LG Alert – Two important decisions from the ERD Court to consider for 2019

In December 2018, the ERD Court delivered two judgments which are of importance for any Council officer involved in monitoring State Commission Assessment Panel development assessments and the assessment of development applications generally.

Those decisions are:

Barrio Developments Pty Ltd v State Planning Commission [2018] SAERDC 44 ("Barrio"); and

Inglis v District Council of Grant & Ehomes Pty Ltd [2018] SAERDC 46 ("Inglis").

Barrio is a rare decision by the ERD Court to refuse to allow a council (in this case, the City of Holdfast Bay) to be joined as a party to a planning appeal against a decision made by the State Planning Commission.

The appeal concerned a decision of the SPC to refuse an application proposing the construction of a multi-storey residential flat building with associated car parking and landscaping, in Glenelg North,

Section 88 of the *Development Act 1993* allows the Court to grant applications for persons to be joined to planning appeals and provides that these applications may be declined on a number of grounds.

In this case, the Council argued that it should be joined to the proceedings because reasons:

- it is the local planning authority;
- it is the owner of nearby reserves; and
- was of the opinion that the proposed development had a number of planning deficiencies which it wished to be heard on.

The Council relied on an earlier decision of the ERD Court in *Barrio Developments Pty Ltd v Development Assessment Commission* [2017] SAERDC 21 where the City of Campbelltown had successfully joined a planning appeal by Barrio against a decision to refuse a development application within that council area.

In refusing the application for joinder, the ERD Court found that:

- the Council's interest in the proceedings was weak and unsubstantiated. The planning concerns it had articulated had been addressed in an amended design. Whilst the Council maintained that the traffic and parking impacts of the proposal were of concern, it did not articulate those concerns;

- the Council had been aware of the Category 2 notification of the development application, but had not made a representation. Further, the Council had not made its application for joinder promptly. The application was made six weeks after the Council became aware of the appeal;

- the planning deficiencies identified by the Council had been largely resolved through an amended proposal put forward by the appellant; and

- the proposed development would not impact the Council's roads or reserves in any material manner.

Barrio is a timely reminder for councils to be aware that joinder of planning appeals for SCAP decisions are not guaranteed. For joinder to be granted, councils must hold valid planning concerns and/or demonstrate tangible impacts on roads, reserves and/or infrastructure, must, as far as they are able to, participate and engage in the planning assessment process as an interested party and, must also make a joinder application promptly.

Inglis was a third-party appeal against a decision of the Council to approve a land division proposing the division of 24 hectares of land located at Carpenter Rocks Road, south-west of Mount Gambier, into 102 allotments which ranged between 3,902m² and 1,300m² in area.

The proposed division, which was located within the Rural Living Zone, Country Living Policy Area 10 of the Council's Development Plan was a non-complying form of development. In the Policy Area, all land divisions were non-complying except those creating allotments greater than 3,000m² where sewer or CMWS connections were available and 5,000m² in other circumstances. The SCAP had issued concurrence to the Council's decision.

In defending its decision, the Council argued that the Zone and Policy Area called for "*low density residential*" development and that the proposal achieved that; 1,300m² was the minimum lot size to achieve such density.

The Court rejected the unopposed expert planning evidence submitted by the Council and the developer in finding that the proposed allotments were significantly undersized when viewed against the provisions of the Rural Living Zone. The Court determined that the proposal was seriously at variance to the Development Plan. Further and in any event, the Court determined that the proposal warranted refusal on its merits.

This case is a timely reminder of the ERD Court's approach to determining whether a development is "seriously at variance" to the Development Plan.

In this case, the ERD Court considered the allotment sizes to be a grave departure from the Zone and Policy Area in circumstances where the provisions of the Zone envisaged minimum allotment areas of 5,000m² and the non-complying 'trigger' was allotments of under 3,000m² in area. The allotment sizes were considered to be low density housing as envisaged in townships and settlements, not in a Rural Living Zone.

When considering land divisions which are non-complying as a result of their area and/or which are lower than the minimum envisaged in the Development Plan, councils must consider how large the discrepancies are and, if significant, must consider whether the proposal is seriously at variance with the Development Plan and should be refused on this basis.

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