South Australia

A Review of Recent South Australian Cases on Interpreting the Terms and Scope of a Development Authorisation (Part 1)

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1. Oakden Shopping Centre Pty Ltd v City of Port Adelaide Enfield

INTERPRETING THE TERMS AND SCOPE OF A DEVELOPMENT AUTHORISATION – MATERIAL TO WHICH TO HAVE REGARD – INCONSISTENCIES BETWEEN PLANNING AND BUILDING CONSENTS

Development authorisations are important documents insofar as they give rise to significant rights and obligations and have an enduring effect on the permissible use of land. The principles for determining the meaning of a development authorisation were considered by the Full Court of the Supreme Court in Oakden Shopping Centre Pty Ltd v City of Port Adelaide Enfield [2004] SASC 373.

The council had issued a Section 84 notice to Oakden Shopping Centre alleging that they had erected two pylon signs without approval. On appeal Oakden claimed that the council had granted development approval for the erection of the signs by way of two previous development approvals.

In February 1999 Oakden applied for provisional development plan consent for a supermarket, specialty shops, offices and tavern. The proposal plan made reference to two pylon signs. In seeking further information, the council wrote to Oakden suggesting that the freestanding sign should not exceed 10 metres in height and should be simple in design and message. Elevations and further details for the signs were sought. Oakden subsequently responded that all signage would be part of a separate application. In the course of considering the application various further plans and drawings were provided to council. The site plans continued to show the pylon signs as did one of the elevation drawings. The council granted consent in November 1999 subject to a number of conditions including condition 9 which read:

> *"No hoardings, flags, flashing lights, bunting or other advertising devices are to be erected or displayed on the subject site at any time, without the appropriate consent, in writing from council".*

In February 2002 Oakden made a new application for speciality shops, offices and tavern. This reflected a number of changes to the proposal while the supermarket component remained unchanged. Plans submitted by Oakden continued to show the pylon signs in a conceptual way only. In a letter from council seeking further information the council stated that signs were not part of the application and would need to be submitted as a separate application.

In May 2002 the council granted development approval for the supermarket component of the proposed development in reliance of the initial provisional development plan consent of November 1999. Subsequently the council granted provisional development plan consent in relation to the varied application. Although similar to the earlier conditions, condition 4 of this consent read as follows:

> *"Advertising signs are not part of this approval and separate application must be made to Council."*

A private certifier granted provisional building rules consent on 23 May 2002 in relation to the new speciality shops, offices and tavern. Documents before the certifier included plans showing signage tower elevations and the footing or foundation for a signage tower. The certifier also had before him a document entitled "*stormwater calculations and sign calculations*". This was prepared by Oakden's consulting engineers. It included several pages of engineering calculations in relation to proposed signage towers and three drawings related to pylon sign towers. It contained structural and design details of a signage tower 16 metres tall.

On appeal it was agreed that the private certifier had issued a provisional building rules consent which purported to approve the proposed pylon signs.

On 19 July 2002 the council granted development approval to the varied application. It attached 27 conditions being the same as those attached to the provisional development plan consent and provisional building rules consent. Those attached to the former included condition 4 quoted earlier.

The council had had the opportunity to examine the material that accompanied the provisional building rules consent before it granted development approval. In correspondence dated 28 May 2002 the Council advised Oakden that it had checked the plans to ensure that they matched the provisional development plan consent. No reference was made in the letter to the inclusion of the plans relating to the pylon signs.

Oakden subsequently erected two 16 metre high pylon signs on the land. On appeal it claimed that it had development approval for the signs.

The Full Court in its judgment made some important observations as to the principles to be applied in interpreting the terms of a development authorisation and as to the material which can be used to assist in this process. The Court found that the meaning of a development authorisation should be determined objectively. It involves determining the meaning that the terms of the authorisation would have to a reasonable person. Any subjective intention of the applicant for authorisation or of the relevant authority was therefore said to be irrelevant. As to the documents to which regard was to be had in determining the objective meaning the Court said as follows:

> *"The primary document is the development authorisation itself. This is the case whether one is dealing with a provisional development plan consent or with a development approval. It is the authorisation (here embracing a consent or an approval) the meaning of which is in question. But usually, perhaps always, a development authorisation will be meaningless without reference to the plans or proposals submitted by the applicant. In principle it must be permissible, when deciding the meaning, scope and effect of a development authorisation to refer to the plans or other documents constituting the proposal submitted for authorisation. This must be permissible when, as here, the development authorisation makes express reference to those plans, by referring to 'details and plans' submitted as part of the application ...*
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> *As to other documents, including correspondence between the applicant and the relevant authority, it is not possible to lay down a general rule. Generally, reference to other documents would not be permissible when one is considering the meaning and effect of a development authorisation. It is the authorisation, and documents expressly made part of it, that is to be interpreted.*
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> *A practical reason for this approach is that difficulties are likely to arise, with the passage of time, if the meaning of a development authorisation is affected by correspondence and other dealings between the relevant authority and the applicant. In this respect, a development authorisation is rather like an instrument of title. But there may be particular circumstances in which it is permissible to refer to other documents."*

These comments reinforce the importance of referencing any relevant plans or details in conditions of approval.

The Court went on to apply these principles to determine the meaning and effect of the first consent and development approval of May 2002 and that of the consent and approval of the varied application in July 2002 in light of the applications and plans that accompanied them and what was submitted in response to a request for further information.

With respect to the first consent, the reference to "*advertising devices*" in condition 9 was found to encompass structures such as the pylon towers. This conclusion was supported by the fact that the towers were substantial structures and that the plans submitted with the first application contained no detail of those pylon towers. Based on an interpretation of the consent, the application and the plans, it was concluded that the provisional development plan consent did not extend to permit the erection of the pylon towers. The Court said that it might be permissible in this case to refer to some of the correspondence between Oakden and the council insofar as that correspondence could be considered to constitute details submitted with the application, for the purposes of condition 1. If reference could be made to the correspondence, the Court found that it was clear that Oakden had written specifically stating that all signage would be part of a separate application.

The Court then turned its attention to the more problematic development approval where the private certifier had granted provisional building rules consent to the pylon signs. The Court said that at face value, the second development approval did not constitute an approval for the erection of the pylon signs. Condition 1 referred to the plans and details submitted with the varied application. That material provided

no further detail in relation to the pylon signs than was provided at the first stage. The Court found that, in any event, condition 4 on its face (taken in isolation from the provisional building rules consent) excluded the pylon signs from the scope of the consent.

Significantly, the Court found that the scope and effect of the conditions associated with the second development approval was not affected by the fact that the provisional building rules consent, referred to in that approval, related to the proposed pylon towers. This was a situation where there was a clear inconsistency between the provisional development plan consent and the provisional building rules consent. The provisional development plan consent did not extend to the pylon towers. The terms of condition 4 and, if relevant, the correspondence confirm that result.

The Court noted that the private certifier had failed to ensure that the two consents were consistent and that the council had also failed to observe the requirements of the Regulations insofar as it issued a notice of development approval where the two consents were not consistent. However, the Court found that the inconsistency between those two consents should not be resolved by giving to the development approval a meaning or effect that it did not have as a matter of law. While the Court suggested that the irregularity was regrettable, it found that it could not change the meaning of condition 4 as imposed on the provisional development plan consent. The proposed pylon towers had not been assessed against the Development Plan as required by Section 33(1)(a) of the Act and had not been granted a provisional development plan consent. Until such time as a provisional development plan consent had been obtained for the towers then the construction of them could not constitute an approved development.

The second development approval noted the 20 conditions attached to the earlier provisional development plan consent, including condition 4. The Court found that the meaning of that condition was fixed when that consent was granted and that the development approval did not reimpose the subject conditions, giving rise to a need to reconsider their meaning in light of the subsequent provisional building rules consent.

The Court went on to conclude that the development approval therefore did not constitute a development authorisation for the erection of the proposed pylon towers and that the council was able to issue the enforcement notice as the towers were not an approved development under Section 33 of the Act.

This decision is a good one for local government. While the task of ensuring consistency between consents is critical and, as shown in this case, can result in an unfortunate outcome if not performed properly; a failure to detect inconsistency in the subsequent granting of development approval will not generally amount to an authorisation of any substantive variations approved in the provisional building rules consent but not considered as part of the planning assessment for provisional development plan consent. The case also highlights the importance of making specific reference to plans and details of ongoing importance in conditions of consent.

2. Rivergum Homes Pty Ltd v District Council of Copper Coast

INTERPRETATION OF A DEVELOPMENT AUTHORISATION – RELEVANT MATERIAL – THE RELATIONSHIP BETWEEN A PROVISIONAL DEVELOPMENT PLAN CONSENT, A PROVISIONAL BUILDING RULES CONSENT AND A DEVELOPMENT APPROVAL – INCONSISTENT CONSENTS – THE GRANTING OF DEVELOPMENT APPROVAL DESPITE INCONSISTENT CONSENTS

Issues similar to those arising in the Oakden Shopping Centre case were considered by the Full Court of the Supreme Court in the decision of Rivergum Homes Pty Ltd v District Council of Copper Coast (2004) SASC 376. This appeal also raised important questions about how the terms of a development authorisation should be interpreted and as to the material to which one can have regard to in that process. There were similar factual circumstances where in this case a private certifier had also granted provisional building rules consent to a proposal that was inconsistent with the relevant provisional development plan consent with the council again issuing a development approval notwithstanding that inconsistency.

The proposed development was one for a dwelling of two storeys. At the rear of the dwelling was to be a balcony extending 3.2 metres from the alignment of its rear wall. The plans showed that the rear wall of the dwelling was to be some 4.7 metres from the rear boundary. The balcony was to extend 3.2 metres from the rear wall of the dwelling and would therefore be within a distance of 1.5 metres from the rear boundary.

Provisional development plan consent was granted subject to a number of conditions including conditions 3 and 8 which read as follows:

> *"Condition 3*
> *The onus of ensuring that this building is sited in the approved position on the correct boundary as per the site plan submitted is the responsibility of the owner"*

> *"Condition 8*
> *The dwelling is to be sited a minimum of 5.5 metres from the rear boundary."*

Rivergum subsequently amended the site plan by deleting the figure of 4.7 metres and substituting the figure of 5.5 metres, indicating an intention that the alignment of the rear wall of the dwelling would be 5.5 metres from the rear boundary. This alteration meant that the distance between the rear face of the balcony and rear boundary would be 2.3 metres. These plans were then referred to a private certifier who granted a provisional building rules consent.

The Court noted the role of a private certifier with respect to Section 89 of the Act and Regulation 89(1)(a) of the Regulations which authorise the certifier to assess a development against the Building Rules and grant provisional building rules consent. It noted that pursuant to Section 89(3) of the Act the certifier cannot grant a provisional development plan consent. By Regulation 89(2)(b):

> *"a private certifier must, in deciding whether to grant a provisional building rules consent, take into account the provisional development plan consent and any condition or notes that apply in relation to the provisional development plan consent (if such consent has been granted)."*

Section 97(1)(b) of the Act requires that a private certifier:

> *"ensure that any development authorisation given by the private certifier is consistent with any other development authorisation that has already been given in respect of the same proposal."*

The Court noted the obligation on a private certifier pursuant to Regulation 92(2)(c) to provide the council with a certificate that the provisional building rules consent is consistent with the provisional development plan consent and any applicable conditions or notes. The private certifier had thus granted provisional building rules consent for the dwelling with a distance of 5.5 metres between its rear face and the rear boundary, but only 2.3 metres between the rear face of the balcony and the rear boundary.

The council subsequently issued a development approval pursuant to Section 33(4) of the Act. That approval recorded the dates of the relevant consents. Attached to the approval was a copy of the conditions imposed on the provisional development plan consent, a copy of the private certifier's consent and of the plan stamped by the private certifier.

Rivergum commenced construction of the dwelling. An enforcement notice was issued by the Council alleging that Rivergum was undertaking development contrary to condition 8 by constructing part of the dwelling, namely the balcony on the first floor, within the said 5.5 metre set back. The dwelling was at an advanced stage of construction when the notice was served. On appeal in the ERD Court Rivergum claimed that the balcony was not part of the dwelling and that the dwelling as constructed complied with the relevant condition of the authorisation. The ERD Court found however that the balcony was part of the dwelling and that it therefore had been constructed in breach of condition 8.

Rivergum appealed against that decision to the Full Court of the Supreme Court. It argued that having altered the site plan for the purposes of obtaining provisional building rules consent such that the distance between the rear wall of the dwelling and the rear boundary was 5.5 metres and thereafter receiving development approval from the council, the council must have been satisfied that the consents were consistent. It was argued therefore that condition 8 should be construed by reference to the subsequent site plan and a reference to the distance between the rear face of the dwelling from the rear boundary. The council however argued that the words in condition 8 were clear and that the reference to dwelling clearly included a balcony. That meaning it was contended could not be affected by what was shown on the subsequent site plan submitted to the private certifier.

In interpreting the development authorisation the Court repeated the relevant principles that it had summarised in the earlier Oakden decision which include the following:

- a development authorisation is a unilateral document issued by the relevant authority;
- the meaning of a development authorisation is to be determined objectively;
- a development authorisation is an important document with enduring legal effects;
- the primary document is the development authorisation itself;
- it is permissible when deciding the meaning, scope and effect of a development authorisation, to refer to the plans or other documents constituting the proposal submitted for authorisation at least when the authorisation makes express reference to such plans and details.

Applying those principles the Court found that, treating the provisional development plan consent as a self-contained document, the reference in condition 8 to the siting of the dwelling a minimum of 5.5 metres from the rear boundary applied to all parts of the dwelling including the balcony. Even having regard to the proposal plans, the balcony was clearly found to be part of the dwelling. The siting proposed by Rivergum on the site plan could not it was said effect the obvious meaning of condition 8.

What then of the private certification of the plans submitted for provisional building rules consent? In light of the interpretation of the provisional development plan consent, those plans proposed the siting of the dwelling in a position contrary to condition 8 of the provisional development plan consent. The Court suggested that the private certifier may well have failed to discharge his duty under Section 97(1)(b) of the Act and under Regulation 89(2)(b) of the Regulations. He had not identified the inconsistency between the proposed siting of the dwelling on the plans submitted to him and the requirement imposed by condition 8 of the provisional development plan consent. As the private certifier had no power to grant a provisional development plan consent, the Court said that it follows that he had no power to vary the provisional development plan consent granted by the council (see Regulation 89 and Section 89(3) of the Act). Whether the outcome of this case would have been different had the provisional building rules consent been granted by the council is an interesting point.

The Court then had to resolve the effect of the inconsistency between the two consents where the latter consent showed the proposed dwelling in a position that did not comply with the earlier consent. Having regard to the provisions of Section 42(2) of the Act which deals with conditions, the Court noted that a condition attached to a consent will not only bind the person who undertakes the relevant development but also those who acquire the benefit of the consent. Accordingly, conditions attached to a provisional development plan consent will continue to have effect. In this regard the Court said:

> *"They do not lose their effect because a provisional building rules consent is granted, or because a development approval is issued. The scheme of the Act assumes the continued operation of each of the provisional consents, subject to a later variation or termination of either one of them. Section 44(4) of the Act makes it an offence to contravene or fail to comply with a condition imposed on a consent."*

The Court concluded that the meaning of condition 8 of the provisional development plan consent could not be affected by the actions of the private certifier.

Despite the inconsistency, the council had issued a development approval. By doing so the suggestion was that it had failed to discharge its obligation under Regulation 46(1) to ensure that the two previous consents were consistent with each other. The Court found that this did not alter the obligation of Rivergum to comply with its provisional development plan consent. In this regard it said:

> *"The issue of a development approval under Regulation 46 is, in part, confirmation that all necessary consents have been obtained. But those consents continue to operate, and the conditions attached to them continue to bind: Section 33(1), (2), (3), (4), Section 42(2) and Section 44(4) of the Act.*
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> *It follows that the provisional development plan consent continued to bind Rivergum after the issue of the development approval. The meaning of condition 8 attached to the provisional development plan consent could not be altered by the issue of the development approval. It cannot be said that*

when the development approval issued it replaced the provisional development plan consent, and reimposed condition 8, requiring that condition 8 now be interpreted in light of later events."

The Court accordingly found that in constructing the dwelling Rivergum had contravened condition 8 of the provisional development plan consent and had thus undertaken development in breach of Sections 32 and 44 of the Act.

3. City of Burnside & Others v City Apartments Pty Ltd

MINIMISATION AND THE EXTENT TO WHICH ALTERNATE SITES OR LOCATIONS ARE TO BE CONSIDERED

The ERD Court on appeal approved a proposal by City Apartments to construct a dwelling with associated earthworks and road works, retaining walls and landscaping on land within the Hills Face Zone. Access was by way of a right of way over the adjoining owner's land. Having been joined to the appeal Mr and Mrs Hall appealed the decision of the ERD Court (as did the City of Burnside) to the Full Court of the Supreme Court in City of Burnside & Others v City Apartments Pty Ltd [2004] SASC 294.

The principal issue on appeal was whether the ERD Court failed to give proper consideration to the Hills Face Zone provisions of the Plan that required development to preserve and enhance, or re-establish the natural character of the Zone; and to minimise the threat and impact of bushfire and the excavation and filling of land. The appellants contended that the ERD Court had failed to properly consider whether placing the development at a different site on the land would satisfy the provisions of the Plan by presenting less of a bush fire risk and involving less excavation and less visual intrusion compared with the proposed site. They contended that the Plan required the ERD Court to consider alternative locations on the land and that it had to be able to find that there were no alternative sites on the land for the proposed development that would reduce bushfire risk and excavation of visual intrusion compared with the proposed site. It was argued that such an approach was necessary because of the many references in the Plan provisions to the need to minimise these matters. The ERD Court had considered other possible sites in a general way but did not embark on a detailed examination of alternatives.

The proposal involved the construction of a single storey dwelling on an excavated site together with additional excavation to create a driveway and area to manoeuvre vehicles. Non-native vegetation was to be removed but extensive planting of native vegetation was to be undertaken. The appellants argued that other sites on the subject land being lower down than the site proposed would involve less bushfire risk, would mean that the development was less obtrusive and that there would be less excavation. No specific alternative site was identified nor assessed against the Plan in any detail by any party. Their case was not that another and preferable site had been identified, but rather that it could not be said that there was no such other site.

The Supreme Court noted that the ERD Court had referred to the possibility of an alternative site and said:

"It is not our task to compare the proposed development with a hypothetical development which is not proposed. Our task is to make a planning assessment of the proposed development. We comment, however, that it is easy in broad principle to assert that an alternative site would be better than what is proposed, but the detailed design of such a proposal may give rise to complications which are not obvious at first glance."

The Supreme Court found that the ERD Court had not made an error of principle by adopting the approach referred to earlier. The Supreme Court noted that it could not safely state a principle of universal application as to the extent to which the ERD Court should consider other possible sites on the land which would or might accommodate a proposed development and better conform with the relevant provisions of the Plan. The Supreme Court said:

"In a particular case there might be an obvious alternative site for a proposed development which would clearly better meet the objectives and principles of the Plan. If that was so, that circumstance might affect the ERD Court's assessment of the proposal before it. It would be a matter for the ERD Court to consider in a practical and common sense fashion. However, it would remain the ERD Court's task to assess the proposed development against the Plan, but bearing in mind, if it were the

case, the existence of an alternative site that would accommodate the proposed development and that would better conform to the provisions of the Plan.

The ERD Court properly took the view that this was not such a case. The availability of an alternative location that was suitable for the proposed development was speculative. Before the ERD Court it was never more than a possibility that there was such a site."

The Supreme Court noted that it would make it impossible for a relevant authority to assess a proposal against the Plan if it had to consider a variety of different locations, and also changes to a proposed development to accommodate those different locations, with a view to deciding whether the hypothetical proposal would better conform with the provisions of the Development Plan than the proposed development.

The Court found that the provisions in the Plan that spoke to minimising bushfire risk, keeping excavation to a minimum, or minimising the obtrusiveness of buildings did not call for a different approach. Such language the Court said called for a planning authority to consider the relevant aspect of the proposed development (bushfire risk, obtrusiveness, the amount of excavation), the extent of or the impact of the relevant aspect, and whether the proposal had been developed in a manner that would contain or reduce the relevant aspect to an acceptable level.

The Court found that the ERD Court had not erred in its approach and that it was not required to exclude the possibility of an alternative site that would better conform to the provisions of the Plan.

4. Hutchison 3G Australia Pty Ltd v City of Mitcham & Others

PROPER CONSIDERATIONS FOR THE ASSESSMENT OF THE SITING OF TELECOMMUNICATIONS FACILITIES – THE RELEVANCE OF ALTERNATIVE SITES

Telecommunications towers remain the subject of much controversy and community angst. The recent Full Supreme Court decision of Hutchison 3G Australia Pty Ltd v City of Mitcham & Others [2005] SASC 249 suggests a different approach to assessment may now be required with respect to the consideration of alternative sites where a planning authority is dealing with an application for a telecommunications facility.

Hutchison had appealed to the ERD Court against the council's refusal of its proposal to construct a 25 metre high steel monopole with associated antennae, equipment shelter and fencing on University of Adelaide land at Urrbrae. The ERD Court dismissed the appeal and Hutchison appealed against that decision to the Supreme Court.

The development was to form part of a new 3G service network provided by Hutchison. It had identified a trouble spot in this area where the network was either inoperable or unreliable because of insufficient signal strength. The purpose of the development was to overcome three such trouble spots in Myrtle Bank, Urrbrae and Netherby.

The land upon which the tower was to be erected was within the University's Waite Campus within an Institutional Zone. The relevant locality however included land within a Residential Zone and the Hills Face Zone. The ERD Court found that the Institutional Zone was not inherently inappropriate for this type of development. Therefore, the planning assessment turned on whether the likely effects of it were acceptable. The relevant provisions made it clear that both the design and location of a telecommunications facility must minimise the visual impact upon the local environment. It referred to the following statements of the Supreme Court in City of Burnside & Others v City Apartments Pty Ltd [2004] SASC 294 at paragraph 35:

"The provisions of the Plan that speak of minimising bushfire risk, keeping excavation to a minimum, or minimising the obtrusiveness of buildings do not call for a different approach. As Mr Roder demonstrated, such terminology (that is the use of 'minimise' and like expressions) is found in many provisions of the Plan. Such language calls for a planning authority to consider the relevant aspect of the proposed development (bushfire risk, obtrusiveness, the amount of excavation), the extent of or the impact of the relevant aspect, and whether the proposal had been developed in a manner that will contain or reduce the relevant aspect to an acceptable level, having regard to the relevant Objectives and Principles of the Plan."

The ERD Court had found that the proposed tower would have an impact on the visual amenity of the locality and that it therefore needed to assess whether it had been designed and sited in a manner that would contain or reduce its adverse visual impact upon amenity to an acceptable degree.

That part of the locality within the Residential Zone was found to be of high visual amenity as was that part of it within the Hills Face Zone comprised of open vegetated land. It found that the visual impact of the tower from properties within the Residential Zone would be dramatic and adverse, that views of the Hills Face Zone would be adversely affected and that views of the tower would constitute the introduction of the type of structure that was not present within the locality. The Court considered whether Hutchison had other options for the siting of the proposed tower and said as follows:

> *"It is clear from the evidence of Mr Sohota that the proposed development is by no means the only way, from a technical point of view, for Hutchison to establish the telecommunications facilities that it needs to cover the trouble spots in the 3G network. Hutchison has many options, some of which would not require the erection of a tower, but would instead involve the establishment of several low impact facilities under the Determination."*

The Court concluded that the tower on the site proposed would not contain the adverse visual impact upon the locality to an acceptable level and that it could not be said to be located and designed to minimise the visual impact on the amenity of the local environment as required by the relevant provisions of the Plan. It concluded that in formulating its strategy for overcoming the trouble spots, Hutchison had not taken adequate steps to minimise visual impact upon the local environment.

On appeal to the Supreme Court Hutchison argued that the ERD Court had erred in the approach it took to the availability of alternative sites. The Supreme Court found that the appeal turned on the ERD Court's approach to need and its approach to visual amenity.

Hutchison argued that the area where there was a need or where there were trouble spots was the relevant area for the purposes of considering any effect on visual amenity. It contended that that area to be serviced by the proposed development was a much larger geographical area than the locality found by the ERD Court to be the relevant geographical area for considering the effect of the proposal on visual amenity.

The Supreme Court found that the ERD Court in defining the locality by reference to the visibility of the proposed tower was appropriate insofar as the relevant provisions referred to the visual impacts of the telecommunications facility on the *"local environment"*. This did not equate to the geographical area whose needs would be met by the facility if the local environment was found to be the area in the immediate vicinity of the proposal including the area from which the proposed tower would be visible. The locality therefore defined by the extent of visibility of the tower was found to be the appropriate reference area for determining the effects on visual amenity.

Of most interest was the second argument put by Hutchison that the ERD Court had erred in the approach that it took to the availability of alternative sites. It contended that such was not relevant, or that only an obvious alternative site would be relevant.

In this context the Supreme Court reviewed its findings in City of Burnside & Others v City Apartments Pty Ltd where the relevant provisions of the Plan provided that development should minimise the threat and impact of bushfire and should minimise the excavation and filling of land. It was put to the ERD Court that it must consider alternative locations and had to be able to find that there was no alternative site for a proposal that would reduce the bushfire risk and the amount of excavation and visual intrusion compared with the site proposed. The ERD Court considered other possible sites in a general way only without a detailed examination of other alternatives. As to a statement of principle of universal application dealing with the extent to which an authority should consider other possible sites on the land which would or might better accommodate the proposed development and would better conform with the relevant provisions of the Plan, the Court said that it was not possible to state a principle of universal application. In this regard the Court had said as follows:

> *"In a particular case there might be an alternative site for proposed development which would clearly better meet the objectives and principles of the Plan. If that was so, that circumstance might affect the ERD Court's assessment of the proposal before it. It would be a matter for the ERD Court to consider in a practical and common sense fashion. However, it would remain the ERD Court's*

task to assess the proposed development against the Plan, but bear in mind, if it were the case, the existence of an alternative site that would accommodate the proposed development and that would better conform to the provisions of the Plan ...

I agree with Mr Roder's submission that it would not be possible for a relevant authority to assess a proposed development against the Plan if it had to consider a variety of different locations, and also changes to a proposed development to accommodate those different locations, with a view to deciding whether the hypothetical proposal would better conform to the provisions of the plan than the proposed development."

In considering whether the reference in a Development Plan to "*minimise*" certain matters called for a different approach the Court found that the planning authority and the ERD Court was not required to exclude the possibility of an alternative site for the proposed development that would better conform to the provisions of the Plan.

However, the Supreme Court in the Hutchison decision found that this case called for a different approach from that taken in the City of Burnside & Others v City Apartments Pty Ltd matter. Relying on the comments of the Chief Justice in that earlier case that the principles established therein could not be considered principles of universal application, the Supreme Court found that the relevant provisions of the Development Plan relating to telecommunications called for a different approach in this case. It found that the assumption behind those relevant provisions was that telecommunications facilities involving towers are likely to be unsightly and low impact facilities likely to be less intrusive. The Plan however recognises that the question of need is relevant to the planning assessment and must be weighed against the effect on visual amenity. The Court found that it was inherent in the question of need that other options or alternatives be considered. It said:

"Provisions in the Development Plan which refer to where the facility is 'located' (Objective 29) or 'sited' (Principle 188(f)), which encourage low impact facilities and which recognise that, on occasions, new facilities in more sensitive areas will be 'unavoidable' reinforce the conclusion that an examination of the need and the available alternatives and options was not only permitted but in fact was required."

The Court found that it was proper for the ERD Court to conclude that there was a need for a facility in the area and if there were alternative locations or sites and to consider if the need could be met by a low impact facility. In finding that Hutchison had many options, some of which would not require the erection of a tower, but would instead involve the establishment of several low impact facilities, was not an error of law nor was its failure to identify in its reasons the options for alternatives.

This decision has significant consequences for both planning authorities and companies such as Hutchison holding a carrier licence under the Telecommunications Act. The case perhaps raises more questions than it answers insofar as the extent to which a carrier will now need to go to establish that the site of a proposed tower is the only option. The approach to the assessment of telecommunications towers would now appear to be different insofar as it will be permissible to undertake an assessment as to whether an alternative site or location would better satisfy the provisions of the Development Plan.

[Review of a further five recent South Australian cases will be included in Part 2, to be included in the Summer 2005 Issue of NELR.]