South Australia

The last twelve months have been busy for the Environment, Resources and Development Court with approximately 90 matters going to a hearing. Most have been in the nature of merit appeals although there have also been quite a number of enforcement matters in the form of prosecutions, contempt of court and civil enforcement proceedings and appeals against enforcement notices.

The Supreme Court dealt with about twelve planning related mattes, the majority in the form of judicial review proceedings alleging various errors in procedure on the part of the relevant planning authority. Of particular interest in local government circles were the challenges to retail centre proposals within West Torrens and Gawler.

Each of the cases that have gone before the Courts have been determined in the context of their own peculiar facts and circumstances and in the context of the relevant Development Plan provisions. Some of these cases however have established new principles or provided direction as to a variety of matters such that they will form useful precedents for the future. In selecting cases for discussion in this paper I have looked at those of interest and those which provide future guidance in the following areas:

* Demolishing a building - a change in the use of land?
* The use of application documentation to construe the scope of an authorisation.
* Supporting reasons for refusal by reference to the Development Plan.
* Relevance of AMCORD when making a planning assessment.
* Relevance of departure from conditions for "complying" development.
* Relevance of precedent effect in planning matters.
* Characterisation of development - what amounts to a special industry.
* Validity of conditions incorporating the words "to the reasonable satisfaction of the council".

The objective of this paper is to provide a discussion of these areas of planning law which commonly concern both local government and developers through an examination of the most relevant decisions during the last 12 months.

The Importance of Supporting Reasons for Refusal by Reference to the Development Plan

Treloar v City of Hindmarsh & Woodville & Anor [1995]

In the case of *Treloar v City of Hindmarsh & Woodville & Anor* [1995] EDLR 672 Commissioner Hodgson emphasised the importance for a planning authority to support its reasons for refusal by reference to relevant provisions of the Development Plan.

The Council had resolved to refuse provisional development plan consent to a proposal to retain existing buildings used for a tyre fitting and sales business and to erect a new workshop to be used as a motor repair station on land at Woodville Park.

As required by Section 40 of the *Development Act*, the Council provided a notice of refusal and cited three reasons for its decision:

* The application is a new application and not an extension of the existing land use on the adjoining land title.
* The application is for an inappropriate land use ie. a motor repair station.
* An additional consent by council, would seriously affect the current zoning of the area amounting to an overdevelopment of an inappropriate land usage in that zone.

The Commissioner was critical of the Council insofar as these reasons for refusal were not supported by reference to those Development Plan provisions with which the Council considered the proposal to conflict. In commenting on the grounds of refusal he said:

> "The first of the grounds for refusal is not only unclear, but appears to bear no relationship to the provisions of the Development Plan. The second is not supported by reference to any provision of the Development Plan which might suggest that a motor repair station is an inappropriate land use on the subject land. The third refers to overdevelopment of the subject land, again without reference to any provisions in the Development Plan which might support such a view."

The Commissioner said that he was not suggesting that there was no basis upon which the Council could have

reached a decision to refuse the application, but rather that he wished to emphasise the importance of a decision to refuse a development application, being supported by reference to those provisions of the Development Plan which are considered by the Council to be instrumental in that decision. The benefit of this taking place was said to be that it :

> "Will ensure that the Councilís statutory responsibility to make its decisions on development applications on the basis of those provisions is not lost sight of in the heat of the debate in the Council chamber, and will avoid refusal being based, in whole or in part,on spurious or irrelevant grounds."

It is important therefore that in all cases where a Council intends to refuse an application that it incorporate within its reasons for refusal relevant references to those provisions of the Development Plan which it believes the proposal is in conflict and upon which it has based its decision.

What Consideration Can be Given by a Relevant Authority to AMCORD When Making its Planning Assessment of a Proposed Development?

Eva Developments v District Council of Angaston

This issue was touched upon in the decision of *Eva Developments v District Council of Angaston (ERD 270 of 1995 delivered December 15, 1995).* It involved a proposal to divide land at Nuriootpa West to create 19 residential allotments. The Council had refused the proposed land division and the primary issues in dispute were the adequacy of open space provided as part of the proposed land division and the resulting residential density when measured against the provisions of the Residential (N10) Zone.

On the issue of the appropriateness of the open space provided in the proposal, each of the planning witnesses made reference to the Australian Model Code for Residential Development (AMCORD) drafted in January 1995. Commissioner Hutchings in his judgment noted that he had examined the draft AMCORD of January 1995 and found it to be a "useful compendium" on the subject in dispute. After measuring the proposal against the provisions of the Development Plan and finding that it was, subject to a number of amendments, worthy of approval, he made specific comment about the role of AMCORD and how it could be used by both experts and the Court. At page 11 he said:

> "It is a document that has become an important reference over recent years. For residential development it particularises data inputs, policy contexts, and design outputs in such a way as to be easily useable by planning practitioners and decision makers and I would expect experts to refer to it as a matter of course.
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> Nonetheless, while it is perhaps the leading reference on this subject in Australia at the present time, it is not the only one. (Indeed, being an evolving document, each new version does not supersede its predecessors - rather, it refines them). Neither is it gospel and no expert should refer to it as such but rather as a reference in the formation of opinions. If anything must be called gospel, it is the authorised Development Plan."

Nikou v City of Hindmarsh & Woodville [1996] EDLR 41.

The same point was recently made by Commissioner Wallman in the decision of *Nikou v City of Hindmarsh & Woodville* [1996] EDLR 41.

In that case the appellant sought consent to divide former market gardening land at Fulham Gardens into two large allotments. An indicative layout of possible further division of the whole of the land was also lodged with the proposal plan. The Council granted provisional development plan consent to the land division subject to three conditions. One of those conditions required a two metre wide strip of land along the entire southern boundary of the land holding to be provided as road reserve in the form of footpath. The appellant appealed against the conditions imposed upon the approval on the basis that they were either unlawful, unreasonable or unnecessary.

The basis for the condition requiring road widening was that the Council had earlier approved the provision of the existing road reserve in association with the division of land on the southern side of the subject road in anticipation of that reserve being widened by two metres on the northern side when the division of the subject land took place. This requirement was said to be consistent with the policy adopted by the Council which provided for sharing of the provision for a road between developers of abutting land where the division of land provides for a local access road along the boundary between the abutting areas. At the time of the application the road reserve was ten metres and as part of the subject approval the Council sought to exercise its power to require widening of the existing road as set out in Regulation 52.

The Council considered that an overall road reserve width of 12 metres was necessary to set the scene for future development by allowing a sufficient area to provide for landscaping, to establish an appropriate level of amenity on the northern side of the road, to separate dwellings from the roadway and to provide for the safe and efficient

movement of traffic by allowing adequate driver sight distance. The Court ultimately upheld the substance of the condition requiring the additional two metre strip of land to be provided as road reserve.

As in the *Eva Developments* case, each of the expert witnesses referred to AMCORD documents for justification or otherwise for the widening of the subject street. These documents included the draft "Edition 2" Australian Model Code for Residential Development published in 1990 (AMCORD) and another draft code referred to as "AMCORD Urban" produced by the Model Code Secretariat in 1992, unlike AMCORD which was designed for single lot housing where the lot area was greater than 300m2 it was concerned with all forms of housing, other than high rise, and addressed infill housing and redevelopment in the area.

It was noted that both of these codes were prepared on the basis that they would need to be adapted to State and local conditions before they could be given any particular weight. While they had been widely displayed to the public, neither had any statutory effect.

The third document referred to was a preliminary draft code entitled "AMCORD 95", designed to replace AMCORD and AMCORD Urban. This code was produced in January 1995 and covers all forms of residential development and housing, except housing that requires lifts. As to the regard which could be had to these documents, the Court again noted that it was appropriate to consider them but as guidelines only. Commissioner Wallman said, however, that while he had regard to the provisions of the references he had only given them limited weight, particularly where quite specific guidelines were concerned, in comparison to the provisions of the Development Plan. While he suggested that the AMCORD documents provided a useful checklist of reasons why verges along a roadway may be needed, he highlighted their limitations saying:

> "Much was made in the evidence of the classification of Eliza Jane Court in reference to the AMCORD documents, but this road does not sit neatly into the given classes of road. This is symptomatic of the problems encountered in using the "AMCORD" documents and is indicative of their limited applicability.
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> Thus, while it has been accepted by the Court that the AMCORD documents can be used as a useful reference tool, the overriding consideration must be that of the relevant provisions of the Development Plan."

Relevance of Departure from Conditions for "Complying" Development and Imposing Conditions Regarding the Form of Future Development on a Land Division Approval

Conway v City of Mitcham (375 of 1995 delivered 22 November 1995)

Both these issues were considered by the ERD Court in *Conway v City of Mitcham* (375 of 1995 delivered 22 November 1995) which involved a proposal to divide one allotment into two on land at St Marys so as to create an allotment with an area of 384m^2 and a balance allotment of 306m^2 containing an existing dwelling.

Following the lodgment of the land division application with the Council, the appellants were asked to provide an indicative design for a two bedroom detached dwelling on the proposed new allotment. This design was provided. While the dwelling did not form part of the application, somewhat curiously, two of the Council's three stated reasons for refusal referred to the dwelling rather than to the land division proposal, ie insufficient set-back and an over development of the site.

The Council argued that in determining whether the zone objective for the Residential 3A Zone was met by the proposal, it was relevant to have regard to the site area standard prescribed for a complying detached dwelling of 560m^2. On this issue the Court referred to the observations made by Jacobs J in *Corporation of the Town of Walkerville v Adelaide Clinic Holdings Pty Ltd* (1985) 38 SASR 161 at 181 in relation to the weight to be placed on standards established for "complying" developments:

> "Finally, the appellant draws attention to two of the conditions, subject to compliance of which certain designated residential uses are permitted in a Residential 3C Zone ... it is common ground that the proposed development infringes both of these conditions, and it is argued that a development which is not expressly permitted should not be in a more favourable position than one that is so permitted. That comparison, in my judgment, is not valid. A designated development which is permitted subject to compliance with those conditions does not come under the scrutiny of a planning authority at all, and the conditions to be complied with are therefore conservative, if not stringent. If a developer wishes to be relieved pro tanto from compliance with those conditions, he must apply for consent, and the application then falls to be considered on its merits. If the authority is bound to insist on compliance with those conditions in all cases one would expect the plan to say so."

Thus, the fact of non compliance with one or more of the standards established for "complying" development is not a relevant consideration. The proposal must be considered on its merits, against all of the relevant provisions of

the Development Plan. (See also *South Australian Housing Trust v City of Prospect* [1995] EDLR 277).

The Court concluded that the size and configuration of the allotments proposed was consistent with that of a number of nearby allotments created by the re-subdivision of corner allotments and that the division would result in a new allotment of a size and configuration suitable for the erection of a small detached dwelling, subject to Council consent, in a manner consistent with the prevailing streetscape. The design and siting of any such future dwelling would be a matter for a future decision by the Council.

Having decided to uphold the appeal, the Court rejected the Council's request to impose a condition on the consent to the effect that any dwelling constructed on the new allotment should have not more than two bedrooms. In this regard the Court said that the dwelling design submitted to the Council did not form part of the application and its sole purpose was to demonstrate the capacity of the land to accommodate a small detached dwelling. The Court quoted from the decision of Judge Bowering in *Crouch v Corporation of the City of Unley* (PAT No. 134 of 1993) where he found that a similar condition imposed on a land division application was invalid offering the following comments:

> " do not construe the condition imposing powers ... as conferring upon the planning authority the power to impose a condition when approving a land division the effect of which condition will be to limit - and very severely limit - the future use to which any allotment thus created may be put and what development application may be made with respect to it ... whilst it is generally accepted that, as a matter of planning commonsense, a planning authority is entitled to require an applicant for land division approval to satisfy it that each allotment proposed to be created is suitable for the purpose for which it is to be created ... this is a far cry from empowering a planning authority to determine, by a condition imposed at the land division approval stage, the future use of the allotments thus created, even to the extent of precisely determining the nature and details of the dwelling to be constructed thereon".

While this decision involved the provisions of the *Planning Act*, it was said that there was nothing in the scheme of the *Development Act* which would suggest that the position has changed. It was thus found that there was no basis upon which such a condition could be imposed under the *Development Act* on a land division approval. See also in this regard the decision in *South Australian Housing Trust v City of Prospect* [1995] EDLR 277. The general principles relating to the requirements for a condition of consent to be validly imposed are worth remembering and are discussed in *Gallacher v City of Mitcham* [1994] EDLR 339 and *Twenty Seven Properties Ltd v City of Noarlunga* (1975) 11 SASR 188. For a condition to be valid it must:

* have a planning purpose,
* relate to the development the subject of the consent,
* be reasonable; and
* be capable of implementation by the applicant.

To What Extent Can Regard be Had to the Precedent Effect in Planning Matters?

Nadebaum v City of Mitcham

In [1995] EDLR 587 Judge Bowering considered the issue of precedent in relation to an appeal against a decision of the Council whereby it refused approval for the construction of two semi-detached dwellings on an allotment of 664 sq metres in a Residential 1A Zone.

The Development Plan suggested that semi-detached dwellings should have a minimum site area of 420 sq metres. The area proposed for each dwelling in the subject proposal was only some 332 sq metres and would have resulted in a building site coverage of 40%, significantly higher than the coverage on other allotments within the locality which ranged from 20% to 30%. The Council argued that the shortfall in site area was excessive when considered in the context of the character of the locality and the fact that the proposed development would have constituted the first intrusion of semi-detached development within the locality. It was also argued that approval of the development would create a precedent leading to other allotments within the street being used for similar purposes which would give rise to such a change in the character and residential amenity of the locality as to be inappropriate.

Judge Bowering accepted that there were certain circumstances in which either a planning authority or the Court may appropriately consider the planning or other ramifications which may flow if uses of the type envisaged become more extensive within the locality. It was said that the "precedent effect" of allowing a particular development should never be taken as being either the sole or dominant criterion in any particular case, but rather that, in some cases, it may be a factor to which a planning authority in the Court might properly have regard. It was said that it was a factor which can never stand alone and that it does not entitle either the relevant authority or the Court to either disregard the relevant provisions of the Development Plan or to treat the application concerned other than on its merits. Judge Bowering quoted from Justice Wells in the matter of *State Planning Authority v Tanczos & Others*

(1979) 20 SASR 210 where he said:

> "What is relevant in each case must be determined by the nature of the application and by the circumstances in which it was made; but it must never be forgotten that the Board seeks to administer a *Planning and Development Act*. The very title to the Act proclaims the necessity of looking, not only at contemporaneous facts and events, but also, within reasonable limits, at the probable evolution of the community and of its mode of living within an area that relates naturally and logically to the subject land. It would seem to me that it has been imperative for the Board to have weighed the likely outcome, in the Brenda Park area at least, of granting the three applications before it. In my opinion, the probabilities were - or, at least, it may well be thought that the probabilities were - well worthy of the consideration by the Board, that the granting of consent in any one of the three cases before it, a fortiori the granting of all three consents, would be likely to encourage others in Brenda Park and elsewhere to pursue similar applications; that further consents would be likely to be granted; and that with the grant of every consent the difficulty of refusing subsequent applications would mount. If the distinct possibility that a spate of similar applications would follow the grant of the instant applications was realised, the Board would have thereby created the danger that Brenda Park would, as part of the flood plain, have been irretrievably lost to the planners."

All of the allotments in the subject street displayed almost identical dimensions and had constructed upon them detached dwellings of similar character and almost identical age. In the circumstances Judge Bowering said that it was appropriate to have some regard to the precedent which the approval of the proposed development may constitute as far as the street was concerned, if not further afield. Judge Bowering said that :

> "...I do not expect the precedent flowing from an approval on no.14 to run down the street like measles, there is little doubt that if the proposed development is approved the redevelopment of other allotments in Wainwright Street for semi -detached dwelling purposes as the dwellings on such allotments become dilapidated or obsolete will be rendered somewhat more likely. That is a factor to which I have regard when determining the issues raised by this appeal, although it is not one upon which I place great weight."

In concluding that the proposed development was not worthy of consent Judge Bowering said:

> "Where a proposed development is of a type recognised by the objective of a zone as falling within one of the primary purposes of the zone, the fact that its approval will constitute a first intrusion of that type of development into the locality does not, of itself, constitute a planning justification for refusal. If, however, the proposal fails in a material respect, to meet relevant provisions of the Development Plan, the fact that it may constitute a precedent within its locality is a matter to which due weight should be given."

Once again the Court has highlighted the paramountcy of the Development Plan and emphasised that the "precedent effect" is not of itself a justifiable reason for refusing an application.

Power v City of Mitcham

In the case of *Power v City of Mitcham* [1996] EDLR 60 the Court considered an appeal against a refusal by the Council to grant consent to the erection of a dwelling on a site to be created by dividing the rear yards of three properties at Clarence Gardens.

The issue of planning merit was said to essentially turn in this case on the acceptability or otherwise of the site areas proposed for the semi-detached dwellings which would result following the introduction of the new dwelling in their rear yards. In as much as the standard for complying developments were not met, the proposal it was said must be considered on its merits. Principle 27 within the Council's Plan sought a minimum site area for semi-detached dwellings of 420m^2 throughout the Council's area. The proposal would have left the two semi-detached dwellings with site areas less than 420m^2 and thus did not accord with Principle 27. This was not fatal to the proposal as the Court subsequently found the site areas proposed were capable of providing adequate areas of private open space, car parking and set backs and that they were not inconsistent with the prevailing character of the locality and the objective for the R1A Zone.

The Council argued that approval of the proposal would create a precedent for the development of other semi-detached dwellings in the locality on sites of a size comparable to those proposed in the subject case.

In dealing with the issue of precedent, Commissioner Hodgson said that while there may be circumstances in which the likely consequences, for the wider locality, of approval of a development are a factor for consideration by the planning authority, the precedent factor can never stand alone and, as Judge Bowering held in *Nadebaum*:

> "It does not entitle either the relevant authority or this Court to either disregard the relevant conditions of the Development Plan or to treat the application concerned other than on its merits."

Commissioner Hodgson went on to quote from the comments of Wells J as to the relevance of precedent in *State Planning Authority v Tanczos & Ors* (1979) 20 SASR 210 where he said:

"What is relevant in each case must be determined by the nature of the application and by the circumstances in which it was made; but it must never be forgotten that the Board sits to administer a *Planning and Development Act.* The very title to the Act proclaims a necessity of looking, not only at contemporaneous facts and events, but also, within reasonable limits, at the probable evolution of the community and of its mode of living within an area that relates naturally and logically to the subject land."

The comments of Wells J continue to be relevant in the context of the *Development Act.*

Commissioner Hodgson found that the circumstances of the subject proposal were unique in the locality given that the semi-detached dwellings already existed and that there were no others in the locality. He proceeded to approve the proposed development subject to a number of conditions.

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