

NELR casenotes

obnoxious form of development as non-complying if the proposed development could also be described as a kind of development that was not proscribed. The object of the Act to promote proper, orderly and efficient planning would be frustrated if planning authorities were required to undertake semantic and metaphysical enquiries into the "true" character of proposed developments.

However, the Court was careful to emphasise that, just because a proposed development might be of a kind which is described as *non-complying*, that did not necessarily mean that that description had to be adopted or relied upon for the purposes of merits assessment. In other words, in this case the Council was entitled to determine that the nature of the proposed development was a "retirement village" and was also correct in identifying that the residential flat buildings proposed as part of the retirement village were *non-complying* and so the proposed development was "a kind of development described a *non-complying*".

AG Building and Developments Pty Ltd v City of Holdfast Bay & Tanti [2009] SASC 11

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This decision the Supreme Court of South Australia provides guidance on the correct use of design techniques or guidelines in the assessment of development applications. This appeal concerned a proposal for a 3 story residential flat building to be erected on a beachfront allotment to which Development Plan consent was refused by the Council. The building was proposed to comprise of five 3-bedroom study apartments and an underground basement car park. The Commissioner hearing the appeal in the ERD Court dismissed the appeal.

On appeal, the Supreme Court was concerned with the ERD Court's focus on the quantitative measures listed in various design techniques and guidelines of the Development Plan rather than a qualitative assessment of the proposal as a whole. Justice Bleby noted that the ERD Court had decided that the proposed development was sufficiently at variance with the principles of Development Control to warrant refusal, that it did not meet the specific requirements of the suggested design techniques, and the focus on quantitative use of guidelines was the wrong approach to be taken in the assessment of a development application.

The Court reaffirmed that provisions of a Development Plan are not to be construed as mandatory requirements, but rather as a guide or objective to be departed from in certain circumstances. Therefore, a mere departure from a particular guideline or design technique measure contained within a provision of a Development Plan was not a sufficient ground to say that the proposal is at variance with that provision.

The Court also found that the Commissioner's approach of assessing the proposal against each development principle individually, and then deciding that the combination of variances to those principles warranted refusal, was the incorrect approach to take.

The Court held that a proper assessment of the proposal did not require a consideration of the relevant issues in "watertight compartments", but an assessment of the proposal as "one complex planning problem".

As such it was held to be impracticable and incorrect to assess certain aspects of the proposal in regard to specific provisions of the Development Plan without having regard to the effect that those aspects of the proposal had on more general provisions of the development plan.

The Court held that the Commissioner's approach to the assessment of the development against the Development Plan was defective, allowed the appeal and remitted the matter back to the ERD Court to decide the appeal according to the correct approach.