Planning Law SA | BULLETIN

PRESIDIAN LEGAL PUBLICATIONS

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CONTENTS

About this Bulletin

In order to enable subscribers to review and keep up-to-date with commentary and planning case summaries being added to *Planning Law SA*, this bulletin reproduces excerpts of key sections of new content added in the most recent update to the service (incorporated under relevant headings to show the provisions or topics to which they relate).

Case law: planning principles and case summaries

Annotated *Development Act 1993*

[3.5] 5—Interpretation of Development Plans

[3.5.18A] Existing use and "reasonable development" principle

The rationale for permitting reasonable expansions is the need to permit the practical continuation of existing uses. A limitation which restricts developments to those considered to be reasonable is a fair, logical and practical response to a dilemma imposed upon land owners as a result of factors outside their control. Any extension of such a concept to situations outside reasonable parameters could tend to undermine the prospective objectives of development plans: *DAC v A & V Contractors Pty Ltd* [2011] SASCFC 21 at [54].

...

The "meaning to be ascribed to the word 'reasonable' is 'not excessive' or 'moderate', rather than something having an understandable 'rationale' ... If the latter meaning could be ascribed to the word, one could imagine a number of perfectly logical expansions which, nevertheless, because of their size or impact, could have the effect of undermining the prospective objectives of the development plan": *Caltex Australia Petroleum P/L v City of Holdfast Bay* [2013] SAERDC 48 at [63]-[66].

...

There is conflicting case law and uncertainty regarding whether the reasonable development principle applies to statutory approvals (ie approvals granted under planning legislation). In *Adelaide Hills Recycling Pty Ltd v DAC* [2010] SAERDC 53, Judge Cole held in *obiter dicta* (at [40]) that the principle only applies in relation to a land use which pre-dates statutory planning controls and has no application when the lawfully existing use has been established pursuant to an approval granted under planning legislation.

However, in *A & V Contractors*, the Full Court of the Supreme Court considered the application of the principle in the context of a statutory approval. It was noted by the ERDC in *Caltex* (at [48]) that "[i]t would be surprising for the Court to approach its consideration of the application of the [principle] in such a detailed fashion were that Principle to have no application in the context of statutory approvals". Further, as noted by the *Caltex*, Kourakis J made the following observations (in a footnote) in *A & V Contractors* regarding the right to lawfully continue an existing non-conforming use:

> I acknowledge that the protection is not to be found in any express provision of the Act. However, the exemption of a continuation of use from the definition of development in the Act means that uses which predate planning controls, and uses in accordance with existing consents, may lawfully continue to be immune from existing or subsequently imposed development restrictions. (emphasis added)

However, in a further footnote, Kourakis J referred to Judge Cole's *obiter dicta* in *Adelaide Hills Recycling* and stated that "that contention was not put in this appeal". The court in *Caltex* concluded that the principle can apply to statutory approvals, stating (at [49]):

> Although the matter is not entirely free from doubt, it seems to me that the approach and reasoning of Kourakis J is consistent only with a view on the part of his Honour, that the [principle] has application to existing uses established pursuant to statutory approvals in the same way as it does to those uses which predated planning controls.

...

The principle does not leave open the potential for development in the nature of "unreasonable" expansions: *Caltex*, above, at [64].

There is a presumption that lists of non-complying developments in Development Plans apply to new developments, not existing ones. In *Caltex Australia Petroleum P/L v City of Holdfast Bay* [2013] SAERDC 48, the court stated (at [72]):

> In considering the proper approach to an interpretation of the relevant provisions of this Development Plan, I accept the presumption that, in the absence of a clear expression of planning policy, it should be assumed that when compiling the lists of non-complying forms of development, the authors of the Plan were intending to catch new examples of such development rather than long-established uses. The question here is whether the relevant provisions rebut that presumption and evince an intention to prohibit the expansion of existing non-complying uses.

Cases

Proposal to redevelop and upgrade existing service station – change in trading hours from 6 am-10 pm to 24/7 – hours limitation imposed as condition of planning approval – *Held:* Reasonable use principle had no application – extension in trading hours, and therefore use, not reasonable: *Caltex Australia Petroleum P/L v City of Holdfast Bay* [2013] SAERDC 48.

[3.6] 6—Concept of change in the use of land

[3.6.6] Test

A change in use can include the process that leads to the actual use. Factors such as the purpose of the use and the proximity of the activities which are to be undertaken to the ultimate purpose and the necessity of those activities in the overall purpose are all relevant considerations: *The Chappel Investment Company P/L v City of Mitcham* [2013] SAERDC 47 at [13], [16].

[3.6.15] Change in hours of operation

Cases

Appeal against decision to classify proposal to redevelop and upgrade existing service station – change in trading hours from 6 am-10 pm to 24/7 – hours limitation imposed as condition of planning approval – Residential Zone – *Held:* Proposal represented change in use of land – hours covered by limitation represented sleeping or more sensitive hours of day for neighbouring residents – condition was imposed to protect amenity of neighbouring residents – hours of operation were essence of land use – change in hours proposed substantial: *Caltex Australia Petroleum P/L v City of Holdfast Bay* [2013] SAERDC 48.

[3.6.56] Excavation and filling

Cases

Two-stage land division and restoration works to render land suitable for construction of dwellings – restoration works involved excavation of contaminated soil from top 3 m of fill on land and compaction of soils to render them capable of supporting houses in undetermined locations and of undetermined sizes and styles – former quarry – existing use vacant land – *Held:* Works constituted commencement of residential use and therefore

change of use from vacant land to residential – proposed use different in character from existing use – decontamination and compaction were proximate to and part of process leading to, rather than distinct or remote from, use of land for residential purposes and ultimately essential to establishment of such use – works were not merely preparatory to residential use: *The Chappel Investment Company P/L v City of Mitcham* [2013] SAERDC 47.

[3.6.71] Storage

Cases

Respondents stored scrap materials on four separate parcels of land that had approved uses for residential with livestock farming, rail yard roundhouse for railway equipment and maintenance, detached dwelling house with associated logging business and residential respectively – *Held:* Storage of scrap materials constituted change of use of land: *City of Mount Gambier v Pearson* [2013] SAERDC 43.

[3.33] 33—Matters against which development must be assessed

[3.33.122] Compliance with law

Planning authorities making planning decisions are entitled to assume compliance by members of the public with the law. There may be situations where compliance becomes almost impossible or is plainly incompatible with the proposed development. In that case the planning authority might well have to consider whether the development will induce non-compliance with the law such that consent should be refused, or whether it should not be granted while the law remains as it is: *Wong v Metcash Trading Australasia Ltd* [2003] SASC 314 at [45].

[3.33.255] Temporary use

In *Clement-Stone Town Planners v City of Charles Sturt* [2014] SAERDC 6, the applicant sought approval for a change of use from warehouse to temporary commercial parking facility for a six-year period in a residential zone where residential redevelopment was unlikely to occur until demand or government assistance was available or the economic and market conditions changed significantly. Commissioner Green stated (at [47]-[48]):

> Until required for desired residential development, it is appropriate to consider the interim period and particularly to ensure that existing development or further redevelopment and change, does not prejudice or diminish the likelihood and timing of change to residential land use or the amenity levels of adjacent existing residential use particularly to the west and north-west.
>
> In that regard, the proposed temporary six year aspect of the development proposal (and thereafter, revision of land use back to the current warehouse use), is important (confirmed by findings in *Commercial & General Pty Ltd v The Corporation of the City of Adelaide* [2013] SAERDC 19). It means a neutral position would occur for that period, a period in which I consider it would be highly unlikely that the land would otherwise be redeveloped for residential buildings and use.

[3.84] 84—Enforcement notices

[3.84.53] Extension of time

Cases

Appeal against s 84 notice to remove shed – approval had been refused for shed – would take about one day to remove shed – appellant had some health problems which could extend time required – *Held:* Extension of 42 days from date of judgment to remove shed (being 78 days after date by which notice required removal) granted: *Turnbull v District Council of Yorke Peninsula* [2013] SAERDC 44.

[3.85.17] Enforcement proceedings

There is no basis to make an order merely to guard against the possibility that past unlawful activity may resume: *City of Mount Gambier v Pearson* [2013] SAERDC 43 at [51].

Cases

Council sought orders relating to four parcels of land requiring respondents to cease storing scrap materials (without approval) on each parcel of land and to remove materials

from land –in relation to one parcel of land materials had been removed prior to hearing – *Held:* Orders in relation to land where scrap materials stored granted but not in relation to land where materials had been removed: *City of Mount Gambier v Pearson* [2013] SAERDC 43.

[3.88B] 88B—Declaration of interest

[3.88B.5] Operation

There is a relationship between the requirements of s 88B and the provisions in s 17 of the *Environment, Resources and Development Court Act 1993* which empower the court to dismiss proceedings instituted for the purpose of delay, obstruction or other improper purpose: *Kipa Freeholds P/L v City of Tea Tree Gully* [2013] SAERDC 45 at [33].

Annotated *Development Regulations 2008*

[4.201] Schedule 1—Definitions

[4.213] ***bulky goods outlet*** or ***retail showroom*** ...

[4.213.5] "Goods"

In *Kipa Freeholds P/L v City of Tea Tree Gully (No 2)* [2014] SAERDC 8, when considering the types of goods that could be available in a bulky goods outlet, the court stated (at [48]):

> If one examines the list of examples of goods that may be available in a bulky goods outlet, they would appear to be the type of goods more likely to be purchased as a part of a special or single purpose trip as opposed to a convenience or day to day shopping trip. They also comprise, in the main, goods which are generally larger in terms of the space taken up to display them and bulkier in terms of the ease in moving them after purchase.
>
> We recognise the danger inherent in reasoning back from examples but the goods so identified do provide limited guidance as to the meaning of the words in the definition and the word 'foodstuffs' in particular. They are the type of goods which are sufficiently large or bulky to necessitate a vehicle to transport them after purchase. The goods so stored would also be commonly found in premises with large floor areas and dedicated loading facilities.
>
> In our view, the type of goods intended for sale in a bulky goods outlet would not, in the main, be the type of goods purchased as part of a regular, convenience or multi-purpose shopping trip. In other words, they are the type of goods which would not ordinarily be found in the core of the centre where a range of specialty type shops selling convenience type products may be expected to be located.

[4.213.5] "Foodstuffs"

In *Kipa Freeholds P/L v City of Tea Tree Gully (No 2)* [2014] SAERDC 8, the court held that "foodstuffs" can include alcoholic drinks. The court stated (at [51]):

> [T]here is no reason to interpret the word 'foodstuffs' as excluding alcohol. Food and drink (both alcoholic and non-alcoholic) are commonly retailed, in the core of centres as part of the overall convenience shopping experience and, with respect to alcohol in particular, from what have been described as the 'traditional' bottle shops, with their more limited ranges and smaller floor plates.

Accordingly, the court went on to find that a retail liquor store, which primarily sells alcohol, does not fall within the definition of a "bulky goods outlet" on the basis that foodstuffs are excluded by the definition from what goods are sold by a bulky goods outlet or retail showroom.

[4.338] ***residential flat building*** ...

[4.338.10] Serviced/holiday apartment

In *The Oaks Hotels & Resorts*, the applicant sought to change the use of 69 apartments in an approved residential flat building with a total of 253 apartments to serviced apartments. The court held that, whilst the nature of serviced apartments might vary from case to case, the proposed commercially managed serviced apartments were likely to have slightly different

impacts upon the amenity of the locality from the impacts of a conventionally used residential flat building in much same way as the impacts of a motel and a residential flat building are different (at [30]). The court concluded that the proposal involved a use of the property, namely use as commercially managed serviced apartments, which would be additional to the previously established and lawfully continuing use of the land, namely use as a residential flat building, and that the proposal therefore needed to be assessed against the Development Plan (at [31]-[32]). Accordingly, in *Karidis Corporation Ltd v The Corporation of The City of Adelaide* [2014] SAERDC 2, it was held that any future proposal to change the use of 30 proposed serviced apartments to residential apartments intended for long-term occupancy would require development consent.

[4.362] *shop* ...

[4.362.500] Miscellaneous

A mobile food van is not a shop as it is not attached to the land: *Piantedosi v City of Port Lincoln* [2014] SAERDC 4 at [9].

Planning Law Case Notes

[7.20] Aged accommodation/retirement village

[7.20.55] Aged care accommodation

Cases

Appeal against refusal of application to redevelop existing aged care accommodation facility – Residential Zone and Mixed Use Zone – near district centre and facilities – retained land use acceptable in zone and location – land had irregular shape with total area of around 9,411 sq m – aged accommodation and care facility existed on land comprised of several buildings accommodating 67 beds (low care and high care) and 30 apartment-style independent living units – complex comprised mix of single and two-storey buildings focussed around centrally located local heritage place and contained two semi-detached dwellings and single-storey detached dwelling – existing site had no on-site visitor car parking and limited off-street staff parking – proposal included demolition of all buildings except local heritage place, construction of two-storey building (total footprint of around 3,530 sq m) housing 100 bed high care facility for aged (96 rooms) and 40 space car park – new building to be integrated with local heritage place – *Held:* Consent granted – well designed development that would fit appropriately in streetscape, locality and site contexts – reflective more of residential than institutional style – traffic generation, access and car parking would be improved – respected and restored existing local heritage place: *Regis Aged Care Pty Ltd v City of Mitcham* [2014] SAERDC 9.

[7.110] Car parking

[7.110.16] Commercial parking facility

Cases

Temporary facility. Application for change of use from warehouse to temporary commercial parking facility (559 spaces) for six-year period – Residential Zone – hours of operation 4.30 am to 12.00 am every day – facility to service parking demand for airport – land developed with substantial warehouse building – prior use for furniture warehousing and depot/distribution – large site, historic gas works related use, filled pug hole with contamination – decontamination required for future residential development – interim temporary use sought – mixed use locality (residential, commercial, industrial, two hotels and community uses) – residential amenity levels low to average – *Held:* Proposal acceptable for temporary period – neutral position would occur for approval period – highly unlikely land would be redeveloped for residential buildings during approval period: *Clement-Stone Town Planners v City of Charles Sturt* [2014] SAERDC 6.

[7.110.65] Liquor outlet

Cases

Appeal against refusal of consent for demolition of drive-through bottle shop, construction of 1,065 sq m retail liquor store and access alterations – District Centre Zone – site area of 8,122 sq m – setback of 21 m – existing car parking layout to be amended to provide 169 spaces compared with existing 166 spaces – parking adequacy relied on dual use of parking area for both hotel and liquor store uses with limited overlapping peak parking demand – on-street parking capacity limited and likely to be exacerbated – *Held:* Consent refused – not sufficiently in accord with Development Plan – access alterations and adjustments, together with increased floor space and potential demand, could lead to increased traffic movement in residential streets, negatively affecting residential properties – peaks and possible coinciding peaks of parking demand of significant concern, with potential for overflow of vehicle parking into surrounding streets, causing safety risks, nuisance and amenity impacts – smaller development with greater car spaces or less floor area likely achievable: *Redcape Property Fund Pty Ltd v City of Holdfast Bay* [2013] SAERDC 50.

[7.110.400] Miscellaneous

The *Australian Standard 2890.1: Parking Facilities – Off Street Parking* is in and of itself of no intrinsic force; however, the ERDC has accepted it as a valuable and authoritative technical reference in traffic and parking design matters – see [7.800.10].

Car parking spaces for disabled persons should be designed to meet the relevant Australian Standard in accordance with the *Road Traffic Act 1961*: *Phillips v DAC* [2011] SAERDC 51 at [80].

[7.130] Centres and shops

[7.130.2] General

Convenience goods are more usually found in shops and centres at lower levels in the retail hierarchy that are more widely spread and in greater number, such as Local Centres, Neighbourhood Centres and, to a lesser degree, in District Centres (lesser by volume); and conversely, more speciality-comparison goods are displayed and sold at higher levels such as Neighbourhood Centres, District Centres, Regional Centres and the CBD. This nominal, theoretical planning concept/policy is based on a degree of reality, but it varies widely and is greatly changing given the growth of on-line retail: *Redcape Property Fund Pty Ltd v City of Holdfast Bay* [2013] SAERDC 50 at [46].

[7.130.100] Anchor stores

In *Kipa Freeholds P/L v City of Tea Tree Gully (No 2)* [2014] SAERDC 8, the applicant sought approval for a retail liquor outlet. The provisions of the Development Plan dealing with arterial roads focused on the need for a centre to develop on one side of an arterial road in order to minimise pedestrian and vehicular movement across the road. Uses that did not encourage such pedestrian activity were identified as uses such as offices and bulky goods retail outlets. In finding that the proposal was unlikely to encourage vehicular or pedestrian activity across an arterial road, the court discussed the nature of "anchor" stores which do encourage such activity. The court stated (at [57]):

> Unlike the smaller, traditional liquor stores, large format liquor stores like the one proposed do function as stand-alone shops with their own dedicated loading, waste management and delivery areas. They are stores that do not act as 'anchor' stores where customers take the opportunity to make purchases at other retail outlets as part of an overall shopping experience ... they are not regarded, despite their size, as an 'anchor' type tenant by shopping centre developers unlike the supermarket, department store or discount department store.
>
> We also accept their evidence that these stores with their larger floor areas, larger range and price competitiveness attract customers coming to the site by car rather than on foot. These customers appear to regard such stores as 'destination outlets' where they choose to spend more time and money on the shopping experience and purchase in bulk or in a fashion which dictates carriage by vehicle rather than on foot. The aforementioned factors or characteristics are to be found in a number of bulky goods outlets or retail showrooms and make them suitable for location on an arterial road and on the periphery rather than the core of a centre.

[7.210] Density

Cases

Residential (Hills) Zone. Appeal against refusal of consent to divide land to create additional allotment – Residential (Hills) Zone – allotment area of 4.3 hectares – new allotment to be 1,182 sq m with frontage of 29.73 m – allotment trapezoid in shape with shortest side being 100 m and average depth of 300 m – detached dwelling on land – Residential (Hills) Zone – zone sought low density development – minimum site areas for dwellings within zone 200 sq m and detached dwelling permissible on allotment of 250 sq m – *Held:* Proposed allotment suitable for detached dwelling at low density and accorded with range of allotment sizes sought for zone – a dwelling on allotment of just over 1,000 sq m best characterised as low density form of development, even if zone encouraged some detached dwellings on smaller allotments in pursuit of overall increase in density – dense urban form not envisaged throughout zone: *Kimber v Town of Gawler* [2014] SAERDC 10.

[7.220] Dwelling

[7.220.52] Additional storey

Cases

Appeal against refusal of consent for addition of additional storey – residential flat building containing two dwellings – subject dwelling one of two similar single-storey strata units – quality of streetscape low – strata plan included rectangular area of 760 sq m divided into two halves, with one associated with each dwelling – second storey to include three additional bedrooms, bathroom, rumpus room and balcony and increase floor area of dwelling from 84 sq m to 195 sq m – overall height to be 8 m to ridgeline of roof – existing front and rear setbacks to be retained – upper storey to be 4.5 m from front boundary and 3.3 m from rear boundary – *Held:* Consent refused – inadequate setbacks – unacceptable adverse effects for streetscape in terms of visual bulk and on amenity of adjoining dwellings: *Burgan v The Corporation of The City of Norwood, Payneham & St Peters* [2013] SAERDC 52.

[7.250] Evidence

[7.250.11] Expert witness – independence

Cases

Application to build extension to seawall to ameliorate unsafe boat ramp – two expert witnesses had prior involvement with aspects of construction of ramp and sand transport – *Held:* Involvement of each witness logical and appropriate – without them, court would not have been able to benefit from their considerable experience with developments in area and expertise in design of structures on coast and coastal processes generally: *McCourt v DAC* [2013] SAERDC 51.

Appeal against refusal for residential flat building – expert witness involved with preparation of original development application and amended proposal – *Held:* Court placed less weight on evidence of expert concerned than that of other experts – public perception of bias could arise – no reason to reject evidence: *Karidis Corporation Ltd v The Corporation of The City of Adelaide* [2014] SAERDC 2.

[7.330] Garage and carport

[7.330.50] Character, streetscape and setback

Cases

Double carport. Application to construct double carport forward of, and central to, existing dwelling – Residential Zone – land area of 1,265 sq m – dwelling setback 10.6 m – carport to extend to 4.7 m from boundary and to be 5.8 m wide, 6 m long and 2.5 m high – masonry wall 1.8 m high along front boundary – existing character of locality derived from established pattern of building setbacks (generally in excess of 7 m), carports and garages sited to side of, and behind, dwellings – landscaped front yards and trees contributed to

streetscape character – Development Plan sought for carports to have minimum setback of 5.5 m and to be in line with or behind main face of dwelling – Plan sought for appearance of new structures to maintain and complement character and built form of existing streetscape – *Held:* Consent refused – double carport would visually intrude within open streetscape – conflicted to unacceptable level with Development Plan: *Papalia v City of West Torrens* [2013] SAERDC 46.

[7.390] Land division

[7.390.7] Relevant considerations – allotment size

Cases

Appeal against refusal of consent to divide land to create additional allotment on basis did not form part of integrated and co-ordinated development proposal – allotment area of 4.3 hectares – allotment of irregular trapezoid shape with shortest side being 100 m and average depth of 300 m – detached dwelling and several outbuildings – approved for use as hobby farm – new allotment to be 1,182 sq m with frontage of 29.73 m – development plan zone boundary crossed subject land – western part of land in Residential (Hills) Zone and larger eastern part in Open Space Zone – proposed additional allotment to be within former zone with latter zone on boundary – Residential (Hills) Zone sought low density development – *Held:* Consent granted – would not be haphazard development likely to prevent future development of nearby land in orderly and efficient way: *Kimber v Town of Gawler* [2014] SAERDC 10.

[7.390.51] Allotment gradient

Cases

Appeal against refusal by council for land division of 2.8 ha allotment of irregular shape into two allotments of 1 ha and 1.8 ha – large allotment to be hammerhead shape – intended for rural residential use – Rural Living Zone – Bushfire Protection Area (Medium Risk) – land suitable for rural residential use – shed structure currently on land – steep sloping land with gradient across building envelope on 1 ha allotment 1:7 and gradient across envelope of 1.8 ha allotment 1:5 – *Held:* Consent refused – slope and likely dwelling siting for proposed hammerhead lot unsatisfactory and even with innovative/high quality building design, access to rear lot not all weather or likely safe and convenient – substantial cutting and filling likely for access and building pad to rear lot – access, manoeuvring and safety considerations on steeply sloping land did not adequately meet Minister's Code Undertaking Development in Bushfire Protection Areas: *Steinemann v District Council of Lower Eyre Peninsula* [2013] SAERDC 55.

[7.430] Liquor outlet

[7.430.2] General

Liquor goods/shops fall within both “convenience goods shops/services” (see [9.427]) and “comparison goods shops” (see [9.390]) to a degree. Some goods, such as beer, may be weekly convenience purchases for many people, whereas wine or spirits may be much less frequently or regularly purchased and involve greater time, selection, choice, price comparisons and even gift giving: *Redcape Property Fund Pty Ltd v City of Holdfast Bay* [2013] SAERDC 50 at [45].

[7.430.60] Location in zone

Cases

Appeal against approval for change of use from office and retail showroom to retail liquor outlet – Regional Centre Zone – located at periphery of zone – site area of 4,300 sq m – locality contained mixture of uses including residential and commercial/retail and major arterial road – outlet to offer up to 3,000 lines of liquor for purchase by public and expected to attract customers from up to 57 km away – *Held:* Approval granted – appropriately located on periphery of centre rather than in core – sufficient car parking to meet peak demand: *Kipa Freeholds P/L v City of Tea Tree Gully (No 2)* [2014] SAERDC 8.

[7.593] Residential flat building

[7.593.7] Residential zone

Cases

Appeal against refusal for eight-storey building (26.5 m high) containing 30 serviced apartments – Capital City Zone – vacant rectangular allotment with area of 394 sq m – street frontage of 13.72 m – high scale development encouraged throughout zone – refused partly on basis did not have sufficient level of design excellence as required by Development Plan – *Held:* Consent granted – consistent with desired character for zone: *Karidis Corporation Ltd v The Corporation of The City of Adelaide* [2014] SAERDC 2.

[7.650] Seaside locality

[7.650.70] Break water

In *McCourt v DAC* [2013] SAERDC 51 at [79], it was held that the recognised standard for structures such as the breakwater and nib proposed in that case is the *US Army Corporation of Engineers 'Short Protection Manual'* (1984) and that the assumptions underlying the design of the breakwater and nib, in terms of tidal movements, were appropriate.

A breakwater is a significant structure on a coastal environment. It is, however, by no means an uncommon occurrence on many coastlines: *McCourt*, above, at [95].

Cases

Third party appeal against approval to construct 1 m high extension to existing breakwater/seawall – existing boat ramp detrimentally affected by wave penetration and build-up of siltation – existing breakwater did not allow for safe and convenient use of boat ramp – extension designed to ameliorate unsafe and inconvenient boat launching conditions and sand build-up in and around existing boat ramp – competing aims for zone and coastal areas sought to conserve coastal environment and to encourage enjoyment by public of such environment – Development Plan expressly acknowledged both coastal protection works and community recreation facilities (such as ramps) were appropriate forms of development in zone – *Held:* Approval confirmed but conditions varied – sufficient conformity with Plan – appropriate in terms of height, length and type of materials – addressed potential environmental impacts so as not to exacerbate adverse impacts on character and amenity of locality: *McCourt v DAC* [2013] SAERDC 51.

[7.650.200] Interpretation of Development Plan

In *McCourt v DAC* [2013] SAERDC 51, a case involving a proposal to construct an extension to an existing breakwater, competing aims of the Development Plan for the zone and coastal areas sought to conserve the coastal environment but at the same time to encourage use and enjoyment by the public of such environment. The Development Plan expressly acknowledged that both coastal protection works and community recreation facilities (such as ramps) were appropriate forms of development in the zone. In determining how to apply these competing aims, the court stated (at [76]-[77]):

> Although neither of these aims is paramount, we would understand the Plan, in this respect, to be encouraging public use and enjoyment of the coast in a manner which does not materially compromise the coastal environment.
>
> Understood in this way, a proposal which involves development (in or about coastal waters) designed to improve the public use and enjoyment of that environment may well result in impacts on that environment. Whether such impacts are acceptable will ultimately depend upon the extent of those impacts when measured against the overall benefit to the public.

[7.700] Sport and recreation

[7.700.28] Skate park facility

Cases

Third party appeal against consent for skate park facility of 550 sq m in area in park – park a local heritage place – site to be in a grassed area of park adjacent to car parks, tennis courts and picnic areas – park to include steel and concrete steps, ramps and jumps – Special Uses Zone –park gates locked at sunset but pedestrian access to skate facility

would be possible – no floodlighting – *Held:* Consent affirmed but conditions amended – desirable to provide sign at skate park giving details of contact numbers to call in event of disturbance: *Chorley v Town of Gawler* [2014] SAERDC 1.

[7.780] Telecommunications and transmitting stations

[7.780.13] Telecommunication towers – visual impact

Cases

Third party appeal against approval of telecommunications facility – Mixed Use Zone adjacent to Residential Zone – monopole 31.15 m high – facility would be highly visible within locality – Development Plan required facility to be sited and designed to minimise visual impact – existing dwellings adjoining side and rear boundaries of subject land would have amenity adversely affected – *Held:* Consent granted – height of around 30 m necessary to provide required services – appropriate zone – all possible steps taken to minimise visual impact – facility required to meet community needs – subject land was only available site: *Bettcher v City of Charles Sturt* [2013] SAERDC 39.

[7.800] Traffic

[7.800.15] Safety

It has been held that an A-frame advertising sign associated with a proposed retail use on an arterial road frontage and verge raised some safety issues for road users (although no evidence regarding the matter was presented in the case): see *Piantedosi v City of Port Lincoln* [2014] SAERDC 4 at [18].

[7.860] Views

[7.860.15] Concept of minimisation of impact on views

In *Turner v City of Victor Harbor* [2013] SAERDC 49, the applicant sought approval to construct a 2-storey dwelling that took advantage of coastal views. The Development Plan strongly encouraged an increase in residential densities in the zone and made reference to an increased proportion of 2-storey dwellings. At the same time, the Plan contained very strong provisions seeking to protect existing views. In taking into account these potentially conflicting requirements, the court held (at [96]) that "[t]he key question is whether, in [seeking to maximise its coastal views], it interferes with existing views to an unacceptable extent".

[7.860.50] Impairment of view

Cases

Multi-storey buildings. Appeal against refusal for demolition of 2-storey dwelling and construction of new 2-storey dwelling – roof height 8.7 m, being 1.7 m higher than that of existing dwelling – Residential Zone – site area 900 sq m – 20 dwellings in locality of which 6 were 2-storey – dwelling orientated to take advantage of scenic coastal views – Development Plan strongly encouraged increase in residential densities, made reference to increased proportion of 2-storey dwellings and encouraged development which maximised coastal views while minimising interference with views from existing development – Plan contained very strong provisions seeking to protect views – area of high amenity with much of its visual amenity derived from significant views – around 10 per cent of view of nearby lookout would be lost – likely to diminish scenic vista currently obtained when entering township – *Held:* Consent refused – did not achieve acceptable balance between maximisation of coastal views and minimisation of interference with views of others – impact on public views, particularly tourist lookout, rather than private views was decisive element: *Turner v City of Victor Harbor* [2013] SAERDC 49.

Applicant sought approval for two 3-storey residential flat buildings – Development Plan sought maintenance of attractiveness and amenity of outstanding views of bay and islands – Plan sought minimisation of disturbance of all existing views – proposal would have largely obscured and significantly obstructed views of two nearby properties which had been sited to gain views across subject land, rather than facing street – *Held:* Consent refused – were many development options open to proponent which would not have had

severe effect on view from two properties concerned – minor impact on views from numerous properties would have been more in conformity with Plan than significant loss of views from one or two properties – would maximise coastal views from proposed building but did not adequately minimise interference with views and outlook from existing development: *Nevarc Nominees Pty Ltd v City of Victor Harbor* [2003] SAERDC 65.

[7.920] Miscellaneous

[7.920.62] Mobile food van

Cases

Appeal against refusal of proposed trailer-mounted mobile food van for retail sale of food (hot dogs, pies, pasties and soft drinks) with A-frame sign – Residential Zone – arterial road corner side street location – mixed use locality – adjacent 80 kph speed zone near change to 60 kph – *Held:* Consent refused – such retail land use not in accordance with zone – increased safety risks given location of van and A-frame sign with potential for direct customer attraction and movement on and off arterial road – could contribute to start of ribbon development: *Piantedosi v City of Port Lincoln* [2014] SAERDC 4.

[7.920.64] Mortuary

Cases

Third party appeal against approval to change use of land to mortuary – facility to receive and hold bodies collected between 10 pm and 7 am – Industry Zone – subject land comprised rear portion of existing building with undivided room 17.8 m x 12.5 m – internal wall had been constructed and new access created to enable second tenancy without approval – character of locality mixed in appearance, use and function and dominated by non-residential buildings and activities and traffic noise – appellants concerned about noise, light spill and parking/manoeuvring – *Held:* Council decision reversed and consent refused but solely on grounds that no approval existed for second tenancy – land use otherwise merited consent as satisfied intent of zone and acceptable in terms of noise and light spill: *Sandford v The Corporation of The City of Marion* [2013] SAERDC 42.

Planning Law Dictionary

Part 1 – Words

[9.390] "Comparison goods shops"

In *Redcape Property Fund Pty Ltd v City of Holdfast Bay* [2013] SAERDC 50, it was held (at [44]) that "comparison goods shops" (also referred to as speciality) is generally understood in urban planning parlance to mean:

> less frequently purchased goods and services – monthly or more; often of more expensive per/unit items, where goods and services purchases are choice items and on occasions where much more research and time is taken with selection (such as perhaps with books, clothing, sporting equipment, white goods, homewares etc), where people tend to shop around for choice/quality/uniqueness and price".

[9.427] "Convenience goods shops/services"

In *Redcape Property Fund Pty Ltd v City of Holdfast Bay* [2013] SAERDC 50, it was held (at [44]) that "convenience goods shops/services" is generally understood in urban planning parlance to mean "regular, usually weekly, or day-to-day purchased goods and services (such as food, drink, household items, papers, magazines, flowers and others; postal, banking, hair-beauty), where prompt need and convenience tend to be particularly valued".

[9.740] "Junk yard"

The definition of "junk yard" which appeared in Sch 1 of the Development Regulations until 1999, before being removed, was:

> ... land used for the collection, storage, abandonment or sale of scrap metals, wastepaper, bottles or other scrap materials or goods, or for the collecting, dismantling, storage, salvaging or abandonment or automobiles or other vehicles or machinery or the sale or other disposal of their parts.

...

Material which has commercial value is capable of being fairly described as "junk". It may be distinguished from "rubbish" or "waste": *Amberich Pty Ltd v City of Mount Gambier* [2014] SAERDC 7 at [12].

Cases

[9.740.5] Application for approval to use land for temporary parking of six loaded unregistered enclosed trailers for 12 months – trailers formerly used in wood chipping industry – each trailer to be filled with salvage materials, such as metal shelving, supermarket trolleys and pallet racking – not intended to store scrap metal in trailers or on site – salvage materials to be offered for sale to public in event applicant ultimately successful in obtaining consent for proposal to use land for salvage business – *Held:* Proposal fell within any reasonable definition of "junk yard" – trailers and materials to be stored within them were salvage materials – land was to be used for storage of those items and therefore a junk yard: *Amberich Pty Ltd v City of Mount Gambier* [2014] SAERDC 7.

Legislative amendments to Development Act and Regulations

Since the previous update to the service, the *Development Act 1993* and *Development Regulations 2008* have been (or will be) amended by the amending Acts and Regulations (commenced and uncommenced) listed below.

Amending Acts

- *Housing and Urban Development (Administrative Arrangements) (Urban Renewal) Amendment Act 2013* (No 45 of 2013); commencement: sch 1 (cll 1 & 2)-18.9.2014 (Gazette 18.9.2014 p5251)

Amending Regulations

- *Development (Fees) Variation Regulations 2014* (No 104 of 2014); *Gazette* 19.6.2014 p2564; commencement: 1.7.2014: r 2
- *Development (Cultana Training Area) Variation Regulations 2014* (No 183 of 2014); *Gazette* 26.6.2014 p3034; commencement: 26.6.2014: r 2
- *Development (Commercial Forestry) Variation Regulations* 2014 (No 190 of 2014); *Gazette* 26.6.2014 p3053; commencement: 1.7.2014: r 2
- *Development (Universities) Variation Regulations 2014* (No 201 of 2014); *Gazette* 10.7.2014 p3218; commencement: 10.7.2014: r 2
- *Development (Assessment of Significant Developments) Variation Regulations 2014* (No 226 of 2014); *Gazette* 14.8.2014 p4045; commencement: 14.8.2014: r 2
- *Development (Urban Renewal) Variation Regulations 2014* (No 243 of 2014); *Gazette* 18.9.2014 p5262; commencement: 18.9.2014: r 2