Planning Law SA

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[3.0]

Annotated *Development Act 1993*

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

[3.1] 1—Short title

This Act may be cited as the *Development Act 1993*.

[3.3] 3—Objects

The object of this Act is to provide for proper, orderly and efficient planning and development in the State and, for that purpose—

(a) to establish objectives and principles of planning and development; and
(b) to establish a system of strategic planning governing development; and
(c) to provide for the creation of Development Plans—
  (i) to enhance the proper conservation, use, development and management of land and buildings; and
  (ii) to facilitate sustainable development and the protection of the environment; and
  (iia) to encourage the management of the natural and constructed environment in an ecologically sustainable manner; and
  (iii) to advance the social and economic interests and goals of the community; and
(d) to establish and enforce cost-effective technical requirements, compatible with the public interest, to which building development must conform; and
(e) to provide for appropriate public participation in the planning process and the assessment of development proposals; and
(ea) to promote or support initiatives to improve housing choice and access to affordable housing within the community; and
(f) to enhance the amenity of buildings and provide for the safety and health of people who use buildings; and
(g) to facilitate—
  (i) the adoption and efficient application of national uniform building standards; and
  (ii) national uniform accreditation of buildings products, construction methods, building designs, building components and building systems.

[s 3 amd 88/2000 s 3; amd 20/2007 s 95]

[3.3.5] Interpretation. The primary purpose of the legislation is not to inhibit, frustrate or discourage development. It is to provide for development to occur in an orderly way in accord with planning policies: *R v Munno Para DC; Ex parte John Weeks Pty Ltd* (1987) 46 SASR 400; 63 LGRA 197. The Act is a practical code calling for practical application: *Munno Para DC v Remove All Rubbish Co Pty Ltd* (1985) 41 SASR 188; *Mitcham CC v Freckmann* (1999) 74 SASR 56; [1999] SASC 234.

One purpose of having objects of a statute set out in the legislation is to assist the reader to interpret its provisions. If there is ambiguity the provision of the Act under consideration is to be read so as to be consistent with the relevant object: *Stirling District Environment Association Inc v Bailey* [1999] SAERDC 40.

In the absence of detailed zoning provisions, the more general provisions of a Development Plan, read in conjunction with the object of the Development Act, which is "to provide for proper, orderly and efficient planning and development in the state", can be called in aid in assessing proposals: *Gwynne v Cleve DC* [1995] EDLR 565; *Linkevics v Adelaide Hills C* [2000] SAERDC 18 at [23].

[3.3.10] Sec 3(c) objects. The object set out in s3(c)(i), (ii) and (iii) is not an object of the Act per se. The Act is to provide for proper, orderly and efficient planning and development. To that end, provision is made for the creation of Development Plans “to facilitate sustainable development and the protection of the environment” among other goals: *Stirling District Environment Association Inc v Bailey* [1999] SAERDC 40.

Section 3(c)(iii) provides for Development Plans "to advance the social and economic interest and goals of the community". Its immediate predecessor, the *Planning Act 1982*, provided for Development Plans that could contain "developmental objectives (whether of a physical, social or economic nature)". Before that, under the *Planning and Development Act 1966-1967* (SA), Development Plans dealt with each of the economic regions of South Australia for planning purposes. For several decades land use planning in South Australia has had regard to economic, as well as other, factors. That is only to be expected in modern comprehensive planning: *Martel v Grant DC* [2000] SAERDC 62.

[3.3.15] Powers. Power is to be used for the purposes expressed in an objects clause if there is one in an Act: *Bromley v Dawes* (1983) 34 SASR 73. Where powers are not expressly set out a court will construe the Act to determine its purposes: *Industrial Equity Ltd v Deputy Commissioner of Taxation (NSW)* (1990) 170 CLR 649; 96 ALR 337.

[3.3.20] "Appropriate" (s 3(e)). It is unlikely that "appropriate" public participation includes the continued engagement of a person in the planning process subsequent to that person having indicated that they do not wish for continued involvement: *Arnold v City of Prospect* [2004] SAERDC 104 at [22].

[3.4] 4—Interpretation

[sub-s (4)-(6) ins 63/1996 s 3(d)], [sub-s (7) ins 70/1997 s 3(c)], [sub-s (8) ins 88/2000 s 4(e); amd 43/2006 s 90(4)-(6)]

[3.4.3] Development Plan and Regulations. The provisions of a Development Plan cannot be used to interpret terms used either in the Act or the Regulations: *The North Adelaide Society Inc v Adelaide CC* [2000] SAERDC 8. The Regulations define terms for the purposes of the Development Plan as well as for the Regulations: *Boeck v Glenelg CC* [1995] EDLR 161; (1995) 2 SAPED 31. The Act cannot be construed by reference to the Regulations; on the contrary, the Regulations must be given a construction that conforms with the Act: *City of Mitcham v The Chappel Investment Company Pty Ltd* [2008] SASC 240 at [29].

[3.4.6] Change in technology. The definition of a word in itself can change with changes in technologies. A word by itself selects a genus but not a particular species within the genus: *Boeck v Glenelg CC* [1995] EDLR 161; (1995) 2 SAPED 31; *Lake Macquarie SC v Aberdare CC* (1970) 123 CLR 327.

[3.4.9] Publicly advertised planning application. Publicly advertised planning applications should be construed in the way an ordinary citizen would understand their contents, not in the manner in which a legal draftsman might intend. Terms used in such applications need not necessarily be construed as per their statutory definition: *Vandeleur v Willunga DC* (1986) 21 APA 100.

Related materials: [4.201] DR sch 1 ("Definitions"); **[9.0]** Planning Law Dictionary.

[3.4.15] (1) In this Act, unless the contrary intention appears—

[3.4.16] "Unless the contrary intention appears". The definitions operate "unless the contrary intention appears". Not all words used in either the Development Act, the regulations or in Development Plans are used in a consistent manner. It is always necessary to consider the context in which the words are used and the object of the legislation: *Carter v Mid-Murray Council* [2007] SASC 145 at [16]. The phrase "unless the contrary intention appears" in s 4(1) means "unless the contrary intention appears in this Act". It does not mean "unless the contrary intention appears in the Development Plan": *Frankham v Adelaide CC* [2002] SAERDC 11.

[3.4.20] ***Adelaide Dolphin Sanctuary*** has the same meaning as in the *Adelaide Dolphin Sanctuary Act 2005*;

[def ins 5/2005 Sch 2 (cl 8(1))]

[3.4.22] ***Adelaide Park Lands*** has the same meaning as in the *Adelaide Park Lands Act 2005*;

[def ins 69/2005 Sch 1 cl 3]

[3.4.25] ***adjacent land*** in relation to other land, means land—

(a) that abuts on the other land; or

(b) that is no more than 60 metres from the other land and is directly separated from the other land only by—

(i) a road, street, footpath, railway or thoroughfare; or

(ii) a watercourse; or

(iii) a reserve or other similar open space;

[3.4.26] "Adjacent land". Adjacent land includes land within 60m of the subject land: *Kensington & Norwood CC v DAC* (1998) 70 SASR 471; 98 LGERA 145.

[3.4.26] "Road" and "street". A road reserve without any formed roadway, even if it is unsuitable for the passage of traffic, is a road: *Permanent Trustee Co of NSW Ltd v Campbelltown MC* (1960) 105 CLR 401.

Roadway "denotes the central, specially constructed, portion of a road that is designed to be used, and is used, by vehicular traffic (in contrast to the footpaths and the verges); it is sometimes spoken of as the carriageway". Distinguishing between "road" and "street" it was said: "The two words differ, one from another, only in some of their connotations: 'road' is appropriate where emphasis is to be placed, upon passage, upon coming and going; 'street' is appropriate where emphasis is to be placed, not so much on those passing along the way, but on the buildings or houses lining it": *Tea Tree Gully CC v Jennings Estates & Finance Ltd* (1972) 2 SASR 354; 27 LGRA 268.

In planning legislation, "road" apparently refers to a public road and not a private one unless the context in which it is used otherwise requires: *Tea Tree Plaza Nominees Pty Ltd v Tea Tree Gully CC* [1995] EDLR 81.

"A street is simply a form of road with the further qualification that it has continuous houses on each side of it": *Marklew v Allen* (1974) 9 SASR 32; 32 LGRA 351.

[3.4.28] "Footpath". A "footpath" is a highway or path restricted to travel on foot by the public: *RB Agencies (SA) Pty Ltd v Pope* [1970] SASR 354.

[3.4.30] "Thoroughfare". An application was made for development consent for aquaculture in the waters of Gulf St Vincent some kilometres from the shore. No conclusion was reached as to whether the site proposed to be used for the development might be separated from coastal land by a "thoroughfare" in the nature of a navigable waterway: *Conservation Council of SA Inc v DAC* [1999] SAERDC 63.

[3.4.32] "Watercourse". A watercourse consists of a stream with a bed, banks and water. The fact that the flow is intermittent or seasonal does not mean that the course is not a watercourse. However, there must be continuity, permanence and unity to make a watercourse. A mere drain or drainage depression is not a watercourse. The banks of a watercourse are its boundaries. Land adjacent to the banks which suffers occasional inundation does not form part of a watercourse: *Native Vegetation Council v Burgemeister* [1995] EDLR 27. Likewise, in another case it was found that a watercourse involves a stream of water that flows in a defined channel that possesses something in the nature of banks. Watercourses may sometimes be dry but a flow of water along a channel for a short number of hours does not make that channel a watercourse. Water of a casual or temporary nature as contrasted with a stream which may be dry at times, even for substantial periods does not constitute a watercourse. Neither a mere drain or drainage depression which takes excess water from upper land when there is major precipitation nor the existence of a defined channel in a drainage depression lacking banks and a bed in the proper sense creates a watercourse A watercourse must exhibit features of continuity, permanence and unity: *Macag Holdings Pty Ltd v Torrens Catchment Water Management Board* (2000) 76 SASR 434.

Cases

[3.4.40] "Adjacent land". Matter where owners or occupiers of adjacent land alleged not given notice of Category 3 development pursuant to s 38 – submission that adjacent land to subject land

included coastal land of adjacent islands and township – definition of "land" in s 4 included land covered by water – land abutting development site either adjacent or subjacent land for purposes of *Harbors and Navigation Act 1993* and therefore vested in Minister administering that statute by virtue of s 15 – adjacent land defined in DA s 4 included land vested in Minister – also included land no more than 60m from subject land and directly separated from that land by a road, street, footpath, railway or thoroughfare or watercourse or reserve or other similar open space – *Held*: Nearest coastal land to subject land more than 1 km away, could not be "adjacent land" as distance greater than 60m: *Conservation Council of SA Inc v DAC* [1999] SAERDC 63.

[3.4.55] ***adjoining owner*** means the owner of land that abuts (either horizontally or vertically) on the land of a building owner;

[3.4.59] ***advertisement*** means an advertisement or sign that is visible from a street, road or public place or by passengers carried on any form of public transport;

[3.4.60] "Advertisement". A sign may clearly be an advertisement by virtue of the definition of advertisement: *Morrow v Mitcham CC* [1997] EDLR 38; (1997) 4 SAPED 32. In ordinary usage "the word 'advertisement' can refer to the message or symbol, the area consumed by the message and, in many cases, the object upon which the message is placed": *Peregrine Corporation P/L v City of Tea Tree Gully* [2009] SAERDC 6 at [13].

[3.4.67] ***advertiser*** in relation to an advertisement, means the person whose goods or services are advertised in the advertisement;

[3.4.70] ***advertising hoarding*** means a structure for the display of an advertisement or advertisements;

[3.4.71] "Advertising hoarding". Not every hoarding is an advertising hoarding. A hoarding may be a hoarding *simpliciter*: *North East Plaza Pty Ltd t/a Plaza Holden v Tea Tree Gully CC* (1989) 1 SAPD 52. A large billboard erected over a building with the intention that it be available for the display of an advertisement is an advertising hoarding even if no actual advertisement is displayed. However, a flagpole is not a structure for the display of an advertisement but for the display of a flag: *Fadu Pty Ltd v Noarlunga CC* (1997) 97 LGERA 145.

An advertising hoarding has been held to include a 5.4m high x 3m wide wall ("blade wall") attached to an existing building for the purpose of displaying illuminated and other advertisements. The blade wall is a "structure" (see s 4) either attached to or forming part of another "structure (ie the existing building): *Peregrine Corporation P/L v City of Tea Tree Gully* [2009] SAERDC 6 at [15].

[3.4.80] ***the Advisory Committee*** means the Development Policy Advisory Committee established under this Act;

[3.4.83] ***allotment*** has the same meaning as in Part 19AB of the *Real Property Act 1886* and in addition includes a community lot, development lot and common property within the meaning of the *Community Titles Act 1996* and a unit and common property within the meaning of the *Strata Titles Act 1988*;

[def sub 38/1996 s 5(a)]

[3.4.84] "Allotment". In a Certificate of Title under the *Real Property Act 1886* an allotment of land is described, not according to its topography, but merely by reference to its dimensions in a plan: *Macag Holdings Pty Ltd v DAC* [2001] SAERDC 108. It has been held that land was not an "allotment" as it was held in a Crown Lease and did not fall within any of the criteria outlined in s 223LA of the *Real Property Act 1886*; further, the land was not a separately defined piece of land delineated on a "public map". This was not a surprising result since Crown lands held under a lease are regulated under the *Crown Lands Act 1929* and not the *Real Property Act 1886*: *Hagger v DAC* [2006] SAERDC 56.

[3.4.92] ***amendment*** includes an addition, excision or substitution;

[3.4.95] ***amenity*** of a locality or building means any quality, condition or factor that makes, or contributes to making, the locality or building harmonious, pleasant or enjoyable;

[3.4.96] "Amenity". The term "amenity" refers to the qualities of a residential area which contribute to making it a pleasant place in which to live: *Adelaide City Council v O'Connell Property Group Pty Ltd* [2007] SASC 313. In ordinary usage, the word "amenity" means the pleasantness of a place. "Pleasantness" means "agreeable to mind, feelings or senses". The term "amenity", therefore, denotes that which is agreeable to either the mind, feelings or senses. Views are but one aspect of amenity. The term "amenity" has the same meaning in planning controls: *Hutchens v City of Holdfast Bay* [2007] SASC 238 at [23].

The amenity of a locality consists of two parts. First, there is what is generally known as the "public realm" – in residential areas consisting of roadways, "nature strips", footpaths and front yards which, although forming part of private property, are key components of a streetscape. Secondly, there is private property generally – gardens and yards, indoor-outdoor relationships and the like: *Agostino v Adelaide City Council* [2004] SAERDC 77 at [15]; *Hutchens*, above, at [26]. The amenity of private areas can be as important a planning consideration as the impact of proposed development on the public realm: *Newarc Pty Ltd v City of Marion* [2008] SAERDC 27 at [48].

Amenity is something relative and imprecise: *RVS Investments Pty Ltd v Burnside CC* [1968] SAPR 203. The concept is wide and flexible; it is not confined to negative factors of freedom from disagreeable conditions but extends to the preservation of existing features which make a locality pleasant; and when coupled with likely future amenity must be taken to include the orderly development of the locality so as to reduce those conditions which are disagreeable and to increase those which are pleasant: *Humby v Woollahra Municipal Council* (1964) 10 LGRA 56 at 65; *Tracey v Waverley Municipal Council* (1959) 5 LGRA 7 at 14; *Hutchens*, above. The concept of amenity is flexible but "giv[es] rise, in the widely varying context of circumstances in which it may have to be applied, to many difficulties of application": *RVS Investments*, above. Amenity "is neither a term of art nor a term capable of precise evaluation". In considering "amenity" or "character and amenity", a tribunal working in a planning situation need not necessarily take a static view; planning or development trends should not be ignored: *Stephenson v Marion CC* [1972] SAPR 83; *Marjanovic v Charles Sturt CC* [2001] SAERDC 10.

It is not easy to state all the aspects of amenity. There are those that are practicable and tangible. Among them are noise, nuisance, traffic, appearance and a locality's way of life. A well-recognised component of the character of an area is the intensity of development: *Ciancio v East Torrens DC* (1990) 2 SAPD 33. *Dazzlers Management Pty Ltd v Mitcham CC* [1996] EDLR 252; (1996) 3 SAPED 52. Some aspects of amenity are somewhat elusive, including a locality's expectations and its class: *Meertens v Burnside CC* [1994] EDLR 64; (1994) 1 SAPED 27; *Broad v Brisbane CC* (1986) 59 LGRA 296.

The expression "amenity of the neighbourhood", when used in relation to a residential area, refers to those characteristics of the neighbourhood which make it a pleasant place in which to live. In the case of residential development on a coast, the word "amenity" will include the enjoyment of such pleasant factors as coastal views and sea breezes (see [7.860.5]): *Hutchens*, above.

Related materials: [7.40] Amenity; **[7.140]** Character.

[3.4.124] ***authorised officer*** means a person appointed to exercise the powers of an authorised officer under this Act;

[3.4.127] ***building*** means a building or structure or a portion of a building or structure (including any fixtures or fittings which are subject to the provisions of the *Building Code of Australia*), whether temporary or permanent, moveable or immovable, and includes a boat or pontoon permanently moored or fixed to land, or a caravan permanently fixed to land;

[3.4.129] "Structure". The term "structure" in the definition of "building", as far as proposed building work is concerned, is limited to a structure which is addressed in the Building Rules: *Carter (Trustee for The Estate of Paul G Schmidt) v Mid-Murray Council* [2006] SAERDC 88 at [41]. For further information regarding the definition of "structure", see [3.4.914].

[3.4.131] Scope. The wide definition of "building" is not diminished or narrowed by virtue of the provisions in Parts 4 and 6 of the Act which relate to buildings and Building Rules: *Carter v Mid-Murray Council* [2007] SASC 145.

A balcony cannot be an outbuilding ancillary to a dwelling and is part of the building to which it is attached: *River Gum Homes v District Council of Copper Coast* [2003] SAERDC 130. Although a "building" includes a "portion of a building or structure", it has been held that the phrase "the total demolition and removal of a building" contained in a Development Plan meant that the whole of the building had to be demolished: *Urban Construct Pty Ltd v City of Holdfast Bay* [2006] SASC 201.

[3.4.133] "Fixtures or fittings". In the phrase "fixtures or fittings" in the definition of "building", "fittings" is *ejusdem generis* with "fixtures". In the definition, "fittings" does not materially expand, if it expands it at all, the meaning usually attributed to "fixtures". The reference in the definition to the *Building Code of Australia* applies only to those fixtures and fittings which are subject to the provisions of the Code: *Harley v East Torrens DC* [1997] EDLR 195; (1997) 4 SAPED 65.

Having regard to dictionary usage, "fixing" in the context of boats, pontoons and caravans involves making something fast to or attaching it firmly to land. For example, it is possible that a balloon is "attached" to a particular parcel although it is only tethered to a vehicle which is standing on, but not attached to, the premises and could, in the wind, fly over other parcels: *Focus Video v Enfield CC* (1985) 120 LSJS 155; 55 LGRA 214.

Cases

[3.4.190] Spa. Spa pool in dwelling rested solely under own weight, unconnected to water supply or drain and operated on single phase domestic electrical supply to which could be plugged in – *Held:* Not a fixture – to become a fixture would need to be securely affixed to land sufficiently to render it part of dwelling: *Harley v East Torrens DC* [1997] EDLR 195; (1997) 4 SAPED 65.

[3.4.192] Dam. Before introduction of exemption in DR sch 3 cl 10, application made for PDP consent to construct dam 110m long and 45m wide and loading pad upon horticultural land – dam to have base 2m below natural ground level and mounded-earth height around 2m above natural ground level – surrounding walls to be 2m in height – *Held*: Sometimes, whether dam is something built or constructed is question of fact and degree – in this case, dam a "structure" and therefore a "building": *Mallala DC v M & B Farmer Nominees Pty Ltd* (2000) 76 SASR 443; [2000] SASC 117.

[3.4.194] Skating facility. Council proposed to build skating facility – whether proposed facility would amount to "building" – facility would include curved ramp 1.2m high, 3.5m long and 1.25m wide, straight ramp 1.2m high, measuring 9m x 3.5m, box approximately 1.05m high with ramps to ground level on three sides, with dimensions of 5.5m x 3.5m, and raised platform of 6.5m in length – *Held*: Size, nature and form of facility brought within definition of "structure" and would be a "building" as defined: *Arnold v Prospect CC* [1999] EDLR 101; [1999] SAERDC 21.

[3.4.196] Light tower. SA Cricket Association applied to construct four permanent light towers to replace four existing retractable light towers on Adelaide Oval – *Held:* Insofar as light towers were "buildings," they would constitute additional buildings that would be, to some extent, necessary for continuation of intensive recreation usage at oval: *The North Adelaide Society Inc v Adelaide CC* [2000] SAERDC 8.

[3.4.198] Causeway. Causeway across lagoon held not to be a building or structure under *Planning Act 1982*: *Richman v SAPC* (1988) 31 APA 288.

[3.4.200] Sink. A sink is a fixture or fitting subject to the Building Code and therefore is part of a "building": *Stewart v McQuade* (1997) 94 LGERA 127; [1997] EDLR 267.

[3.4.202] Mobile phone tower. The relevant Development Plan provided that "buildings with a height greater than two storeys or 10m" were non-complying forms of development. In issue was whether a cellular mobile telephone base station with a tower 25m in height constituted a "building". *Held*: The court had regard to the wide definition of "building" contained in s 4. It also noted that the definition in s 4, unless the contrary intention appears, is applicable to the term as used in the Development Plan. This position is subject to the provisions of s 5 whereby a regulation may define a term in a Development Plan and that definition may be inconsistent with a definition in s 4. The term "building" was not defined in a regulation made under the Act. The proposed development would clearly be a "structure" and thus within the definition of "building" in s 4. However, the term "building", as used in that portion of the Development Plan, was not intended to have the same meaning as the term as defined in s 4. Readings of the objectives and principles of development control for the zone contained in the Development Plan meant the discouragement of buildings in excess of two storeys or 10m in height related to the impact of the mass and bulk of such a building. The Development Plan used the word "buildings" where it intended to refer to buildings in the sense given by common parlance (see *Optus Communications Pty Ltd v Kensington & Norwood CC* [1998] EDLR 565; (1998) 5 SAPED 48) and used the term "buildings and structures" where it intended to refer to "buildings" as defined in s 4. The 25m high tower was a "structure" but not a "building" which would be a non-complying form of development: *Telstra Corporation Ltd v Marion CC* [2000] SAERDC 69; *Mitcham CC v Fusco* [2000] SASC 250; (2000) 110 LGERA 14.

[3.4.204] Boat. The question arose whether a structure floating in a river was a building for the purposes of para (a) of the definition of "development" in s 4(1) of the *Planning Act 1982*. *Held*: Houseboats, rafts and the like floating in a river cannot amount to the erection or construction of a building "on the land": *Mount v SAPC* (1987) 32 APA 161.

The issue arose of whether the construction of a large yacht in the grounds of a dwelling amounted to the erection of a building or structure "on the land" in question. *Held*: Under the *Planning Act 1982*, that the construction of a large yacht in the grounds of a dwelling did not amount to the erection of a building or structure "on the land" in question. The yacht as such was not attached to the land. It was held in a frame that could be moved around the property. The yacht's construction was an activity reasonably incidental to the use of the land for a dwelling and planning authorisation was not required: *Noarlunga CC v Fraser* (1986) 42 SASR 450; 61 LGRA 324.

[3.4.206] Tuna farm pontoon. A proposal was made to create a tuna farm under which each tuna cage was to have six pontoons from which a net would be suspended to a 12m depth. Each cage, of about 40m in diameter, would be kept in position by 6 to 12 mooring devices, each of about one tonne, resting on the seabed. A cage would remain in one place for about nine months before being moved to a new site. *Held*: Such a pontoon would amount to a "fixture", being temporarily affixed to the seabed: *Tuna Boat Owners Assoc of SA Inc v DAC* (2000) 77 SASR 369; [2000] SASC 238.

[3.4.208] Sewerage pipe/stormwater drain. The classification of "building or structure" under the Building Code of Australia does not encompass underground services such as sewerage pipes and stormwater drains: *City of Burnside v Macag Holdings Pty Ltd* [2006] SASC 89 at [49].

[3.4.247] ***Building Code*** means an edition of the *Building Code of Australia* published by the Australian Building Codes Board, as in force from time to time and as modified (from time to time) by the variations, additions or exclusions for South Australia contained in the code, but subject to the operation of subsection (7);

[def ins 70/1997 s 3(a); sub 79/2005 s 4(1)]

[3.4.251] ***building owner*** means the owner of land on or in relation to which building work is or is to be performed;

[3.4.1300]

(8) For the purposes of this Act, a person is an associate of another person if—

(a) the other person is a relative of the person or of the person's spouse or domestic partner; or

(b) the other person—

(i) is a body corporate; and

(ii) the person or a relative of the person or of the person's spouse or domestic partner has, or two or more such persons together have, a relevant interest or relevant interests in shares of the body corporate the nominal value of which is not less than 10 per cent of the nominal value of the issued share capital of the body corporate; or

(c) the other person is a trustee of a trust of which the person, a relative of the person or of the person's spouse or domestic partner or a body corporate referred to in paragraph (b) is a beneficiary; or

(d) the person is an associate of the other person within the meaning of the regulations.

Note—

For definition of divisional penalties (and divisional expiation fees) see Appendix.

[3.5] 5—Interpretation of Development Plans

(1) Subject to subsection (2), if a term defined in this Part is used in a Development Plan then the term has, unless the contrary intention appears, the defined meaning.

(2) The Governor may, by regulation, define a term used in a Development Plan, and such a definition, if inconsistent with a definition in this Part, operates to the exclusion of the latter.

(3) The Governor cannot make a regulation under subsection (2) unless the Presiding Member of the Advisory Committee has certified that the requirements of subsection (5) have been complied with in relation to that regulation.

(4) An allegation in legal proceedings that the certificate required by subsection (3) was issued on a particular day is, in the absence of proof to the contrary, sufficient proof of that fact.

(5) The following provisions apply in relation to the making of regulations under subsection (2):

(a) the Advisory Committee must cause to be published in the Gazette and in a newspaper circulating generally throughout the State an advertisement—

(i) containing a general explanation of the regulations that are (subject to this section) to be made; and

(ii) inviting interested persons to make written submissions to the Advisory Committee in relation to the proposed regulations within a specified period (being a period of not less than 28 days from the date of publication of the advertisement); and

(iii) appointing a place and time for the public hearing referred to in paragraph (b);

(b) at the time and place appointed for that purpose in the advertisement, the Advisory Committee, or a committee appointed by the Advisory Committee, must hold a public hearing at which any interested person may speak in favour of, or in opposition to, the proposed regulations;

(c) a copy of the proposed regulations must be sent to the Local Government Association of South Australia at an appropriate time determined by the Advisory Committee and the Advisory Committee must give the Local Government Association of South Australia a reasonable opportunity to make submissions in relation to the matter;

(d) the Advisory Committee must then make recommendations to the Minister in relation to the proposed regulations (including recommendations for the modification of the proposed regulations in view of the public comment and the submissions received from the Local Government Association of South Australia) and forward with those recommendations copies of any written submissions made to the Advisory Committee under this subsection;

(e) the Governor may then proceed to make such regulations as are appropriate.

[3.5.3] Interpretation of Development Plan. A Development Plan is not a statute and, as such, must not be interpreted like one. A Development Plan is a planner's document, and cannot be interpreted as strictly as a statute, though the principles of statutory interpretation may be of assistance: *Elimatta Nominees Pty Ltd v Adelaide Hills Council (No 2)* [2005] SAERDC 25 at [18]. A Development Plan does not always use expressions in a consistent manner. Regard must, therefore, be had to the overall purpose and intent of the zone: *Mallala DC v M & B Farmer Nominees Pty Ltd* (2000) 76 SASR 443; [2000] SASC 117 at [20]; *City of Mitcham v MOL Pty Ltd* (2003) 85 SASR 279; [2003] SASC 166; *Hassen v Murray Bridge DC* (1984) 35 SASR 448 (see also: *Renton v Adelaide CC* [1999] SAERDC 41; *Claude Neon Ltd v West Torrens CC* (1982) 29 SASR 260; 49 LGRA 31; *Poole v Unley CC* [1998] EDLR 211; (1998) 5 SAPED 52 – a Development Plan is not a document which has the rigour of expression found in an Act of Parliament). These principles were summarised by Bowering J of the ERDC in *Telstra Corporation Ltd v City of Mitcham* [2000] SAERDC 77 in the following way (at [17]):

> [W]hen seeking to interpret the Plan, one must be cautious and not apply to it the principles of interpretation applicable to a statute, and accept that, at times, there may be some inconsistency in the use of expressions. When interpreting the Plan it is necessary to have regard to the overall purpose, objectives and principles of development control applicable to the relevant zone. There may be times … when consistency of use of expression may prove illusive. Nevertheless, if a consistent interpretation of the use of expressions can be reasonably applied without wreaking havoc upon the objectives and principles applicable to and the general intent of the zone, such consistency should be applied. For example and in particular, in [*City of Mitcham v Fusco* [2000] SASC 250], Williams J (having examined the origins and history of the Hills Face Zone provisions as appearing in the Development Plans of various metropolitan councils) expressed the view that if the regulatory scheme applicable to the Hills Face Zone is to be effective, there should be consistency in interpretation of individual parts of the Plan (paragraph 34). By this I take His Honour to be saying that the same meaning should be placed on the various expressions used in the Hills Face Zone provisions of the Development Plan, even though those provisions lie within the Development Plans of a number of metropolitan councils. In other words, terms such as *"agriculture"*, *"farming"*, and *"horticulture"*, as used in the Hills Face Zone provisions lying in a number of metropolitan council Development Plans should be given a consistent interpretation.

The provisions of a Development Plan are not mandatory. However, effect should be given to a clear statement of the intent of the Plan. Otherwise, the Plan becomes a meaningless document: *Adelaide City Council v O'Connell Property Group Pty Ltd* [2007] SASC 313. Where a Development Plan clearly sets out authorised planning policies, those authorised policies are to prevail unless it can be demonstrated that, for environmental or physical reasons, it would be impossible to undertake a development falling within the scope of those authorised policies: *Sneath & King Pty Ltd v Norwood, Payneham & St Peters CC* [2000] SAERDC 63. The fact that a Development Plan's provisions are not mandatory does not negate the fact that due weight must be given to them: *City of Port Adelaide Enfield v Moseley* [2008] SASC 88 at [22].

Special provisions in a Development Plan will prevail over those which have a more general application: *Corporation of the Town of Walkerville v Adelaide Clinic Holdings Pty Ltd* (1985) 38 SASR 161; *Moseley*, above. For a case in which there was a failure to apply a special provision which prevailed over a development control principle of general application, resulting in the decision being overturned by the Supreme Court, see *City of Port Adelaide Enfield v Moseley* [2008] SASC 88.

Section 26 of the *Acts Interpretation Act 1917* (SA) allows for words in the singular to be construed in the plural. However, these provisions do not extend to words used in a Development Plan as it is not an Act of Parliament: *Pro-Star Service Station Pty Ltd v Petroleum Products Retail Outlets Board* (1998) 72 SASR 383; 99 LGERA 163.

The court will not insert or read words into a Development Plan except in the clearest cases particularly where a literal reading of the Plan is capable of producing an intelligible result. Were a court to add words it would be framing planning policy which is the task of the authors of the

Development Plan. A Development Plan should be read and construed so as to give true effect to its maps and text: *Ditara Pty Ltd v Norwood, Payneham & St Peters CC* [2001] SASC 234.

The issue of whether a word or a principle contained within a Development Plan is used in its ordinary sense, or has a technical meaning, is a question of law. If it is clear that the word or principle has been used in its ordinary sense, the interpretation of the word or principle, and the application of that word or principle to the facts, will not involve a question of law, unless it is not reasonably open to the decision-maker to make the decision that it did: *City of Mitcham v MOL Pty Ltd* [2003] SASC 17; (2003) 225 LSJS 273.

The interpretation of a principle of development control contained in a Development Plan involves a question of law: *St Ann's College Inc v Adelaide CC* [1999] SASC 479.

The provisions of a Development Plan cannot override or vary in any way the requirements of any portion of the Act, including s 33(1) which sets out the procedure to be followed when seeking approval pursuant to s 32. There may be circumstances in which, under the Development Plan, matters which are appropriate under s 33(1) for assessment against the Building Rules may be relevant to an assessment for PDP consent: *Opal Inn Pty Ltd v Coober Pedy DC* [1997] EDLR 646.

A Development Plan must be interpreted in relation to the subject land in its entirety. If, for example, the subject land is effectively divided into two portions by a fence, it is not a correct approach to only consider the application of the plan in relation to one portion: *Angove v District Council of the Copper Coast* [2009] SAERDC 18 at [38].

For a discussion of the extent to which an explanatory statement to a Plan Amendment Report can be used in the interpretation of a Development Plan, see *Elimatta Nominees*, above (the Plan was used as a guide to the way in which new provisions were to relate to existing provisions in the relevant Development Plan).

In *Telstra Corp Ltd v City of Holdfast Bay* [2008] SAERDC 47, it was observed that, in regards to telecommunications facilities, council-wide provisions have been inserted in all Metropolitan Adelaide Council Development Plans and that mostly these are newer provisions than the more specific zone provisions. It was held that, in some respects, the more recent, though broader, council-wide policy directions for telecommunications facilities require greater weighting where they overlap or are in contradiction to, or are to be considered against, silent local zone provisions.

[3.5.5] Interpretation of Development Plan – departure from Development Plan. There is a discretion, ultimately unfettered, in a planning authority to take other considerations into account and to make decisions which are not in conformity with a Development Plan. This discretion of the planning authority must, like all discretions, be exercised for the purpose for which it is given; namely, for the purpose of attaining the planning objectives of the Act. Although the authority, having given proper consideration and due weight to the provisions of the Development Plan, may depart from it in the exercise of its discretion, it may do so only upon grounds which are properly related to the planning objectives of the Act. If the discretion were exercised arbitrarily or upon grounds not properly related to planning objectives, the exercise would miscarry: *Corporation of the Town of Walkerville v Adelaide Clinic Holdings Pty Ltd* (1985) 38 SASR 161; 55 LGRA 197; *O'Connell Property Pty Ltd v Adelaide City Council* [2007] SASC 456 at [59]; *Town of Gawler v Impact Investment Corporation Pty Ltd* [2007] SASC 356 at [80]. Whilst the provisions of a Development Plan are not mandatory, provisions of the Plan are directory and persuasive and one would normally expect a planning authority and the court to apply them unless, as a matter of judgment, there is good reason to depart from them: *City of Port Adelaide Enfield v Mosely* [2008] SASC 88; *Hurley v City of Holdfast Bay* [2008] SAERDC 78 at [43]; *Dudley v City of Unley* [2008] SAERDC 52 at [26]. Further, s 35(2) specifies that where a development is assessed as being seriously at variance with the Development Plan, it must not be granted consent – see [3.35].

In *Town of Gawler v Impact Investment Corporation Pty Ltd* [2007] SASC 356, Bleby J held that a number of considerations were relevant to determining whether it was appropriate to depart from a clearly expressed policy in a Development Plan. His Honour stated (at [81]-[82]):

> in order to determine whether a relevant Planning Authority or the ERD Court is justified in departing from a clearly expressed policy ... I consider that each of the following matters is relevant:
>
> 1. The language of the principle or principles concerned – whether it is direct or contemplates some flexibility in approach;
> 2. Whether the relevant principle is in conflict with some other applicable planning principle. That is likely to happen only rarely, in which case the more specific principle may displace the more generally expressed principle;
> 3. The evident purpose and objective of the policy expressed in the principle or principles concerned;
> 4. The significance of the policy to this particular Development. The clearer the policy in its application to a particular development, the more compelling the reasons for departing from the policy will need to be;
> 5. Where the policy contemplates possible degrees of compliance, the extent of the Development's compliance with the policy;
> 6. Consistency of the Development with other objectives and purposes of the Zone;
> 7. Whether there is something unusual about the Development or the land on which it is to take place which makes the policy inapplicable or inappropriate;
> 8. Whether other events have happened since the Development Plan was adopted which make the policy redundant, either generally or in respect of this particular development;
> 9. The probable effect of non-compliance with the policy on the planning objectives of the Zone; and
> 10. Whether non-compliance with the policy in this case is likely to encourage other non-complying developments in the Zone.
>
> In other cases there may be other relevant considerations. This list should therefore not be considered to be exhaustive but merely a useful guide. (citations omitted)

When assessing the extent of departure, it is also necessary to consider the intent of certain terms in the stated provisions and in particular what might comprise the underlying character of the locality. Whether the proposed development might have consequences for future development on the subject land is also a consideration: *Adelaide Hills Council v Gibson* [2006] SASC 181; *Palo Alto Pty Ltd v City of Onkaparinga* [2008] SAERDC 70 at [25].

It is preferable to describe the exercise of the court's unfettered discretion to depart from principles of a Development Plan as the exercise of a planning judgment within the ambit, scope and purpose of the Act, the Regulations and the Development Plan: *City of Mitcham v Freckmann* [1999] SASC 234*;* (1999) 74 SASR 56 at [21]. It has been confirmed that *Freckmann* does not suggest that a conclusion that a proposed development is not consistent with the overall intent, purpose and desired character of the relevant zone is necessarily decisive of the matter. There may be a number of other relevant factors. For example, the existing characteristics of the land may mean the objectives and principles of development control have very little relevance (*Paradise Developments Pty Ltd v The Nature Conservation Society of SA Inc* (1992-93) 59 SASR 239 at 249-252). Furthermore, the proposed development must be judged in its historical and factual context (*Courtney Hill Pty Ltd v SAPC* (1990) 59 SASR 259 at 263): *City of Unley v Hall* [2002] SASC 143 at [54].

Development Plans cannot be read without regard to the physical reality of the character of the area in which a development is proposed: *Rogers v Mount Gambier CC* (1997) 4 SAPED 41 (affirmed in *Rogers v Mount Gambier CC* (1997) 4 SAPED 99). In *Remibisi Pty Ltd v City of Salisbury (No. 2)* [2008] SAERDC 83, the ERDC stated:

> the Supreme Court has articulated on more than one occasion, not only that the development plan has been superimposed in any particular case upon a wide range of non-conforming uses, but also that a

relevant authority in making its decision, must recognise that the reality on the ground may be different from that assumed by the relevant development plan and that a planning decision should be a common sense decision according to the circumstances: see *District Council of Tanunda v Davis* (1985) 39 SASR 578; *City of Unley v Hall* [2002] SASC 143; *Courtney Hill v SA Planning Commission* [(1990)] 59 SASR 259.

For example, it has been held that, where a minimum site area and frontage sought by a development principle is founded on a need to ensure effluent and stormwater can be managed in an environmentally responsible way, it would follow that, where such a need can be met on a smaller allotment (eg due to improvements in waste water treatment and stormwater capture technology), the minima referred to have no work to do and can be disregarded: *Belle v City of Onkaparinga* [2009] SAERDC 27 at [26].

[3.5.8] New form of development. When the "zoning" of a locality contemplates forms of development additional to those already existing, some change to the appearance of the locality is inevitable. Those provisions of the Development Plan which seek harmony between the new and the existing character should not be interpreted so narrowly as to obviate any change: *Keihani v City of Burnside* [2006] SAERDC 19. Where the effect of a Development Plan is to usher in new elements of urban design which create seemingly impractical results, such as narrow frontages encompassing "the fault often found in semi-detached properties whereby narrow, dysfunctional alleyways are created along dividing fences between the two dwellings", such new "lifestyle" attitudes must be considered in the context of the Development Plan and the characteristics of the locality unless a Development Plan speaks against such trends or seeks to preserve earlier styles: *Spectra Building Design v Unley CC* [2001] SAERDC 35.

[3.5.9] Inconsistency – with Act. Read together, s 5(1) and (2) provide that terms defined in s 4 are to be taken to have the same meaning if used in a Development Plan, unless regulations are made defining those terms in a different way. If a term is defined by regulation and used in a Development Plan, the definition in the regulation is the operative definition. A Development Plan cannot redefine a term or word defined in the Regulations (see further [4.3.5]): *Frankham v Adelaide CC* [2002] SAERDC 11. A key underlying purpose of cl 5 is to ensure terms are defined by regulation, rather than in each Development Plan, so as to avoid inconsistency and duplication between plans: Second reading speech, *Hansard*, 30-31 March 1993 at 1851.

[3.5.10] Inconsistency – within Development Plan. It must be accepted that there might, at times, be inconsistency in the use of expressions in a Development Plan. Nevertheless, if a consistent interpretation of the use of expressions can be reasonably applied without "wreaking havoc", such consistency should be applied: *Telstra Corporation Ltd v Mitcham CC* [2000] SAERDC 77.

Inconsistencies within a Development Plan will often be resolved by considering the desired character and amenity of the zone: *Mitcham CC v Freckmann* (1999) 74 SASR 56; [1999] SASC 234; *Bindara Pty Ltd v Holdfast Bay CC* [2001] SASC 314. Where the nature of the relevant development is at issue, regard may be had to the genus into which the development might fall. Where the proposed development is of a kind defined in the Regulations, the category to which the proposed development is to be assigned will be determined by reference to the definition of that development. For example, serviced holiday apartments are but one kind of residential flat building and therefore the category of such development will be determined by reference to residential flat buildings. There is no reason why they should not be consistently treated in the Development Plan when determining whether development consent should be granted. Any other approach is likely to lead to an undesirable inconsistency in the planning approach: *Paradise Development (Investments) Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 139.

Where, in relation to residential development within a zone, the statements in an objective in the Development Plan and those in a principle of development control in the Development Plan differ, the intention set out in the objective should prevail: *Zoontjens v Mitcham CC* [1999] SAERDC 51.

Where there is a discrepancy in the words of the body of a Development Plan as against the Plan's definitions schedule, three questions must be answered in the affirmative to justify the reading of words into the Plan: (i) can the court be satisfied from reading the Plan as a whole that the definitions enumerated were intended to remove any uncertainty that might otherwise arise from the use of the various terms in the body of the Plan?; (ii) can the court be satisfied that by inadvertence the makers of the Plan overlooked, and so omitted, a word in an expression of the definitions in the body of the Plan?; (iii) can the words to be implied be stated with certainty in the sense that it is clear what the makers of the Plan would have inserted had their attention been drawn to the omission?: *Frankham v Adelaide City Council* (2004) 89 SASR 372; [2004] SASC 263 at [23].

[3.5.14] Lack of specificity/silence on matter. In the absence of detailed zoning provisions, the more general provisions of a Development Plan assume significance. Such provisions are to be read in conjunction with the stated object of the Act "to provide for proper, orderly and efficient planning and development in the State" to assess a development proposal: *Linkevics v Adelaide Hills C* [2000] SAERDC 18.

The absence of a statement in a Development Plan discouraging a particular kind of land use does not necessarily mean that that kind of development is allowable. The intent of the Plan for the subject locality can usually be ascertained by reference to the relevant objectives and principles. The fact that a Plan says that development should comprise "primarily" of certain uses (eg commercial and industrial uses) does not necessarily leave the way open for other inconsistent uses (eg residential development): *Angwin Pty Ltd v City of Norwood, Payneham & St Peters* [2007] SAERDC 38. The fact that the provisions of a Development Plan relating to a particular area do not contain lists of either complying or non-complying uses does not mean that the provisions are general and vague and that little reliance should be placed upon them. Rather, developments should be carefully considered on their merits: *Pedler v Port Lincoln CC* [1997] EDLR 416; (1997) 4 SAPED 102.

Where the provisions of a Residential Policy Area were silent on the matter of non-residential development, it has been held that this did not necessarily mean that non-residential development was not appropriate in the area. Rather, non-residential development could be contemplated if it met the relevant conditions set out in the Development Plan: *Barossa Projects Pty Ltd v The Barossa Council* [2008] SAERDC 8; see also *Eastern Building Group Pty Ltd v The Barossa Council* [2005] SAERDC 26.

In *Lakshmanan v City of Norwood, Payneham & St Peters* [2009] SAERDC 22, it was held that certain provisions of the relevant Development Plan set standards for new, but not existing, buildings for flood protection. The application concerned related to a proposed demolition of a heritage listed house that had been flooded relatively recently as a result of an overflowing creek. The house had not been returned to a habitable state since and the appellants sought to demolish it and to redevelop the land for residential purposes in a manner which would provide greatly increased protection for the new dwellings from damage in the event of flooding. The appellents presented evidence regarding the risk of flooding, whether practical measures could be taken to ameliorate the risk of flooding and the value of the dwelling as a heritage place. The court held, however, that there were no provisions in the Plan applicable to the site which enabled the court to take into account such evidence and, in view of these parameters for assessment, refused the application. The court arrived at a similar conclusion in *Minicozzi v City of Norwood, Payneham & St Peters* [2009] SAERDC 21, a case heard together with *Lakshmanan*.

[3.5.15] Unachievable objectives. Whilst a Development Plan may establish general objectives for a zone created by the Development Plan, there is a possibility that some land exists within the zone where such objectives are unlikely to be achieved. When such a situation occurs the relevant authority is entitled to have regard to it and acknowledge that the objectives are relevant only in the limited sense of establishing the context. Once that has occurred the provisions of the Development Plan that speak solely to the attainment of those objectives are not relevant to development on the

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

(1) A development is an approved development if, and only if, a relevant authority has assessed the development against, and granted a consent in respect of, each of the following matters (insofar as they are relevant to the particular development):

(a) the provisions of the appropriate Development Plan (***development plan consent***);

(b) the provisions of the Building Rules (***building rules consent***);

(c) in relation to a proposed division of land (otherwise than under the *Community Titles Act 1996* or the *Strata Titles Act 1988*)—the requirement that the following conditions be satisfied (or will be satisfied by the imposition of conditions under this Act):

(i) the allotments resulting from the division may be lawfully used for the purposes proposed by the applicant;

(ii) open space will be provided, or a payment will be made in accordance with the requirements imposed under this Act;

(iii) adequate provision is made for the creation of appropriate easements and reserves for the purposes of drainage, electricity supply, water supply and sewerage services;

(iv) the requirements of the South Australian Water Corporation relating to the provision of water supply and sewerage services are satisfied;

(iva) where land is to be vested in a council or other authority—the council or authority consents to the vesting;

(v) requirements set out in regulations made for the purposes of this provision are satisfied;

(d) in relation to a division of land under the *Community Titles Act 1996* or the *Strata Titles Act 1988*—the requirement that the following conditions be satisfied (or will be satisfied by the imposition of conditions under this Act):

(i) each lot or unit that would be created or affected by the development is appropriate for separate occupation;

(ii) any encroachment of a lot or unit over other land has been dealt with in a satisfactory manner;

(iii) where land is to be vested in a council or other authority—the council or authority consents to the vesting;

(iv) a building or item intended to establish a boundary (or part of a boundary) of a lot or lots or a unit or units is appropriate for that purpose;

(v) the division of the land in the proposed manner is, having regard to the relevant Development Plan, appropriate;

(va) the division of land under the *Community Titles Act 1996* or the *Strata Titles Act 1988* is appropriate having regard to the nature and extent of the common property that would be established by the relevant scheme;

(vi) open space will be provided, or a payment will be made in accordance with the requirements imposed under this Act;

(vii) the requirements of the South Australian Water Corporation relating to the provision of water supply and sewerage services are satisfied;

(viia) any building situated on the land complies with the Building Rules;

(viii) requirements set out in the regulations made for the purposes of this provision are satisfied;

(e) the requirement that any encroachment of a building over, under, across or on a public place (and not otherwise dealt with above) has been dealt with in a satisfactory manner;

(f) such other matters as may be prescribed.

(2) An application may be made for all or any of the consents required for the approval of a proposed development, or for any one or more of those consents.

(3) A relevant authority may, in granting a development plan consent, reserve its decision on a specified matter until further assessment of the relevant development under this Act.

(4) A development will be taken to be an approved development when all relevant consents have been granted and a relevant authority has, in accordance with this Act, indicated that the development is approved.

(4a) The regulations may exclude prescribed classes of development from the operation of paragraph (a) of subsection (1) (so that an assessment against the Development Plan and a development plan consent that would otherwise be required under that paragraph need not be undertaken, sought or obtained).

(4b) If—

(a) a development only requires an assessment under paragraph (b) of subsection (1); and

(b) a council—

(i) is the relevant authority; and

(ii) is to make the assessment under that paragraph; and

(c) the council determines to grant consent under that paragraph,

the council, as the relevant authority, must issue the relevant development approval with the consent

(5) The provisions of the Building Rules that are relevant to the operation of subparagraph (viia) of paragraph (d) of subsection (1) are the provisions of the Building Rules as in force at the time the application is made for consent in respect of the matters referred to in that paragraph.

[sub-s (1) amd 53/1995 s 5; amd 38/1996 s 6; amd 88/2000 s 14(a); amd 79/2005 s 8(1)-(4); amd 17/2007 s 5(1), (2)], [sub-s (3) amd 17/2007 s 5(3)], [sub-s (4) ins 3/1997 s 4], [sub-s (4a) ins 1/2009 s 4], [sub-s (4b) ins 1/2009 s 4], [sub-s (5) ins 88/2000 s 14(b)]

Overview. Section 33 sets out the matters against which a development must be assessed by a relevant authority including, among other things, the provisions of the relevant Development Plan and the Building Rules. A development will only be an "approved development" if all necessary consents have been granted once the proposal has been assessed against each of the stipulated matters. However, certain developments are exempted by the Regulations from requiring Development Plan consent. An applicant may apply for "staged" assessment, with the provision of greater levels of detail in plans as certainty is obtained.

Sec 33(1)

[3.33.1] Assessment. Pursuant to reg 16(1), a relevant authority must determine the nature of the development before proceeding to assess the development in accordance with the provisions of s 33(1). It must then proceed to deal with the application in respect of that development in accordance with the determination of the nature of the development which it has made: *Enfield CC v DAC* (2000) 199 CLR 135; 74 ALJR 490. No matter how an applicant may choose to describe a proposed development, it is necessary for the relevant authority to make its own decision about its nature (see [4.16.10]): *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd* [2001] SASC 409.

Once a relevant authority determines the nature of an application, it is to determine whether the proposed development is of a complying or non-complying kind and whether it must be referred to a body prescribed under DR sch 8 ("Referrals and concurrences"): *Barton Springs Pastoral Company Pty Ltd v Adelaide Hills C* [2000] SAERDC 37.

The terms of s 33 of require that the development be assessed rather than the application: *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd* [2001] SASC 409; *Potter v City of Victor Harbor* [2006] SAERDC 42.

It is rarely the case that any development proposal, no matter how well-designed or conceived, will squarely meet all of the guidelines set out in a Development Plan. The failure to do so does not necessarily warrant a rejection of the proposal: *Wicks Estates Pty Ltd v District Council of Yorke Peninsula* [2006] SAERDC 57 at [27].

Care must be taken in applying dicta in cases decided under predecessors to s 33 of the DA cast in slightly different terms: *Town of Gawler v Impact Investment Corporation Pty Ltd* [2007] SASC 356 at [74]-[75].

If a proposal for development is finally and unequivocally satisfactory, it should receive planning permission, whether subject to conditions or not. If any feature of a proposal is not satisfactory, consent should be refused: *Clare DC v Hallett* (1984) 53 LGRA 103.

Generally speaking, and subject to certain exceptions such as ss 35(1), an applicant for development consent has no right or entitlement to a grant of development permission in the event that certain facts are established. In contradistinction is a decision of a court of law or tribunal where, generally, if a party establishes certain facts which satisfy a principle of law that party is entitled to a favourable decision: *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273; *Thorpe v Charles Sturt CC* (1999) 103 LGERA 395; (1998) 5 SAPED 102.

[3.33.3] Assessment – test. Various approaches to assessing developments proposals have been espoused by the courts. It has been held that the first question to be addressed in assessing a proposed development is whether that development is "at least prima facie, a suitable and appropriate use of the subject land having regard to the provisions of the development plan": *Remove All Rubbish Pty Ltd v Corporation of the City of Salisbury* (1989) 51 SASR 26 at 34 (cited with approval in *Land Alliance Pty Ltd v City of Salisbury* [2004] SAERDC 99 at [17]). In answering that question, it is also necessary "to distil from the relevant provisions of the Plan the overall intent and purpose and the desired character of the zone in which it is sought to place the proposed development, a task which is often assisted by reference to the stated objectives of the zone and the principles of development control". However, given that it is impossible to make provision in a Development Plan for every kind of development, the ultimate criterion by which a proposal might have to be judged is “whether it is conducive to the desired character and amenity of the zone. The less conducive it is, the less likely that it might merit planning approval”: *City of Mitcham v Freckmann* (1999) 74 SASR 56; [1999] SASC 234 at [18] (applied in *Papalia v City of Port Adelaide Enfield* [2008] SAERDC 54 at [34]).

However, in *City of Unley v Hall* [2002] SASC 337, Besanko J stated (at [10]):

> The decision in *City of Mitcham v Freckmann and Ors* does not suggest that a conclusion that the proposed development is not consistent with the overall intent, purpose and desired character of the zone is necessarily decisive of the matter. There may be a number of other relevant factors. For example, the existing characteristics of the land may mean the objectives and principles of development control have very little relevance (*Paradise Developments Pty Ltd and Anor* (1992-93) 59 SASR 239 at 249-252). Furthermore the proposed development must be judged in its historical and factual context (*Courtney Hill Pty Ltd v South Australian Planning Commission and Ors* (1992-93) 59 SASR 259 per King CJ at 263).

The making of a planning judgment has been held to involve three concerns. The first requires an identification of the intended character imprinted upon the particular locality by the Development Plan. Secondly, there has to be an assessment as to how the features of the proposed development may impinge upon that character and the associated amenity. Thirdly, a planning judgment made in the exercise of discretion will be reached by weighing the extent of compatibility between the proposed development and the Development Plan (as to the meaning of “compatible”, see [9.400]). In doing that, the relevant authority (or the ERDC) will bear in mind that the language in the Development Plan is one intended to express goals and guiding principles. To interpret any such goal as a legal requirement in a particular case would amount to an error of law: *Klein Research Institute Ltd v Mount Barker DC* [2000] SASC 377; *Walkerville TC v Adelaide Clinic Holdings Pty Ltd* (1985) 38 SASR 161; 55 LGRA 176; *Lovrinov v City of Charles Sturt* [2007] SAERDC 3. It is

legitimate to look well beyond the precise wording of the principles of a Development Plan and ask as to their overall purpose: *Materne & Lykke v DAC* [2002] SAERDC 112. In outlining the role of the Development Plans in the assessment process, the ERDC has indicated that, whilst a failure to assess a proposed development against the relevant Development Plan (and instead assessing on the basis of identified community demand), would render relevant policy provisions at nought and undermine the existing planning system, the Supreme Court has indicated that a relevant authority must recognise that the reality on the ground may be different from that assumed by the relevant development plan and that a planning decision should be a common sense decision according to the circumstances – see [3.5.5] ("Interpretation of Development Plan (departure from Development Plan)").

The appropriate approach to assessing a development proposal has also been summarised as follows: "Broadly, in assessing development proposals, there are three questions to be answered. Does the proposal fit the general land use strategy of the Plan? Does it fit within its locality as a good neighbour? Does it fit upon its subject land as a workable site-planning solution?": *Aifandis v Adelaide CC* [2006] SAERDC 3 at [12]; *Jennings v City of Norwood, Payneham and St Peters* [2003] SAERDC 51.

A further approach has found that inquiries into planning merit can usefully be structured so that a succession of queries are raised and dealt with: First, does the development fit the Development Plan's strategy, taken as a whole? Secondly, does it fit into its locality? Thirdly, is it suitable on the subject land?: *Pooley v Mallala DC* [1995] EDLR 186; *Fabris v Adelaide CC* [1999] SAERDC 24; *Diakos v Adelaide CC* [2001] SAERDC 48. In approving *Pooley*, the ERDC has elaborated on these tests, stating that it is basic planning practice to evaluate development proposals: first, against the strategic intent of the relevant Development Plan; secondly, as to how they fit within their localities; and, thirdly, how they sit upon their sites having regard to the provisions of the Development Plan. Should the answer to the first question be in the negative, there is little point in proceeding further. Each of the three questions must be answered having regard to the physical realities of the urban and rural setting into which the proposal is to be placed: *Bindara Pty Ltd v Holdfast Bay CC* [2001] SAERDC 36 (affirmed in *Bindara Pty Ltd v Holdfast Bay CC* [2001] SASC 314 at [9]).

[3.33.4] Assessment – onus on applicant. Generally, there is no onus on an applicant for development consent to establish that the development consent should be granted. The relevant authority must simply assess the proposed development against the relevant Development Plan: *Mitcham CC v Freckmann* (1999) 74 SASR 56; [1999] SASC 234 at [16]; *Tuna Boat Owners Association of SA Inc v DAC* [2000] SASC 238 at [27]. However, there are limitations on this principle. In *Lacey v City of Burnside* [2009] SASC 136, Kourakis J stated (at [33]-[35]):

> The general proposition that an applicant for development consent does not carry an onus to establish that approval should be granted cannot be taken too far. The proposition is sound where the objectives and principles of the plan against which an application must be assessed do not in themselves create a presumption or bias, for or against, approval. Administrative tribunals are commonly given discretions which, if their jurisdiction is properly invoked, they must exercise. Where jurisdiction is conferred in that way it is not open to a tribunal to throw up its hands and say that it is all too hard and that it does not know which way it should exercise its discretion. It cannot for that reason dismiss an application made to it. In that limited sense an applicant might be said not to carry an onus.
>
> However, if the objectives and principles of a development plan provide that approval should not as a general rule be given to specified development unless there is a special reason to do so, then, plainly enough, an applicant for an approval must demonstrate that there is a special reason in his or her case. In effect, the applicant carries a persuasive onus ...
>
> [Further, there] is a distinction between the exercise of a discretion itself, which may be conferred without any inherent bias, and the determination of the facts on which the discretion will be exercised. If a party urges a tribunal to exercise a discretion on the basis that a particular circumstance is a relevant matter, the existence of that circumstance must be proved by the party who seeks to rely on it. That party necessarily carries the onus to prove, as a fact, the existence of that circumstance.

In *Lacey*, the relevant Development Plan provided that significant trees should be preserved and that tree-damaging activity should not be undertaken unless the significant tree represented an unacceptable risk to safety and all other reasonable remedial measures were demonstrably ineffective. The ERDC had refused consent to remove a significant tree on the basis that all reasonable remedial treatments and measures – in particular, pruning – had not been demonstrated to be ineffective, as required by the Development Plan. The appellant claimed that the ERDC erred in law by placing an onus on the appellant and holding against him because he had not discharged the onus. The Supreme Court held that the ERDC was right to approach the question on the basis that it was not satisfied that the second element of the proviso had been established. The court was entitled to take the view that the appellant had failed to discharge the onus of showing that pruning would not reduce the safety risk to an appropriate level.

[3.33.5] Assessment – own merit. Each development application must be considered on its own merits: *Dal Pra v Happy Valley CC* [1995] EDLR 107; (1995) 2 SAPED 23; *Zollo v Unley CC* (1996) 3 SAPED 114; *Pedler v Port Lincoln CC* [1997] EDLR 416; (1997) 4 SAPED 102; *Malthouse v Tatiara DC* (1998) 5 SAPED 89. Such consideration must be done without any presumption for or against the proposed development: *Mitcham CC v Freckmann* (1999) 74 SASR 56; [1999] SASC 234. As each application is to be considered on its own merits, it is inappropriate to deal with an application on the basis that it is an amendment of a previous proposal which has already been finally dealt with: *Unley Property Development v Holdfast Bay CC* [1998] EDLR 796; (1998) 5 SAPED 129.

[3.33.7] Assessment – zoning requirements. When assessing whether a proposed development is at variance with the intent, purpose and desired character of a zone, the court must first ascertain those aspects of the zone and assess the development against them. Other factors may also be relevant; including the general provisions of the plan and, where applicable, the on-ground reality. It is an incorrect approach, having found the proposed development at variance with the intent, purpose and desired character of the zone, for the relevant authority to move to the general provisions of the relevant Development Plan, assess the proposal against those, and conclude that, as there would be no negative impacts, and there would be a net economic benefit to the community, the proposed development had sufficient merit to proceed: *South East Ward Residents Association Inc v District Council of Grant* [2004] SAERDC 107; *MM Hassan Enterprises Pty Ltd v City of Unley* [2008] SAERDC 2 at [17].

[3.33.10] Relevant considerations – failure to consider. Failure to take into account a relevant consideration is an error of law. The fact that certain factor may be accorded less weight does not mean they should be accorded no weight at all and become irrelevant: *City of Unley v Hall* [2002] SASC 143 at [49]-[50]. For a decision that was remitted back to the ERDC for rehearing for failure to consider a relevant consideration (being existing developments in a locality and zone which did not comply with the relevant Development Plan), see *City of Unley v Hall*, above.

For a case in which a planner's report that was replete with erroneous assumptions and statements regarding the effect of the Development Plan, resulting in the relevant authority failing to take into account relevant considerations, see *Mar Mina (SA) Pty Ltd v City of Marion* [2008] SASC 120.

[3.33.11] Relevant considerations – weighting of factors. When determining whether to approve a development application, the authority assessing the application must weigh up and consider a number of factors. These factors include the objectives and principles of the Development Plan as a whole, relevant legislative regimes and the evidence before it: *Rowe v Lindner* [2006] SASC 176 at [81] (upheld on appeal in *Rowe v Lindner (No 2)* [2007] SASC 189). Proper weight must be given to criteria set out to be used in determining whether an application should be granted. The criteria cannot be ignored in favour of some matter extraneous to them which gains the attention of the relevant authority: *Japling Pty Ltd v Shenannigans One Pty Ltd* [1998] SASC 6911. Almost always, there will be pros and cons in relation to a proposed development. The favourable and unfavourable

(3) The Commissioner may, before making a determination under this section, request the applicant to provide such additional documents or information (including calculations and technical details) as the Commissioner may reasonably require to assess the application.

(4) If a request is made under subsection (3)—
(a) the Commissioner may specify a time within which the request must be complied with; and
(b) the Commissioner may, if he or she thinks fit, grant an extension of the time specified under paragraph (a).

(5) If the Commissioner determines that the proposed development involves the creation of fortifications, the relevant authority must—
(a) if the proposed development consists only of the creation of fortifications—refuse the application; or
(b) in any other case—impose conditions in respect of any consent to or approval of the proposed development prohibiting the creation of the fortifications.

(6) If a relevant authority acting on the basis of a determination of the Commissioner under subsection (2) refuses an application or imposes conditions in respect of a development authorisation, the relevant authority must notify the applicant that the application was refused, or the conditions imposed, on the basis of a determination of the Commissioner under this section.

(7) If a refusal or condition referred to in subsection (5) is the subject of an appeal under this Act—
(a) the Commissioner will be the respondent to the appeal; and
(b) the relevant authority may, if the Court permits, be joined as a party to the appeal.

[s 37A ins 46/2003 s 7]

Subdivision 2—Consultation

[3.38] 38—Public notice and consultation

(1) Subject to this section, there will be 4 categories of development for the purposes of this section—
(a) Category 1 development; and
(ab) Category 2A development; and
(b) Category 2 development; and
(c) Category 3 development.

(2) Subject to subsection (2a), the following provisions apply in relation to the assignment of developments to these categories:
(a) the regulations or a Development Plan may assign a form of development to Category 1 or to Category 2 and if a particular form of development is assigned to a category by both the regulations and a Development Plan—
(i) if the regulations provide that an assignment by a Development Plan may prevail—the assignment provided by the Development Plan will, to the extent of any inconsistency, prevail (subject to the operation of paragraph (b)); but
(ii) in any other case—the assignment provided by the regulations will, to the extent of any inconsistency, prevail;
(b) the regulations may assign a form of development to Category 2A and this will prevail to the extent of any assignment provided by a Development Plan under paragraph (a) or (b);
(c) any development that is not assigned to a category under paragraph (a) will be taken to be a Category 3 development for the purposes of this section.

(2a) The assignment of a form of development to Category 1 under subsection (2)(a) cannot extend to a particular development if that development involves, or is for the purposes of, a prescribed activity of environmental significance as defined by the *Environment Protection Act 1993*.

(2c) For the purposes of subsection (2)(b), building work will be taken to be along a boundary if there is no set-back or separation from that boundary.

(3) Where a person applies for a consent in respect of the Development Plan for a Category 1 development, the following provisions of this section do not apply—

(a) the relevant authority must not, on its own initiative, seek the views of the owners or occupiers of adjacent or other land in relation to the granting or refusal of development plan consent; and

(b) the following provisions of this section do not apply.

(3a) Where a person applies for a consent in respect of the Development Plan for a Category 2A development—

(a) the relevant authority must—

(i) subject to any exclusion or qualification prescribed by the regulations—give an owner or occupier of each piece of adjoining land; and

(ii) give any other person of a prescribed class,

notice of the application; and

(b) the relevant authority must—

(i) give consideration to any representations in writing made in accordance with the regulations by a person who is entitled to be given a notice under paragraph (a); and

(ii) forward to the applicant a copy of any representations that the relevant authority must consider under subparagraph (i) and allow the applicant an opportunity to respond, in writing, to those representations within the period prescribed by the regulations; and

(c) if a representation is received under paragraph (b) within the prescribed number of days, the relevant authority may, in its absolute discretion, allow the person who made the representation to appear personally or by representative before it to be heard in support of the representation.

(4) Where a person applies for a consent in respect of the Development Plan for a Category 2 development, notice of the application must be given, in accordance with the regulations, to—

(a) an owner or occupier of each piece of adjacent land; and

(b) any other person of a prescribed class.

(5) Where a person applies for a development assessment of a Category 3 development, notice of the application must be given, in accordance with the regulations, to—

(a) the persons referred to in subsection (4); and

(b) any other owner or occupier of land which, according to the determination of the relevant authority, would be directly affected to a significant degree by the development if it were to proceed; and

(c) the public generally.

(6) Except as otherwise provided by the regulations, the subject matter of—

(a) any notice required under this section; or

(b) any representations under this section; or

(c) any appeal against a decision on a Category 3 development by a person entitled to be given notice of the decision under subsection (12),

must be limited to the following:

(d) what should be the decision of the relevant authority as to development plan consent;

(e) in a case where a prescribed body is empowered to direct that the application be refused, or that conditions be imposed in relation to the development—what should be the decision of the prescribed body in response to the application.

(7) Subject to subsection (17), where notice of an application for consent in respect of a Category 2 or Category 3 development has been given under this section, any person who desires to do so may, in accordance with the regulations, make representations in writing to the relevant authority in relation to the granting or refusal of consent.

(8) The relevant authority to which the application is made must forward to the applicant a copy of the representations made and allow the applicant an opportunity to respond, in writing, to those representations.

(9) The response referred to in subsection (8) must be made within the prescribed number of days after the relevant material is forwarded to the applicant.

(10) In addition to the requirements of subsections (7), (8) and (9)—

(a) in the case of a Category 2 development—the relevant authority may, in its absolute discretion, allow a person who made a representation to appear personally or by representative before it to be heard in support of the representation; and

(b) in the case of a Category 3 development—the relevant authority must allow a person who made a representation and who, as part of that representation, indicated an interest in appearing before the authority, a reasonable opportunity to appear personally or by representative before it to be heard in support of the representation.

(11) If a person appears before the relevant authority under subsection (10), the relevant authority must also allow the applicant a reasonable opportunity, on request, to appear personally or by representative before it in order to respond to any relevant matter.

(12) Where representations have been made under this section, the relevant authority must—

(a) give to each person who made a representation notice of its decision on the application and of the date of the decision and, in the case of a Category 3 development, of the person's appeal rights under this Act; and

(b) in the case of a Category 3 development—give notice to the Court—

(i) of its decision on the application and of the date of the decision; and

(ii) of the names and addresses of persons who made representations to the relevant authority under this section.

(13) A notice under subsection (12) must be given within five business days from the date of the decision on the application.

(14) An appeal against a decision on a Category 3 development by a person who is entitled to be given notice of the decision under subsection (12) must be commenced within 15 business days after the date of the decision.

(15) If an appeal is lodged against a decision on a Category 3 development by a person who is entitled to be given notice of the decision under subsection (12)—

(a) the applicant for the relevant development authorisation must be notified by the Court of the appeal and will be a party to the appeal; and

(b) in a case where the decision of a prescribed body in response to the application for the development authorisation could be a subject matter of such an appeal—the prescribed body will be a party to the appeal.

(16) A decision of a relevant authority in respect of a Category 3 development in respect of which representations have been made under this section does not operate—

(a) until the time within which any person who made any such representation may appeal against a decision to grant the development authorisation has expired; or

(b) where an appeal is commenced—

(i) until the appeal is dismissed, struck out or withdrawn; or

(ii) until the questions raised by the appeal have been finally determined (other than any question as to costs).

(17) Where a relevant authority is acting under this section in relation to a Category 2A or Category 2 development, a representation made by a person who is not entitled to be given notice of the relevant application under this section is not required to be taken into account under this section and will not have effect for any relevant purpose under this section.

(18) In addition, a representation that is not made in accordance with any requirement prescribed by the regulations for the purposes of this section is not required to be taken into account under this section and will not have effect for any relevant purpose under this section (including, in the case of a Category 3 development, in connection with the operation of subsection (12)).

[sub-s (1) amd 17/2007 s 10(1), (2)], [sub-s (2) amd 76/1993 Sch 2 cl 4(b); sub 17/2007 s 10(3); sub 1/2009 s 7(1)], [sub-s (2a) ins 76/1993 Sch 2 cl 4(c)], [sub-s (2b) ins inserted by 17/2007 s 10(4); del 1/2009 s 7(2)], [sub-s (2c) ins 17/2007 s 10(4)], [sub-s (3) sub 1/2009 s 7(3)], [sub-s (3a) ins 17/2007 s 10(5); sub 1/2009 s 7(4)], [sub-s (6) sub 76/1993 Sch 2 cl 4(d); amd 17/2007 s 10(6)], [sub-s (7) amd 76/1993 Sch 2 cl 4(e); amd 17/2007 s 10(7)], [sub-s (10) amd 76/1993 Sch 2 cl 4(f)], [sub-s (14) and (15) sub 76/1993 Sch 2 cl 4(g)], [sub-ss (17) and (18) ins 17/2007 s 10(8)]

Overview. Section 38 establishes a framework for public notice and consultation in relation to development control decisions. For these purposes, the clause establishes categories of development: Category 1 (exempt from public consultation), Category 2A (generally subject to neighbour notification and comment); Category 2 (subject to neighbour notification and comment) and Category 3 (full public notice required). A Development Plan may assign certain forms of developments to Category 1 and Category 2; however, the Regulations may also do this and such assignment will prevail over any inconsistency with a Development Plan. Only the Regulations (and not a Development Plan) can determine which forms of development are Category 2A. The section also sets out the rights of representors to make representations, to be heard and to lodge appeals in respect of development applications.

Sec 38

[3.38.5] Operation. In a number of respects the Act and the Regulations exhaustively set out the obligations of a relevant authority as well as the right of an interested person to notice of the making of an application for development consent and to become involved in the process: *Upham v The Grand Hotel (SA) Pty Ltd* (1999) 74 SASR 557; [1999] SASC 414.

In relation to the ability of a relevant authority to delegate the duty of hearing those who had a right to be heard by the relevant authority in respect of representations, see [3.20.80].

The scheme, set out in the Act seeks to avoid a plethora of submissions to a relevant authority at various times. Time periods for lodging materials are set out in the scheme. Material relevant to the application, received other than in accordance with the legislation – such as a letter from a person who is neither the relevant applicant nor a representor – should not be provided to the members of the relevant authority. A legislative scheme exists. Actions which go beyond the scheme offend Parliament's intention: *Crookes v Adelaide Hills C* [1999] SAERDC 67.

Section 38 creates categories in relation to a development, not in relation to an application. It is the nature of the development and not the nature of the application which governs public notification and public consultation: *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd* [2001] SASC 409; *Macag Holdings Pty Ltd v DAC (No 2)* [2002] SAERDC 31.

[3.38.10] Procedural fairness. There is a common law duty to act fairly in the sense of according procedural fairness in the making of administrative decisions affecting rights, interests and legitimate expectations, unless there is a clear manifestation of a contrary statutory intention: *Kioa v West* (1985) 159 CLR 550; 62 ALR 321; *The Grand Hotel (SA) Pty Ltd v DAC* [1998] SASC 7018. The provisions of s 38 relating to notice, to entitlement to lodge a representation and the right to be heard by a relevant authority supplant the relevant common law principles to the extent that they do not leave room for common law principles relating to procedural fairness to operate on these matters.

This is subject to exceptional situations such as might arise as a result of a specific course of conduct between, for example, a particular person and the relevant authority. The Act, the Regulations and, in particular, reg 34 (which deals with public inspection of certain applications for the purposes of s 38 – see [4.34]), do not wholly exclude the application of common law principles of procedural fairness. For instance, in order to accord with principles of procedural fairness a relevant authority must disclose to a representor whatever material it has received from an applicant for development consent, other than the applicant's written response to any representation, up until the time for the hearing of submissions in support of a representation: *Upham v The Grand Hotel (SA) Pty Ltd* (1999) 74 SASR 557; [1999] SASC 414. It follows from *Upham* that the Act obliges a relevant authority to give a fair hearing to a person who made a representation and indicated therein that they wished to be heard and that a denial of a fair hearing will invalidate the decision of a relevant authority: *Verbis v Town of Gawler* [2008] SAERDC 9 at [60].

A relevant authority should do all that it can to see that important information about an application for development consent is not provided by an applicant after the period for the making of representations has expired: *Upham*, above.

[3.38.13] Category definitions. For the purposes of s 38, Category 1 and Category 2 developments are, pursuant to reg 32 (see [4.32]), defined in DR sch 9 ("Public notice categories") – see [4.770]. See under sch 9 for annotations regarding the provisions of the schedule.

If a development is not of a non-complying kind, identified as such by the Development Plan, then, if it falls within any of the descriptions of DR1993 sch 9 pt 1 cl 2(l)(a)-(f) (now DR2008 sch 9 pt 1 cl 2(a)-(g)), it is a Category 1 development: *Agostino v Charles Sturt C* [1998] EDLR 344; (1998) 5 SAPED 63. A non-complying development is a Category 3 development: *KIPA Freeholds Pty Ltd v DAC* (1999) 101 LGERA 414; [1999] EDLR 39.

[3.38.15] Categorisation – purpose. The purpose of deciding which developments should fall into Category 1 or Category 2 is to abrogate or restrict rights of representation and appeal in relation to a development application: *Friends of Elliston – Environment & Conservation Inc v South Australia* [2007] SASC 19 at [153].

[3.38.17] Categorisation – assessment process. When determining the category of a proposed development, a relevant authority must first determine the nature of the development (s 35 and reg 16): *Bade v Rural City of Murray Bridge* [2008] SASC 9 at [37] (appealed on other grounds and upheld for different reasons in *Bade v Rural City of Murray Bridge* [2008] SASC 189).

The determination of the relevant category of a particular development is not a subjective act. If a relevant authority incorrectly assigns a category it, in so doing, may make a procedural error that could vitiate its decision. In certain circumstances such an error, and its ramifications, may be considered in an appeal to the ERDC: *Willunga DC v Riches* (1987) 135 LSJS 463; 62 LGRA 132; *McMullen v Playford CC* (1999) 6 SAPED 68. In order to determine which of the three categories a development falls into it is first necessary to ascertain whether the development is a complying or a non-complying development or neither. Relevant authorities must vigorously examine even what appear to be relatively straightforward applications in order to ensure developments are assigned the correct category: *Verdouw v Unley City Council* [2001] SASC 63.

If a relevant authority determines the nature of the development to be a non-complying one and the developer has not so identified it, the authority must inform the developer accordingly: *Enfield CC v DAC* (1997) 69 SASR 99.

[3.38.19] Categorisation – interpretation of categories. The provisions relating to either Category 1 or Category 2 should not be benevolently interpreted in an attempt to bring as many developments as possible into the realm of one category, rather than another. When, if properly assessed, a particular development does not apparently fall into Category 1 or Category 2, it should

be classified as a Category 3 development. The other two categories should not be stretched so as to avoid such a Category 3 classification or to reduce the scope of Category 3 development. None of the categories can be regarded as constituting an exception to the obligations applicable to the other categories: *Nash v Holdfast Bay CC* [1997] SAERDC 438.

[3.38.21] Categorisation – statement of effect. The fact that the statement of effect provided for by reg 17 must be given before any notice under s 38(4) or (5) indicates that the determination of the appropriate category need not take place before such information is given. That information may well bear on what is the true nature and extent of the development under consideration: *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd* [2001] SASC 409.

[3.38.23] Categorisation – duration of decision. The decision of the relevant authority on an application for development authorisation stands until set aside by a competent court: *Stirling District Environment Association Inc v Bailey* [1997] EDLR 548; (1997) 4 SAPED 124; *McMullen v Playford CC* [1999] SAERDC 44.

[3.38.25] Categorisation – adequacy of information from applicant. A relevant authority should consider the adequacy of the information provided by the applicant at the same time as the relevant authority assigns a category to the proposed development (s 38(1)) and considers whether the proposed development is a non-complying development (s 35(3)(a) and reg 17). If there is insufficient information the relevant authority should request the applicant to provide further information (see s 39(2)). In such event, the period between the date of the request and the date of compliance with the request is not included in the time within which the relevant authority is required to decide the application (s 39(3)(a)): *Upham v The Grand Hotel (SA) Pty Ltd* (1999) 74 SASR 557; [1999] SASC 414.

[3.38.29] Mandatory and non-mandatory requirements. It is well recognised that the requirements under s 38 are mandatory: see, eg, *Hoffrichter v DAC* [1999] EDLR 1; [1999] SAERDC 1 at [13]; *Briggs v Mount Gambier CC* (1981) 30 SASR 135; *R v Marion CC; Ex parte Independent Grocers Co-operative Ltd (No 1)* (1984) 37 SASR 415; *R v Salisbury CC; Ex parte Burns Philp Trustee Co Ltd* (1986) 42 SASR 557. Likewise, it has been held that 38(6) is expressed in mandatory terms as it states that a representation "must" contain the prescribed information: *MacKenzie Intermodal Pty Ltd v Lawson* [2003] SASC 297 at [12] (cf: *Mancorp Holdings v City of Adelaide* (unreported, ERDC, judgment no OE451, 5 December 1997), where Bowering J held that the provisions of s 38(6) are not mandatory; although, this finding has been interpreted as being limited in scope – see *Sampson v DAC* [1999] SAERDC 46 at [12]). Section 38(7) is mandatory insofar as the relevant authority is to both receive and have regard to a representation. The requirements that a representation be in writing and in compliance with the Regulations are mandatory. Consequently, the provisions of reg 35 ("Lodging written representations") are also mandatory. Section 38(8) confers a mandatory obligation on a relevant authority to forward a copy of all representations to an applicant and to allow the applicant an opportunity to make a written response: *Mancorp Holdings*, above.

[3.38.32] "Relevant authority". For the purposes of s 38(16), the ERDC is not a "relevant authority" as referred to in that sub-section, since it does not fall within the definition of s 4 and is not a relevant authority under s 34. It follows that s 38(16) can have no application to a decision of the ERDC: *Hall v City of Burnside & City Apartments Pty Ltd* [2005] SASC 343.

[3.38.35] Extension of prescribed period. There is no provision in the Act or Regulations, no matter into which category the development falls, which requires public notification of an application to extend a prescribed period or of the consideration by a relevant authority of such an extension. There is therefore no right on the part of anyone other than an applicant to be heard in relation to such extension: *Friends of Elliston – Environment & Conservation Inc v South Australia* [2007] SASC 19 at [45].

[3.38.40] "Form of development" (sub-s (2)). The ambit of the power to make regulations assigning "forms of development" to categories must be considered against the consideration that one part of the process by which Development Plans seek to achieve orderly and economic development is through the creation of zones. Assignment of forms of development to a particular category by either regulations or by Development Plans must be widely interpreted. It would, for example, be highly impracticable to assign a dwelling house as a Category 1 development, or a shop as a Category 3 development, in all cases without regard to the relevant zoning. It would make the assignment of categories unworkable. Consequently, a broad interpretation should be given to the regulation making power so that the expression "form of development" signifies the nature of the development that carries with it the notion that the form of category might depend on the area or zone within which the development is to be located: *Mar Mina (SA) Pty Ltd v City of Marion* [2008] SASC 120 at [30].

Cases

[3.38.65] Categorisation – validity. Application made for PDP consent to build commercial greenhouses – application treated as Category 3 development – development opposed – consent granted subject to 12 conditions – opposer appealed to ERDC – order made requiring consent to be granted subject to 23 conditions – a condition provided that "Stage 2 greenhouse" should not be commenced until at least 18 months from time of approval, but should be substantially commenced within three years of approval and substantially completed within five years of approval – further application for consent lodged to remove restriction on time limit for Stage 2 greenhouse – application held to be "minor in nature", having regard to DR1993 sch 9 pt 1 cl 2(1)(f) (now DR2008 sch 9 pt 1 cl 2((g)), and treated as Category 1 development no notice of application given – application approved – opposer sought order for *certiorari* to quash decision – application over three months out of time – *Held*: Nothing to suggest relevant authority considered whether application unlikely to be subject of reasonable objection from owners or occupiers of land in locality – if had done so, was unlikely it could have reached such conclusion – failure to do so meant opposer denied right to be heard and to appeal to ERDC – opposer normally entitled to order to quash decision; however, having regard to Supreme Court Rule 98.06 (requiring prompt application), summons for *certiorari* made out of time – such order would be futile and of no practical use since Stage 2 erection taken place and other development authorisations given – order refused: *Heath v Adelaide Hills C* [2000] SASC 406.

Cemetery company owned cemetery land in Special Uses Zone – relevant authority granted PDP consent for establishment of cemetery on cemetery land – before grant of consent made, successful application made by telecommunications facility construction company for PDP consent for telecommunications facility on Council land immediately adjacent to cemetery land – almost contemporaneously with grant of consent for cemetery, cemetery company became aware that telecommunications tower to be erected on land adjacent to cemetery land – until then relevant authority classified proposed telecommunications development as Category 1 development, and therefore not required to give public notice of proposed development – cemetery company appealed against grant of consent by relevant authority on grounds that proposed development should have been classified as Category 3 development and therefore cemetery company should have had right to make representations opposing proposed development and right of appeal against relevant authority's decision – *Held*: Although relevant authority had classified proposed development as Category 1 development, no reasons for that decision proven – not possible to determine whether relevant authority had considered DR sch 9 cl pt 1 2(1)(f) (now DR2008 sch 9 pt 1 cl 2(g)) – if not, failed to have regard to relevant matter – if so, only basis upon which decision could be set aside would be unreasonableness (ie no reasonable relevant authority could have reached decision that proposed development was of minor nature which would be unlikely to be subject of reasonable objection) – on the facts, no reasonable relevant authority could conclude that telecommunications facility proposed of minor nature – relevant authority erred in law in originally classifying proposed

development as Category 1 development – relevant authority failed to comply with DA s 38 – had denied public opportunity to make representations to it about development – as relevant authority failed to observe procedures prescribed by DA, decision was invalid and was set aside: *Sidney Harrison Pty Ltd v Tea Tree Gully CC (No 2)* [2001] 112 LGERA 327.

PDP consent granted to application to establish vineyard – development treated as Category 2 development – person making representation in respect of Category 2 application does not have right of appeal against decision of relevant authority – person who made representation appealed to the ERDC on ground that relevant authority had wrongly categorised application as Category 2 application whereas it should have been Category 3 development – acknowledged by authority but submitted that nothing flowed from error – *Held*: As determination of relevant category of development is not subjective act, such error could vitiate the decision: *McMullen v Playford CC* (1999) 6 SAPED 68.

Proposed development a Category 3 development – relevant authority failed to give public notice, as required by s 38(5) – development approval granted was liable to be set aside – plaintiff sought orders in nature of declarations as well as order in nature of *certiorari* quashing decision of relevant authority – both parties adversely affected by relevant authority's failure to comply with Act – *Held*: Court made certain declarations; however, in circumstances, not appropriate to grant relief sought and, in particular, to invalidate grant of development approval as would cause undue hardship to party who received consent: *Budarick v Elliston DC* [2001] SASC 184.

Council erred in assigning proposed development to Category 1, when it fell into Category 3 – plaintiffs consequently denied ability to make representations to council and, if council was to have granted development consent, denied ability to appeal to ERDC – *Held*: Decision materially affected plaintiff's rights and was set aside: *Paradise Development (Investments) Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 139.

Application made to DAC, as relevant authority for PDP consent in relation to development – DAC determined development within category of "general industry" rather than "special industry" – effect of determination was that concurrence of local council was not precondition to consent and there were restrictions on appeal against consent by representors – council argued that proposed development was "special industry" and therefore its concurrence in any consent necessary – sought a declaration that PDP consent was *ultra vires* and void and for injunctive relief preventing applicant from taking action pursuant to consent – *Held*: Action brought by appellant had not been brought by way of judicial review pursuant to r 98.01 of SA Supreme Court Rules – nor was it common law action, such as that relating to *ultra vires* activities by public officers – rather, jurisdiction which appellant sought to invoke was jurisdiction of SASC as court of equity to grant equitable relief to restrain apprehended breaches of law: *Enfield CC v DAC* (2000) 199 CLR 135; 74 ALJR 490.

Relevant authority purported to give planning authorisation to development it categorised as Category 1 development when should have been Category 3 development – *Held*: As relevant authority failed to comply with procedures in Act and Regulations for giving notice of Category 3 development, rights of prospective representor were so substantially interfered with that planning authorisation had to be set aside: *Pro-Star Service Station Pty Ltd v Petroleum Products Retail Outlets Board* (1998) 72 SASR 383; 99 LGERA 163.

Relevant authority formed opinion in relation to proposed division of land that division would have undesirable impact upon nature or function of existing road – *Held*: Although relevant authority's concern not sufficient to justify authority's decision to refuse consent on that ground, since authority had formed genuine opinion to that effect, it was properly open to authority to determine that development fell into Category 3 pursuant to s 38(2)(b): *Fairmont Homes Pty Ltd v West Torrens CC* [1999] EDLR 126; [1999] SAERDC 2.

See also: the case summaries at [3.38.600]; the case summary of *Bade v Rural City of Murray Bridge* [2008] SASC 189 at [3.32.455].

[3.38.68] Categorisation – multiple developments. Application for PDP consent to make alterations and additions to dwelling – although various aspects of matter dealt with by different relevant authorities, development had to be viewed as whole in order to determine its category – *Held*: Viewed as a whole, notwithstanding that alterations and additions to a building are, unless the development is classified as non-complying, a Category 1 development, the development in contemplation was neither a Category 1 nor a Category 2 development – by virtue of s 38(2)(b), it had to be categorised as Category 3 development: *Hall v Burnside CC* [1999] 6 SAPED 190.

Proposed development comprised two-storey dwelling together with excavation and filling in excess of 100 cubic meters of material for erection of dwelling – pursuant to relevant Development Plan principle, dwelling would be Category 2 type development – excavation and fill constituted "development" in itself, due to volumes of materials involved, falling into Category 3 – *Held*: Proposal to be dealt with as Category 3 development – excavation and fill could not be subsumed under "dwelling" categorisation; nor could it be classed as development "of a minor nature" under DR sch 9 because that required formation of opinion by relevant authority which had not occurred – existence of two types of development in one application did not prevent application from being dealt with by council in accordance with correct categorisations: *Krstic v City of Burnside* [2007] SAERDC 52.

[3.38.69] Categorisation – excavation and filling. See [7.255.70].

[3.38.71] Categorisation – carport. A carport erected at the side of an existing dwelling is not necessarily a Category 3 form of development. If the carport complies with the provisions of the Regulations or the relevant Development Plan it will be a Category 1 dwelling. If it fails to so comply the relevant authority must address the issues in the provisos to DR1993 sch 9 pt 1 cl 1 or cl 2(1)(f) (the latter clause now being DR2008 sch 9 pt 1 cl 2(g)) to determine whether the development will be of a minor nature only and unlikely to be the subject of reasonable objection. If the relevant authority does not reach such a conclusion the development will fall into Category 3: *Verdouw v Unley City Council* [2001] SASC 63.

[3.38.73] Categorisation – unknown incidental aspect of development – signs. Whether development correctly categorised as Category 2 development – council aware that developer might seek to erect signs on property – whether development consent required for signs depended on kind of sign proposed – plaintiff argued council ought to have inquired as to nature of signs as this could have resulted in development being Category 3 development – *Held:* Argument rejected – any signs that might be erected were incidental to use of land – question whether development consent should be granted did not turn on signs – question of signs could be addressed at later stage and not a factor that affected category of development: *Mar Mina (SA) Pty Ltd v City of Marion* [2008] SASC 120.

[3.38.80] Procedural fairness. Representor informed by relevant authority that they would be given 10 minutes to speak in support of their submission – during hearing, the time was unilaterally reduced to five minutes by relevant authority – *Held*: Relevant authority must abide by rules of procedural fairness, modified as they may be by legislative scheme – where speaking time agreed, was unreasonable and unfair for relevant authority to reduce time in absence of any agreement with representor: *Crookes v Adelaide Hills C* [1999] SAERDC 67.

[3.38.85] Irregular representation. Representor's representation did not meet all requirements of s 38 or reg 35 – representor did not give his address, did not give reasons for representation and did not state whether he wished to be heard by planning authority – representor sought to lodge appeal in relation to decision to which representation related – *Held*: Not possible to discern legislative purpose that failure to comply with s 38(6) and reg 35 should invalidate representation –

representation valid and representor entitled to lodge appeal with ERDC: *McKenzie Intermodel Pty Ltd v Peter Lawson & Naracoorte Lucindale Council* [2003] SASC 297.

[3.38.90] Amendment of regulation. Variation made to DR sch 9 having effect of designating development as Category 1 development when previously Category 3 development – plaintiff claimed regulation made for improper purpose to prevent plaintiff from making representations – *Held*: Only purpose of regulation to restrict rights of representation and appeal in respect of particular development authorisations by labelling development Category 1 development – political considerations may have affected decision does not necessarily render regulation invalid – no evidence from which to infer improper purpose and no rational basis for finding that regulation made for purpose not contemplated by Act: *Friends of Elliston – Environment & Conservation Inc v South Australia* [2007] SASC 19.

Representors

[3.38.150] Role. The purpose of a representation is to give notice to the relevant planning authority and to the applicant for development consent of the decision which the representor believes should be made by the planning authority and the grounds for that view. In that way, the representation enables a better examination of the relevant planning issues. Where an opposing representation is made, a planning authority is not deciding a dispute between the applicant for development consent and those who lodge representations opposing it. Instead, the planning authority is making a decision in the public interest. In the process of making that decision, it is often obliged to consider the effect of a proposed development upon owners and occupiers of adjoining land or on land in the vicinity of the proposed development. However, in the ultimate result, the planning authority makes its decision in the public interest having regard to the provisions of the Act, the Regulations and the relevant Development Plan and other relevant planning principles: *MacKenzie Intermodal Pty Ltd v Peter Lawson & Naracoorte Lucindale Council* [2003] SASC 297 at [10]-[11].

Because the process of the relevant authority is inquisitorial rather than adversarial, a representor is not given the status of a party to an adversarial dispute before the relevant authority. The relevant authority is not deciding a dispute between the applicant for consent and a person who has made a representation to the relevant authority about that application, therefore the representor need not be accorded the same rights as a party to an adversarial dispute: *Upham v The Grand Hotel (SA) Pty Ltd* (1999) 74 SASR 557; [1999] SASC 414; *IGT (Aust) Pty Ltd v The Licensing Court of South Australia* [2004] SASC 29 at [23].

A representor has a limited role in the decision-making process undertaken by a relevant authority, as manifested by the legislative emphasis on timely judgments and the legislative provision for amendment of applications for development consent without requiring that the relevant authority revisit the stages of the process which have previously occurred. The process which the relevant authority has to undertake does not depend upon the presence or absence of representors, although where they exist they will have an effect upon the process: *Upham*, above.

While representations are often made to oppose a development application, there is nothing to prevent persons from making representations supporting an application: *Mackenzie Intermodal*, above, at [11].

[3.38.153] Representations. To ensure the purposes of the representation provisions are met, a document containing a representation should set out in reasonable detail the grounds on which the representation is made: *MacKenzie Intermodal Pty Ltd v Peter Lawson & Naracoorte Lucindale Council* [2003] SASC 297 at [11]. A representation under DA s 38 (and reg 35) involves a written communication from a person seeking to be a representor. It must be more than a mere letter or the like. A communication which makes no comment about a proposed development or does not speak either for or against it, or which is not sufficiently specific such that the prospective developer can

[4.0]

Annotated *Development Regulations 2008*

(8) Pursuant to section 54(2)(c) of the Act, the period of 4 weeks from the commencement of the relevant work, or such longer period as a relevant authority may allow, is prescribed.

(9) Pursuant to section 54A(2)(c) of the Act, the period of 4 weeks from the performance of the relevant tree-damaging activity, or such longer period as a relevant authority may allow, is prescribed.

(10) Despite a previous subregulation, if an application relates to a proposed development that involves the division of land in the Golden Grove Development Area which is complying development in respect of the Development Plan—

(a) the application must be lodged with the council for the area in which the proposed development is to be undertaken (instead of with the Development Assessment Commission); and

(b) the application must be accompanied by 3 copies of the appropriate plans, drawings, specifications and other documents or information (or such additional or lesser number of copies as the council may require) required under Schedule 5; and

(c) the council must forward to the Development Assessment Commission within 5 business days after receipt by the council—

(i) a copy of the application; and

(ii) a copy of the plans, drawings, specifications and other documents or information accompanying the application.

(11) The relevant authority may, in an appropriate case, dispense with or modify the requirements of Schedule 5 in relation to a particular application.

[sub-reg (3) var 18/2009 reg 6]

[4.15.5] Land division. Where the DAC receives an application relating to the division of land within the area of a local government authority, it must, pursuant to DR1993 reg 15(5) (now DR2008 reg 15(4)), forward the application to that local government authority within five business days after its receipt, notwithstanding that the DAC may perceive there to be some deficiency in the application or the accompanying documents: *Turner v Mid Murray C* [2001] SAERDC 97.

Generally speaking, in the case of an application for the division of land within the area of a local government authority that local government authority is the relevant authority to deal with the application, notwithstanding the provisions of reg 15(3)(b)(ii): *Turner*, above.

[4.15.10] Duty of DAC (reg 15(5)). It is the DAC's duty under DR1993 reg 15(5) (now DR2008 reg 15(4)) to forward applications it receives relating to the division of land within the area of a local government authority to that authority within five business days after its receipt. The DAC is not to delay the application's transmission because it perceives there is some defect or deficiency in the application or the accompanying documents: *Turner v Mid Murray C* [2001] SAERDC 97.

[4.16] 16—Nature of development

(1) If an application will require a relevant authority to assess a proposed development against the provisions of a Development Plan, the relevant authority must determine the nature of the development, and proceed to deal with the application according to that determination.

(2) If the relevant authority is of the opinion that an application relates to a kind of development that is described as *non-complying* under the relevant Development Plan, and the applicant has not identified the development as such, the relevant authority must, by notice in writing, inform the applicant of that fact.

Related materials: [7.260] Extension of existing use.

[4.16.5] Operation. Regulation 16 is a means by which relevant authorities may ensure that an applicant is not seeking to evade the requirements and intentions of a development plan in respect of non-complying developments – see the case summary of *Australian Waste Pty Ltd v Compaction Application Tips Pty Ltd* (2001) 79 SASR 532; [2001] SASC 173 at [3.35.103]. Once reg 16 applies to an application for development consent, a relevant authority has a statutory duty or obligation to determine the nature of the development proposed: *Australian Waste*, above.

If having dealt with an application in accordance with reg 16(1) a relevant authority decides to issue a planning approval, it can only do so on the basis of the determination which it has made pursuant to reg 16(1): *Smith v Mount Barker Products Pty Ltd* [2000] SAERDC 1 at [14].

Once a relevant authority determines the nature of a development, it is to determine whether the proposed development is of a complying or non-complying kind and whether it must be referred to a body prescribed under DR sch 8 ("Referrals and concurrences"): *Barton Springs Pastoral Company Pty Ltd v Adelaide Hills C* [2000] SAERDC 37.

Under Victorian legislation it has been said that planning legislation regarding the nature of applications is to discourage speculation and inference about the purpose for which a planning permit is sought and to encourage a plain statement of purpose: *Marock Pty Ltd v Billong Pty Ltd* (1981) VR 413.

[4.16.10] Assessment. The nature of a proposed development should be assessed in a practical and commonsense way: *Tarca and District Council of Stirling v Hambrook* (1995) 86 LGERA 56; [1995] EDLR 47; *Mallala DC v Bishop* (1997) 96 LGERA 145; [1997] EDLR 568. It is the nature of the development that is to be determined, rather than the nature of the application. The two concepts are distinct: *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd* (2001) 80 SASR 435; [2001] SASC 409; *Kermode v City of Mitcham* [2007] SAERDC 57 at [7]; *Mojim Pty Ltd v City of Playford (No 2)* [2007] SAERDC 19; *Bade v Rural City of Murray Bridge* [2008] SASC 189 at [91]. When determining the nature of a thing one is not limited to an examination of mere appearances but may go behind them to examine the real substance: *Australian Waste Pty Ltd v Compaction Application Tips Pty Ltd* (2001) 79 SASR 532; [2001] SASC 173; *Compaction Application Tips v Australian Waste Pty Ltd* (2001) 80 SASR 435; [2001] SASC 409. No matter how an applicant may choose to describe a proposed development, it is necessary for the relevant authority to make its own decision about its nature. In particular, when discharging the task imposed on it by reg 16(1), a planning authority must objectively examine the documents and other information before it and, "as a matter of practical reality, decide what the nature of the development is": *Compaction Application Tips v Australian Waste Pty Ltd* (2001) 80 SASR 435; [2001] SASC 409 (see also *Macag Holdings Pty Ltd v DAC (No 2)* [2002] SAERDC 31; *Potter v City of Victor Harbor* [2006] SAERDC 42; *Paradise Development (Investments) Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 139 at [24]; *Tarca v Hambrook* [1995] EDLR 47 per Debelle J).

However, in *City of Mitcham v The Chappel Investment Company Pty Ltd* [2008] SASC 240, Kourakis J (Doyle CJ and White J agreeing) held (at [40]) that this is not a relevant process in determining whether a development in a particular zone is a non-complying development. That will be determined by whether the development as described in the application falls within any of the classifications of development which the Regulations or the Development Plan label as non-complying. Further, Kourakis J held that this approach must be read and understood in the context of the issue decided in that case – see [3.35.6].

In *The Chappel Investment Company Pty Ltd*, the appellant contended that reg 16 requires a planning authority to determine the single "true" nature of the proposed development under consideration. In rejecting this argument, Kourakis J stated (at [29]):

> there is no reason to construe the direction in reg 16(1) to determine the nature of the development as a direction to give the development a single classification or description. A determination of the nature of the development is necessary so that the substance of the proposal can be practically and realistically

> understood ... [T]he merits assessment of a proposed development would, in some cases, be constrained if reg 16(1) were to be construed as requiring a planning authority to arrive at a single characterisation of the development that reflects its "true nature". Regulation 16(1) cannot be given a differential operation that requires a single characterisation of a development for the purpose of determining [under s 35] whether it is complying or non-complying, and allows a more flexible approach for the purpose of merit assessment.

Although a description used by an applicant is relevant, and perhaps in some cases, decisive, the planning authority is not bound to adopt it, particularly where the description does not match the terminology used in the planning legislation: *Nash v Holdfast Bay CC* [1997] SAERDC 438. As such, it is the planning authority that unitlaterally decides the nature of the development application, in the same way that the planning authority unilaterally decides whether development consent should be granted: *Paradise Development (Investments) Pty Ltd*, above. It may often be a question of fact and degree whether the proposed development constitutes one kind of development as opposed to another: *Lizzio v Ryde MC* (1983) 155 CLR 211; *Adelaide City Mission v SAPC* (1993) 60 SASR 178. Definitions defining forms of development should not be applied in a rigid and inflexible manner. A development should be looked at as a whole to determine its true nature and character: *Hambrook*, above: *Skorpos v DAC* [1995] EDLR 56; (1995) 2 SAPED 128; *Hickinbotham Blue Gum Pty Ltd v Campbelltown CC* (1981) 29 SASR 93; 46 LGRA 268.

A relevant authority must determine the nature of a development either upon receipt of an application or, if the information supplied to it is inadequate, upon receipt of the additional information it may request under DA s 39(2): *Smith v Mount Barker Products Pty Ltd* [2000] SAERDC 1; *Barton Springs Pastoral Company Pty Ltd v Adelaide Hills C* [2000] SAERDC 37.

Town planning involves two critical integers, land and use. A planning authority must therefore be able to ascertain the land intended for development when performing its duty under reg 16: *Paradise Development (Investments) Pty Ltd*, above; *City of Port Adelaide Enfield v Moseley* [2008] SASC 88 at [15].

[4.16.13] Assessment – relevant considerations. DA s 33 does not deal with the nature of the material to which a relevant authority may refer for the purpose of making the assessment required by reg 16. It is not possible to create a definite list of materials, other than that contained in the development application, to which a relevant authority may have regard in any particular circumstances so as to determine the true nature and extent of a proposed development: *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd* [2001] SASC 409; *Macag Holdings Pty Ltd v DAC (No 2)* [2002] SAERDC 31.

In determining the nature of a development, a relevant authority is entitled, if not obliged, to examine all of the information before it in relation the application. This includes: (i) information given by representors; (ii) information given by government agencies; and (iii) any additional information from the applicant requested by the relevant authority pursuant to DA s 39(2): *Australian Waste Pty Ltd v Compaction Application Tips Pty Ltd* [2001] SASC 173. The implications of the application should also be carefully scrutinised: *Paradise Development (Investments) Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 139.

In determining the nature of a proposed development, all aspects of the proposal have to be considered. Structures should not be looked at in isolation from the use to which they are to be put: *Piscitelli v East Torrens DC* (1992) 41 APA 391; 4 SAPD 97. Often, a relevant authority will have to consider the proposal against existing land use and development in the neighbourhood or the locality: *Australian Waste*, above. The inquiry can involve the nature of any building proposed to be constructed on the land and its intended use: *Adelaide City Mission v SAPC* (1993) 60 SASR 178.

Whenever a relevant authority has to consider whether it will issue a development authorisation it must consider the practical consequences that would flow from such approval in both legal and planning terms. Those consequences are a significant factor to be considered by a relevant authority

when determining the nature of a proposed development: *Brown Falconer Group Pty Ltd v Mount Gambier CC (No 5)* [1998] SAERDC 535 (referred to by the ERDC as *(No 2)*). However, the essential nature of a proposed development is not dictated solely by the impacts of the proposal: *McKenzie Constructions Pty Ltd v Development Assessment Commission* (1999) 74 SASR 539 at [31]; *Chappel Smallacombe Joint Venture v City of Mitcham (No 1)* [2008] SAERDC 39 at [11].

A determination under reg 16 by a planning authority that is clearly wrong will be overturned: *R v Tea Tree Gully CC; Ex parte Concrete Systems Pty Ltd (No 2)* (1986) 133 LSJS 277; 65 LGRA 67; *Craig v Burnside CC* (1987) 135 LSJS 458; 65 LGRA 77. Likewise, the regulation does not empower a planning authority to bypass existing definitions or classifications contained in a Development Plan: *Degenhardt v Happy Valley CC* (1986) 23 APA 469.

[4.16.15] Assessment – irrelevant considerations. The nature of a development must not be determined by the nature or the identity of the developer: *Adelaide City Mission v SAPC* (1993) 60 SASR 178; *Tysoe v Unley CC* [1998] EDLR 613; [1998] SAERDC 509. An inquiry should not involve a meticulous examination of the details of the likely activities to be conducted on the land. Rather, the inquiry should be directed as to what, according to ordinary terminology, is the designation of the use in question that would appeal to practical minds as being appropriate: *Perth SC v O'Keefe* (1964) 110 CLR 529; *Pioneer Concrete (Qld) Pty Ltd v Brisbane CC* (1980) 145 CLR 485; *Adelaide City Mission*, above.

When an application for PDP consent is received, the relevant authority must determine for itself the nature of the proposed development. Accordingly, it is not a proper approach for the authority to look first at the definitions in sch 1 to see whether the development proposed fits into a defined term. However, it is appropriate to have regard to those definitions when determining whether that kind of development is complying or non-complying in the zone in which it is proposed to place it. On appeal, the ERDC should follow the same course: *Fusco v Mitcham CC* [2000] SAERDC 36.

[4.16.17] Assessment – related applications. A relevant authority must have regard to whether the development is no more than an extension of an existing development and must also take into account any other development application of which it has knowledge. Similarly, the extent to which the documents and other information may disclose intentions of the applicants, they too are relevant because those intentions may disclose whether, in truth, the separate applications are for one larger development. A person's intentions with respect to a similar and adjoining development will be highly relevant to determining whether or not the development is properly regarded as one. The planning authority has an obligation to make that determination: *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd* [2001] SASC 409; *Macag Holdings Pty Ltd v DAC (No 2)* [2002] SAERDC 31.

If a proposed development is to be assessed in the light of existing development, it should also be considered in the light of any other development proposed in the area of which a relevant authority is aware. Where two or more applications are made to a relevant authority which impinge on one another in any respect or which in some other way are related to or affect one or another, the relevant authority is entitled to consider them together. If such consideration shows that there is in fact one development which is a non-complying one a relevant authority must give notice to an applicant of that fact: *Australian Waste Pty Ltd v Compaction Application Tips Pty Ltd* [2001] SASC 173.

Every consent application should be examined carefully to see whether it is for one development comprising various elements, or whether more than one discrete land use is proposed: see, eg, *Blackwell v Mount Gambier CC* (1977) 2 SAPR 197; *Classic Toys Manufacturing Pty Ltd v Salisbury CC* (1980) 5 SAPR 193; *Warringah Shire Council v Raffles* (1979) 38 LGRA 306; *Leverington v SPA* [1970] SASR 387; *Lewiac Pty Ltd v Gold Coast CC* (1993) 81 LGRA 219; *Airport Farms v DAC* [1996] EDLR 620; (1996) 3 SAPED 112. Are the components elements of one main development that together make an entity or are they separate uses? *Ronecast Caterers Pty Ltd v Davis* (1981) 26 SASR 545; *Southern Cross Homes Inc v Enfield CC* (1992) 164 LSJS 191; 76 LGRA 94; *Edwards v West Torrens CC*

[4.754.5] Discretion under item 5 – State heritage places. The discretion of the Minister exercised under item 5 is not purely administrative in nature. The fact that there is no statutory power for the Minister administering the *Heritage Act 1993* (as it was then called) to delegate responsibility under item 5 suggests strongly an intention by Parliament that the Minister is to act in person. The consequences of the exercise of power under item 5 are significant. The Minster administering the *Heritage Act 1993* is unlikely to be overwhelmed with referrals. It would not be possible to come to a conclusion to the effect that it would be impractical for the Minister to act personally, such that Parliament must have intended that, out of necessity, others should exercise the Minister's power: *David Cheney Pty Ltd v Adelaide CC* [1998] EDLR 116; (1998) 5 SAPED 29.

[4.770] Schedule 9—Public notice categories

[4.772] Note—

Pursuant to section 38 of the Act, the assignment by these regulations of a form of development to Category 1 or Category 2 is subject to any assignment provided by the relevant development plan.

The assignment of various forms of development to Category 1 does not extend to developments that involve, or are for the purposes of, any activity specified in Schedule 22 (see regulation 32).

Editor's note: Annotations to Schedule 9 do not seek to provide commentary or case summaries in relation to specific types of development, but rather in relation to the scope and interpretation of the provisions of the Schedule. For commentary and case summaries regarding the categorisation of specific types of development, see generally under the relevant topic headings under "Planning Law Case Notes" at [7.0].

[4.772.5] Interpretation of exemptions. A regulation setting out exceptions to the general statutory obligation to give public notification of a development is to be construed strictly. If the language used in describing the exceptions is not clear and unambiguous, it should be given a restricted rather than a benevolent construction: *R v SAPC; Ex parte Burnside CC* (1986) 45 SASR 487; *Manuel v Charles Sturt CC* (1999) 75 SASR 284. The exemption from the requirements to advertise a proposal is not to be taken as a reading down of the power of the appeal body to join a person with a bona fide interest as a party to the proceedings: *Petroleum Refineries (Aust) Pty Ltd v Archer Boulton Pty Ltd* (1991) 55 SASR 510; 72 LGRA 355.

Part 1—Category 1 development

[4.774]

1 Any development classified as a *complying* development under these regulations or the relevant Development Plan, or which would be a *complying* development if it were to meet the conditions associated with the classification where the failure to meet those conditions is, in the opinion of the relevant authority, of a minor nature only.

[4.776]

2 Except where the development is classified as *non-complying* under the relevant Development Plan, any development which comprises—

(a) the construction of any of the following (or of any combination of any of the following):
  (i) 1 or more detached dwellings;
  (ii) 1 or more single storey dwellings;
  (iii) 1 or more sets of semi-detached dwellings, provided that no such dwelling is more than 2 storeys high;
  (iv) 3 or more row dwellings or 1 or more additional row dwellings, provided that no such dwelling is more than 2 storeys high; or

(b) the alteration of, or addition to, a building so as to preserve the building as, or to convert it to, a building of a kind referred to in paragraph (a); or

(c) a change in the use of land to residential use that is consequential on the construction of, or conversion of a building to, a building of a kind referred to in paragraph (a), or on the resumption of use of such a building; or

(d) the construction of (or of any combination of) a carport, garage, shed, pergola, verandah, swimming pool, spa pool or outbuilding if—

(i) it will be ancillary to a dwelling; and

(ii) it will not be constructed any closer to a street frontage than the wall of the dwelling that is closest to the street frontage; and

(iii) it will not be constructed within the following distance of a boundary of the site of the development:

(A) if it will have solid walls (including walls with windows or made of glass)—900 mm;

(B) in any other case—600 mm; and

(iv) in the case of a carport, garage, shed or outbuilding—

(A) it will not exceed 1 storey; and

(B) if it will have eaves—the eaves will not be more than 3 metres above the ground; and

(C) if it will not have eaves but will have gutters—the gutters will not be more than 3 metres above the ground; and

(D) it will have a floor level that is not more than 0.6 metres above or below natural ground level at any point; and

(E) it will not have a floor area that is more than 54 square metres; and

(F) no wall will be more than 9 metres in length; or

(e) the construction of a farm building on land used for farming, or the alteration of, or addition to, a building on land used for farming that preserves the building as, or converts it to, a farm building; or

(f) the division of land which creates not more than 4 additional allotments; or

(g) a kind of development which, in the opinion of the relevant authority, is of a minor nature only and will not unreasonably impact on the owners or occupiers of land in the locality of the site of the development.

Editor's note: Some annotations below outline findings that were made in relation to DR1993 sch 9 pt 1 cl 2(1) (renumbered under DR2008 as sch 9 pt 1 cl 2) prior to amendments to that clause. Under DR2008, sub-clauses 2(1)(ca), (d), (e) and (f) have been renumbered sub-clauses 2(d), (e), (f) and (g) respectively.

[4.776.5] Operation. If a development is not of a non-complying kind, identified as such by the Development Plan, then, if it falls within any of the descriptions in DR1993 sch 9 pt 1 cl 2(1)(a)-(f) (now DR2008 sch 9 pt 1 cl 2(a)-(g)), it is a Category 1 development: *Agostino v Charles Sturt C* [1998] EDLR 344; [1998] SAERDC 497.

[4.776.07] "Detached dwelling". The term "detached dwelling" in sch 9 means a dwelling house only and does not include outbuildings ordinarily used with a detached dwelling. Although the clear intention of DR sch 9 pt 1 para 2(1)(a) is that dwellings should be a Category 1 use, where the application is for other outbuildings which do not constitute sundry minor operations within the meaning of sch 3, the application is not a Category 1 development: *Baker v City of Norwood, Payneham & St Peters* [2003] SASC 282 (appealed on other grounds in *City of Norwood, Payneham and St Peters v Baker* [2004] SASC 135).

[4.776.15] Site held exclusively with dwelling. Pursuant to DR sch 9 cl 2(1)(a), certain detached dwellings and semi-detached dwellings are Category 1 developments. It is not proper to seek to identify a site to be held exclusively with a dwelling in a manner that avoids taking into consideration all land within the curtilage of a dwelling so as to define a particular dwelling as a Category 1 development. That would be absurd as it could lead to a situation in which a relevant authority could avoid giving notice to adjoining owners or occupiers no matter how many dwellings

might be in contemplation for construction on one parcel of land: *Polites v Holdfast Bay CC (No 2)* (1998) 72 SASR 475; (1998) 101 LGERA 151.

[4.776.20] Minor development. Clause 2(1)(f) (now cl 2(g)) turns on the opinion of the relevant authority considering the relevant application. The relevant authority must consider two issues. First, it must consider whether the proposed development is of a minor nature. Secondly, it must consider whether the proposed development could be the subject of reasonable objection from the owners and occupiers of land in the locality of the site proposed for the development: *Sidney Harrison Pty Ltd v Tea Tree Gully CC (No 2)* [2001] 112 LGERA 327. In this context, "minor" is not being used in contrast to a development of a major nature. Rather, it is intended to signify development which is of little moment or importance: *McKay v Alexandrina Council* [2003] SASC 167.

It is important that, where work is not minor and gives rise to reasonable objection, that neighbours have an opportunity of making representations in order that the use of their land is not adversely affected by the proposed development: *Ian Ross McKay*, above.

In *Baker v City of Norwood, Payneham & St Peters* [2003] SASC 282, it was held that cl 2(1)(f) (now cl 2(g)) is not intended to enable planning authorities to break a development down to its component parts and to treat those parts as separate developments (appealed on other grounds in *City of Norwood, Payneham and St Peters v Baker* [2004] SASC 135). However, it has been held that *Baker* did not intend to lay down, and is not authority for, a principle of universal application. There is a danger in overgeneralising in this area: *Bucknell Anor v City of Unley Anor* [2008] SAERDC 50 at [15].

[4.776.22] Minor development – filling and retaining wall. Although filling and a retaining wall may be associated with and are incidental to the construction of a dwelling, each may be considered as separate developments and be assigned a separate category of development. An example of excavation which is a minor development, unlikely to be the subject of objection, is excavation for drainage or sewer pipes: *McKay v Alexandrina Council* [2003] SASC 167 at [26].

[4.776.23] Minor development – excavation and filling. In many cases, excavation and filling will qualify as minor development and therefore be classified as a Category 1 development. This is provided that both limbs of cl 2(1)(f) (now cl 2(g) and since reworded) are satisfied. If both are not satisfied, the excavation or filling should be classified as a Category 3 development: *Budarick v District Council of Elliston* [2001] SASC 184 at [27]; *Daniels v District Council of Lower Eyre Peninsula* [2008] SAERDC 45 at [86] and [88].

[4.776.28] "Unreasonably impact". Prior to amendment, cl 2(1)(f) previously required that a relevant development be "unlikely to be the subject of reasonable objection from the owners or occupiers of land in the locality of the site of the development". It was held that the relevant test was whether the objections could have a reasonable basis in the planning assessment of the proposed development: *Eblen Investments Pty Ltd v City of Holdfast Bay (No 2)* [2005] SAERDC 74 at [32]. In assessing whether a reasonable objection was unlikely, it was not necessary to determine whether the objection might be upheld. If this did occur, the decision was liable to be set aside on the grounds that regard was had to an irrelevant factor: *McKay v Alexandrina Council* [2003] SASC 167 at [32]. Likewise, it was not necessary to assess whether such an objection would be likely to cause the development to be refused, or made subject to conditions. It was necessary only to form the view that an objection which was not irrational, vexatious or frivolous could possibly be made: *Baker v City of Norwood, Payneham & St Peters* [2003] SASC 282 at [38]; *Parkins v City of West Torrens* [2004] SAERDC 51 at [12]. It was not necessary to assess whether the objection would be likely to cause the development to be refused, or made subject to conditions. It was necessary only to form the view that an objection which was not irrational, vexatious or frivolous could possibly be made: *Parkins*, above; *Baker*, above.

Cases

[4.776.80] Non-compliance. For a case in which the question was raised as to whether the construction of a dwelling being any of the buildings referred to in DR1993 sch 9 pt 1 cl 2(1)(a) (now DR2008 sch 9 pt 1 cl 2(a)) would be a Category 1 development notwithstanding that it did not comply with a condition contained in a Development Plan, see: *Verdouw v Unley City Council* [2001] SASC 63.

[4.776.85] "Addition to a building" (cl 2(b)). Proposed development to provide partially enclosed living area adjoining existing dwelling and, in practical terms, extend dwelling – conceded that proposed development not outbuilding, verdandah or pergola – *Held*: Under DR1993, proposal was addition to building where building was existing detached dwelling – commonsense interpretation of words "addition to a building" included structure that is added to or adjoins existing building: *Gouskos v City of Marion* [2008] SAERDC 19.

[4.776.90] "Minor nature" (cl 2(g)) – retaining wall/filling. Application made to construct dwelling on hillside – associated retaining wall to be built and 738 cubic metres of filling to be introduced – *Held*: Retaining wall and filling not "minor in nature" within meaning of DR1993 sch 9 pt 1 cl 2(1)(f)) (now DR2008 sch 9 pt 1 cl 2(g)) – either or both filling and retaining wall could have had particular effects upon adjoining or other lands which could have been subject of reasonable objection: *McKay v Alexandrina Council* [2003] SASC 167.

Fill required across seven allotments, each of approximately 800 sq m, to ensure minimum 2.5 m height – *Held:* Fill required a substantial amount and not "minor in nature": *Daniels v District Council of Lower Eyre Peninsula* [2008] SAERDC 45.

For other cases involving claims that proposed developments were "minor in nature" within the meaning of DR1993 sch 9 pt 1 cl 2(1)(f) (now DR2008 sch 9 pt 1 cl 2(g)), see: *Heath v Adelaide Hills C* [2000] SASC 406 (at [3.38.65]); *Sidney Harrison Pty Ltd v Tea Tree Gully CC (No 2)* [2001] 112 LGERA 327 (at [3.38.65]); *Eblen Investments Pty Ltd v City of Holdfast Bay (No 2)* [2005] SAERDC 74 (at [4.564.50]); *Krstic v City of Burnside* [2007] SAERDC 52.

Under *Planning Act 1982*, development proposed on allotment through which boundaries of two councils passed – if development authorised, land in one council's area would be developed as residential land and reserves, while the only development proposed in other council's area was creation of access road in General Industry Zone – *Held*: With regards to giving notice, council in whose area access road would be created could properly conclude that development of minor nature, unlikely to be subject of objection and so, under *Development Control Regulations 1982*, exempt from notification: *Petroleum Refineries (Aust) Pty Ltd v Archer Boulton Pty Ltd* (1991) 55 SASR 510; 72 LGRA 355.

[4.776.93] "Minor nature" (cl 2(g)) – carport. Principle of development control contained in Development Plan provided additions to dwelling would be complying development provided that additions met with conditions expressed in Development Plan – large carport proposed to be erected at side of dwelling that would not comply with conditions – however, DR sch 9 pt 1 cl 1 allows non-complying development to be classified as Category 1 development where failure to meet those conditions is, in opinion of relevant authority, of minor nature only – *Held*: Carport so large and effect on neighbour's use and enjoyment of neighbouring allotment so significant that no reasonable planning authority could have concluded that development would be of minor nature – consequently carport not Category 1 development: *Verdouw v Unley City Council* [2001] SASC 63.

[4.776.96] "Minor nature" (cl 2(g)) – dwelling/garage. Application made for detached dwelling and garage – relevant authority proceeded on footing that were two developments, one detached dwelling and other a garage – *Held:* Incorrect approach – application always for one development consent, being both house and garage: *Baker v City of Norwood, Payneham & St Peters* [2003] SASC 282 (appealed on other grounds in *City of Norwood, Payneham and St Peters v Baker* [2004]

[7.0]

Planning Law Case Notes

How to use this section

This Planning Law Case Notes section provides case notes and summaries of legal principles on a topical basis. However, commentary on a particular topic (though different in substantive content) may appear under both a heading in this section and in other parts of the text; in particular, the Annotated *Development Act 1993* (at [3.0]), Annotated *Development Regulations 2008* (see [4.0]), Planning Law Dictionary (at [9.0]) or another heading in this section. To avoid duplication, substantive commentary has not been included in more than one place in the text.

For example, "car parking" is considered in both this section at [7.110] and under s 33 of the *Development Act 1993* (in the context of whether it is a relevant consideration in the assessment of a development application) at [3.33.105]. Likewise, in this Planning Law Case Notes section, "noise" is considered under both "Noise" at [7.450] and "Amenity" (in the context of when noise unreasonably interferes with amenity) at [7.40].

The index behind the "Index/Tables" tab can be used to locate commentary on any particular topic throughout the publication.

[7.0] Planning Law Case Notes

Contents

[7.10] Advertising

[7.10.2] Assessment of application. The use of a parcel of land for the display of advertisements, not being a display accessory to another and existing use of the land, involves a change in the use of land and is development. To use land for the general display of advertisements is, in generic terms, a commercial use of the land. Where the development proposed is to commence the display of advertisements which may change from time to time, it is not possible for a relevant authority or the ERDC to fully assess the impact of those unknown advertisements on a proposed advertising hoarding. Assessment of the visual input of the development must be focused on the horizontal width, the height and location of the advertising relative to adjacent road frontages and on the extent to which the advertisements will be seen by the public: *Keast v Salisbury CC* [1999] SAERDC 55.

In relation to the approach of planning principles to outdoor advertising in general, the message is neither the issue nor whether it advertises a product or service available on the land on which it is sought to place the advertisement: *Keast v Salisbury CC*, above, at [5].

Provisions in a Development Plan controlling matters such as the colours, wording and print style on advertisements have little, if any, relevance to an application regarding the display of advertisements which may change from time to time. It is not possible to assess fully the impact of advertisements on the proposed advertising hoarding. The emphasis of assessment of the development's visual impact must be focused on the horizontal width, height and location of the displays, relative to the adjacent road frontages, and on the extent to which the advertisements will be seen by the public: *Keast v Marion* [1999] SAERDC 55 at [44].

[7.10.4] Advertising of third party goods/services. In *Keast v Salisbury CC* [1999] SAERDC 55, Commissioner Wallman held (at [22]) that advertising that is associated with existing or proposed uses of land can be distinguished from advertising by unrelated third parties and, as such, the two are not wholly comparable. However, in *Keast v City of Marion* [1999] SAERDC 74, Commissioner Hutchings held (at [5]-[6]):

> in general, the message is not the issue. A message advertising a product or service available on the land on which a hoarding may be erected can be just as offensive in terms of its visual impact as one advertising a generic product or service. What is at issue is the size, height, shape etc of the hoarding.

In *A & A Centofanti Pty Ltd v City of Port Adelaide Enfield* [2009] SAERDC 8 at [40], Commissioner Hamnett accepted the view expressed by Commissioner Hutchings in *Keast v City of Marion* [1999] SAERDC 74 that "in general the message is not the issue". Commissioner Hutchings went on to state (at [42]):

> It is true that signs that relate to the building to which they are attached or adjacent may make more contribution to the meaning or legibility of a locality than third party signs of a generic nature, unrelated to that building or locality, and might therefore be said to make more contribution to enhancing the amenity and appearance of an area. However, third party advertisements clearly have a place in the urban environment and one looks to Development Plans to provide guidance on where that place might be.

[7.10.5] Amenity. It is difficult, but not impossible, to come to a conclusion that any sign will enhance an area: *Gerard Industries Pty Ltd v SAPC* PAT No 797 of 1989; *A & A Centofanti Pty Ltd v City of Port Adelaide Enfield* [2009] SAERDC 8 at [37]. It has been held, however, that landscaping designed to conceal the base of a proposed sign, would make some modest contribution to enhancing the appearance and amenity of the area: *A & A Centofanti Pty Ltd*, above, at [39]. Generally, signage that protrudes above a built form element of a building is considered to be a poor urban design outcome: *Peregrine Corporation P/L v City of Tea Tree Gully* [2009] SAERDC 6 at [33].

[7.10.7] Amenity – commercial zone. Where a Development Plan indicates that guidance of outdoor advertisements should be away from some areas, such as residential areas, parks, recreation areas and precincts of particular visual qualities, and towards others, such as where trade and

commerce exist, this does not necessarily mean there is to be "open slather" in the latter parts: *Keast v Marion CC* [1999] SAERDC 74. Even on a stridently commercial strip containing a jumble of private business and public infrastructure paraphernalia, an advertisement needs to be considered with regard to the principles of urban design: *Keast v Marion CC*, above.

[7.10.9] Amenity – industry zone. While outdoor advertising is a valid use of land in its own right, it should not deleteriously influence the arrangement of future development of a large area of an industry zone. It is difficult to envisage how advertising could enhance or improve the character and amenity of an area of an industry zone. Further, in an industry zone it is not correct to infer that already existing advertisements are exemplars of what is acceptable in the zone, simply because they exist: *Keast v Salisbury CC* [1999] SAERDC 55; *A & A Centofanti Pty Ltd v City of Port Adelaide Enfield* [2009] SAERDC 8 at [37].

[7.10.15] Existing advertisements. In an industry zone, it is not correct to infer that existing advertisements are exemplars of what is acceptable in the zone simply because they exist, as some may not, for example, have approval. Nevertheless, existing advertisements are elements of the character of a locality to be taken into account: *Keast v Salisbury CC* [1999] SAERDC 55. Simply because there exists a plethora of poor advertising signs in a locality, this does not warrant the perpetuation and enlargement of such conditions: *Saturno's Findon Hotel Property Pty Ltd v Charles Sturt CC* [2001] SAERDC 101.

[7.10.20] Size. The fact that a proposed free-standing advertising hoarding will be the first of its size in a locality becomes a more important consideration than it would otherwise be: *Keast v Salisbury CC* [1999] SAERDC 55.

[7.10.30] Qualitative vs quantitative provisions. Where a Development Plan contained a multiplicity of provisions which related to advertising and all, with one exception, were qualitative rather than quantitative, the quantitative should be given considerable weight to the extent that it may speak to the matter of the proposed development the more directly: *Fadu Pty Ltd v Noarlunga CC* [1997] EDLR 520; (1997) 4 SAPED 118.

Cases

[7.10.60] Shopping centre. Planning permission sought to increase height of sign advertising fast food restaurant in Local Shopping Zone – *Held*: Sign may have amounted to attempt to enlarge actual use of zone, by seeking to capture attention of passing motorists, beyond purpose for which it designed; namely, for small groups of shops catering for daily needs of nearby residents: *Coates Modern Letters Sign Co Pty Ltd v Unley CC* (1986) 129 LSJS 55; 60 LGRA 60.

Application to erect advertising hoarding – proposed advertisement did not differ in general size, shape or colour from those used by same advertiser in other shopping centres or single shops scattered throughout metropolitan area – *Held*: This a relevant factor in considering effect on amenity: *Focus Video v Enfield CC* (1985) 120 LSJS 155; 55 LGRA 214.

[7.10.65] Residential zone. Advertising display intended to be set up in General Industry Zone – whether this would detrimentally affect amenity of nearby Residential Zone – *Held*: Residential Zone some distance from proposed site of development and as Residential Zone already suffered from traffic noise, fumes and lighting, any expectation that advertising sign would not be seen from Residential Zone would be unreasonable: *Russell Ads Pty Ltd v Charles Sturt CC* (1997) 4 SAPED 63.

[7.10.67] Industry zone. Appeal against refusal of application for two single-sided "supersite" signs – General Industry Zone – primary use of land for warehousing – advertising structures each freestanding supported by two pylons or columns and facing opposite directions – each 12.66m wide by 3.35m high – bottom of each sign 4.15m above ground – total height 7.5m – display area of each sign 42.41sq m – landscaping to conceal supporting columns – signs to be used to display both information relating to warehouse activities on subject land and third party advertisements – Development Plan did not state anything against third party advertisements – existing consent for

two smaller advertising signs, each 2.2m high and 8.3m wide, with display area of 18.26sq m and height of 6.35m – *Held:* Signs consistent with Development Plan regarding character and amenity of locality, avoidance of clutter and desire for compatibility with nearby buildings and spaces – signs would not frustrate primary use of land – consent granted subject to conditions, including condition regarding illumination overspill: *A & A Centofanti Pty Ltd v City of Port Adelaide Enfield* [2009] SAERDC 8.

[7.10.70] Road junction. Appellant sought development approval to construct advertising hoarding at junction for display of paid advertisements unrelated to any use of land – council refused consent on grounds it was "seriously at variance" with relevant Development Plan and, in particular not consistent with: setbacks and land use within Industry Zone; character and scale of other existing advertising displays within Industry Zone; providing equal exposure to businesses in locality – would also impair natural character of surrounding skyline and could be potential hazard for persons using junction – appellant argued site suitable for that type of development in view of precedent set by comparable adjacent signs and advertisements – *Held*: Consent refused – development not seriously at variance with provisions of Development Plan; however, sufficiently inconsistent with provisions regarding land use, character and amenity: *Keast v Salisbury CC* [1999] SAERDC 55.

[7.10.75] Identical hoardings. Several separate applications to erect identical advertising hoardings on public streets in provincial city – appeals arose in relation to three of those hoardings – each considered on its merits in own prospective location – *Held*: Two appeals dismissed and one allowed – what may be appropriate in one place may not be so in another: *Claude Neon Ltd v SAPC* (1990) 2 SAPD 94.

[7.10.80] Roof. Application to replace existing wall mounted advertising hoarding with roof mounted hoarding refused – hoarding not in conflict with intent and purpose of subject District Commercial Zone but failed to meet other more specific provisions of Development Plan including that would not be fully integrated with development to which it would be related, and other development in vicinity – *Held*: Original decision to refuse consent upheld: *Everest Advertising v City of West Torrens* [2005] SAERDC 127.

[7.10.85] Sky-sign. Whether "sky-sign" advertising restaurant and shop that were lawfully in existence on subject land took on character of restaurant and shop, which constituted prohibited development in zone – *Held*: Not possible to assign characteristics of shop to free-standing pylon advertising existence of shop – a "sky-sign" and supporting steel pylon not one of kinds of development prohibited in relevant principles of development control – development for which approval required not a change of use of land: *Corp of the City of West Torrens v McDonald's Properties (Australia) Pty Ltd* (1985) 38 SASR 467.

[7.10.90] Service station. Appeal against refusal of application for advertising hoarding – 5.4m high x 3m wide wall ("blade wall") attached to existing building for purpose of displaying illuminated and other advertisements – service station complex with carwash and retail outlet – Local Commercial Zone – intent of Principle of Development Plan to avoid impairment of views from adjoining site – *Held:* Proposal sufficiently integral to design of existing building – however, proposed structure close to boundary and projected well forward of frontage of building – structure's height and overall scale not compatible with setback, scale and context of building and curtilage – unreasonably interfered with advertising opportunities on adjoining land, was excessive advertising and impaired views from adjoining land – consent refused: *Peregrine Corporation P/L v City of Tea Tree Gully* [2009] SAERDC 6.

[7.20] Aged accommodation

[7.20.5] Categorisation. Simply stating that dwellings are designed to provide accommodation suitable only for elderly people does not make them so. Accommodation equally suitable for people of all ages, although attractive to the elderly, which does not differ in any major way from other available forms of accommodation for the populace at large cannot of itself be categorised as "aged accommodation" as referred to in a Development Plan: *Tarca and District Council of Stirling v Hambrook* (1995) 86 LGERA 56; [1995] EDLR 47.

For a discussion of the various kinds of aged accommodation, such as retirement villages, hostels and nursing homes, see *Padman Health Care v City of Burnside* [2007] SAERDC 12.

Cases

[7.20.60] General. For cases involving applications for the development of aged care facilities, see: *Anglicare SA Inc v City of Mitcham* [2008] SAERDC 63 (application to demolish existing facility and establish new facility as well as assisted living units); *City of Mitcham v The Chappel Investment Company Pty Ltd* [2008] SASC 240 (retirement village including apartments); *Crown Marina P/L v City of Port Adelaide Enfield* [2009] SAERDC 3 (refusal of approval for three storey, four level building for mixed use retirement village (32 units), marina lounge and serviced apartments (six units)).

[7.30] Agriculture

[7.30.3] "Agriculture". In relation to the meaning of "agriculture", see [9.110].

[7.30.5] Piggery. A piggery is an agricultural activity: *Aldersey v Coorong DC* [2001] SAERDC 27.

Cases

[7.30.50] Excluded activities. Development Plan set out "agriculture" as complying development – specified agriculture not to include excavation, construction of roads or tracks and erection of any structure – *Held*: These possible examples of "development" had no particular association with agriculture – Development Plan put beyond doubt being able to carry on agriculture did not give any right to engage in any of activities set out: *Mitcham CC v Fusco* [2000] SASC 250; (2000) 110 LGERA 14.

[7.40] Amenity

[7.40.1] Assessing impact. It is well established that an important consideration in the assessment of a proposed development is the extent to which it is conducive to the desired character and amenity of the area within which it is proposed. The more conducive it is, the more likely it will merit planning authorisation: *Zito v City of Burnside* [2004] SAERDC 23 at [30].

[7.40.3] Assessing impact – relevant factors. Amenity is not only affected by what may be perceived from the street, or even from a ground floor level. Things can be seen from ground positions other than the street frontage position and from height which influence amenity. It is not only those things which can be seen which can affect amenity: things may affect amenity simply because they are known even if not easily seen, or because they are used by a considerable number of people: *Minborough Pty Ltd v Burnside CC* [1968] SAPR 153; *Smethurst v SPA* [1972] SAPR 1; *SA Aboriginal Child Care Agency Forum Inc v Port Augusta CC* [1996] EDLR 591; (1996) 3 SAPED 101; *Novak v Woodville CC* (1990) 70 LGRA 233; 158 LSJS 473; *M & B Farmers Nominees Pty Ltd v Mallala DC (No 2)* [1999] SAERDC 35; *Owen v Clare & Gilbert Valleys* [2000] SAERDC 23.

How amenity is affected almost invariably relies on objective expert evidence for its resolution. However, the ERDC takes careful note of the views of residents and landowners about amenity: *MacKay v Onkaparinga CC* (1998) 5 SAPED 120. Regard may be had to the perceptions of residents in a locality as to its amenity. Even a purely subjective view based upon no objective, observable likely consequence of a development need not necessarily be disregarded although it is most often likely to have little weight: *Meertens v Burnside CC* [1994] EDLR 64; (1994) 1 SAPED 27; *Broad v Brisbane CC* (1986) 59 LGRA 296. There are cases where the basis of residents' concern and perception is measurable and able to be assessed against accepted standards: *Optus Communications Pty Ltd v Kensington & Norwood CC* [1998] EDLR 565; (1998) 5 SAPED 48.

The amenity of a residential zone is capable of being affected by what occurs in an adjacent business zone (stated in the context of a case dealing with an illuminated sign in a business zone): *Coates Modern Letters Sign Co Pty Ltd v Unley CC* (1986) 129 LSJS 55; 60 LGRA 60.

[7.40.7] Assessing impact – multiple areas or zones. Where a locality covers a mixture of areas or zones, such as industrial and residential, its amenity is not to be measured solely by standards appropriate to residential zone amenity but to those arrived at by looking at the locality as a whole: *Lanzilli Holdings Pty Ltd v Campbelltown CC* (1982) 32 SASR 81; 51 LGRA 102; *Mace v Salisbury CC* [1996] EDLR 270; (1996) 3 SAPED 55; *Cameron-Smith v Marion CC* [1998] EDLR 511; (1997) 4 SAPED 156; *Marjanovic v Charles Sturt CC* [2001] SAERDC 10.

To say, in relation to the amenity and character of a residential locality, that because of its height and roof form, a church does not resemble the dwellings in the locality is to say no more than that it is not a residential use of land. In that regard it is not dissimilar to a school serving a residential area: *Uniting Church in Australia (Coromandel Parish) v Happy Valley CC* (1997) 4 SAPED 90.

[7.40.9] Assessing impact – future amenity. In some circumstances, it may be appropriate to assess the amenity of a locality on the basis of not only the existing character and form of development in the locality but also the form of development anticipated or permissible in the locality: *Aspex Building Designers v City of Norwood, Payneham & St Peters* [2005] SAERDC 91 at [23]; *Marjanovic v City of Charles Sturt* [2001] SAERDC 10; *Lanzilli Holdings Pty Ltd v Campbelltown CC* (1982) 32 SASR 81.

[7.40.11] Assessing impact – illegal activity. If current activities are of an illegal nature, in determining whether activities presently conducted in an area detract to any significant extent from its amenity, it is inappropriate to take the illegal activities into account in deciding on the merits of a proposed development: *Sullivan v Riverton DC* (1997) 95 LGERA 150; [1997] EDLR 486.

[7.40.23] Perceived amenity. The question of perceived loss of amenity relating from intangible aspects is valid from a personal perspective but needs to be weighed against reasonable and objective criteria where they exist: *Rilk v Onkaparinga CC* [2002] SAERDC 28; *Telstra Corporation Ltd v Mallala DC* [2000] SAERDC 50. When considering matters of perceived amenity some consideration may be given to subjective views as to loss of amenity; however, the ERDC is cautious about the weight to be afforded to such concept: *Vlassis v Unley CC (No 2)* [2002] SAERDC 8. Where the concerns of residents about a proposed development are measurable and are capable of being assessed against recognised standards, there is no basis to sustain an argument that the mere perception of harmful effects will reduce the amenity of a locality: *Telstra Corporation Ltd*, above. For a case in which arguments regarding perceived amenity were made but rejected, see *Feltham v Adelaide Hills CC* [2000] SAERDC 68. An intangible element that can affect amenity is perceived erosion of the principles of zoning: *Edwards v West Torrens CC* [1994] EDLR 18; (1994) 1 SAPED 18.

[7.40.26] Noise. The most widely accepted objective test of whether noise unreasonably interferes, or is likely to unreasonably interfere, with the enjoyment of an area by persons and, thus, have an adverse effect on the amenity value of an area for the purposes of the *Environment Protection Act 1993* is whether the equivalent noise level exceeds by more than 5dB(A) the background noise level at the measurement place: *Olson v Windybanks Child Care Centre Pty Ltd* [1999] EDLR 197; [1999] SAERDC 28. One aspect of amenity is the ability to enjoy uninterrupted sleep: *Adelaide City Council v O'Connell Property Group Pty Ltd* [2007] SASC 313.

[7.40.28] Undesirable development. The effect on the character and amenity of a particular locality of a development that is lawful because it has been approved but which is one which ought not to have been approved may become relevant as a precedent. An undesirable development, lawfully in place, inevitably affects the character and amenity of its locality, thus opening up the possibility that other developments based on the character and amenity as then affected by the particular development in question might be allowed: *Urquhart v Mount Gambier CC* (1995) 89 LGERA 57; 2 SAPED 146.

[7.40.30] Idiosyncratic perceptions. In a case where approval was sought for a funeral parlour, the court stated that where a resident has an inherent or acquired abhorrence of death, the inescapable fact is that to that person amenity will be affected by the existence nearby of a funeral parlour. Taken by itself, that consideration was not a reason for refusing development authorisation which is otherwise acceptable having regard to the Development Plan: *Sidney Harrison Pty Ltd v Port Adelaide CC* (1990) 2 SAPD 7; *D'Andrea v Salisbury CC* [1998] EDLR 153; (1998) 5 SAPED 35.

[7.40.32] Licensed premises. Licensed premises have the capacity to affect adversely the residential amenity – from noise made by patrons resorting to or leaving the premises late at night or in the early hours of the morning: *Adelaide City Council v O'Connell Property Group Pty Ltd* [2007] SASC 313.

[7.40.34] Funeral parlour. In evidence in an application for a funeral parlour, a psychologist, who had made a study of the issue, gave evidence to the effect that the average, normal person would not be distressed to any extent because of the existence of an existing funeral home or of a proposed cremator within that funeral home within a locality. Only those already psychologically distressed as a consequence of some past event relating to death would suffer lasting and genuine distress. The ERDC had some hesitation in accepting that evidence, although it went virtually unrebutted. It considered that there would be many average, reasonable Australians who, if they had a free choice, would prefer to live in a locality without a crematorium or cremator. However, the court accepted the psychologist's evidence that unless a crematorium or cremator produces odorous emissions on sufficient occasions to cause concern to residents, most living within its vicinity will at the least accept it within a relatively short time: *Aldekerk Pty Ltd v Port Adelaide Enfield CC* [2000] SAERDC 47.

[7.40.36] Holiday settlement. Approval was sought for a holiday settlement. The court considered that aesthetic and amenity standards were less relevant than in urban areas. Development in many such developments in South Australia is characterised by a greater diversity in the scale, design and materials than is typical in more urbanised places. That does not determine development control policies. Through Development Plans, authorities may determine policies in such a way as to achieve a greater consistency and coherence in the scale, design and materials of new development than has occurred in the past: *Atkinson v Yorke Peninsula DC* [2000] SAERDC 21.

[7.40.38] Rural area. When considering the amenity of a rural area one should recall that rural areas may expect to house rural buildings: *Aldersey v Coorong DC* [2001] SAERDC 27. In a rural area where primary production is afforded primacy, the amenity is very different from the sometimes idyllic settings sought by residents in rural living zones: *Sawers v Adelaide Hills C* [2001] SAERDC 72.

Division of an allotment into two in an area of large rural living allotments would offend against the character of the locality and lead to the diminution of its amenity. Whilst it would not set a precedent, it would be a significant step towards a change in character: *Rogers v Mount Gambier CC* (1997) 4 SAPED 41 (affirmed in *Rogers v Mount Gambier CC* (1997) 4 SAPED 99).

[7.40.40] Roof fittings/attachments. Many items attached to roofs, such as TV antennae, satellite dishes and air-conditioning units, do not require planning consent. Some tolerance of relatively ugly elements of residential built form and conventional features/fittings attached to them is reasonably required to be allowed for: *Woo v Campbelltown City Council* [2008] SAERDC 25 at [40]. The visual amenity impact of a satellite dish on a dwelling roof is a very site and locality specific consideration and assessment. Concerns as to other similar developments on dwelling roofs in a locality and the likelihood of consequence for such decision making may not be sufficient grounds or reasons to reject such a proposal: *Woo*, above, at [54]-[55].

Cases

[7.40.48] Dwellings – group. Developer applied to divide parcel of land into four allotments – each allotment intended to be occupied by one or more of eight dwellings comprising single and double storey detached and semi-detached dwellings of similar architectural style – Development Plan contemplated change in nature of different dwelling types so long as types compatible with existing dwellings and streetscapes – prominent position in well-established area with own particular character and amenity – would introduce new building forms at quite different density – *Held*: Project would likely meet all specific and quantifiable measures set out in Development Plan – would not meet qualitative tests relating to character, amenity and streetscape of locality – offended existing pattern of generously sized allotments and relationships between built form and open space – at odds with informal siting and architecture of many existing buildings – PDP consent refused: *Fusco Building Company Pty Ltd v Burnside CC* [2000] SAERDC 72.

Application to partially demolish existing building – converting remains into single and two-storey dwellings – amenity of locality of subject land high – amenity influenced by quality of buildings, mature street trees and landscaping and by absence of heavy traffic volumes – representor objected to proposed development and appealed against decision of relevant authority – *Held*: Five principal concerns, including density of development, appearance, parking and access arrangements, impact of dwelling upon representor's dwelling and prescribed area of open space – any defect alone not fatal but taken together reflected misguided attempt to retain substantial portion of existing building whilst seeking to achieve on balance of land a yield consistent with whole of subject land being cleared site – proposal detrimentally affected appellant's property and relevant streetscape: *Sava v Norwood, Payneham & St Peters CC* [2000] SAERDC 58.

[7.40.49] Dwellings – density. Council refused development application solely on dwelling density – council had no objection to design, layout or appearance – *Held*: Dwelling density factor acknowledged as important "building block" in composition of overall character and amenity of developed township or urban area – but it is only one of a suite of guidelines, standards and characteristics that make up overall picture – concerns about implications of greater dwelling density upon infrastructure planning and provision in future not substantiated – consent granted: *Allen v District Council of Robe* [2007] SAERDC 39.

[7.40.50] Dwellings – retirees. Application to establish school in Living Area – retirees occupied number of dwellings in area – *Held*: ERDC realised nature of occupants of dwellings in locality varied – proper that residential use of land in locality, together with present amenity, be taken into account rather than fact that numerous dwellings occupied by retirees: *Jongebloed v Yorke Peninsula DC* [2000] SAERDC 52.

coverage and private open space requirements – amount of sunlight reaching rear yard and rear windows of dwelling would be significantly reduced: *Taylor v City of Mitcham* [2009] SAERDC 28.

Related materials: [7.340] Height.

[7.90] Building rules

[7.90.5] Alteration to existing building. Where approval is sought to undertake building work in the nature of an alteration to an existing building which must be taken to conform with the DA, but which does not in fact comply with the current standards specified in the Building Rules, there is no provision in the DA or the DR which provides that, where development not involving building work is proposed in respect of such a building, it must be brought into conformity with all or any of the current standards of the Building Rules: *White v Port Adelaide Enfield CC* [1999] SAERDC 11; *Opal Inn Pty Ltd v Coober Pedy DC* [2000] SAERDC 11 (note: certain matters dealt with in the judgment that rely on s 28 of the *Statutes Repeal and Amendment (Development) Act 1993* need to be considered with caution following the repeal of s 28(2)-(5) of that Act).

[7.100] Bushfire

[7.100.5] Australian Standards. The performance provisions required of buildings in bushfire prone areas are set out in *Australian Standard 3959*: *Van der Pennen v R T Taylor & Associates Pty Ltd* [2001] SAERDC 71.

Eighteen small to medium sized gum trees along a creek bed have been held not to constitute a "forest" in a bushfire prone area for the purpose of Figure 2.1 of *Australian Standard 3959*: *van der Pennen*, above.

[7.110] Car parking

[7.110.3] Capacity. It is not appropriate to design the capacity of car parks so as to accommodate absolute peak requirements for parking arising out of unusual events or times: *Noseda Petroleum Pty Ltd v Mount Gambier CC* [1999] SAERDC 79.

[7.110.5] Capacity – adequacy. A perceived or demonstrated shortfall of parking spaces within a locality in which a particular development is proposed cannot be used as a basis for rejecting a proposal which satisfies the parking requirements of the Development Plan. Businesses in the locality which have not provided sufficient on-site parking spaces must share equally in any adverse consequences which flow from inadequate levels of car parking spaces within that locality: *Koumi v Adelaide CC* [2002] SAERDC 15.

If the car parking proposed for a development is inadequate, the development as a whole is unlikely to merit development consent. Limiting the number of persons available on the premises, when but for the car parking it could accommodate more, is generally not appropriate. However, there will be occasions when it will be proper to limit the number of persons. For instance, if car parking proposed for a hotel were to be adequate, a limit on the number of persons attending the hotel could be fixed to ensure that the hotel did not seek to attract additional persons so as to create a parking problem: *KIPA Freeholds Pty Ltd v DAC* (1999) 101 LGERA 414; [1999] EDLR 39.

For a detailed discussion of how the adequacy of car parking is to be assessed and the "lack of any relationship" between a limit on numbers in a hotel and the demand for car parking, see *Chyswick Pty Ltd v Kingston District Council* [2003] SASC 164.

[7.110.7] Capacity – existing shortfall. When determining car parking requirements for a new development, any shortfall in car parking associated with the existing use is lawful and cannot be added to any shortfall created by the subject proposal for the purpose of a planning assessment: *Stamopoulos Pty Ltd v City of Holdfast Bay* [2004] SAERDC 45; *SAJ v City of Holdfast Bay* [2005] SAERDC 71 at [30]. Likewise, an existing parking shortfall does not need to be rectified by a

proposal for additional development, provided such development does not exacerbate the existing problem: *Carrabs Nominees Pty Ltd v City of Burnside* [2003] SAERDC 116 at [34].

[7.110.10] Large vehicles on residential land. Where the parking of a vehicle on land requires planning authorisation, the question to be resolved is whether the effects on the locality of the parking are such as to conflict, to a material degree, with the relevant provisions of the Development Plan: *Freckmann v Mitcham CC* [1998] EDLR 575; (1998) 5 SAPED 91.

The presence of a large commercial truck in the driveway of a residential allotment indicates a commercial use of the land which is wholly inconsistent with the purpose of a zone in which commercial development is to be contained in identified areas. The fact that such a truck has a commercial function, in contrast to the recreational nature of other large vehicles such as boats on trailers parked on residential land, does not alter the fact that the parking of any large vehicle on residential land affects to some degree the appearance of the land. They all raise the question of whether it is desirable for such large vehicles to clutter residential sites. Further, it is not relevant that large delivery and other vehicles use roads nearby the subject land on which it is desired to keep such a truck, or that the subject land is close to a neighbourhood centre area and its car park. This involves detrimental effects of a relatively brief nature. They would be considerably less than the parking of a large commercial truck in the driveway of a residential allotment out of business hours: *Mitcham CC v Freckmann* (1999) 74 SASR 56; [1999] SASC 234. The fact that the parking of a truck on residential land may be seen as a static activity does not mean that it is not a commercial activity: *Charles Sturt CC v Hatch* [1999] SASC 523. In relation to the parking of commercial vehicles, see also [4.482.15].

Whether other commercial vehicles are being stored, lawfully or unlawfully, in the locality is irrelevant. It does not relieve an owner of the obligation to comply with the DA and DR. If a vehicle has been parked on the land for many years prior, this is not a matter to be taken into account. An application must be dealt with on the basis that the storage of the large vehicle has not commenced. Any financial hardship of a vehicle owner associated with storing the vehicle elsewhere cannot affect the proper decision based on planning merits: *Hallwas v Campbelltown CC* [2001] SAERDC 16.

A distinction can be made between the parking of a commercial vehicle weighing about 7.6 tonnes at a person's home and the keeping in such a place of large four wheel drive vehicles, caravans, camper vans, boats and trailers which are more or less recreational in nature and have come to be accepted as part and parcel of what is to be found in residential zones. Their impact is usually subtler than that of a vehicle quite clearly commercial in nature and function: *Hallwas*, above.

[7.110.15] "Open-lot" parking. See under Planning Law Dictionary at [9.1100].

Cases

[7.110.50] Hotel. An application was made for development consent for a hotel. The proposal made no provision for car parking. A number of off-street car parking spaces had been established in the resort and the relevant authority was asked to allocate 60 to the hotel proposal. The material before the relevant authority suggested the hotel would have a capacity of 310 persons. However, the floor space was such that the Licensing Court could license the premises to a maximum of 450 persons. Consent was granted, without any condition limiting the number of persons who could be present at the hotel. *Held*: It was wrong for the relevant authority to base its decision on 310 persons present at one time but not to attach an accompanying condition. Having regard to the importance of car parking in the assessment of the development, the relevant authority could not reasonably have concluded that the development should be approved without any limit on the number of persons to be present at the hotel at any one time: *Upham v The Grand Hotel (SA) Pty Ltd* (1999) 74 SASR 557; [1999] SASC 414.

For a case in which a condition limiting the capacity of a hotel was unlawfully imposed in order to limit demand for car parking, see *Chyswick Pty Ltd v Kingston District Council* [2003] SASC 164 at [3.42.171].

[7.110.55] Motel. When seeking consent for the construction of an underground motel it appeared that the forecourt area would be poorly laid out and far too small for the scale of the development proposed. The manoeuvring of vehicles would be difficult and dangerous. It was suggested that buses could park on a street at a distance of 30m from the reception office of the motel. Passengers could then walk to the reception. Bellboys could assist with luggage. *Held*: The likelihood of that being acceptable to the travelling public was improbable. Travellers, especially those of mature years, expected reasonable service. They would expect to be able to drive or to be driven to within a few steps of the reception office. Such is a basic requirement for any motel whatever its standard or grading: *Opal Inn Pty Ltd v Coober Pedy DC* [2000] SAERDC 11.

Concerns were raised about the design, function and expected use of an aboveground forecourt and roof car park of an underground motel. *Held*: PDP consent was granted to the motel. However, due largely to the limited amount of space, consent was subject to strict and detailed conditions regarding the number and size of buses that could enter and park on the subject land: *Opal Inn Pty Ltd v Coober Pedy DC (No 2)* [2000] SAERDC 65 (the condition excluding certain buses was approved on appeal in: *Opal Inn Pty Ltd v Coober Pedy DC* [2001] 115 LGERA 40).

A principle of development control contained in a Development Plan sought, in relation to a motel, one car parking space for every motel unit. *Held*: The provision of only 10 such spaces for a motel with 18 units was unsupportable, even though it was expected that about one-quarter of the guests coming to the motel would arrive by coach: *Rainsford v Burnside CC* [2000] SAERDC 7.

[7.110.60] Amenity. An application was made for the establishment of a car park to serve a factory on land containing detached dwellings. The car park would abut other residential properties. *Held*: The car park would need to enhance amenity for residents for it to be approved: *Edwards v West Torrens CC* [1994] EDLR 18; (1994) 1 SAPED 18.

[7.110.65] Liquor outlet. It was proposed to change the use of land in a Specialty Goods Zone from a motor repair and sales showroom to a retail liquor outlet. A retail liquor outlet is a "shop", as defined in DR sch 1. The relevant Development Plan proposed that the particular development would require 61 parking spaces upon site. Only 44 spaces were proposed. It was contended that resulting on-street parking could interfere with the free flow of traffic within the locality. It was also contended that the proposed parking provision for the development as a retail liquor outlet might be inappropriate for any other form of shop, creating a level of parking demand lower than many other types of shop. *Held*: The parking ratios set out in the Development Plan reflected parking demands established before the then current liberalisation of shop trading hours. Parking demand had now been spread over a much longer period. That meant that there were substantially lower demand ratios. Any peaks in demand, if they should occur, would be on Saturday afternoons, a time when there was unlikely to be considerable traffic on the streets. The provision of 44 off-street parking spaces would be sufficient. However, a condition restricting the use of the subject land to a retail liquor outlet operated in accordance with a Retail Liquor Merchant's Licence granted under the *Liquor Licensing Act 1997* was imposed: *Liquorland (Aust) Pty Ltd v Unley CC* [2000] SAERDC 38.

[7.110.70] Offices in residential zone. A church in a residential zone sought consent to change the use of a single-storey detached dwelling on an allotment. The proposed use would involve the four front rooms of the dwelling being used as offices for activities directly in association with the church. Three car parking spaces on the subject land, as well as spaces in the churchyard, were allocated for car parking. *Held*: The proposed parking arrangements were sufficient for the proposed development: *Van Der Laan v Holdfast Bay CC* [2000] SAERDC 3.

See also the case summary involving medical consulting rooms at [3.4.502].

[7.110.73] School. For a case involving an application for a school car park in which detailed consideration was given to matters regarding traffic, landscaping, hours of operation, use by non-staff members and noise, lighting, and other emissions, see *Greaves v District Council of Mt Barker* [2009] SAERDC 14.

[7.110.75] Commercial vehicle – residential land. Application was made to park a large furniture removal van weighing 4.95 tonnes alongside the applicant's dwelling on a residential allotment. The applicant conducted a furniture removal business from the dwelling. The applicant's home was separated from a 'neighbourhood centre' area only by a lane. The first two objectives of the Development Plan for the area were directed to the preservation of residential amenity. A subsequent objective looked to the preservation of existing shopping development in neighbourhood centre areas. The Development Plan made no provision for any buffer or transitional area between the residential area and the area of the neighbourhood centre. *Held*: The parking of the truck at the place and in the manner proposed would not further detrimentally affect land in the immediate vicinity of the neighbourhood centre area. It would amount to nothing more than an element of commercial use which would not be unexpected at the interface between the residential area and the neighbourhood centre area: *Mitcham CC v Freckmann (No 2)* [2000] 76 SASR 145.

A rubbish collection truck was being parked on residential land. The truck was 10.3 tonnes in weight, 2.44m wide, 8.23m long and 3m high. *Held*: The parking of the truck was not excluded from the definition of development by DR sch 3 cl 5(2)(d). The parking of the truck was an independent use and not in any relevant sense incidental to the use of the dwelling house. The parking, or storage, of the truck on the residential land for extended periods amounted to a commercial use of the land and, as such, a change in the use of the land constituting development: *Charles Sturt CC v Hatch* [1999] SASC 523.

A person sought to keep a commercial vehicle weighing about 7.6 tonnes at that person's home in a Residential 2 Zone. The amenity was not affected by any commercial intrusion or nearby commercial activities. *Held*: Consent was refused. The impact of the subject vehicle that was clearly commercial in nature and function would be detrimental to the amenity. The width of the road pavement as well as the width and configuration of the driveway serving the subject land were found not to be sufficient for a vehicle of such a size. The size, colour, bulk and commercial appearance of the vehicle would involve an inappropriate and unwelcome visual intrusion into what could be seen from neighbouring houses. Screening could ameliorate the impact but to do so would involve an attempt to make good a development that was inappropriate: *Hallwas v Campbelltown CC* [2001] SAERDC 16.

Development approval sought for parking of two trucks each over 3 tonnes in Rural Living Zone – trucks not associated with rural or residential use – no vehicle repairs, maintenance, servicing or refuelling to take place on land – *Held:* Proposal not orderly or proper use of land in rural living zone and locality contexts – use of trucks not ancillary to industries that process agricultural/horticultural produce (which would have made such use more acceptable in principle) – approval could encourage additional similar uses and cause incremental change to character of locality – consent denied: *Howe v City of Playford* [2008] SAERDC 5.

See also at [4.482.65].

[7.110.80] Ramp. A cross-section of a ramp from ground surface to the floor of an undercroft car park did not conform to Figure 2.10 ("Changes of Grade in Ramps") in *Australian Standard Parking Facilities*: *Part 1*: *Off-street car parking AS 2890, 1-1993*. It was contended that the Standard was only a guideline and that it could be applied leniently. *Held*: The contention was rejected. The Standard is specific as to the geometry to be applied. The fact that other ramps in the locality did not appear to meet the Standard did not excuse the lack of conformity: *Unley Property Development v Holdfast Bay CC* [1998] EDLR 796; (1998) 5 SAPED 129.

[7.110.85] Access to abutting property. The car park of a proposed development would provide ready access to the rear of abutting dwellings, which might be used to obtain unauthorised access to

those properties. *Held*: As access to the properties already existed, consent was unaffected. It may, however, be a matter of concern if a development should create such access where none has previously existed: *Uniting Church In Australia (Coromandel Parish) v Happy Valley CC* (1997) 4 SAPED 90.

[7.110.95] Low demand. Land Management Agreement (LMA) prohibited owner of residential dwellings from permitting land to be used for any purpose other than housing of people with "low demand for on site car parking" – LMA also prohibited owner from leasing residence to person "who owns a car and needs to park that car in the vicinity of the residence unless there is a car parking space available ... for that person's exclusive use" – *Held:* Phrase regarding "low demand" almost incapable of adequate definition – any tenant who owned a car was likely to provide demand for onsite car parking – taken literally, clause could have meant no dwelling could be occupied by any person who owned car – in any case, phrase uncertain, vague and difficult, if not impossible, to enforce – phrase regarding prohibition on leasing likely unenforceable as well: *Linke v DAC* [2008] SASC 121.

[7.110.97] Shortfall/loss of parking space. Appeal against refusal of telecommunications facility – council claimed space to be utilised by proposed monopole would take up potential parking space for two cars – council sought condition that appellant produce report setting out vehicle parking requirements for all uses on subject land and if such requirements exceeded amount of space available for parking, appellant required to make contribution to council's car parking fund or demonstrate alternative arrangements to be made to cater for shortfall – *Held:* Proposal would make minor and insignificant difference to parking arrangements – condition not warranted: *Telstra Corp Ltd v Town of Gawler* [2009] SAERDC 2.

For cases dealing with car parks in the context of land use, see under [7.400].

Related materials: [7.260] Extension of existing use.

[7.120] Carwash

[7.120.5] Nature of use. A carwash facility is a commercial type of development which in its operating hours, appearance and potential to create noise is closer to an industrial use than an office or retail use: *Serpeyn Pty Ltd v West Torrens CC* [2000] SAERDC 16.

Cases

[7.120.50] Residential zone. Whether carwash facility be allowed PDP consent in residential zone because it met domestic need – carwashing often undertaken on land – *Held*: Consent refused – suggestion akin to proposition that as gardening done on residential lands plant nurseries should be allowed there: *Serpeyn Pty Ltd v West Torrens CC* [2000] SAERDC 16.

[7.130] Centres and shops

[7.130.5] Purpose of centre provisions in Development Plans. An underlying factor of centre provisions of Development Plans is the hierarchical nature of many of the functions considered appropriate within them. These hierarchical functions are the basic building blocks of centres. In town planning terms, it is appropriate to cluster other functions of a similar land use nature, which may not be hierarchical, in centres alongside those hierarchical elements: *Eagle Rise Christian Centre Inc v Salisbury CC* [2000] SAERDC 45. The provisions in Development Plans for centres are cornerstones of plans for urban areas. They promote the clustering and grouping of business and community facilities into nodes at regional, district, neighbourhood and local operational levels: *Eagle Rise Christian Centre*, above. Centre type facilities, such as those that retail goods in the categories of foodstuffs, clothing, sporting goods and personal effect goods, should not be located outside a Centre Zone, even if there is an established community need for such facilities in the area concerned: *Remibisi Pty Ltd v City of Salisbury (No. 2)* [2008] SAERDC 83 at [65].

[7.130.10] Corner shop. A "corner shop" on a Major Local Road, an acceptable distance from existing centres, associated with a large amount of residentially zoned land, can be reasonable in planning terms: *Bluff Harbor Pty Ltd v Victor Harbor DC* [1994] EDLR 196; (1994) 1 SAPED 90.

[7.130.15] Consulting room. There is an emerging trend to locate consulting rooms, appropriate for centres, outside but close to centres, either within former residential premises or within commercial rather than retail premises. Such locations are apparently more attractive to patients than those situated in centre zones: *Roxburgh v Happy Valley, Noarlunga & Willunga CC (No 2)* [1999] SAERDC 10.

[7.130.20] Nursery. Whilst retail nurseries do so, it could be correct that a combined wholesale and retail nursery operation could not reasonably be expected to be established in a centre zone or area: *Lomax v Mount Barker DC* [1999] SAERDC 84.

[7.130.25] Fast food restaurant. A Kentucky Fried Chicken restaurant with a drive through take away food facility needs a large catchment. It requires being on a major traffic route and having high visual exposure. It is a type of use normally to be found in a centre zone, seemingly one of a reasonably high order within the hierarchy of such centre zones: *Sneath & King Pty Ltd v Norwood, Payneham & St Peters CC* [2000] SAERDC 63.

Cases

[7.130.75] Supermarket. Appeal against refusal by council of development application for supermarket and shops at ground floor level with residential apartments on three floors and associated car parking – issues in relation to bulk, scale and height – Development Plan sought contemporary modern designs – character of locality mixed – impact on State and Local Heritage Places in vicinity – *Held:* No adverse impact on State and Local Heritage Places – development plan consent granted subject to conditions: *Bayspring Pty Ltd v City of Charles Sturt* [2008] SAERDC 89.

[7.130.80] Group of shops. Appeal against refusal of tavern and freestanding group of single-storey shops comprising six tenancies on grounds was at variance with Development Plan – Country Township Zone – small town with population of around 500 which doubled in summer tourist season – shop to have area of 560sq m – Development Plan required a centre of such size to be in business, centre or shopping zone, sought "orderly and economic development" and required retail/business development be located adjacent to specific road and in proximity to existing retail development – *Held:* Consent refused – retail development of size normally located in designated business centre or shopping zone, suggesting proposed retail tenancies were of scale larger than required to meet local needs or needs of surrounding district – not orderly and economic – not in accord with intention of Structure Plan and zone requirements: *Norich Development Pty Ltd v Alexandrina Council* [2009] SAERDC 24.

[7.140] Character

[7.140.5] Role in planning assessments. It is well established that an important consideration in the assessment of a proposed development is the extent to which it is conducive to the desired character and amenity of the area within which it is proposed. The more conducive it is, the more likely it will merit planning authorisation: *Zito v City of Burnside* [2004] SAERDC 23 at [30].

"Character" is a basic and well-used concept in the practice of town and country planning: *Ciancio v East Torrens DC* (1990) 2 SAPD 33; *Sherlock v Mitcham CC* [2001] SAERDC 24.

Whilst there are valid community expectations and planning obligations about the constraint to be shown in matters such as height, size, orientation and location of subsequent developments, later developments in their turn are entitled to similar enjoyments. The presence of earlier buildings should not so constrain matters that new development cannot, other than in a virtually negligible

way, enjoy such factors. The diversity of architecture, scale and setback of buildings in a locality or area may be an existing positive element of the character of that area. In matters of amenity there must be emphasis on reasonableness. *Tashounidis v Flinders SC* (1988) 33 APA 427 applied: *David Cheney Pty Ltd v Unley CC* [1998] EDLR 720; (1998) 5 SAPED 116.

[7.140.10] Constituent elements. Character involves land use, intensity of development, built form and the spaces between. It calls upon a sense of place established within which new development should sit. This is particularly so in long-settled localities where the provisions of the Development Plan seek, either explicitly or implicitly, to maintain the status quo: *Chary v Charles Sturt CC* [1999] SAERDC 12. Pattern is an element of character. Character is the two dimensional fabric of an urban area: *Villaplex Pty Ltd v Norwood, Payneham and St Peters CC* [2000] SAERDC 10; *Sherlock v Mitcham CC* [2001] SAERDC 24. As to the meaning of "pattern of development" and the relationship between "character" and "pattern", see [9.1220].

When the overall character of a locality is referred to in a Development Plan, "character" is an amalgam of planning and urban design factors, such as an amalgam of architectonic factors, namely height, size, colour, scale, form, siting, architectural style and materials of construction: *Likouresis v Burnside CC* [2000] SAERDC 9.

In urban areas, character, whether "historic" or not, arises out of a number of components. The plat or pattern of streets and allotments is a very important component. More often than not, the original pattern of the division of land is the most enduring action in the planning, design, development and redevelopment of areas from fields to built-up cities and towns. Buildings, streetscapes, traffic ways, open spaces, parks and the like come and go. The underlying cadastre changes infrequently. When it does it is more in detail than in overall pattern: *Ellis v Norwood, Payneham and St Peters CC* [2001] SAERDC 18.

The area and dimensions of allotments and the density of development are fundamental aspects of the character of an area. Area and dimension provides the basis for built form/open space and built form/public space relationships as well as other, more subtle, associations which, taken together, form the character and amenity of a locality: *Fusco Building Company Pty Ltd v Burnside CC* [2000] SAERDC 72. The fact that a site is generically suitable for its area does not obviate the need to design such a development in a manner paying due regard to the established character and amenity of a locality, especially if the characteristics of the development suggest an attempt to "put a quart in a pint pot": *Rubini v Port Adelaide Enfield CC* [2001] SAERDC 41.

In relation to the meaning of "predominant character of other buildings", see [9.1260].

[7.140.15] Future appearance. Where zoning contemplates forms of development additional to those already existing in a locality, the inevitability of some change to the appearance of that locality has to be recognised. Provisions of a Development Plan that set out to ensure new development harmonises with the prevailing character of the locality cannot be interpreted narrowly to obviate change. They can be used to ensure that the key determinants of the prevailing character are maintained: *Alan Sheppard Homes Pty Ltd v Burnside CC* (unreported, ERDC, judgment no 249 of 1996) (approach confirmed in *Toyias v Alan Sheppard Homes Pty Ltd* (1997) 69 SASR 42); *Jones v Happy Valley, Noarlunga & Willunga CC* [1998] EDLR 489; (1997) 4 SAPED 154.

The fact of an approval does not change the character of a locality. To take prospective development into account would introduce an undesirable level of uncertainty into the planning process. To re-open its case, an appellant must wait until the development actually proceeds and then apply again in the changed circumstances: *Penech Pty Ltd v DAC (No 1)* [2005] SAERDC 57 at [3]-[4].

[7.140.20] Desired future character. In assessing a development proposal, it is important that the relevant authority distil from the relevant provisions of the Development Plan the overall intent and purpose and the desired character of the zone within which it is proposed to place the development. That may often be assisted by reference to the objectives of the zone and principles of development

control: *Mitcham CC v Freckmann* (1999) 74 SASR 56; [1999] SASC 234; *Bell v Berri Barmera C* [2001] SAERDC 42.

Where an assessment is required of a proposed use to which no reference is made in the relevant zone provisions of a Development Plan, weight is to be given to the desired character and amenity of the relevant zone and the extent to which the proposed development is conducive to their realisation. If the proposed use is neither a "desirable" nor a "non-complying" one, it may be approved provided it does not detract from attainment of the objectives and principles and any relevant statement of desired future character and principles. Rather than requiring a proposed development to be conducive to the attainment of the desired future character and amenity of its precinct, it is required not to detract from that attainment: *Koumi v Adelaide CC* [2002] SAERDC 15.

[7.140.25] Natural character. Where a Development Plan required that development "should not only preserve but should also enhance the natural character of the zone or assist in the re-establishment of a natural character", it has been held that, when determining whether a proposal should receive development consent, more weight is to be given to the question of whether the proposal assists in preserving, enhancing or re-establishing the natural character than to a comparison with existing development in the locality: *City of Mitcham v MOL Pty Ltd* (2003) 85 SASR 279; [2003] SASC 166; *City of Burnside v City Apartments Pty Ltd* [2004] SASC 294 at [12].

[7.140.30] Nature of change in locality. Whilst change may occur in a locality over a number of years, the nature of such change should be governed by the provisions of the Development Plan in force at any given time: *Forest v Holdfast Bay CC* [1999] 6 SAPED 164.

[7.140.35] Zoning objectives. It is a planning precept, especially in built-up areas, that the existing character of a locality and zoning objectives must be carefully balanced: *Rainsford v Burnside CC* [2000] SAERDC 7; *Courtney Hill Pty Ltd v SAPC* (1990) 59 SASR 259; 69 LGRA 351.

[7.140.40] Two storey dwelling. The predominance of single storey dwellings in a locality does not preclude the erection of two storey dwellings in such a locality: *Sinclair v Burnside CC* [2002] SAERDC 14.

[7.140.45] Allotment. The fact that a development proposes allotment widths less than that which is characteristic of the locality is only of some moment with respect to future development if, by the construction of the development, the character of the locality is altered in some undesirable way: *Bach v Burnside CC* [2001] SAERDC 89.

Cases

[7.140.67] Assessment of locality. Expert planning witnesses differed in assessment of relevant locality due in part to different definitions adopted of area demonstrating character of policy area – *Held:* Amenity of locality must be judged by reference to locality as a whole rather than by reference to houses located closest to adjoining zone (*Lanzilli Holdings Pty Ltd v Corporation of the City of Campbelltown* (1982) 32 SASR 85) – larger area provided better indication of policy area's character: *Barossa Projects Pty Ltd v The Barossa Council* [2008] SAERDC 8 at [9].

[7.140.70] Retention of existing character. Application to demolish existing detached dwelling and construct two single-storey three bedroom group dwellings with common driveway – *Held*: On particular site proposed development would introduce a form of development which, in terms of density, siting and orientation, would fail to meet provisions of Development Plan that new developments complement predominant architecture, streetscape and low density character of existing developments within locality: *Holman v Mitcham CC* [1999] SAERDC 43.

[7.140.75] Predominant pattern of development. Application for three double-storey group dwellings in historic zone and near dead-end street with pattern of development that contrasted with surrounds – relevant policies sought development maintaining historic character, and had regard to character, of immediate locality – development could not be "inconsistent with the predominant

[9.0]

Planning Law Dictionary

About this dictionary

This Planning Law Dictionary provides commentary on words and phrases that are not defined in the *Development Act 1993* (see, eg, s 4 ("Interpretation") at [3.4]) or the *Development Regulations 2008* (see, eg, DR sch 1 ("Definitions") at [4.201]) but which have received judicial consideration in planning cases. It should be borne in mind that meanings accorded to such words and phrases are heavily dependant upon the context in which they are used (such as the provisions of a relevant Development Plan) and, as such, should be used as a guide only.

[9.20] "Accessory use". An accessory use, although associated with a principal use, is a separate, independent use and not part of the principal use: *Claude Neon Ltd v West Torrens CC* (1982) 29 SASR 260; 49 LGRA 31.

[9.40] "Above natural ground level". The court had to decide how many storeys a proposed building would have "above natural ground level" in an area, the topography of which had been shaped and reshaped over decades. The court substituted the phrase "existing ground level" and considered the height and mass of the proposal in the context of how it would be viewed from various points in the area, compared with other buildings: *Mila Enterprises Pty Ltd v City of Holdfast Bay* [2005] SAERDC 34.

[9.60] "Accommodation". The primary meaning of accommodation is the act of accommodating. Its meaning will vary according to context: *Paradise Development (Investments) Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 139.

[9.80] "Addition to a building". It is not necessary that a wall of the dwelling be breached and walls and the roof extended, to enlarge the dwelling, for a construction to be an "addition" to a dwelling. A commonsense interpretation of the words "addition to a building" would include a structure that is added to or adjoins an existing building: *Gouskos v City of Marion* [2008] SAERDC 19 at [16].

Cases

[9.80.5] Covered deck area to adjoin (without necessarily being affixed to) part of rear wall of existing dwelling in paved area and would extend to replace in part existing pergola that may have been attached to existing dwelling – to be closed on one side by wall with windows and door – *Held*: Development an "addition to a building" (the building being existing detached dwelling) in same way that deck or verandah might be added to dwelling: *Gouskos v City of Marion* [2008] SAERDC 19.

[9.100] "Aerial". A television transmission reflector dish that was 3.65m in diameter and 4.3m high has been held to be an "aerial": *Boeck v Glenelg CC* [1995] EDLR 161; (1995) 2 SAPED 31.

[9.110] "Agriculture". In ordinary usage, agriculture means the cultivation of land and includes growing crops, forestry and raising stock. It means farming in the wider sense: *City of Mitcham v MOL Pty Ltd* [2003] SASC 166 at [66]. See also [7.30.50].

[9.120] "Agricultural activity". The term "agricultural activity" in a Development Plan has been held, by reference to the context in which it appeared and, in particular, to the objectives for the relevant zone, not to include viticulture: *City of Mitcham v MOL Pty Ltd* (2003) 85 SASR 279; [2003] SASC 166.

[9.140] "Ancillary". The context in which the word "ancillary" was used in a Development Plan did not suggest that the particular land use had to be "essential" to the primary development; rather, it had to be subservient, subordinate, ancillary or providing support to the primary land use: *Koker v City of Port Lincoln* [2006] SASC 55 at [69]. In the context of a Principle of a Development Plan that emphasised that social and recreational facilities were to be principally ancillary to any youth camp land use, it has been held that the "[t]he word 'ancillary' to my mind is directed to use, activities, purpose and linkages with existing uses and users, and unless clearly catering or likely to cater for others, and/or become the dominant use/activity in its own right, built form size is not a significant ingredient": *Alexander v District Council of Robe* [2009] SAERDC 4 at [39] per Commissioner Green.

For commentary on the meaning of "ancillary" in the context of reg 4 ("Interpretation"), see generally under [4.3].

Cases

[9.140.5] Application by church for recreation hall, to be used in conjunction with other facilities – existing youth camp and approved church/mixed use development and land uses – recreation hall only to be used by persons attending and using site for camping-residential purposes – Development Plan required development on property "should principally be accommodation and ancillary social and recreation facilities" – *Held:* Proposal likely to be ancillary to existing and approved uses: *Alexander v District Council of Robe* [2009] SAERDC 4.

[9.160] "Antenna". A television transmission reflector dish that was 3.65m in diameter and 4.3m high has been held to be an "antenna": *Boeck v Glenelg CC* [1995] EDLR 161; (1995) 2 SAPED 31.

[9.180] "Apartment". An apartment forms part of a residential flat building: *Paradise Development (Investments) Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 139.

[9.200] "Area". Where a lack of precision and consistency existed in the wording of a Development Plan, it has been held that references in some policies appearing in the Development Plan to such expressions as "area" and "locality" may refer essentially to the same tract of land: *Poole v Unley CC* [1998] EDLR 211; (1998) 5 SAPED 52; *Claridge v Unley CC* [1999] SAERDC 17; (1999) 6 SAPED 86. There may be circumstances in which the word "area" is used in a Development Plan as synonymous with the use of the word "locality" elsewhere in the Development Plan: *Tysoe v Unley CC* [1998] EDLR 613; (1998) 5 SAPED 100; *David Cheney Pty Ltd v Unley CC* [1998] EDLR 720; (1998) 5 SAPED 116. In other circumstances, that may not be so: *Alvaro v Charles Sturt CC* [1999] SAERDC 6; *Thorpe v Charles Sturt CC (No 2)* [1999] SAERDC 64. For further discussion of the meaning of the word "area", see also *Sabatino v City of Unley* [2004] SAERDC 31.

[9.220] "Attached housing". The term "attached housing" is a generic planning or architectural term that generally encompasses several building forms that are joined side by side and generally of more than one storey: *Nevarc Nominees Pty Ltd v City of Victor Harbor* [2004] SAERDC 27.

[9.240] "Average allotment width". For a case where opinions of expert witnesses varied on the way in which "average allotment width" should be calculated, and on the relationship between allotment width and the desired character of a zone, see *Playford Homes Pty Ltd v City of Mitcham* [2007] SAERDC 51.

[9.260] "Basic needs and facilities". A reference to "basic needs and facilities" for holiday makers and visitors to holiday settlements includes meals and drinks and establishments providing them: *Penley v SAPC* [1994] EDLR 109; (1994) 1 SAPED 35; *Penley v DAC* [1995] EDLR 577; (1995) 2 SAPED 143; *Hanna v Yorke Peninsula DC (No 2)* [1999] SAERDC 36.

[9.280] "Beyond economic repair". A Development Plan provided that a Heritage Place should not be demolished unless it was "beyond economic repair" and represented a risk to public safety. The meaning of "beyond economic repair" involved an objective test which should not depend upon the financial means of the person proposing the demolition. The issue was whether the cost of repairing the building to a standard allowing it to be used, would be less than the cost of replacing the building with another suitable for the location and the use desired: *Shackley v Town of Gawler* [2005] SAERDC 108.

[9.300] "Boarding house". The ordinary meaning of "boarding house" is a place that provides meals as well as accommodation. It is not correct to say that, in a planning sense, "boarding house" includes a place for lodging where no meals are provided: *Strata Corporation 4922 Inc v Norwood, Payneham & St Peters City C* [2001] SAERDC 68.

[9.320] "Builder's yard". A "builder's yard" is a yard in which materials or stores, used or required by a builder in the course of carrying out his trade, occupation or calling, may be found. A consideration of the definitions of "yard" in the *Shorter Oxford English Dictionary* makes clear that a yard is an outdoor area of land, the sides of which are enclosed by a building or buildings, or a wall.

An open area at the rear of a workshop used for industry as well as storage, in conjunction with the workshop, has been held not to be a yard and therefore not a builder's yard: *Taylor v City of Onkaparinga* [2003] SAERDC 76.

[9.329] "Centre". When used as a town planning description rather than a marketing term, the word "centre" implies "... premises of considerable size and, generally, the presence of a number of elements related to an overarching kind of land use. A single shop is not a shopping centre, but a group of shops may be. A single doctor's consulting room is not a medical centre, but premises containing the consulting rooms of a number of health practitioners may be". Similarly, a single exercise circuit occupying 80sq m in premises containing other non-recreational uses is not an indoor recreation centre for town planning purposes: *Willcocks v Corporation of The City of Whyalla* [2009] SAERDC 23 at [14] per Cole J.

[9.335] "Close proximity".

Cases

[9.335.5] Development Plan stated intent for zone was "[m]edium density residential development ... in close proximity to centres and other suitable locations" – *Held:* In town planning terms, "close proximity" means "a location near and together with the centre zone and centre type land uses, for a person on foot moving to/from the subject land, so that a near-close location makes sense to both support centre type uses and for the convenience of a greater number of people who may choose to live in a medium density development": *Debut Developments & Debut Building Pty Ltd v The Barossa Council* [2008] SAERDC 68 at [39].

[9.340] "Commercial". Caution is needed when looking at the word "commercial" as used in planning schemes out of South Australia. The word may attract a different connotation elsewhere. In some New South Wales planning laws, the word is used to deal with uses that are business uses generally. A brothel has been held to be commercial premises: *Walsh v Bankstown CC* (1997) 96 LGERA 62.

[9.360] "Commercial development". It has been held that the term "commercial development" in a Development Plan was not a wide, all encompassing one, synonymic with "business" but was more circumscribed: *Norris v Onkaparinga CC* [1998] EDLR 339; (1998) 5 SAPED 62.

[9.380] "Community facilities". In considering the meaning of a reference to "community facilities" in a Development Plan, it has been stated that "'community' usually refers to a community of interest, be that interest of a sporting, religious, recreational, educational or other nature": *Urquhart v Mount Gambier CC* (1995) 89 LGERA 57; 2 SAPED 146. In the context of town planning, a commercial use such as a hotel is neither a community facility usually or commonly associated with residential use, a local community facility, of a local community nature, nor of a local area function: *Nicole Bay Pty Ltd v DAC* [2005] SAERDC 62.

[9.400] "Compatible". Where a principle of development control contained in a Development Plan calls for alterations and additions to existing developments to be "compatible" with the siting of existing buildings, it does not require that there should be a sameness with the siting of existing buildings; compatibility is all that is required. A proposal which would change the spatial relationship between the main buildings on the subject land and the boundaries of the land with abutting lands need not necessarily be ruled out: *Jones v Mitcham CC* (1998) 5 SAPED 105.

Incompatibility is occasioned by inappropriate design, siting, massing, and scale relationships, not by the mere fact of, for example, a two-storey dwelling being sited next to a single-storey dwelling: *Lee v City of Mitcham* [2003] SAERDC 55; *Just v City of Mitcham* [2008] SAERDC 37 at [44].

[9.4002] Contemporary. Where the desired future character statement of a Development Plan called for dwellings of "contemporary" design but gave little guidance as to what was intended by the term, the use of that term was said to be seductive; inviting the proposal of a building of a modern "of-the-day" design absent of many aspects that relate to its context. However, in a locality