The Courts' Approach to Ecologically Sustainable Development Provisions Within Development Plans

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We do not have a choice about creating a sustainable future. There is simply no other choice, if we are to continue to live in a habitable earth. Due to the realisation that the impacts of humans on their supporting environment must be reduced, the concept of ecologically sustainable development ("ESD") has arisen, and has been the subject of much international, national and local discussion. However, despite the rhetoric, it is apparent that most urban development occurring within South Australia is still not ecologically sustainable.

Although it is recognised that other mechanisms, such as financial incentives, can encourage more extensive adoption of ESD, it is evident that one of the most effective methods for the implementation of ESD practices is suitably drafted planning and development control legislation. Planning and development control systems are already used to extensively control the location, form and character of development, hence, it is clear that such systems can also be used to promote ESD.

Development Plans created under the *Development Act*, 1993 (SA) provide detailed guidance regarding development considered desirable for any given geographical area and are the primary document against which development proposals will be assessed. The requirements of Development Plans directly and significantly affect the nature of development occurring within South Australia. Indeed, if a development is assessed by a relevant authority as being seriously at variance with the relevant Development Plan it must not be granted consent.

Importantly, a study of the provisions of a broad selection of Development Plans applying to different parts of Metropolitan Adelaide has revealed that, although there is variation between Plans and the provisions are not as consistent between Plans as are provisions relating to traditional planning matters, there is significant support for the implementation of ESD at the practical level within the Development Plans through provisions relating to: energy conservation and solar energy opportunities; vegetation conservation; water conservation and management; pollution minimisation; the protection of biological systems; transport; and coastal area protection.

Therefore, given that ESD is not generally actually occurring, it is important to consider the courts' approach to ESD provisions within Development Plans.

The Status of Development Plans

At the outset it should be noted that South Australian courts have firmly established that development proposals are to be assessed against all relevant Development Plan provisions (both the general and the specific) and that the Plans are to be interpreted flexibly. No provision of a Development Plan is mandatory, irrespective of the form of language used. Whether a particular provision will be "more important than other standards and objectives in the Development Plan must depend ... on the particular proposed development and all the surrounding circumstances". Also, there is no general rule that "the planning principles stated in respect of a particular zone override or take priority over planning principles of general application". Indeed, if a proposal is contrary to the specific principles applicable to a zone, it may still warrant consent if it is consistent with other principles of general applicability.

The courts do not generally treat ESD provisions as issues of crucial importance within the balancing process necessary

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* This article is extracted directly from Nairn, "Is Ecologically Sustainable Development Being Promoted Within South Australia's Planning and D velopment Control System?" (Honours Thesis, LLB, Adelaide University, 1996)

in assessing the merits of a development proposal. For example, without going into detail about the merits of the cases, it may be observed that of at least nine cases recently going to the courts on appeal in respect of development consent or refusal or conditions attached to a consent involving issues of vegetation conservation, coastal areas, and overshadowing, all but two developments were approved subject to conditions. This article will consider the courts' approach to ESD provisions in a variety of circumstances.

The Weighting of Provisions

A recent example of the weight accorded by the courts to ESD provisions is given by the case of *Holden Hill Estate v City of Marion & Corporation of the City of Noarlunga*, where the Planning Appeal Tribunal ("PAT"), during the examination of the merits of a proposal to create 169 residential allotments and one industrial allotment (with several "reserve" areas) over 15.75 hectares of undeveloped coastal land, stated in relation to stormwater disposal arrangements,

"It might well be that stormwater from the subject residential development will discharge directly into the "Marine Environment" contrary to Principle 11(f), depending upon what is meant by the words "direct discharge" in that Principle. I think that the best that can be done is to discharge as much stormwater as is practicable into Field River, thereby complying with Principle 11(f); and to control the discharge that has to go directly into the marine environment, to obviate the deposit of debris and silt therein, and to slow down the rate of discharge and hence reduce erosion. The alternative would be the virtual refusal of the proposed residential land division. That would cut across the aims of the Development Plan. It is to be remembered that the subject land (and other lands to the north) are set aside for residential purposes, in the main. ...

I have not overlooked Principle 11(a) of the Residential (Field River Valley) Zone. That says that development should incorporate a stormwater management scheme that encourages " ... on site water harvesting to maintain garden and lawn areas". I cannot see how that can be incorporated into the present land division proposal unless the number of residential allotments is considerably reduced. And even then, it does not appear to be a practical proposition, on the evidence. In any event, one cannot be certain whether that Principle is directed at the land division stage or the consequent land use stage. I think that the latter is probably the case. As I have indicated, I do not think that a substantial reduction in the number of allotments is warranted for the reasons that I have already given".

In this case, the PAT overturned the City of Marion's refusal of consent to the proposed land division, and found it unnecessary to impose stringent stormwater management conditions despite this being the predominant issue of concern on the facts. Clearly, from the statements above, the PAT did not feel that these issues of concern should override the broader desire to have residential development in the area.

Similar importance was attached to the residential zoning of very steep land in the case of *Roche Bros Pty Ltd v City of Burnside* where, although it was noted that the land division need not necessarily be approved due to the zoning given, it was felt that substantial weight should be given to the residential zoning and the compliance of the development with the residential zone objectives and principles. Subsequently, a residential subdivision was permitted by the PAT despite significant concerns about the safety and suitability of proposed roads, access to the proposed allotments, adequacy of water supply, fire safety and drainage provision amongst other matters.

The Interpretation of Ambiguous Provisions

Also, a conservative approach to the interpretation of ambiguous provisions has been exhibited by the courts, thereby effectively promoting development over the protection of environmental values. For example, in *Manthorpe v Quatern Pty Ltd & Lower Eyre Peninsula District Council*, Justice Jacobs of the Supreme Court held that the Planning Appeal Tribunal had erred in law by misinterpreting the proper meaning to be given to "coast", "coastal" and "coastline". In this case, the relevant zone was a Rural Coastal Zone, the objective for which was, "the retention of the coast primarily in its natural state", supported by the principle that, "development should not detract from the appearance of the coastline, by adversely affecting coastal features, such as native vegetation or significant views. The Planning Appeal Tribunal had found that all 222.2 hectares of a peninsula in the Coffin Bay area proposed to be subdivided into holiday home allotments of varying sizes formed part of the "coast", and accordingly that it was inappropriate for any form of development to occur in the area, even though the relevant proponents had sought to design the development in such a way as to retain significant amounts of native vegetation. They came to their decision following this determination:

"Upon consideration, it would seem to us that the word 'coast' must, in the objective, be taken to mean something more than just the point at which the land meets the sea or the sea-shore alone. When one considers the extent of the land dedicated to the rural coastal zone and the principles of development control formulated to assist in achieving the stated objective for that zone, the word must be given a wider connotation than that. We think that it must be interpreted as meaning that tract or region of land in respect of which the proximity of the sea impacts directly upon its character and amenity. As we interpret the term, it envisages no narrow concept. Its geographical extent may vary greatly. In an area such as the one now under consideration, the many bays, inlets and promontories ensure that the region is extensive. In our opinion, the word 'coastline' in the commentary is to be given no narrower connotation. ... On our interpretation of the

word, the whole of the subject land falls within the 'coast', as well as within the rural coastal zone".

Justice Jacobs , disagreed with this interpretation, stating:

> "After anxious consideration I have come to the conclusion that the tribunal has erred in foreclosing any form of development of the subject land by reference to the planning criteria it has invoked. It is one thing to say that the whole of the subject land is a "coastal" part of the rural coastal zone, but it is quite another to say that the whole of it is governed by the criteria which protect the coastline. The Development Plan itself, in its description of a rural coastal zone expressly contemplates tourist and holiday accommodation in such a zone - and one must infer in the coast areas of such a zone rather than in the farming or rural hinterland - but it is at pains to protect the coastline. I do not think it is permissible to foreclose all such development by extending the concept of, and the planning criteria appropriate to, the coastline itself to the whole of the subject land."

In reaching his decision, Justice Jacobs clearly felt that it was important that the relevant Development Plan had failed to incorporate provisions explicitly prohibiting development in the area. This reasoning is somewhat questionable given that earlier cases have suggested that the format of the Development Plan should not suggest some prima facie right of development (or prohibition) if a given type of development is not classified as non-complying or complying. Planning authorities have a "duty to examine each application upon its merits, and from a neutral base". Also, due to the large variability in the approaches of different Councils to lists of complying/non-complying development, it seems inappropriate to use such a distinction to support a particular interpretation of any one Plan.

It is interesting to note that upon remission of the case to the Planning Appeal Tribunal, the proposal was rejected by a majority predominantly on the grounds that: the proposal would interfere with the preservation of native vegetation, an aspect of great importance under the relevant provisions of the Development Plan for amenity reasons as well as any scientific/ conservation purposes; that the proposal did not form a "compact and continuous extension of a built up area", but would constitute a new development area not contemplated, and in fact discouraged, by the Development Plan as a whole; and, the land division would result in locational problems for future dwellings on a number of sites due the need to try and meet both the minimum high water mark setback and minimum road setbacks.

Balancing Developmental and Environmental Considerations

Importantly, where the environmental effects of a case have been firmly drawn to the courts' attention, the courts have performed a careful balancing of development and environmental concerns. The case of *Cusack v SAPC & Corporation* of the City of Port Augusta, shows the Full Bench of the Environment Resources and Development Court attempting to strike such a balance in deciding whether or not the construction of a boat ramp requiring the destruction of a small stand of mangroves should be permitted. The court accepted that mangroves "play an extremely important role in the ecosystem of the upper part of the Spencer Gulf" and that, "all existing mangroves warrant both preservation and protection". However, they also looked at the number, health and location of the mangrove trees, and their importance as a fish nursery and/or bird habitat relative to the facilitation of development on the foreshore and the re-establishment of mangroves in other areas. Here, due to the small size of the stand, it extremely limited contribution as a fish nursery, the extensive mangrove stands in the locality and the potential for re-planting of mangroves in the general area, the Court decided that the development should be permitted in this case subject to a condition that the Council undertake "serious and sustained endeavours to plant replacement mangrove trees" in two nearby areas.

These cases show that the facilitation of development is considered an important function of the courts. However, when environmental considerations are placed clearly before the courts, they will engage in a careful balancing of the different social, environmental and economic interests.