

NELR casenotes

for review under s.149 of the Planning and Environment Act. There is no statutory requirement for such a precondition to the giving of consent.

- the changes consented to do not trigger a requirement for a further assessment or approval under the Environment Effects Act 1978 (Vic). The application of the EE Act is discretionary and there is no reference in the EE Act to secondary consent.
- the applicants were not denied procedural fairness. They were also accorded their right pursuant to s.18 Charter of Human Rights and Responsibilities Act 2006 (Vic) to participate in public affairs when they appeared and presented submissions to the Panel. An opportunity to participate in public affairs does not extend to notification of every change that will occur under a condition in a planning permit.

SOUTH AUSTRALIA

Full Court of the Supreme Court

***Lakshmanan & Anor v City of Norwood, Payneham and St Peters [2010] SASFC 15* by Rebecca Macaulay, Senior Associate, Norman Waterhouse**

This was an appeal to the Full Court of the South Australian Supreme Court against a decision of the full bench of the Environment Resources and Development Court (ERD Court).

The appellants' local heritage-listed Victorian stone dwelling had suffered flood damage but remained structurally sound. The dwelling was in the 50-year average recurrence interval flood plain for First and Second Creeks. The appellants did not want to repair the dwelling due to the risk of future flooding. City Wide Principle of Development Control 172 of the Council's Development Plan provided that demolition or removal of a local heritage place should not occur unless the portion to be demolished did not contribute to the heritage value of the place; the structural condition was seriously unsound and could not be rehabilitated; and a heritage impact statement had been prepared by an independent qualified heritage expert.

The Council had refused the appellants' development application for demolition (only) of the dwelling. The ERD Court upheld that refusal without considering the risk of future flooding or the heritage value of the dwelling, notwithstanding that evidence of such matters had been given.

The Supreme Court held that the ERD Court had failed to consider the engineering evidence of the threat of future flooding and the relative heritage value of the dwelling. The Supreme Court remitted the matter back to the ERD Court.

The two most interesting parts of the decision come from Justice Kourakis (Justice White agreeing).

First, His Honour suggested that at times matters outside the relevant Development Plan may be relevant considerations in a planning assessment. He said that Development Plans 'cannot be expected to deal with all possible circumstances' and 'there may be good reason not to apply a particular provision'.

Whilst it is accepted that a Development Plan is not applied strictly as if it were a statute, it is with considerable caution that a relevant authority should consider matters outside the Development Plan. Where it appears that it may be appropriate to consider matters outside the relevant Development Plan, it is recommended that legal advice be sought prior to any decision being made by the relevant authority.

Second, the Council argued that the appeal should be dismissed as it did not include a replacement dwelling as sought by City Wide Objective 90 and City Wide Principle of Development Control 223. His Honour commented that the ERD Court 'must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms'. The ERD Court had before it a further appeal of the appellants, an appeal for both

the demolition, and for the construction of replacement dwellings. As the ERD Court had this evidence it did not follow that the demolition appeal should be dismissed as it did not include a replacement building. His Honour suggested that the ERD Court had the power to deal with the approval of the replacement dwellings on the appeal against the demolition. Alternatively, the ERD Court had the power to amalgamate the two appeals.

The suggestion of His Honour that the ERD Court should or must consolidate the two appeals and deal with them 'as one' can be accepted without further comment, however, any amendments to the demolition appeal so as to introduce replacement buildings not considered by the Council at first instance might possibly amount to an impermissible change in the essential nature of the proposal.