

It was held that a common driveway used by occupants of other dwellings on the development site should not be included in the calculation as it is not an area capable of being used and enjoyed exclusively by occupants of a dwelling. Another reason for not including a common driveway was due to the fact that it is capable of producing a misleading result in the event that the driveway is of a substantial size.

Furthermore, the curtilage of a dwelling pertains to an area for the exclusive benefit of the dwelling, not to an area used by the occupants of other buildings for their own benefit. In some instances the curtilage of a detached dwelling may include driveways, however this cannot be the case for residential developments such as the current proposal, as the driveway is for the benefit of occupiers of other dwellings on the site.

Each dwelling in the proposal was held to have a site area less than the minimum area required by the Development Plan. The appeal was allowed and the decision of the Environment Resources and Development Court was set aside.

Kermode v City of Mitcham [2007] SAERDC 57

*By Rebecca McAulay – Associate – Norman Waterhouse and Thomas Ivey –
Clerk – Norman Waterhouse*

Dwellings and Detached Dwellings

This matter concerned the construction of a second dwelling on the subject land, with the proposed dwelling having an independent frontage to a public road.

The Court sought to determine the true nature of the proposed development, specifically whether it constituted a 'detached dwelling' within the meaning of Schedule 1 of the *Development Regulations 1993* (SA).

The Development Regulations defined 'detached dwelling' as:

'a detached building comprising one dwelling on a site that is held exclusively with that dwelling and has a frontage to a public road, or to a road proposed in a plan of land division that is the subject of a current development authorisation'.

There was consideration of what was necessary for a site to be 'held exclusively'. The Court considered that it was not sufficient to merely have an intention of creating separate allotments. There had to be a commitment, either in the form of a land division application (lodged previously or concurrently to the Development Application) or some other means of securing exclusive tenure. The Court held that it was an essential precondition to Development Approval for a 'detached dwelling' that there be evidence of such rights. In conclusion on this point, the Court commented that the application was intended to be for a detached dwelling but that the relevant authority could not assess it without evidence of the necessary rights for the site to be 'held exclusively'.

In the alternative, the Court also proceeded to assess the merits of the proposed development, as a second independent dwelling on the subject land, against the relevant Development Plan. The Court found that it was at odds with the desired character for the Policy Area in the Residential (Central Plains) Zone, largely due to the site for each dwelling being below the minimum site area prescribed.

The appeal was dismissed and the decision of the Respondent Council was confirmed.