Supreme Court of South Australia

Mar Mina (SA) Pty Ltd v City of Marion & Anor [2008] SASC 120

By Vasiliki Danambasis – Associate – Norman Waterhouse

In Mar Mina (SA) Pty Ltd v City of Marion & Anor [2008] SASC 120, the Plaintiff sought judicial review of the Council's processing and subsequent assessment of a development application for a private primary school in a Neighbourhood Centre Zone. The Court had cause to consider:

- the validity of the Development Regulations which assign different forms of development to Public Notification Categories,
- the scope and operation of Section 33(3) 'reserved matters', and
- in what circumstances amended plans should be recirculated to referral bodies for further comment and re-notification.

His Honour Justice Debelle held that the Regulations assigning categories were valid and found no error with the Council's decision not to re-notify or re-refer the amended plans. Insofar as the decision on the merits of the application was concerned, Justice Debelle concluded that the grant of development plan consent was invalid because: the decision-maker failed to address the question whether the proposed development was seriously at variance with the Development Plan, and even if it had done so, it had regard to several irrelevant factors and failed to consider factors which were relevant to the assessment of the proposal; the proposed development was on a proper planning assessment 'seriously at variance'; and the decision to reserve consideration of a chain wire mesh fence three metres high did not accord with the intent of Section 33(3) and was an invalid exercise of that power. The Panel were of the view that the fence had a material bearing on the question whether development approval should be granted.

In considering the effect of Section 33(3) the Court concluded that: It is a power that must be exercised with great care. The primary purpose of [the section] is to enable approval of staged development. It might also be utilised to deal with something that is quite incidental to the development and does not effect the question whether development consent should be granted. Justice Debelle further supported his view on the basis that no development application had been lodged for the fence and therefore there was no specified matter on which the Panel could reserve its consideration.

Paradise Development (Investments) Pty Ltd v District Council of Yorke Peninsula & Anor – [2008] SASC 139

By Felicity Niemann – Associate – Norman Waterhouse

Hot on the heels of the Supreme Court decision of Mar Mina (SA) Pty Ltd v City of Marion & Anor [2008] SASC 120, the Supreme Court of South Australia delivered its decision of Paradise Developments (Investments) Pty Ltd v District Council of York Peninsula & Anor [2008] SASC 139, a further judgement considering the question of 'seriously at variance' and its consideration in planning assessment. The application for judicial review before the Supreme Court sought to set aside a development approval by the District Council of York Peninsula granting consent to the construction of nine self contained apartments.

The grounds for that application included, among other things; that the application had been incorrectly categorised, and was in fact a Category 3 development; that the proposed development was seriously at variance with the Development Plan and also that; the Council's delegate had failed to consider whether the proposed development was seriously at variance with the Development Plan. Similarly, to the decision in Mar Mina Justice Debelle held (at

paragraph [60]) that Section 35(2) of the Development Act 1993 ('the Act') requires that before a consent is granted, the planning authority must make an assessment that the development is not seriously at variance with the Development Plan. He opined that the planning authority had to perform two tasks. First, to consider the proposed development against the Development Plan (Section 33(1)(a)) and secondly, to consider whether the proposal was seriously at variance (section 35(2)). Following the decisions in Mar Mina and Paradise Developments, it appears that to avoid planning decisions (as to whether planning consent should be granted) being successfully challenged, Council administration should ensure it is clear on the face of all records that the delegate has exercised the duty at Section 35(2) of the Act.

This decision also provides an interesting consideration of what might constitute "tourist accommodation" and the full breadth of its meaning in the context of development assessment. Justice Debelle criticised the use of the term "...as an abstract singular used instead of concrete plurals" which "...has the capacity to lead to inconsistency". He therefore found, in the context of the Development Plan before him, (at Para [34]) that:

> "...tourist accommodation does not necessarily mean the provision of rooms or lodgings for tourists. It is capable of referring to all that accommodates the needs and desires of tourists. Tourist accommodation is, therefore, that which supplies the wants or needs of tourists or is a convenience to tourists. It is an expression that includes a range of services including provision of lodgings and the provision of food and refreshment as well as the provision of a wide range of other services. In this case, the context is the provisions relating to the Commercial (Port Vincent Marina) Zone."

On this analysis and without a clear definition or indication to the contrary, the scope of what might constitute "Tourist Accommodation" when assessing an application against the Development Plan is now quite broad.

Gould v Austral Tree & Stump Services P/L & Anor (No 2) [2008] SASC 149

By Thomas Ivey – Norman Waterhouse

The First Respondent ("Austral") was engaged by another body corporate to clear vines and olives from land at Clare, north of Adelaide, in conjunction with a land division development. The Second Respondent was a director of Austral. The offence arose when employees of the First Respondent attended the subject land to discharge the contract. The director of the contracting company, Mr Steinert, who directed the clearance, was known to the operations manager of Austral, Mr Macaitis. Hence, Mr Macaitis was comfortable to let Mr Steinert direct the employees of Austral. Mr Macaitis was also prepared to rely on Mr Steinert's assurances that all relevant approvals were in place. When the employees of Austral had completed the task of clearing the vines and olives, Mr Steinert directed them to remove 59 blue gums, one peppermint box and one long-leaf box. No approvals existed for the removal of these trees. In a separate action, a magistrate imposed a fine on Mr Steinert of $20,000 and a fine of $10,000 on his employer.

The Respondents had previously been prosecuted in the Magistrates Court for the offence under Section 26 of the *Native Vegetation Act 1991* for clearing native vegetation. The magistrate had acquitted them, but on appeal to the Supreme Court Her Honour Justice Vanstone made findings of guilt (*Gould v Austral Tree & Stump Services & Anor* [2008] SASC 124). The matter was adjourned so that submissions could be made on penalty. The current judgement is the result.

The Court noted that Austral had nothing to gain from the commission of the offence. The contract was not lucrative and Austral had effectively performed the illegal work for free. Counsel for the Respondents, in seeking to avoid a criminal conviction being recorded, submitted