

## *Regulated Trees – what is development that is “reasonable and expected”?*

### *Savoy Developments Pty Ltd v Town of Gawler [2013] SAERDC 32*

This recent decision from the ERD Court is the first instance that it has considered whether *“development which is reasonable and expected would not otherwise be possible”* unless Regulated Trees were removed.

The development application the subject of the appeal proposed the removal of two regulated trees, both of which were located within an approved subdivision for which titles had not yet been issued. The trees were located within approved lot 42, but their canopies extended into approved lot 43.

The subject land was located within the Residential Zone of the Council’s Development Plan, and the subdivision had occurred to accommodate residential development.

During the assessment of the relevant subdivision application, the Council had worked with the developer to ensure that the allotments were designed so that the subject trees (and a number of other trees within the proposed subdivision) could be retained.

Both the appellant and the Council agreed that “dwellings” were expected forms of development on the approved lots. On this basis, the Commissioner determined that the following factors were relevant:

1. the ability of each lot to support a dwelling; and
2. whether such a dwelling might be so constrained by the limitation of the subject trees that it would be unreasonable to require someone to construct it.

Concerning the first factor, it was agreed between the parties that a dwelling could be accommodated on each approved lot without encroaching into the tree protection zones.

In relation to the second factor, the appellant submitted that the construction costs of a dwelling on either of the approved lots would significantly increase due to the presence of the trees, particularly as it would likely require a custom-designed dwelling to be constructed on the lots, rather than a standard, off-the-plan, “project” home. As such, the appellant submitted that the retention of the trees prevented

development which was reasonable and expected, from proceeding.

The Commissioner accepted that the construction costs resulting from the need to build a site specific design to avoid damage to regulated trees may, on occasions, be relevant to the consideration as to what is “reasonable and expected”.

However, the Commissioner found that construction cost was not a relevant consideration in the present situation as:

- the land available for a dwelling was not so constrained as to require any obviously unusual dwelling shape or form; and
- the Commissioner was not satisfied on the evidence led by the appellant that only a “custom” designed dwelling could be located on the lots.

Further, the Commissioner determined that even if construction costs was a relevant consideration, that there was insufficient evidence before her to determine what the market might reasonably expect to pay for a dwelling on the lots and what the market may actually be required to pay for such a dwelling.

The “take home” message from this case is that construction costs can be relevant to determining whether development which is reasonable and expected will only be able to occur if a regulated tree is removed.

However, in the context of residential land, to establish that development which is reasonable and expected cannot occur unless a regulated tree is removed, an applicant must provide sufficient evidence in this regard, such as:

- proof that the available area for a dwelling is unusual in shape, or too constrained to accommodate a relatively standard dwelling footprint; or
- proof that the costs of undertaking development on the land are higher than what the market would be prepared to pay for the dwelling.

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