragraphs (a) to (g) in section 4 of the Act is, by its very nature, in relation to land. The Court used the example that while the display of an advertisement for mobile phones on the side of an operating Trans Adelaide bus would not constitute development, the display of the same advertisement on the same bus brought onto a racecourse and parked in a location where the advertisement can clearly be seen by passers by on a public road, with the intention that the bus remain in that location on a permanent basis, might constitute development.

The Court said that "in relation to land" suggests in connection with or in the context of, land, as defined in the Act. It found that the proposal was in relation to land and that the signs constituted advertisements which would be readily visible on all but 36 days per year. The act declared by regulation to constitute development was the commencement of the display of an advertisement and thus the proposal amounted to development for the purposes of the Act.

Having made this finding the Court did not need to decide the change in use argument however, it indicated that it was of the view that the implementation of the proposal would result in a change in the use of the land. It found that the land, or portion thereof, was proposed to be used for a new, additional purpose, namely that of advertising. It followed the authority of *Corporation of the City of West Torrens v. McDonald's Properties (Australia) Pty Ltd* (1985) 38 SASR 467 where the Court was unable to assign the characteristics of a shop to a proposed free standing pylon sign. Accordingly, the use of land for the location of third party advertising signs could not, the Court said, fit within the purpose of the existing use of the racecourse. It was an independent use of the land separate and distinct to the racecourse use. The Court found that the signs carrying advertisements by third parties could not be considered to be incidental or ancillary to the racecourse use of the land and that it did not matter that the space occupied by the signs was small compared with the overall area of the land subject to the existing use (see *Southern Cross Homes v. Corporation of the City of Enfield* (1992) 164 LSJS 191).

The Jockey Club has appealed to the Supreme Court against this decision and the judgment is pending.

Gavin Leydon
Partner
Norman Waterhouse
Adelaide

The Power to Impose Conditions

Mosel Browne Surveyors and Tim Knappstein v District Council of Clare

(ERD 137/95 delivered 28 June 1995).

The ability of Councils to impose conditions requiring a developer to undertake work external to the subject land has long been an issue of contention. This issue was considered by the ERD Court.

The subject condition had been imposed by the Council on a provisional development plan consent to divide land into two allotments. The contentious condition read as follows:

> "The applicant to contribute an amount of $2,100 toward the upgrading of Angas Back Road to provide safe and convenient access to the allotments herein proposed."

The subject land had an area of approximately 27 hectares with frontages to Springfarm Road and Angas Back Road.

The appellant argued that the condition was ultra vires, in that the Council had no power to impose it and that it therefore should be severed from the provisional development plan that consent had been granted.

Two existing access points were available in respect of each of the proposed allotments. While certain parts of both roads fronting the subject land were unsealed, the Court found that they were trafficable and in regular use.

The subject land was located in a rural area and the evidence presented to the Court was that the proposed allotments would be used for a vineyard in respect of allotment 1 and Mr Knappstein's family home and some vineyard use on allotment 2. It was unlikely therefore that there would be any additional traffic to what presently existed as a consequence of the proposed land division.

The powers of a relevant authority to impose conditions on a consent are set out in section 42 of the Act. While that section gives a relevant authority a wide discretion insofar as the conditions which it may impose, the Courts have consistently found, following *Twenty Seven Properties Ltd v. Corporation of Noarlunga and Others* (1975) 11 SASR 188, that for a condition to be valid, it must have a planning purpose, it must fairly and reasonably relate to the development the subject of the consent and it must be reasonable.

On the question of whether the condition had a planning purpose, the Court found that on the evidence it did not. While the condition purported to be imposed for the purpose of upgrading Angas Back Road to provide safe and convenient access to the proposed allotments, the evidence was that safe and convenient access was presently provided to the subject land and would be provided to each of the proposed allotments without any work being done. In fact, the evidence of the Council's Environmental Services Manager was that the upgrading of Angas Back Road was required for an ulterior purpose, namely for the benefit of users of the road generally.

In addition, the evidence to the Court was that it was a standard Council policy to require a contribution from a land owner as a condition of provisional development plan consent on a proposed land division where the land abutted a public road. This standard policy was applicable regardless of whether the proposed land division would, of itself, give rise to increased use of any abutting public road.

The condition also could not be said to fairly and reasonably relate to the proposed development as the land division would not have given rise to any increased usage of Angas Back Road.

As to whether the condition was reasonable the Court found that in all of the circumstances it was not, particularly given the ulterior purpose behind its imposition. Accordingly, the Court found that the condition was ultra vires the power of the relevant authority and therefore could not stand.

The Court went on to decide that the condition was severable in that it did not limit the way in which the land could be developed nor did it go to the heart of the consent granted. Judge Trenorden found that it had:

> "... been designed to achieve an ulterior object such as the formation, upgrade or repair of an existing public road, abutting the land proposed to be divided. It cannot even be that the condition is designed to achieve a contribution towards the formation, maintenance or upgrade of the portion of the road abutting the land to be divided, which road is in need of repair, because the evidence in this case did not go as far as showing that this portion of the road was in need of such works."

Care must therefore be taken when considering the conditions to be imposed upon a provisional development plan consent to ensure that they each have a planning purpose, that they fairly and reasonably relate to the development the subject of the consent and are reasonable.

Gallacher v City of Mitcham

(1994) EDLR 339.

In the matter of *Gallacher v City of Mitcham* [1994] Judge Trenorden considered the validity of 9 conditions imposed upon a provisional development plan consent to divide two allotments at Panorama into 8 allotments, 7 for residential purposes and one for use as a road.

The subject land was vacant, except for a variety of shrubs and trees, and a large red gum designated on the plan of division as a tree which would be retained. The site plan had been submitted to the Council showing general proposals for housing and landscaping on four of the proposed allotments. While reference was made to the proposed housing in the report of the planning officer, the application before the Council was one for land division only. The applicant appealed against the conditions imposed on the provisional development plan consent on the basis that they could not be validly imposed as they had either been imposed for an ulterior purpose, or that they simply did not relate to the subject development.

The conditions imposed by the Council were as follows:

(i) The development shall proceed in accordance with the application and plan submitted which include the design and siting of future dwellings on the site.

(ii) That the applicant enter into a land management agreement pursuant to section 57 of the *Development Act*, 1993, (as amended) to retain the existing mature Eucalyptus located to the rear of proposed allotment 106.

(iii) Council declares the whole of the land shown on the plan of land division in development application 080/D014/94 as an underground mains area pursuant to the provisions of the *Development Act*, 1993.

(iv) The developer shall construct the road with:
- interlocking pavers
- cul-de-sac head
- minimum road width of 6 (six) metres

(v) The site shall be cleared of all buildings and graded to Council's satisfaction. All onsite trees shall be protected to prevent damage to the trunk and root system.

(vi) Ardlui Close shall be a private road under the ownership of Lots 101, 102, 104, 105 and 106.

(vii) All services shall be underground.

(viii) The construction of Ardlui Close, including the installation of all services, shall be completed to a good engineering standard prior to titles being issued.

(ix) Consent shall be expressly conditional upon the road being a private road."

As the matter concerned the appropriateness and validity of conditions attached to a consent for land division, the Court considered the provisions of the *Development Act* and Regulations insofar as they related to land division.

After considering the provisions of s33 of the Act, the Court noted that a land division application required two consents and that while both consents may be the subject of one application, the relevant authority does not have to grant a consent in relation to s33(1) (c) of the *Development Act* at the time it grants provisional development plan consent. It was noted that it would be unusual for both consents to be granted at the same time given the other provisions of the Act and Regulations. For example, to comply with r29, a Council cannot make a decision on a land division application, until it has received a report from the Development Assessment Commission "in relation to the matters under s33(1) (as relevant)" or, until the expiry of the statutory period under the regulations with no report having been received. As the Council has two decisions to make under s33(1), r29 was said to apply to both decisions.

DAC has a further role in relation to land division applications. Under s51(1), it is required to issue a certificate that it is satisfied that the prescribed conditions as to development have been satisfied or that the applicant has entered into a binding agreement to the satisfaction of any of those conditions. Before the Council can give s33(1)(c) consent, it has to have assessed the land division against the requirements set out in the Regulations made for the purposes of S33(1)(c) and be satisfied that they have been complied with (or will be satisfied by the imposition of conditions).

Part 9 of the regulations entitled "Special Provisions relating to land division" sets out those requirements "prescribed for the purposes of s33(1)(c)(v) and 51(1) of the Act". Division 2 of part 9 sets out requirements in respect of roads, bridges, drains and services. They must be satisfied before a certificate can be issued by DAC under s51. Alternatively, a certificate may be issued if binding arrangements are entered into in accordance with r58.

Conditions may be attached to a consent pursuant to the provisions of s42 of the Act which provides:

"42(1) A decision under this Division is subject to such conditions (if any) -

* as a relevant authority thinks fit to impose in relation to the development; or

* as may be prescribed by the regulations or otherwise imposed under this Act."

Subsection (3) gives examples of the type of conditions that may be imposed on a consent to a development. It was accepted that each of the consents required in s33(1) may be subject to conditions, but the conditions in respect of each consent, to be valid, would have to be lawfully imposed in relation to each particular consent. It was made clear that a condition imposed on a provisional development plan consent, although lawfully imposed on that consent, may not be a lawful condition of consent pursuant to s33(1)(c) or on a provisional building rules consent, and vice versa.

Before looking to the specific conditions before it, the Court considered the authorities for the test for determining the validity of a condition purporting to be an exercise of the power to grant planning permission either unconditionally or "subject to such conditions as the authority thinks fit". Those cases were *Twenty Seven Properties Limited v Corporation of Noarlunga & Ors* (1975) 11 SASR 188; *Corporation of the City of Unley v Claude Neon Limited & Dalgety Australia Limited* (1983) 32 SASR 329; *Paramatta City Council v Peterson* (1987) 61 LGRA 286 and *Newberry District Council v Secretary of State for the Environment* and *Newberry District Council v International Synthetic Rubber Co Limited* (1981) AC 578. These cases are authority for the proposition that in order for a condition to be lawfully imposed it must satisfy three tests:

* It must have a planning purpose;

* It must relate to the permitted development to which it is annexed; and

* It must be reasonable.

Therefore, while a relevant authority has an apparently wide discretion insofar as the granting of conditions pursuant to s42(1)(a) is concerned, that discretion is limited by the three tests discussed in the cases described above. Having examined those cases the Judge suggested that:

> "The application of those tests might result, it follows in a condition attached to a consent under one of the limbs of s33(1) being valid, whereas the same condition might not be valid when attached to a consent granted under a different limb of s33(1). Indeed, it seems to me that a consideration of the matters against which an application has to be assessed for each consent suggests, in the case of an application for land division, that very few conditions might appropriately be attached to a provisional development plan consent..."

The Court then turned to consider each of the specific conditions.

Insofar as condition 1 was concerned, the latter part of the condition relating to the design and siting of future dwellings on the site was deleted given that the application was merely for the division of the land.

In relation to condition 2 which required a land management agreement to be entered into for the retention of an Eucalyptus tree, the Judge suggested that the condition was unnecessary given that the plan of division included a notation that the tree would be retained. In any event, it was found that a requirement that an applicant enter into a land management agreement cannot lawfully be imposed as a condition attached to a consent. This followed a previous decision of the Planning Appeal Tribunal in *Holshuyssen & District Council of East Torrens and Nest Egg Nominees Pty Ltd v District Council of East Torrens and D W Scott & Holyshuyssen* (PAT No 779 of 1989 and 63 of 1990, delivered 4 October 1990) where the Tribunal said:

> "... amendment to the land management agreement can only proceed if agreement is reached between the parties. No condition imposed either by the Council or by this Tribunal, can force parties to agree. The fact that the agreement of the Council is required as a pre-requisite to the fulfilment of the condition places the Council in a position in which it is able, by simply declining to reach agreement with the applicants on the proposed amendments, to entirely frustrate the approval granted... a condition having such an effect has been held, on many occasions to be inappropriate, if not invalid."

While a condition requiring a land management agreement was held to be invalid the Court did accept a condition requiring the tree to be retained in the absence of approval from the Council that it be removed.

As to condition 3 that any electricity mains be placed underground, the Court found that it was a condition that was more appropriately imposed at the land division consent stage.

As to condition 4 concerning the width and construction materials of the road, again it was held that it was inappropriate to be the subject of a condition attaching to a provisional development plan consent. Road construction materials are dealt with in r54, being one of the regulations containing the requirements prescribed for the purposes of s33(1)(c)(v) and s51(1) of the Act. Roadway width and requirements for a cul-de-sac are dealt with in r53 which also contains prescribed particulars. As these matters were therefore specifically for consideration prior to the issue of a certificate under s51 and the consent pursuant to s33(1)(c), they were said to be appropriately dealt with at that time and thus were inappropriately the subject of a condition attaching to a provisional development plan consent.

Condition 5 concerning the clearing of all buildings on the site and grading it to the Council's satisfaction was one of the few conditions to be held to be valid. The Court was satisfied that a planning purpose might be fulfilled by the imposition of the condition on the basis that it was directed towards the safe and efficient disposal of stormwater on the land consistent with one of the Council's principles of development control.

Condition 6 requiring the road to be a private road under the ownership of several of the allotment holders was found to be invalid as it had been imposed for an ulterior object, namely the financial well being of the Council. This conclusion resulted from evidence given by the Council that it did not want to accept financial responsibility for new roads in developments such as the one proposed because of the financial pressures currently upon it.

Condition 7 requiring all services to be underground was found to be a condition inappropriately imposed upon a provisional development plan consent.

Condition 8 which required the construction of the road and installation of services to be completed to good engineering standards prior to titles being issued was also found to be an inappropriate condition attaching to a provisional development plan consent being a matter which should be dealt with in relation to the consent under s33(1)(c).

The requirement in condition 9 that consent was conditional upon the road being a private road was said to be beyond the power of the Council to impose.

In considering the question of whether the invalid conditions could be severed from the consent the Court quoted from the judgment of Lord Reid in *Kingsway Investments v Kent County Council* (1971) AC 72at 90:

> "...suppose that a planning authority purports to impose a condition which is nothing whatever to do with planning considerations but is only calculated to achieve some ulterior object thought to be in the public interest. Clearly, in my view, the condition should be severed and the permission should stand but suppose, on the other hand that a condition, though invalid because ultra vires or unreasonable, limits the manner in which the land can be developed, then the condition would not be severable, for if it were simply struck out the result would be that the owner could do things on his land for which he never in fact obtained permission, and that would be contrary to the intention of the statutes."

The Court found that it could sever the conditions held to be invalid and granted provisional development plan consent to the proposed land division.

Gavin Leydon
Partner
Norman Waterhouse
Adelaide

The Weight to be Assigned to Development Plan Principles - Mandatory or Advisory?

SAHC v DAC and Another (1994)

(1994) 85 LGERA 92

The Full Supreme Court considered the concept of seriously at variance as contained in the provisions of s47(9) of the *Planning Act* in the context of a reservation of questions of law to the Full Court pursuant to s31 of the *Environment, Resources and Development Court Act.*

The South Australian Housing Trust had applied to the City of Marion for consent to develop land for three detached and two semi-detached dwellings.

The Development Assessment Commission considered the matter in January 1994 and while it indicated to representatives from the Council that it considered the proposed development warranted approval on its planning merits as it satisfied the criteria listed in Principle of Development Control 39 applicable to row and multiple dwellings; it resolved that on legal grounds it had no choice but to refuse the application. It did so because the proposed development was not consistent with the site area standards listed in Principle of Development Control 37.

The Trust appealed to the ERD Court against the Commission's decision and the questions of law reserved to the Full Court were as follows:

Whether the Commission, having resolved:

* to acknowledge that the proposal does demonstrate considerable merit on planning grounds in terms of siting, layout and appearance and in addition -
    * having convenient walking distance to public transport;
    * being within convenient distance to local shopping facilities;
    * the site being a vacant large allotment suitable for redevelopment;
    * the road system being able to adequately cater for any increase in traffic;
    * being similar to existing development regarding the types of housing;
    * the site and locality having adequate public infrastructure.
* to refuse the application only because it does not comply with the site area standards as required by Marion Principle of Development Control 37;

the application must be refused as a matter of law because of the development's non-compliance with the standards set out in Principle 37.

Whether compliance by the development with Principle 37:

* is mandatory, or
* is mandatory, except where the development fails to conform with standards in that principle in only a minor respect and otherwise merits approval, or
* is not mandatory.

Whether Principle 37 is to be given any greater importance over and above other relevant Principles of Development Control in the Development Plan in relation to this development."

In *Marion City Council v. Kerta Weeta Construction Pty Ltd* (1993) 81 LGERA 392, Principle 37 was described as expressed in terms which provided that it was the lowest acceptable standard, compliance with that standard being mandatory. It was put on behalf of the Council that compliance with Principle 37 is not strictly mandatory but consent should be given only where the development fails to conform with the standards in a minor respect and otherwise merits approval.

After considering the provisions of s47(9) of the *Planning Act* which were as follows:

> "(9) In deciding whether to consent to a proposed development under this section, a planning authority -
>
> * must have regard to the provisions of the Development Plan so far as they are relevant to that decision; and
>
> * not make a decision that is seriously at variance with those provisions."

the Court chose not to follow the reasoning in *Kerta Weeta* suggesting that no Principle of Development Control can be mandatory because, by virtue of s47 of the Act, the planning authority is empowered to grant consent unless the proposed development is seriously at variance with the provisions of the Plan. The Court did not agree that an application must be refused, as a matter of law, if the proposal does not comply with the standards in Principle 37 finding that that did not automatically render the proposed development seriously at variance with the provisions of the Plan.

The Court referred to the case of *Walkerville Town Corporation v. Adelaide Clinic Holdings Pty Ltd* (1985) 38 SASR 161 where it was made plain that to regard any Principle of Development Control in the Development Plan as mandatory was contrary to s47 of the *Planning Act*. Standards such as those contained in Principle 37 were said to be guides rather than mandatory. The subject principle was said to be advisory in the sense of expressing goals and guiding principles rather than mandatory or necessarily compulsive. It was said that Principle 37 was a matter to be considered, but that non-compliance with that principle did not necessarily involve a breach of s47(9)(b) of the *Planning Act*.

The subject principle was not be given any greater importance over and above other relevant Principles of Development Control in the Development Plan. It is a matter for the judgment of the relevant planning authority having regard to the proposed development and all the surrounding circumstances.

Gavin Leydon
Partner
Norman Waterhouse
Adelaide

The Joinder of Parties to an Appeal

Pitt & Others v ERD Court, Calvary Hospital Adelaide Inc and Corporation of the City of Adelaide

(Supreme Court No. 1101 of 1994).

On 1 August 1995 the Full Court of the Supreme Court delivered a significant decision in relation to the jurisdiction of the ERD Court to order joinder under section 17 of the *ERD Court Act*.

The matter was before the Full Court as a result of an appeal against a decision of Judge Bowering in the ERD Court to refuse an application by residents living in close proximity to the Calvary Hospital at North Adelaide to be joined as parties to an appeal.

On 14 January 1994, the day prior to the *Development Act* coming into operation, the Calvary Hospital sought planning approval from the Council to extend existing wards and construct a two level car parking station. The application for approval was made under the provisions of the *City of Adelaide Development Control Act* which was repealed on 15 January 1994. The tactics behind the timing of the application were that the *City Act* included no public notification procedure nor third party appeal rights. Notwithstanding this, the Council chose to informally notify residents who were permitted to appear before a committee of the Council to make representations and present reports from planners, architects and traffic consultants in opposition to the proposal. The Council refused approval and Calvary appealed against that refusal to the ERD Court pursuant to the transitional provisions which abolished the former City of Adelaide Planning Appeals Tribunal.

On the residents' application to Judge Bowering to be joined as a party to the appeal, the Judge held that while he had jurisdiction to join the residents, in exercising his discretion he should not do so.

The Full Court agreed with Judge Bowering insofar as he found that pursuant to the transitional provisions in the *Statutes Repeal and Amendment (Development) Act,* 1993 he had jurisdiction to join the residents. The reason for this was that s24(2) of the *Repeal Act* provided that an appeal commenced under any of the repealed Acts could be continued and completed as if the *Development Act* had not been enacted except that the reference to the City of Adelaide Planning Appeals Tribunal was to be taken as reference to the ERD Court. Therefore, the right of appeal allowed by the previous legislation could be exercised to the ERD Court which was to deal with the matter in accordance with its procedures. Part of those procedures are set out in s17 of the *ERD Court Act* which enable the ERD Court to order the joinder of a person as a party to the proceedings.

The residents argued that Judge Bowering had erred in the exercise of his discretion when he refused leave to permit joinder. Whilst the Judge acknowledged that the appellants had a bona fide interest in the proposal; that they lived within close proximity to the hospital; and that it was likely that they would be affected by the proposed development he said that:

> "In view of the statutory provisions set out in the *City of Adelaide Development Control Act*, the rights to participate must be limited and must indeed, be limited to special circumstances.....It seems to me that the fact that people live in close proximity to the land subject to the appeal, will be affected, quite possibly detrimentally, by the development proposed, does not bring them within those special and unusual circumstances in which they should be permitted to participate in legal proceedings in circumstances where, leaving aside the power to be joined, the statute has clearly indicated that they should have no role." *(my underlining)*

Justice Duggan and Chief Justice Doyle in considering the ERD Court's jurisdiction to join parties pursuant to s17 (1) of the *ERD Court Act* found that Judge Bowering had allowed irrelevant factors to influence the exercise of his discretion. They found that the exercise of the discretion in s17 was not expressly or impliedly limited to "special and unusual circumstances".

The Court found that the features of the case for an applicant for joinder under s17 must not necessarily disclose something in the nature of a "special" case. The Court suggested the following matters should be considered where the ERD Court is exercising its discretion to join a party:-

* It is a proper exercise of the powers of the Court to exclude mere meddlers or busy bodies from the proceedings;

* Essential to the exercise of the discretion to permit joinder is whether the applicant has a genuine interest in the appeal. Such an interest would arise if an order could be made which would prejudicially affect the interest of the person applying to be joined;

* Important factors include the nature and strength of the interest of the applicant for joinder in the decision under appeal;

* The contribution which the applicant for joinder is likely to be able to make to the proper resolution of the issues before the ERD Court;

* Whether the interest which the applicant for joinder represents and the material to beadvanced by that person will be adequately dealt with by the parties already before the Court; and

* It will also be appropriate for the ERD Court to consider the impact upon the proceedings of the joinder (ie the Court should consider the interests of the parties before it as of right and the public interest in the prompt and efficient dispatch of proceedings.)

The test therefore for an applicant for joinder is whether he or she can establish a sufficient interest and the establishment of factors which make it appropriate to make an order for joinder in the particular case. The Court made the point that joinder will never be made as a matter of course and that, the third party who cannot institute its own appeal, will only be joined if in the particular circumstances of the case, there are factors making it appropriate to do so. The Court found it incorrect to reason that because an order for joinder permits involvement in the proceedings which under the *City of Adelaide Development Control Act* was not permitted, that a restrictive approach should be taken for the making of an order for joinder.

In allowing the appeal and joining the residents as parties to the appeal before the ERD Court, the Full Court took into account the following matters:-

* the extent to which the proposed development would affect the residents living in close proximity to the hospital by way of a potential to affect the amenity of their locality;

* the history of the residents' involvement in the development application suggesting that the ERD Court will derive some benefit from the continued involvement of the residents, which involvement had indicated their genuine interest in the issues to be debated;

* other matters relevant to the exercise of the discretion including the Court's interest in ensuring that proceedings do not become protracted or cumbersome; and

* the extent to which the issues which would be raised will coincide with issues to be raised by the parties as of right to the appeal and the number of parties seeking to be joined.

Justice Duggan in rejecting the argument that to allow joinder would be to open the floodgates recognised:-

> "an acknowledgment in recent times of the justice of community involvement in planning applications. The commendable practice of the City Council in this case in permitting submissions from persons potentially affected by proposed developments is an example."

He adopted the comments of Cooke J in *Blencraft Manufacturing Co Ltd v Fletcher Development Co Ltd and Anor* [1974] 1 NZLR 295 at 312:-

> "This Court should not be swayed, of course, by any fear, whether well or ill-founded, of a significant increase in the number of town planning cases in its list of business. I do not think that the New Zealand courts will underestimate the importance for the public and the individual of the issues with which town planning disputes are concerned - an importance sometimes transcending that of disputes in the more traditional fields of law."

Justice Duggan went on to suggest that if the discretion in s17 of the *ERD Court Act* was considered to be too widely expressed then it was open for Parliament to narrow it.

Accordingly, in light of the residents' genuine interest, the type of development, its potential to substantially affect the interests of the residents, their prior involvement in the application, the nature of the issues which they would raise on appeal, and the unlikelihood that their participation would unduly prolong the appeal, the Court formed the view that they should be properly joined to the proceedings and ordered accordingly.

Gavin Leydon
Partner
Norman Waterhouse
Adelaide