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When is a dwelling a "detached dwelling"? – the goalposts shift again

Paior & Anor v City of Marion & Ors (No. 3) [2014] SAERDC 42

As a result of several ERD Court and the Supreme Court judgments, including *McNamara v City of Charles Sturt & Anor* [2001] SASC 368, *Kermode v City of Mitcham* [2007] SAERDC 57 and *City of Port Adelaide Enfield v Moseley* [2008] SASC 88, the way in which applications for dwellings may lawfully be processed by councils has undergone significant change.

Where an application proposes the construction of a new dwelling on land, that dwelling is not a "detached dwelling" as a matter of law unless the site upon which the dwelling is to be located comprises an allotment of land or otherwise provides the owner of the dwelling with similar, exclusive and unalienable tenure.

This is for two reasons:

- firstly, the Courts have determined that where a developer intends to divide land in the future, it is inappropriate for a relevant authority to determine a related built form application prior to the division because:
    - logically, in the view of the Courts, the division of land comes before the approval of any development of that land; and
    - to do so has the potential to fetter the relevant authority's discretion to determine the land division with regard to the relevant provisions of the Development Plan; and
    - the nature of the division will necessarily bear upon the decision to grant consent to the related built form;
- secondly because the definition of "detached dwelling" in Schedule 1 of the *Development Regulations 2008* requires that the dwelling be *"on a site that is **held exclusively** with that dwelling"* (our emphasis);
    - the Courts have determined that the term "held exclusively" denotes exclusive and inalienable rights to the owner of the dwelling, which can only be achieved through the grant of title;
    - in the context of development applications, the Courts have determined that, at the very least, "there must be a commitment, in the form of an application to divide the subject land, lodged prior to or contemporaneously with the application for the dwelling, or evidence of the creation of some other appropriate and sufficient form of tenure" (*Kermode* at [29]).

As a result of these decisions, where an applicant proposes a "detached dwelling" where the dwelling's site does not comprise an allotment of land, councils have been determining the nature of the development to be an undefined "dwelling" or are otherwise requiring lodgment of a land division application and ensuring that the land division is approved prior to or together with the built form application.

The *Paior* judgment has taken this line of reasoning considerably further.

This judgment related to two section 86(1)(f) reviews commenced by the Paiors in relation to two development applications, one lodged in 2011 and one lodged in 2013. The 2011 development application proposed a single, two-storey dwelling on a site which was not an allotment, nor had an approval been issued for the creation of an allotment. The Council had determined the nature of the dwelling to be a "detached dwelling" as it had been provided with a copy of a plan of division and was informed that the land division would occur after the built form application was approved (the subsequent land division application was lodged after the grant of Development Plan consent to the dwelling application and received full development approval prior to the dwelling application receiving full development approval).

In its decision on the 2011 application, the Court found that the dwelling was not a "detached dwelling" at the time that this application was assessed and that the dwelling only became a "detached dwelling" when the approved plan of division was **lodged for registration at the Land Titles Office**.

This decision is significant as it means that an application for a dwelling cannot be determined to be a "detached dwelling" (or, for that matter, a semi-detached or row dwelling, each definition for which also requires a site that is "held exclusively" with that dwelling) unless and until a land division application has received full development approval and a section 51 certificate from the DAC and the approved plan of division lodged for registration (necessitating the payment of stamp duty and all other fees and taxes associated with the creation of a new allotment).

Given the state of the South Australian economy and the already precarious lending conditions facing developers which, in turn, is increasing pressure upon them to seek approval for built form applications as soon as possible, we consider that this judgment will create considerably backlash amongst developers and may, finally, lead to reform of the relevant definitions in Schedule 1.

In the meantime however, the judgment of the ERD Court is clear and means that councils will need to reassess the way in which dwelling applications are processed and determined.

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