1. Introduction

Town planning has once again been topical over the last 12 months. The long awaited 30 Year Plan for the development of Greater Adelaide was released in July with an emphasis on controlling urban sprawl, greater structure planning, more affordable housing and transit oriented development. Debate has continued over the proposed re-zoning of the former Cheltenham racecourse, the Glenside Hospital site and the appropriate re-development or lack thereof of the Port Adelaide waterfront.

Climate change and the general shortage of water in Adelaide and South Australia has lead to further calls for more environmentally sustainable development including stormwater capture and reuse. The perceived difficulty in obtaining consent to remove significant trees has also been raised recently in Parliament where some legislative change has been foreshadowed. The rollout of legislative reform resulting from the Planning Review including the introduction of the Residential Code has lead to plenty of work for local government development control and policy planners, many of whom have been busy undertaking character studies of their area.

With development application numbers down in some councils the opportunity has been taken to apply their resources to compliance and enforcement which has resulted in an increased number of criminal prosecutions where significant penalties have been imposed.

Both the Environment, Resources and Development Court and Supreme Court have heard a number of interesting cases including merit appeals, civil and criminal enforcement and by way of judicial review.
This paper will be presented in two parts with the first concentrating on significant recent planning decisions which provide future guidance and the second on recent enforcement proceedings in the nature of both civil action and criminal prosecution.

We have selected those decisions of the ERD and Supreme Court of greatest ongoing relevance and interest. These cases deal with the following issues of general importance:

- What constitutes reasonable remedial measures in the context of significant tree removal;
- Whether there is an onus of proof on an applicant for significant tree removal;
- When is a local heritage place beyond economic repair;
- Whether the satisfaction of local heritage place listing criteria is an objective jurisdictional fact that can be challenged in a planning appeal or a matter of subjective judgment;
- When will a common driveway be included as part of the curtilage and thus the site of a group dwelling;
- How to calculate site area for a group dwelling proposal;
- The application of Development Plan policy that promotes certain minimum standards;
- The determination of the site of a dwelling which shares a right of way;
- Characterising the nature of development and determining whether it constitutes a single land use or consists of distinct and separate elements;
- The extent to which building form and proposed land use may be determinative in characterising the nature of development;
- When will a residential flat building be a retirement village;
- When will bed and breakfast accommodation be a motel;
• The power of the ERD Court on an application to review public notice categorisation or the characterisation of a development;

• Time limits on an application for review to the ERD Court;

• The importance of the formation and recording of relevant opinions for public notification purposes;

• Interpreting a development approval where there are inconsistent Development Plan and Building Rules consents;

• Characterising the nature of development and determining whether a use is ancillary and incidental to an existing use or an independent land use in its own right;

• The requirement in a planning assessment to consider both quantitative and qualitative provisions of the Development Plan and to assess the weight and relevance of any identified departure from policy;

• What constitutes sale by retail as distinct from wholesale for the purposes of the definition of “shop”.

• What might constitute reasonable design alternatives in the context of significant tree removal;

• When will a gymnasium be an indoor recreation centre;

• The consequences of a failure to use, maintain and operate a development in accordance with an approval.

• How Rural Zone provisions should be applied when assessing a boundary realignment;

• Division of contaminated land, and whether possible contamination can be dealt with by condition;

• Whether the division of land terminates existing use rights;

• Whether and how existing unlawful land uses should be taken into account when assessing new development proposed to occur on adjacent land;
• When exemplary damages may be obtained in enforcement proceedings;

• The consequences of building contrary to an approval;

• A selection of typical sentencing outcomes for criminal tree-damaging activity.
2. Significant tree removal – determination of acceptability of risk and reasonableness of remedial treatments and measures – persuasive onus on the applicant for tree removal

The recent decision of Justice Kourakis in *Lacey v City of Burnside* [2009] SASC 136 is only the second time where the Supreme Court has considered Development Plan provisions relevant to the assessment of a proposal to remove a significant tree on the basis that it represented an unacceptable risk to safety. The decision provides some useful guidance on risk assessment; whether there is any onus on an applicant to establish that development consent should be granted and what might constitute reasonable remedial measures.

The matter before the Supreme Court was an appeal from a decision of a Commissioner of the ERD Court who had dismissed an appeal against the Council’s decision to refuse an application to remove a very large and old Wallangarra White Gum from the appellant’s backyard. The tree was 14 metres high with a crown of approximately 17 metres. It overhung Mr Lacey’s rear veranda and tennis court. The evidence to the ERD Court was that over a 6 year period there had been about 10 instances of branch failure such that Mr Lacey stopped using the portion of his rear yard, including the tennis court, around and beneath the tree. His application for removal of the tree was refused by the Council and his appeal to the ERD Court dismissed.

While the Commissioner accepted that the first element of the relevant Principle of Development Control being PDC 48 had been satisfied, namely; that the significant tree represented an unacceptable risk to safety; he concluded that the second element had not. The Commissioner was not satisfied that the risk could not be brought back within acceptable limits by appropriate pruning.

Like most relevant provisions in Development Plans across metropolitan Adelaide; PDC 48 provided that significant trees should be preserved, and that tree damaging activity should only be undertaken, if, relevant to this appeal, the significant tree represented an unacceptable risk to safety, and all other reasonable remedial measures were demonstrably ineffective. Justice Kourakis put it nicely when he
suggested that the resolution of the question of reasonable remedial measures would in effect:

“…determine whether the white gum is to be subjected to a regime of periodic amputations of those of its limbs which are prone to fall, or a final, life ending decapitation.”

PDC 48 provided as follows:

“Significant trees should be preserved and tree-damaging activity should not be undertaken unless:

(a) in the case of tree removal;

(1) (i) the tree is diseased and its life expectancy is short; or
(ii) the tree represents an unacceptable risk to public or private safety; or
(iii) the tree is within 20 metres of a residential, tourist accommodation or otherwise habitable building and is a bushfire hazard within the Bushfire Prone Area shown on Figure BurBPA/1; or
(iv) the tree is shown to be causing or threatening to cause, substantial damage to a substantial building or structure of value; and

all other reasonable remedial treatments and measures have been determined to be ineffective.”

In addition to being a significant tree because of its circumference; the subject tree was also declared to be significant by the Development Plan itself on the basis that it made an important contribution to the character or amenity of the local area and formed a notable visual element.
The uncontested evidence of a landscape architect called by the Council in the ERD Court was that the tree was a notable visual element from surrounding avenues and terraces up to 100 to 150 metres away.

The finding of the ERD Court that the tree posed an unacceptable risk was based on the evidence that in 2003 a limb of about 250mm in diameter fell and almost hit Mr Lacey. A branch of about 150mm in diameter was said to weigh about 90 kilograms with the branches falling since 2003 generally being between 50 to 100mm, with one nearly 200mm.

The critical evidence then became what would be the effect of the pruning of the tree on limb failure and what other consequences might it have in terms of the visual amenity of the tree. The tree had not previously been well pruned nor managed and the arborist called on behalf of the appellant accepted that targeted reduction pruning could achieve the desired effect of lowering limb failure rates in the short term. This would have involved shortening the lateral limbs of the crown by about 15 to 20% with such pruning being repeated every 2 to 5 years or 12 to 18 months depending upon the growth rate of the tree. The cost of that pruning to reduce limb failure was estimated at $1,500.00. However, that arborist suggested that such pruning would have undesirable consequences insofar as only half of the branches of the tree had suitable reduction points. Thus, those which did not have a suitable reduction point would have to be cut back by more than 15 to 20%, and possibly all the way back to the trunk. He suggested that this would adversely affect the aesthetic appeal of the tree and hasten its decline. The Supreme Court noted that this arborist did not produce a pruning or cutting plan nor attempt to specifically identify the branches that would be disproportionally cut back nor illustrate diagrammatically or pictorially the effect of the necessary pruning to reduce risk on the appearance of the tree. He estimated the life expectancy of the tree to be between 10 and 20 years on the assumption that it was pruned every 12 to 18 months.

The evidence called on behalf of the Council in relation to tree health was from a botanist who suggested that the life expectancy of the tree was between 10 and 20 years and could possibly extend to 50 years. He recommended that only maintenance pruning of the tree should be undertaken in the form of the removal of dead and failed branches. He did not recommend any more severe pruning
because such would produce epicormic regrowth which would affect the structure and aesthetic appeal of the tree. While he agreed that harsher pruning would further reduce the risk of limb failure, he expressed the view that the risk, such as it was, was not unacceptable and therefore recommended no more than maintenance pruning. He suggested that pruning could be undertaken without affecting, in any substantial way, the aesthetic appearance of the tree.

On the issue of the degree of risk posed by the tree, the Commissioner found as follows:

“I have concluded that the rate at which limbs of notable size have dropped in an area of Mr Lacey’s backyard he would expect, in the normal course, to be used by his family and friends for recreational and leisure is not acceptable, is in excess of the risks that are implicit in owning such a tree and is approaching if not reached the point where removal is justified having regard to the provisions of the Plan.”

On the question of the measures that might be taken to reduce that risk the Commissioner said:

“On advice from Mr Knight in 2003 following the near miss, Mr Lacey has chosen not to embark on a pruning program. Mr Knight’s advice then and now is that the tree is not a suitable candidate. In his view, the extent of pruning necessary to reduce the risk of limb failure when undertaken in accordance with AS4373-2007 would adversely affect its visual amenity and hasten its decline. In stark contrast, Dr Nicolle said that maintenance pruning is desirable but not essential. If undertaken, maintenance pruning would not have impacts on the health of the tree and may improve its aesthetic appeal.

It appears to me that the qualification to Principle 48(a)(1)(ii) has not been adequately satisfied. Having carefully reviewed the evidence of Mr Knight and Dr Nicolle I do not think that it has been established to a sufficient level of certainty that maintenance
pruning or more significant pruning undertaken by an appropriately qualified and experienced person would lead to so rapid a decline of the tree that “biting the bullet now” by removing it is the justified course of action. On the question of longevity after pruning, Mr Knight conceded that the life expectancy of the tree would be in the order of 10 years.

The tree has high aesthetic and amenity value and characteristics the Plan seeks to preserve. Nevertheless the evidence shows that it has a pattern of limb failure that is likely to be repeated over time. The tree is located in an area of the subject land that could reasonably be expected to be used by Mr Lacey and his family quite intensively. That area has been, by necessity, quarantined by him. In the absence of any other consideration the point has been reached where the removal of the tree might be justified. However, the provisions of Principle 48(1)(a)(ii) only come into effect after determining that all reasonable remedial work is shown or is considered to be ineffective. I acknowledge the possibility that the tree might be adversely affected by pruning but I am not persuaded by the appellant’s case. Burdensome as it may be Mr Lacey should undertake a regular pruning regime and monitor the results and record them accurately. If that course of action fails to achieve a reduction in the various aspects of limb failure that bear upon personal safety it is open to him to reapply to the Council for the removal of the tree.”

Justice Kourakis rejected the appellant’s submission that the Commissioner had erred in accepting the appellant’s evidence about the level of risk but the Council’s evidence about the effect of pruning the tree. He said that the assessment of the evidence of the two expert witnesses raised questions of fact alone, and that the Commissioner had made no error in the way that he dealt with their evidence. Both experts accepted the rate and nature of limb failure that had occurred in the past and the circumstances in which it might continue into the future. Importantly, the Supreme Court noted that it was on that common factual basis that the Commissioner found that the tree posed an unacceptable risk to the safety of Mr Lacey, his family and friends. Although involving an element of judgment, it was
said that that conclusion was one of fact that it was ultimately for the Commissioner to make. The Supreme Court highlighted that it was not for the arborist or botanist or other expert to make an assessment as to the acceptability of the relevant identified risk.

While the experts expressed opinions about the acceptability of the risk, given the nature of the evaluative judgment involved, the Supreme Court suggested that their opinions were never likely to be determinative. In this regard it said:

"Acceptable levels of risk are decisions that ultimately must be made by the tribunal charged to evaluate the competing considerations that are involved in making a judgment of that sort. Although botanists and arborists can give evidence as to the expected frequency and nature of limb failure, they are not experts on public safety standards. For example, it would have been open to the Commissioner to decide that the risk was acceptable, even if both Mr Knight and Dr Nicolle thought that it was unacceptable (and the converse is equally true). Nothing much flows from the fact that Mr Knight happened to share the Commissioner's view on the evaluative judgment he ultimately made, and that Dr Nicolle did not."

The Court found that it was open to the Commissioner to find that the risk management pruning described by the appellant’s arborist could be undertaken without adversely affecting the aesthetics of the tree. This in effect was the evidence of the Council’s botanist. It was said to be open to the Commissioner to prefer this evidence on that question even though the Commissioner had reached a different conclusion about the acceptability of the risk of the present state of the tree than that of the Council’s botanist. The Supreme Court suggested that the Commissioner had found only that it had not been demonstrated that a reasonable pruning regime would not achieve the relevant risk reduction in a way that was aesthetically acceptable.

The Supreme Court also rejected the appellant’s submission that the Commissioner had inappropriately imposed an onus on the appellant and held against him because he had not discharged it.
The Supreme Court found that there was a general proposition that an applicant for development consent did not carry an onus to establish that approval should be granted, but that this proposition cannot be taken too far. It was suggested that this proposition is sound where the provisions of the Development Plan against which an application is to be assessed do not in themselves create a presumption or bias, for or against approval. In that limited sense, the Court agreed that an applicant did not carry an onus. However, in the context of the present case the Supreme Court suggested that the relevant policy regime altered this general position. It said in this regard:

“... if the objectives and principles of a Development Plan provide that approval should not as a general rule be given to specified development unless there is a special reason to do so, then, plainly enough, an applicant for an approval must demonstrate that there is a special reason in his or her case. In effect, the applicant carries a persuasive onus.”

The Supreme Court noted a distinction between the exercise of the discretion itself, which may be conferred without any inherent bias, and the determination of the facts on which the discretion will be exercised. It was said that if a party urges the Court to exercise a discretion on the basis that a particular circumstance is a relevant matter, that the existence of that circumstance must be proved by the party who seeks to rely on it. Accordingly, that party necessarily carries the onus to prove, as a fact, the existence of that circumstance.

Mr Lacey contended that the presumption in the Plan against allowing development which damages significant trees should not be applied on the basis that his tree posed an unacceptable risk and that the identified remedial measures would be unreasonable and ineffective. The Supreme Court suggested that whether or not the proviso applied raised factual matters, which the appellant had to prove, if he was to escape the application of the conservation principles in the relevant provisions. The Court recognised that the structure of PDC 48 was such that unless those facts were demonstrated, the general principle was to be applied. There was said to be an onus in respect of both elements of the proviso.
The Commissioner was found to have correctly approached the question on the basis that he was simply not satisfied that the second element of the proviso had been established. In the absence of any more precise evidence about the effect of pruning he was said to be entitled to find that the appellant had failed to show that the remedial pruning would so adversely affect the vitality of the tree and that more severe pruning was unreasonable. It was said to be open to the Commissioner to remain unconvinced that pruning would not be effective.

As to the concept of “reasonable measures” in the proviso to PDC 48, the Supreme Court said that such was related to the question of the cost and the practicality of the recommended measures. The appellant however did not suggest that the pruning involved prohibitive cost or was impractical. He contended however that the concept of reasonableness extended to a consideration of the fact that the recommended pruning regime would only allow the contribution of the visual amenity made by the tree to continue for a limited period of time. The appellant argued that a period of 10 years where the tree would continue to contribute to the amenity of the locality was relatively short and was relevant to the issue of the reasonableness of the suggested pruning regime. The Supreme Court found that the limited life expectancy of the tree was not relevant to the issue of the “reasonableness” of measures within the meaning of that term in PDC 48. Rather the Court said:

“The limited life expectancy of a significant tree is a relevant consideration in the exercise of the discretion allowed by the Development Plan to approve the removal of the significant tree, even where it is demonstrated that reasonable measures could bring the risk it poses back within acceptable limits. In balancing the private interests of the appellant against the public benefit of maintaining the white gum, approval to remove it might still have been given, after taking into account PDC 42 and PDC 48, if its life expectancy was too short to justify the impingement of the appellant's enjoyment of his backyard.”

In any event, even if the life expectancy of the tree was relevant to the question of reasonableness, the Supreme Court found that the Commissioner was entitled to take the view that extending the visual amenity of the tree for a further 10 years
justified its continued presence in the appellant’s backyard and that hard pruning would reduce the identified risk.

It was said that insofar as the appellant’s case was that pruning would substantially affect the aesthetics and vitality of the tree, it was a case based on events that may or may not happen in the future and that the Commissioner was entitled, given the inherent uncertainly as to the aesthetic outcome of the pruning regime, to approach the matter with care.

Ultimately, the Commissioner was found to have sensibly taken the view that, given the conflicting expert evidence, major pruning could not be dismissed as a remedial measure “without first giving it, and the tree, a chance”.

3. Demolition of historic structure – structural soundness & ability to economically renovate

The common test in a number of Development Plans in relation to proposals to demolish local heritage places or other historic buildings is whether they are structurally unsound and beyond economic repair.

These considerations were the subject of discussion in *Ikkaj Pty Ltd v District Council of Copper Coast* [2009] SA ERDC 36. It involved a proposal to demolish a structure on land within the Town Centre (Moonta Historic Conservation) Zone in the Retail Core Area. The desired future character contemplated the maintenance and enhancement of the historic character and integrity of the Zone with buildings developed and renovated in accordance with conservation guidelines contained within the Development Plan. The Development Plan contained no list of local heritages places.

The proposal was to demolish an old shed adjacent to the boundary of the subject land which included a remnant stone wall approximately 23m long and 3.8m high on or close to the boundary. The applicant had made a subsequent application to establish a dwelling on the subject land and the retention of the old structure and stone wall were not part of its plans. The most relevant Zone provision was
Principle 4 which stated:

“Demolition of buildings which contribute to the heritage character of the Policy Area, should not be undertaken unless the item is proven to be structurally unsound and cannot be economically renovated.”

The only other relevant provision that spoke to demolition was Council Wide Principle 6 which provided:

“Buildings or structures should be conserved where they are of:

(a) historical significance (refer to the 1998 survey of Yorke Peninsula); or
(b) particular architectural merit or significance”

The Court heard evidence that the stone wall and outbuildings were a remnant of the stables which were associated with an old butchers shop. The wall and associated outbuilding had been identified in the Yorke Peninsula heritage survey and had been recommend for inclusion as a local heritage place. The Court found that the building, that is, the stone wall, was of historic interest and had a strong visual presence in the central part of Moonta where a number of historic buildings gave the Zone its historic character. While the historical character of the Zone would not be lost if the wall were to be demolished, it was found that it would be diminished, simply because one of the elements which contributed to the historic character would be lost. Principle 4 became the primary focus in the case. As the building had been found to contribute to the heritage character of the Policy Area, it provided that such a building should not be demolished unless it was both proven to be structurally unsound and could not be economically renovated.

Much of the evidence was directed to whether the wall was structurally sound, the nature of the work required to be carried out to make it so were that not the case, and the cost of that work. Given the clear relevance of Principle 4, the Court found that it was for the appellant to show that the building was structurally unsound, and then, that it could not be economically renovated. In this sense, while not in the nature of a formal onus of proof, it was for the applicant to show that this was the
situation, in the interest of succeeding in its application. This is consistent with the comments of the Supreme Court in *Lacey v City of Burnside* [2009] SASC 136.

The Court noted that the Principle:

“suggests that a building that is proven to be structurally unsound may able to be renovated – either economically or uneconomically. Thus, if the building is proven to be structurally unsound, the ultimate issue would be whether it can be economically renovated. It is for the applicant to show that the building cannot be economically renovated.”

Engineering evidence was called on the question of structural soundness. The remedial work considered essential to ensure the structural integrity of the wall varied between the engineers. Both however agreed that the structure needed repair work. Neither was of the opinion that it was beyond repair and required demolition. They agreed that the structure needed work to make it sound and the issue between them was the extent of the work required. The major issue between the engineers was as to whether the northern wall needed buttressing, to avoid the risk of being overturned in a strong wind. The Court did not need to make a final decision on this issue finding that even if the need for buttressing went to the stability of wall, it did not, of itself, determine the question of whether the wall was structurally unsound. That had been determined by the agreed view that the wall needed rectification work of a structural rather than a cosmetic nature. Having found that it was structurally unsound, the question then became whether the structure could be economically renovated.

To make the wall structurally sound the following work at a minimum was required:

- repairs to cracks in the wall;
- treatment of damp affected areas of the wall;
- (if the structure was to become part of a habitable building) insertion of a damp proof membrane.

The method of undertaking the work and the likely cost was the subject of widely varying evidence.
The Court identified a difficulty for the appellant which was posed by the Development Plan. It had no plans to use the existing structure or incorporate it into a proposed building. The policy within the Plan sought the retention or conservation of structures which contributed to the heritage character of the Policy Area. Recognising that the provisions of the Plan were not mandatory, the Court nevertheless suggested that an applicant for consent, faced with a provision such as Zone Principle 4, needed to establish the relevant criteria.

The appellant had no interest in renovation, economic or otherwise. The evidence was that renovation would cost more than $15,000 to $20,000, however the Court noted that “the figures themselves do not tell us whether that expenditure would amount to economic renovations. The term “economically renovated” can only have meaning in a context”.

The Court referred to the earlier decision of *Shackley v Town of Gawler & Anor* [2005] SAERDC 108 which involved a proposal to demolish a building that was of historic character. The judgment turned on whether the building was so structurally unsound that it represented a risk to safety and was beyond economic repair. The applicant gave evidence that he was able to construct a new building sufficient for his purposes in place of the existing building, at a much smaller cost than the cost of repairing the existing building. The Court concluded in the circumstances that the existing building was beyond economic repair. In that case the test for “beyond economic repair” was said to be an objective test. It said:

"Ultimately, the issue is whether it is economic to repair the building or in other words, whether the cost of repairing the building to a standard that will enable it to be used is less than the cost of replacing the building with another that is suitable at the location, for the use designed."

The Court noted that implied in the above, was that the owner desired to have the use of a building in the place presently occupied by the building in need of repair.

The present case was different insofar as the appellant wished to demolish the wall and then construct a dwelling on the land which would not incorporate the existing
structure. This was said to be quite different to the factual situation in Shackley where the Court took into account the nature of the building and how it might be used. The Court said that in considering whether the structure “cannot be economically renovated”; such was not just a question of looking at the cost of renovation in isolation.

The Court was critical of the appellant insofar as it had not brought evidence to show that the structure could not be economically renovated in the context of its proposal plans for the subject land. If the wall was to become part of a habitable building, then a damp proof course would be required. If not, a damp proof course may not be needed but the question of stabilisation by way of buttresses would need to be revisited, depending on what was proposed. As to the relevant test the Court concluded:

“The test may not be so different in this matter (compared with Shackley). It really amounts to whether the cost of repairing the structure, that is of bringing it to structural soundness so that it may be used (whether as part of a complete building or as a wall) is so unreasonably expensive having regard to the end result, as to be undesirable. The test is not without difficulty. The appellant wants to use the land for residential purposes. Can the structure or part of it be used as a boundary wall, shielding the dwelling? Again, the appellant does not appear prepared to consider this as there is no evidence in this regard before the Court. As a result, we are unable to conclude that the wall cannot be economically renovated.”

“Another approach is to consider whether the structure can be economically renovated for any reasonable land use. The zone provisions including the objectives and the desired future character contained therein would need to be considered. In this regard, we note that it is intended by the zone provisions that the zone accommodate “a range of shopping, administrative, culture, office, commercial, entertainment and recreational facilities” (Objective1) and that the desired future character for the retail core area (Policy Area 1) is for the development of retail, commercial and
community land uses (Objective 5(f)). Further, the historic character and integrity of the zone should be maintained and enhanced: see Objective 5(b).”

The Court found that there appeared to be ample scope to use the structure in accordance with what might be contemplated within the Zone and that no evidence was presented to it on this topic. In the absence of evidence to establish that the structure could not be economically renovated for the purposes of a use encouraged in the Zone the Court held that it was not satisfied that the structure was both structurally unsound and could not be economically renovated as was desired by the Zone provisions. The decision to refuse consent was upheld.

4. Collateral challenge to a Development Plan local heritage place listing – satisfaction of Section 23(4) criteria an objective/jurisdictional fact or matter of subjective opinion – Wednesbury unreasonableness only basis for challenge

A Full Bench of the ERD Court heard the cases of Minicozzi v City of Norwood, Payneham & St Peters and Anor [2009] SAERDC 21 and Lakshmanan v City of Norwood, Payneham & St Peters and Anor [2009] SAERDC 22 together as each involved similar factual scenarios and the same expert witnesses.

Both appeals were against decisions of the Council to refuse consent to applications to demolish dwellings listed in the Council’s Development Plan as local heritage places. The properties at 114A and 112 Osmond Terrace, Norwood, were situated either side of First Creek. 114A was described in the Local Heritage Place Table as a “Federation Masonry Dwelling” and 112 as a “Victorian Stone dwelling”. The Development Plan encouraged the retention and conservation of local heritage places and contemplated their demolition only in circumstances where the structural condition of the relevant building was seriously unsound and beyond rehabilitation.

The applications were made as a result of each dwelling being significantly damaged by flood waters when First Creek flooded in November 2005. Water entered both dwellings flooding the underfloor and basements of each with water rising some 3ft above floor level during the relevant period. The flood waters caused extensive damage to both dwellings and their contents. Neither house had been returned to a habitable state since the flood. Each appellant wished to
demolish their respective dwellings to enable the redevelopment of their land for residential purposes in a manner which would provide greatly increased protection for a new dwelling or dwellings from damage in the event of future flooding.

The flood event of 2005 was estimated to be in the order of a 1 in 20 average recurrence interval (“ARI”) event. In 2007 the Council undertook extensive flood mitigation works adjacent the subject properties and beyond with a view to reducing the risk of flooding of both properties and others in the vicinity of the First Creek culvert at Osmond Terrace. As a result of the flood mitigation works the floor level of the dwelling at 114A was slightly less than the level of a 1 in 50 year ARI event while the floor level for 112 was slightly higher than the level of a 1 in 50 ARI event.

The Development Plan contained a number of provisions relating to flood protection. It showed both 112 and 114A within the 50 year ARI floodplain of First Creek. Principle 103 suggested that the lowest floor level of all habitable spaces of development should be not less than 300mm higher than the likely 1 in 50 ARI floodplain. The Court found that this and the other provisions relating to flood protection were directed towards the construction of new buildings and had no direct application to demolition.

A substantial amount of engineering evidence was given in relation to additional work that could be undertaken on each property to provide a level of protection against a 100 year ARI event with a freeboard of 300mm which would now appear to be the commonly applied standard for new development. The experts disagreed on the cost and practicality of such works and the likely effect on other properties in the locality. From a purely engineering point of view, the demolition of the dwellings and the building of houses with a floor level above the 100 year ARI flood event was recognised to be a preferable outcome.

Of significant interest was the collateral challenge to the listing of the dwellings as local heritage places. Each had been designated as a local heritage place by the Kensington and Norwood Local Heritage Places (Built Heritage) Plan Amendment Report in 1999. The PAR was based, to a large extent, on a heritage review survey undertaken in 1995. The appellants argued that the validity of the provisions introduced into a Development Plan by a PAR are judicially reviewable and that the ERD Court had jurisdiction in the course of proceedings pursuant to Section 86 of
the Act to determine the validity of such provisions where the resolution of those proceedings would turn upon their application. It was argued that the Development Plan designation of the buildings as places of local heritage value was invalid because such could only occur validly if, as an objective fact, the dwellings satisfied one or more of the criteria in Section 23(4) of the Act, which it was contended that they did not.

The challenge to the local heritage listing in each case was founded on the following propositions:

- that the validity of a PAR is, and therefore the validity of the provisions introduced into a Development Plan by a PAR, are judicially reviewable;
- that the ERD Court has jurisdiction to determine the validity of provisions of a Development Plan introduced into it by a PAR in the course of proceedings pursuant to Section 86 of the Act, in circumstances where the resolution of those proceedings will turn upon the application of that document; and
- that the designation in the Development Plan of 114A and 112 as places of local heritage value was invalid because that listing could only have occurred validity if, as an objective fact, the dwellings satisfied one or more of the criteria in Section 23(4) of the Act, and that the dwellings did not satisfy any of those criteria.

The Court found that while a Development Plan is a policy document, it could be the subject of judicial review in the Supreme Court if, for example, it could be demonstrated that the Minister had failed to have regard to relevant factors or had had regard to irrelevant factors. The Court then went on to consider whether it had jurisdiction to determine a collateral challenge to the validity of the provisions of a Development Plan.

The Court found that while the authorities did not rule out the possibility of a collateral challenge to the validity of the provisions of a Development Plan in the ERD Court; the circumstances in which such a challenge were likely to be
appropriate will arise infrequently, if at all, having regard to:

- the nature of a Development Plan as a statutory instrument, expressing mostly policy, for use in the assessment of proposed developments rather than imposing rules upon conduct;
- the process of the amendment of a Development Plan which involves consultation with the public and interaction between local and State government; and
- the availability of judicial review proceedings in the Supreme Court, and the 6 month time limit for the bringing of such proceedings.

Accordingly, the Court found that these appeals were not appropriate cases for it to determine the collateral challenge to the local heritage place listings and declined jurisdiction to do so. Nevertheless, in the event that it was wrong in denying jurisdiction, it went on to consider the substantive grounds of each challenge on its merits.

The appellants argued that the satisfaction of one or more of the criterion in Section 23(4) was a prerequisite to the exercise by the Minister of his or her power to approve a Development Plan Amendment. They contended that the question of whether a place satisfied one or more of the criteria was an objective fact and thus a jurisdictional fact, an error in relation to which could render the decision of the Minister to approve the amendment invalid. The Court suggested that in the case of a PAR (or DPA) initiated by the Council that it was in fact the Council which formed the requisite opinion as to whether a place should be designated as one having local heritage value and that the Minister, when approving the PAR, relied on that assessment.

In any event, the appellants’ argument that the satisfaction of Section 23(4) criteria for local heritage place listing was a question to be answered objectively which had the character of the ascertainment of a jurisdictional fact was rejected with the Court finding that a decision under Section 23(4) involves matters of opinion or degree. Such was said to be demonstrated by the evidence of the two opposing heritage architects. The Court found that the decision as to whether a place satisfies the criteria in Section 23(4) of the Act was not a decision in relation to the existence of a jurisdictional fact but rather was a decision involving assessment and value.
judgment which are arrived at subjectively. On this question, the Court concluded that, insofar as the appellants’ argument asserted *Wednesbury* unreasonableness, any such claim had to fail as no adequate evidentiary basis that for the decision was one which could not have been reasonably arrived at, whether by the Council or by the Minister, had been established. Therefore, each application had to be assessed against the relevant provisions of the Development Plan as in existence at the relevant date.

The appellants both conceded that the structural condition of each dwelling was redeemable. Both sides called heritage architects who expressed different views as to the heritage values of each dwelling. The appellants were critical of the Council’s expert on the basis that they contended that the relevant criteria required some local element and that the various themes identified were common. Despite expressing some sympathy to this argument; the Court found that, as a matter of fact, each dwelling was listed as a local heritage place and there was no basis upon which that listing could be reviewed. In this regard the Court said:

> “We have determined that we must undertake our assessment of the application to demolish on the basis that the dwelling is a local heritage place. It seems to us that it is likely that some local heritage places have greater heritage value than others. However, there is no warrant in the provisions of the Development Plan applicable to this application to bring the debate as to the extent of the heritage value of the dwelling into the assessment.”

The Court concluded that each proposal was contrary to the heritage provisions of the Development Plan to an extent that each application warranted refusal. It found that those provisions of the Plan which set standards for buildings for flood protection applied only to new buildings.

It found that there was no warrant in the Development Plan for bringing into the assessment the engineering evidence about the extent to which the dwellings might be flooded in the future, the extent to which practical measures might be implemented to protect the dwellings from flooding or the extent of the heritage value of each dwelling as heritage places.
The Lakshmanan family have appealed its decision to the Supreme Court on the basis that the ERD Court erred in not considering the issue of flooding nor the extent of the heritage value of the dwelling as relevant issues in the assessment of the application for demolition. That appeal is yet to be determined.

5. **The calculation of site area for a proposal for group dwellings and the proper application of Development Plan provisions that describe minimum quantitative standards**

The common practice of calculating the site area for a group dwelling proposal by an averaging process including driveway was the subject of consideration in an appeal to the Supreme Court against a decision of the ERD Court granting consent for a proposal at Melrose Park to demolish an existing dwelling on an allotment and erect five dwellings in its place. The decision was *City of Mitcham v Terra Equities Pty Ltd* [2007] SASC 244.

The area of the subject land was 2107 square metres. Two of the proposed five single storey dwellings were to have a street frontage with the other three to the rear. A common driveway was to run between the two front dwellings that would provide access for those at the rear. Each dwelling was to be constructed separately with no binding obligations to the tenure under which each dwelling would be held nor any indication as to the creation of separate Certificates of Title.

The subject land was in Policy Area 8 of the Residential (Central Plains) Zone. The Plan set out minimum site areas for dwellings differentiating between detached dwellings, semi-detached dwellings and any other form of dwellings. Principle 1 for Policy Area 8 provided as follows:

> “Excluding residences comprising dependent relative accommodation, the minimum site area for a dwelling should be as follows:

(a) 500 square metres for a detached dwelling;
(b) 425 square metres for a semi-detached dwelling; and

(c) 400 square metres for any other dwelling…”

The ERD Court had found that the five dwellings constituted group dwellings. This meant that the Plan required a minimum site area of 400 square metres for each dwelling. Using an averaging process, the ERD Court found that each dwelling in the proposal had an average site area of 421.4 square metres and thus complied with the Plan. This result was arrived at by dividing the total area of the subject land by the number of dwellings proposed. The Supreme Court found that this means by which the site area of each dwelling in the development was determined by deriving an average area was an error. The Supreme Court found that this process only created an overall average without having regard to the actual site area that each dwelling proposed.

The Plan it was said is concerned with the actual site area of each dwelling and not the average site areas. It found that the common driveway should not have been included as part of the site area given that it was used by the occupants of other dwellings on the development site and could thus not be included in the site of any particular dwelling. The conclusion was said to be supported by the defined term “site” which appears in these terms:

“site means the area of land on which a building is built, or proposed to be built, including the curtilage of the building, or in the case of a building comprising more than one separate occupancy, the area of land on which each occupancy is built, or proposed to be built, together with its curtilage.”

The Supreme Court suggested that this definition signified that each building in a group of buildings will have its own curtilage and that it would be inconsistent with that definition if the occupants of one dwelling shared the curtilage of that building with the occupants of another dwelling. It was said that the notion of a common area used by others was inconsistent with the concept of a curtilage. What falls in the curtilage was said to be a question of fact and degree in each case. The common driveway in the present case was found not to form part of the curtilage of the five dwellings. The common driveway could not be on the site of each building.
in the group as it was not part of the curtilage of any of those buildings; rather it was to be a shared as part of the overall land. Although it contributed to the enjoyment of the three rear dwellings, it did not serve any purpose in respect to the front two dwellings, which each had, or were proposed to have, a separate driveway access direct to the road. Calculating the site areas excluding the common driveway resulted in areas between 315 and 378 square metres, well short of the minimum requirement of 400 square metres in the Policy Area.

In considering what had been a long established practice of determining site area by dividing the area of the subject allotment by the number of dwellings proposed in cases such as *Forest v City of Holdfast Bay* [1999] SAERDC 96 Justice Debelle found that the automatic application of this practice to determine an average site area is not appropriate and should be discontinued. He suggested that such an approach failed to have regard to various factors which in each case might affect the site area of each dwelling. In this regard he said:

"those will include factors inherent in the design of the proposed development as well as the terms of the Development Plan. The aim of this Development Plan is that an adequate site area be provided for each dwelling. Just as the question of what constitutes the curtilage is a question of fact and degree to be examined in each individual case, so too the question of what is the site area must be determined by considering the facts and circumstances of each individual case. No doubt, there will be occasions when it is appropriate simply to divide the area by the number of dwellings. In other cases it will not and the present case is an instance."

Some interesting comments were also made by the Court in relation to the use of so-called prescribed “minimum” standards in Development Plans. So often, minimum standards are treated as the planning benchmark from which one determines the maximum development potential of land. To do so, it was emphasised in this case, is to distort the plain meaning and intent of the
Development Plan. Relevantly, the Court said:

“Prescribed minimum standards are not a statement of desired standards. They are no more than minimum standards. Had the Council intended that the prescribed minimum standards should be the norm, it would have said so in the Development Plan… the Commissioner has approached the issue on the footing that, if a proposal complies with minimum quantitative standards, it must be approved. That is not necessarily so. Compliance with minimum standards rarely leads to a grant of development consent. Regard must be also had to the qualitative provisions in the Plan when deciding whether it is proper planning to grant the development consent.”

6. Determination of development “site” and curtilage – characterisation of development as one dwelling or consisting of distinct and separate elements – outbuildings ancillary to a dwelling

The proper characterisation of a proposal will be critical to the correct assignment of a category for public notification purposes. Whether a residential development simply comprises a proposal for a dwelling or consists of distinct and separate elements namely, a dwelling and separate garage and studio will be important considerations. The often difficult question as to what constitutes the “curtilage” of a proposed building for the purposes of determining the “site” of the development and associated issues of exclusivity will also be important.

These issues were considered by the Supreme Court in judicial review proceedings challenging a development authorisation granted by Alexandrina Council in July 2007 where it was contended that the development had not properly been classified by the Council as a Category 1 development. The decision was Colmer & Ors v Alexandrina Council & Ors [2009] SASC 13.

The proceedings for judicial review were not commenced until September 2008, more than 14 months after the granting of development plan consent and more than 9 months after the granting of development approval. Construction of the approved development was well advanced by the time the proceedings were instituted. The
plaintiffs could not succeed therefore in the absence of an extension of time within which to commence the proceedings. The Court refused to grant an extension of time to the plaintiffs within which to bring the proceedings as the reasons for the delay were not satisfactorily explained and the prejudice to the defendants was found to be substantial on account of the extent of construction already undertaken. The Court found that the public interest in insulating defective decisions of planning authorities from attack after such a relatively long time had not been displaced. However, while the Court refused to grant an extension of time and therefore grant relief to the plaintiffs, it did consider the substantive argument of the plaintiffs and expressed the view that the Council had erred in classifying the development as Category 1.

The defendant’s land was allotment 54 being one of five adjoining allotments numbered 51 to 55 located between Hutton Street and Rosetta Terrace, Port Elliot. Each allotment had a southern boundary to an unmade public road reserve known as Merrilli Place. To the south of the road reserve was a coastal reserve and then the ocean. The allotments sloped downwards from north to south and had uninterrupted views of the coastal reserve and ocean. Adjoining allotments 51 to 55 on their northern boundaries was a series of four allotments which had Barbara Street as their northern boundary and access road. The plaintiffs owned three of the four allotments and had two storey dwellings with windows on the upper storey facing to the south and west, overlooking the five allotments fronting Merilli Place, including allotment 54. Because of the slope of the five southern allotments, the houses built on Lots 52 and 53 were two storey houses at the southern end but single storey at the northern end with vehicle garages adjacent to a right of way to Hutton Street. From the adjacent northern allotments owned by the plaintiffs, the dwellings on Lots 51, 52 and 53 appeared as single storey dwellings. Prior to the defendant’s development on Lot 54, the plaintiffs had extensive uninterrupted views from their upper stories to the southern ocean and across Encounter Bay to Victor Harbor and the Bluff.

Because there was no vehicular access available to Merilli Place, a 5 metre wide right of way had been created at the northern end of each of allotments 52, 53, 54 and 55 whereby each of the contiguous owners granted to the owners of the other allotments a right of way. The common right of way was known as Knight Beach Walk and gave rear access to at least four of the five allotments to Hutton Street. In
practical terms vehicular access to each of allotments 52, 53 and 54 was only via
the right of way.

On 2 July 2007 the Council granted development plan consent to what was
described as “detached dwelling – two storey”. Development approval was
ultimately granted on 27 November 2007 with construction commencing in January
2008. At the southern end of the development was a two storey residence. At the
northern end was the garage and visitors car park opening off the right of way.
Above the garage was a second storey studio and store. The garage floor was at
ground level at the northern level of the allotment and at the same level as the upper
floor of the residence. The two components were linked at the same level by a
walkway and outdoor entertaining area. The nature of the structure was considered
in more detail by the Court in determining the question as to whether it constituted a
“detached dwelling”.

When the proceedings were commenced in September 2008 most of the elements
of the development were complete including the second storey studio. It gave rise
to a significant interruption to the views of the plaintiffs from the second storey of
their respective residences.

The Council had treated the development application as one for a Category 1
development. The ground on which the plaintiffs challenged the validity of the
development approval was that this classification was incorrect because:

- the proposal was not for a “detached dwelling” because its “site” was not
  exclusive; and
- the development was not simply for a detached dwelling because of the
  inclusion of the garage/studio as a separate structure.

As to the first argument as to why the development was not one for a detached
dwelling, it was contended that the “site” of the development was not held
exclusively with the dwelling as required by the definition of “detached dwelling”
which reads:

*detached dwelling* means a detached building comprising one
building 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."

Site is defined in Schedule 1 to the Regulations as follows:

"site means the area of land on which a building is built, or
proposed to be built, including the curtilage of the building, or in the
case of a building comprising more than one separate occupancy,
the area of land on which each occupancy is built, or proposed to
be built, together with its curtilage."

The term “curtilage” is not defined in the Regulations and thus often gives rise to
some uncertainty in determining what might constitute the site of a building.
Because the only means of vehicular access to the property was via the right of way
known as Knight Beach Walk; the plaintiffs argued that the curtilage of the dwelling
included the right of way over which the owners of other allotments had rights such
that it was therefore not held exclusively with the subject dwelling. The plaintiff
relied on the decision of McNamara v City of Charles Sturt [2001] SASC 368 where
the Court held that the whole of the driveway which served as vehicular and
pedestrian access to one dwelling on portion of the land formed part of the curtilage
of that dwelling. Portion of the same driveway was also used for access to another
dwelling on another portion of the land and therefore the curtilage of the first
dwelling and therefore its “site” was not held exclusively with that dwelling. The
Court noted that in that decision it was emphasised that what constituted the
curtilage of a building was a question of fact in each case and that in McNamara the
answer turned on the design and layout of the particular means of access to each of
the dwellings in that case.

In considering whether the right of way itself formed part of the curtilage of the
subject dwelling the Court also referred to the earlier decision of Polities v City of
Holdfast Bay (2) (1998) 72 SASR 475 at 481 where it said:

"The question whether a driveway forms part of the curtilage of a
dwelling will depend on the facts and circumstances of each case.
In those instances where the dwelling has a frontage to a street or
road and the rear abuts a lane which provides access for vehicles
to the land, the lane is not part of the curtilage. However, in those instances where a driveway provides the only means of entry from a street or road, the driveway may form part of the curtilage. It will be a question of fact and degree in each case.”

The Court found that the enclosure of the buildings from the right of way, the lack of enclosure of the right of way from Hutton Street and public access to the right of way was significant in determining that it could not properly be regarded as being part of the curtilage of the development and thus was not part of the “site” of the dwelling. Apart from a visitor parking space which was part of the exclusive curtilage of the particular dwelling, solid barriers had been erected to separate each dwelling from the right of way, given that there was uncontrolled access to the right of way from Hutton Street.

The Court noted a dictionary definition of “curtilage” as:

“A small court, yard, garth or piece of ground attached to a dwelling house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling house and its outbuildings. The area of land occupied by a dwelling and its yard and outbuildings, actually enclosed or considered as enclosed.”

Accordingly, the enclosure of the buildings from the right of way, the lack of enclosure of the right of way from Hutton Street and public access to the right of way were significant factors in preventing the right of way from being properly regarded as part of the curtilage of the development. It was found therefore to not form part of the “site” of the dwelling. Whilst unsuccessful on this argument; the plaintiffs were successful in arguing that the development, properly viewed, comprised more than simply a detached dwelling. It was contended that it comprised an additional and separate element, namely, the garage and studio, which could not properly be considered to be an integral part of the dwelling.

The Court noted that Regulation 32(5) refers to a development that comprises two or more elements “as set out in the relevant application or as determined by the relevant authority”. While the Court noted that the application for consent described
the proposal as nothing more than “new residence”; the proposal plans depicted, separate from the house, the garage and studio. While the decision notification form issued by Council for development plan consent described the development as “detached dwelling – two storey” its subsequent development approval described the nature of the development as “detached dwelling – double storey, garage, balcony, deck, swimming pool and fencing.” The Court concluded that the application and the Council’s determination acknowledged two or more elements to the development.

The Court noted that Regulation 32(5) contemplated that a development may contain more than one element and that Clause 2(1)(ca) of Part 1 of Schedule 9 (now clause 2(d)) contemplates the carport, garage, shed, pergola, verandah, swimming pool or outbuilding may be ancillary to a dwelling, not necessarily part of it. Whether such structures are ancillary to a dwelling or integral to it was said to be largely a matter of impression. Therefore, if a structure is not integral to a detached dwelling and falls within any of the categories in paragraph (ca)(now paragraph (d)), is ancillary to a detached dwelling and complies with the other requirements of the paragraph, it will fall within Category 1. As the Court concluded that the garage and studio formed an element of the development separate from the dwelling, it had to consider whether the garage and studio could properly be viewed as ancillary to the residence or integral to it. This was said to be largely a matter of impression. As to the connection the Court said:

“There is undoubtedly a visual linkage as there is with any artificial structure linking a residence with some other structure or outbuilding. It was argued that there was a structural linkage. This is not apparent from the plans. Each of the residence and the garage and studio appears to be a separate and independent structure. The two are linked by the suspended concrete deck, but neither structure is dependant on the other or on the deck for its integrity.”

The Court noted the earlier decision of Baker v City of Norwood, Payneham & St Peters (2003) 127 LGERA 200 that held that a free standing garage separate from a proposed dwelling but connected by a covered walkway was not part of the detached dwelling and warranted separate characterisation. It was largely as a
result of that decision that the Regulations where amended to specifically address the issue of outbuildings.

The Court found that while the structures joining the two components in this case were more substantial and complex than the ground level covered walkway in Baker's case, the principle was the same. Despite the whole development being integrated, the Court found that nevertheless it involved distinct and separate elements comprising the residence and the garage and studio. The residence component was said to be no less a residence by the exclusion of the garage and studio. Returning to the definition of “detached dwelling” being a detached building (“comprising one dwelling”) the Court found that only a portion of the subject building answered that description.

As the garage and studio was found not to be part of the detached dwelling, the development could only have been treated as Category 1 if that component fell within Paragraph(ca) of Part 1 to Schedule 9. The Court noted that while a garage was mentioned in that paragraph, a studio was not, nor was a garage and studio. Even if the building could have been considered to qualify as an outbuilding, it did not comply with the other requirements of that paragraph. The Court found therefore that the Council had improperly classified the development as Category 1 for the purposes of the Act.

It is noted that given amendments to the Regulations since that time that the second element of the proposal (certainly the garage, but perhaps not the studio) may have fallen within Paragraph 20 of Part 2 to Schedule 9 and thus been a Category 2 development.

7. Determination of the site of a dwelling - whether a common driveway is part of the curtilage of each dwelling it serves and thus part of the site of each

The often difficult question of characterising proposed dwelling types for a development comprising more than one dwelling was the subject of consideration in the recent ERD Court decision of Baily v City of Norwood, Payneham & St Peters and Fantasia [2009] SA ERDC 38. This characterisation is particularly important as often it will determine whether the dwelling type is one that is consistent with the Zone purpose; the public notice category and thus extent of neighbour involvement
and, on occasion, whether the proposal is one for an on-merit or non-complying kind of development.

The identification of the “site” of each dwelling is often critical to this assessment and was the subject of this judgment which considered as a preliminary question whether the proposed development was properly a non-complying kind of development. This involved determining whether two buildings at the street frontage of the proposal, which were each to contain two dwellings, were residential flat buildings or semi-detached dwellings.

The proposal was to establish 9 dwellings with associated garaging on land at Edward Street, Evandale. The Council had processed the application as one for a category 2 development which was neither complying nor non-complying. The 9 dwellings were characterised by Council as being 5 two-storey group dwellings and two pairs of two-storey semi-detached dwellings.

The development application was refused and Mr Baily appealed that decision. An adjacent neighbour Ms Fantasia took out an application for review of the Council’s characterisation of the development and was also joined as a party to the merits appeal.

As a preliminary point in the planning appeal, Ms Fantasia argued that the development should have been categorised as a non-complying kind of development on the basis that the four two-storey dwellings with frontages to Edward Street should properly have been described as residential flat buildings. The subject land was situated in the Residential 2A Zone where a residential flat building of more than one storey in the location of the subject land was a non-complying kind of development.

The four dwellings with frontage to Edward Street were characterised by the Council as semi-detached dwellings and were referred to by the Court as “the front dwellings” with dwellings 1 and 4 being referred to as the “outside dwellings” and dwellings 2 and 3 as the “inside dwellings”.

A driveway was proposed between the inside dwellings that would provide the only vehicular access from Edward Street to those dwellings and the other proposed
dwellings on the subject land, except dwellings numbered 1 and 4 which were to have direct vehicular access from Edward Street. A separate application had been lodged to divide the land into Community Title allotments consistent with the land use proposal with the common driveway to form common property.

The Court had to consider whether the front two dwellings were properly characterised by the Council as two pairs of semi-detached dwellings or were rather two residential flat buildings and thus a non-complying kind of development. A semi-detached dwelling and residential flat building are defined in Schedule 1 to the Regulations as follows:

“**semi-detached dwelling** means a dwelling –

(a) occupying 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 planning authorisation; and

(b) comprising one of two dwellings erected side by side, joined together and forming, by themselves a single building.

**residential flat building** means a single building in which there are two or more dwellings, but does not include a semi-detached dwelling, row dwelling or a group dwelling.”

The term “site” is also defined in Schedule 1 to mean:

“the area of land (whether or not comprising a separate or entire allotment) on which a building is built, or proposed to be built, including the curtilage of the building, or in the case of a building comprising more than one separate occupancy, the area of land (whether or not comprising a separate or entire allotment) on which each occupancy is built, or proposed to be built, together with its curtilage.”
The two outside dwellings were not contentious insofar as it was clear that each was to occupy a site held exclusively with that dwelling with the proposal plans showing fencing with a gate at the Edward Street frontage thus enclosing a site for each dwelling. Within that site was a driveway providing direct access between the proposed garage under the main roof of each dwelling and Edward Street.

The arrangement for the inside dwellings however involved indirect vehicular access by the common driveway that was to run from Edward St between the inside dwellings towards the rear of the subject land which was also to service the other five proposed dwellings. Fencing was proposed, with gates for pedestrian and vehicular access, so as to enclose a site for each dwelling. The garage associated with each inside dwelling was located at the northern extremity of each site and was not to be separated from the common driveway by a fence. The balance of the land surrounding the dwelling was to be separated by a fence between the common driveway.

The contention of Ms Fantasia was that the site of each inside dwelling included its curtilage; that the access to each from the public road is part of that curtilage; that it does include a common driveway that was not exclusive to any dwelling such that neither of the inside dwellings occupied a site held exclusively with each dwelling. Therefore, it was argued that the inside dwellings could not be semi-detached dwellings. The key question for determination thus became whether the curtilage of the inside dwellings included part of the common driveway given that the land around the dwelling as ordinarily understood is to be included within its curtilage.

The Court considered three of the most recent key decisions on the topic of what constitutes a curtilage and thus the site of a building where access is in the form of a common driveway arrangement.

In *Polities v City of Holdfast Bay & Anor* (No. 2) (1998) 72 SASR 475 the question turned on whether each dwelling occupied a site held exclusively with that dwelling where the sole means of vehicular access to the two attached dwellings was by way of a shared driveway from the street. The question was whether each proposed dwelling was to occupy a site exclusively with that dwelling and thus had properly been treated as a category 1 development on the basis that each was a semi-detached dwelling. The Supreme Court emphasised that what constituted the
curtilage of a building will be a question of fact in each case, that it may not necessarily be an enclosed area, but must be “so intimately associated with the building as to lead to the conclusion that the area in question in truth forms part and parcel of the building”. It was said that the question as to whether a driveway formed part of the curtilage of a dwelling would depend on the facts and circumstances of each case. In those instances where a driveway provides the only means of entry from a street or road, the driveway may form part of the curtilage and such was found to be the case in this decision. Given that part of the curtilage of each dwelling was shared, it was not possible to identify an exclusively held site with each dwelling and thus the dwellings were not semi-detached dwellings.

In City of Mitcham v Terra Equities Pty Ltd [2007] SASC 244 the Supreme Court considered whether in calculating the site area of each dwelling, the planning authority should include the common driveway. The Court found that in that case where the common driveway provided access between the public road and three of the five proposed dwellings, that such was not part of the curtilage of the five dwellings. The Court suggested that a common driveway used by the occupants of other dwellings on the development site could not be included in the site of any dwelling. It was suggested that:

“The notion of a common area used by others is entirely inconsistent with the concept of a curtilage,”

Again, the Court noted that what fell within the curtilage was a question of fact and degree in each case and that while in Polities it was held that the driveway formed part of the curtilage of two dwellings, the common driveway in the Terra Equities case did not form part of the curtilage of the five dwellings. In Terra Equities it was noted that the three rear dwellings had their own driveway which connected to the common driveway and that the common driveway had a function very similar to that of a public road.

Finally, the ERD Court considered the most recent case of Colmer & Ors v Alexandrina Council & Anor [2009] SASC 13. The proposed dwelling in that case was on an allotment which had no frontage to a public road with access by means of a right of way, portion of which abutted the dwelling. The right of way also provided access to the public road for occupiers of other allotments. The Court rejected the
proposition that the right of way formed part of the curtilage of the dwelling on each of the allotments to which it provided access, finding that it therefore did not form part of the site of the subject dwelling.

The ERD Court concluded that the common driveway was not part of the curtilage of the proposed inside dwellings distinguishing the circumstances of the *Polities* decision. It said:

“the common driveway would function like a public road for all the dwellings proposed on the subject land, except the outside dwellings. The driveway would contribute to the use and enjoyment of each dwelling by reason of it being the sole vehicular access to and from a public road for the occupiers in the dwellings and their visitors, but each occupier’s use and enjoyment of a common driveway would be shared with the occupiers of every other dwelling on the subject land except the outside dwellings. Accordingly, the common driveway would not be part of the curtilage of any dwelling and it therefore could not be part of the site that would be held exclusively with each of the inside dwellings.”

Accordingly, the inside dwellings were found to occupy a site that would be exclusive to them, as a result of the fencing proposed. That site was said to include the curtilage of each dwelling as shown and that the curtilage did not include the common driveway. Accordingly, the inside dwellings were to each occupy an exclusively held site and were thus found to have been correctly characterised by the Council as constituting semi-detached dwellings. While the Court appeared to place no weight on the fact that an associated application for land division had been made, we suggest that such is important in determining the question of exclusivity.

8. Characterising the nature of development for procedural purposes – complying, merit or non-complying – residential flat buildings or retirement village?

This topic was considered by the ERD Court in the decision of *Chappel Smallacombe Joint Venture v City of Mitcham* (1) [2008] SAERDC 39. Since that
time a single Judge of the Supreme Court has reviewed that decision on appeal and allowed the appeal in *City of Mitcham v Chappel Investment Company Pty Ltd & Smallacombe Investment Company Pty Ltd* [2008] SASC 240. That decision was appealed to the Full Court of the Supreme Court in *Chappel Investment Company Pty Ltd & Smallacombe Investment Company Pty Ltd v City of Mitcham* [2009] SASC 23 which found that Justice Bleby in the initial appeal to the Supreme Court was correct in determining that the kind of development proposed by the appellants involved a series of “residential flat buildings” and therefore was non-complying even though they would operate and function as a retirement village.

The subject application was for a retirement village of 66 apartments and 11 cottages. The apartments were to be comprised in 6 buildings each of 3 levels. One of those buildings, the Manor House, was to incorporate an area for community facilities and office management in addition to apartments.

On appeal in the ERD Court, the Council contended that all of the buildings, with the exception of the single stand alone dwelling, contained two or more dwellings and therefore constituted residential flat buildings, a non-complying form of development in the Zone. The appellants contended that the development was properly characterised as one in the nature of a retirement village that would be managed and operated under the provisions of the Retirement Villages Act 1987 and therefore was an on merit development giving rise to a right of appeal against the Council’s refusal.

In its assessment of the application the Council did not classify the development as non-complying but rather assessed and refused the application on its merits. In the ERD Court it argued that the proposed development included residential flat buildings and was therefore non-complying such that there was no right of appeal against its refusal.

The ERD Court found that although the proposed dwellings did “technically” fall within the definition of “residential flat buildings”, ultimately as a matter of practical reality, the nature of the development was not a series of residential flat buildings, but was a retirement village and that, as a matter of practical reality, this was the true nature of the development. Accordingly, it found that there was a right of appeal against the Council’s refusal. The Council appealed this decision to the
Supreme Court contending that it should have classified the development as non-complying.

In the Residential (Foothills) Zone of the Development Plan, a “residential flat building” was a non-complying kind of development. A retirement village was not listed as either a complying or non-complying development. Justice Bleby noted that a “residential flat building” was defined in Schedule 1 of the Regulations as being “a single building in which there are two or more dwellings”, but did not include a “semi-detached dwelling, a row dwelling or a group dwelling”. He found that each of the buildings in the proposal, with the exception of the detached single dwelling, was a residential flat building as defined in Schedule 1 to the Regulations. He also accepted that the development was intended to constitute a retirement village for the purposes of the Retirement Villages Act and noted that the Mitcham Development Plan contained numerous references to aged care accommodation and a specific reference to “retirement villages”, in one of its zones where both a retirement village and residential flat building was included in the list of non-complying developments.

The Council contended that while the proposal might be both a “retirement village” and involve “residential flat buildings”; if the development constituted residential flat buildings; then it was a non-complying kind of development and thus the ERD Court lacked jurisdiction to hear any appeal.

Justice Bleby noted the procedural requirements in the Act and Regulations where a development was of a kind described as non-complying in the Development Plan. He noted that the provisions of Section 39(4)(d) of the Act and Regulation 17 involved procedural restrictions that did not involve an assessment of the application against the provisions of the Development Plan. He found that if a definition in the Regulations or the Development Plan applies and the defined term appears in the Plan as a type of development which is complying or non-complying, then it must be treated accordingly. Such procedural restrictions, he said, cannot be avoided by describing as something else what, by definition, falls within the class of a complying or non-complying development. That is the case even though another description may also accurately describe the nature of the development.

He found that the ERD Court had erred therefore in attempting to classify the development as a retirement village given that the only relevant question was
whether the development was or included a series of residential flat buildings. The fact that the development could accurately be described as a retirement village did not mean that its ceased to be a series of residential flat buildings. He suggested that it would be incongruous if a series of residential flat buildings was non-complying and yet an identical series of buildings, because together they formed a retirement village was not. He rejected the argument that because “retirement village” was specifically mentioned elsewhere in the Plan alongside a reference to “residential flat buildings” that the Development Plan should be construed as excluding a retirement village from the description of “residential flat buildings”. To do so, he said, would be to fail to properly apply the definitions contained in the Regulations noting that not all retirement villages will consist of residential flat buildings.

The developers appealed against the decision of Justice Bleby to the Full Court of the Supreme Court. The Full Court dismissed the appeal and agreed with the approach of Justice Bleby confirming that the only relevant question for the purpose of determining whether the development was non-complying was “whether the development was or included a series of residential flat buildings”.

The Full Court confirmed that Section 35(4) of the Act required nothing more nor less than a comparison of the proposed development to the kinds of development described as non-complying by the Development Plan. The relevant question for the planning authority simply becomes whether the development is of a kind listed as non-complying (or complying) or doesn’t include development of the kind listed as non-complying (or complying). If the development does not fall into either category, it will be subject to a merit assessment in accordance with Section 35(5) of the Act.

The Full Court made the following observations and notable findings:

- The relevant question is “does the development include a series of residential flat buildings” as defined in the Regulations?
- Section 35(4) in its terms requires nothing more nor less than a comparison of the proposed development to the kinds of development described as non-complying by the Development Plan.
The definition of “retirement village”, contained in the Retirement Villages Act was not relevant for the purpose of determining whether the development was non-complying under the Act;

The task of the planning authority is not to determine the one “proper” description of a proposed development. Rather, it is to determine whether the proposed development can be described as a kind of development that is non-complying even though it can be described in another way which is not a non-complying development;

It is therefore possible, at least in theory, for a single development to be both a complying development and a non-complying development. The Court considered that such cases would be rare and went on to discuss how such cases should be resolved. The approach to be adopted in such a case to resolve the inconsistency was said to firstly be to consider whether there was a construction of the Development Plan that was capable of resolving the inconsistency on the basis that it could not have been intended to classify a proposal as both complying and non-complying. If that was not possible, second, it was suggested that a planning authority would need to decide whether the proposed development was more appropriately characterised as a development of the complying or non-complying kind.

The case of Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd & Anor (2001) 80 SASR 435 was noted as an authority for the proposition that a planning authority must “as a matter of practical reality, decide what the nature of the development is”. The Full Court found that this did not mean that there can be only one true description of the development but rather that, for the purposes of determining the nature of the development, it is substance of the development for which approval is sought that is important and not the mere form of the application or applications.

9. Characterisation of development – Distinction between form and use of a building – bed & breakfast and motel – Power of ERD Court on Section 86(1)(f) application for review

The proper characterisation of a proposed development and the power of the ERD Court to quash or set aside a consent on an application for review pursuant to
Section 86(1)(f) of the Act was the subject of consideration in *Pohl & Ors v Adelaide Hills Council & Anor (No 1) [2009] SAERDC 44.*

The Council had granted development approval for a development described as:

> “Construction of a single storey detached dwelling (including tourist accommodation – Bed and Breakfast for a maximum of six (6) persons), double carport and retaining wall, and the removal of four (4) significant trees, (3 x Pinus radiata (Radiata Pines), 1 x Acacia decurrens (Early Black Wattle)).”

The application had been processed as a category 3 merit development.

The Pohls occupied land adjoining the subject land at Aldgate. They appealed to the ERD Court against the Council’s decision to grant consent. They also lodged an application to review the Council’s decision pursuant to Section 86(1)(f) of the Act which proceeded to argument first.

The review application contended that the Council should have characterised the development as a “motel” being a kind of development expressed to be non-complying in the Zone and that the Council should have processed the application accordingly.

The recipients of consent owned and resided on nearby land. On land immediately adjacent their property they operated a self contained bed and breakfast facility known as the Cladich Pavilions. The proposal the subject of challenge was to be situated on adjacent land at 25 Wilpena Tce, Aldgate.

The Court had to consider whether the development had been incorrectly classified as “on merit” by the Council. The built form proposed comprised:

- A single storey detached building shown in the plans as comprising 3 bedrooms, 2 bathrooms, kitchen, dining and living areas, with provision for laundry facilities, wardrobe space and linen storage
- A large deck area attached to the detached building
- Three 22,000L water storage tanks to be located beneath the deck and western portion of the detached building
- A detached carport with space for 2 vehicles
- Retaining walls along the northern and eastern sides of the carport area”

The applicant for consent advised that the proposed development was ultimately to be used by them for a dwelling in the future, but that their present intention was to use the “dwelling” for the next few years as a self contained bed and breakfast facility accommodating up to 6 guests.

In reviewing the plans, the Court noted that the detached building appeared to be designed as a dwelling with a master bedroom and walk-in robe and ensuite facilities and two other bedrooms, a main bathroom with separate toilet, with a kitchen area, a dining area and a living area. There was also to be provision for a laundry and a linen cupboard. Within the Country Living Zone where the subject land was situated a “motel” was listed as a non-complying kind of development.

In the absence of the Development Plan including a glossary or defined terms, the Court first turned to Regulation 3 which provides, amongst other things, that the terms set out in Schedule 1 to the Regulations have, unless inconsistent with the context, or unless the contrary intention appears, the respective meanings assigned by that Schedule when used in any Development Plan. Motel is defined in Schedule 1 as follows:

“motel means a building or group of buildings providing temporary accommodation for more than 5 travellers, and includes an associated restaurant facility, but does not include a hotel or residential flat building.”

The Court found that there was nothing either specifically within the provisions of the Country Living Zone or generally within the balance of the Development Plan to suggest that the defined meaning in Schedule 1 was not to apply.

The Court noted that the detached building designed with 3 bedrooms and associated facilities could provide accommodation for up to 6 persons. It was
proposed to operate as a bed and breakfast facility and thus it was found to be a proposal that would provide temporary accommodation for up to 6 travellers. As to this last element of the definition, the Court said:

“Consistently with the meaning attributed in the Macquarie Dictionary (Third Edition) a traveller is a person who is travelling or on a journey. A traveller may seek temporary accommodation in a facility capable of providing it, before moving onwards in their journey or returning to a permanent place of abode. There is no doubt that what is proposed is a building providing temporary accommodation for up to 6 travellers.”

It was argued by the Council and applicant that the development did not have the characteristics of what would ordinarily be understood to be a motel, having more the characteristics of a detached dwelling. The Court accepted that the proposal did not appear to provide what is usually expected of a motel as that expression is commonly used insofar as the plans did not show a reception area, nor was each bedroom provided with ensuite bathroom facilities.

Notwithstanding this the Court found that the primary obligation of the planning authority was to first determine whether the proposal fell within any of the kinds of developments expressed to be non-complying. This would have involved ascertaining whether the proposal fell within the meaning of “motel” as defined in the Regulations. At that point, the test was whether the meaning of “motel” in the Regulations was met rather than any dictionary definition or commonly understood meaning of “motel”.

The Court noted that the development application had described the proposal as “new residence/bed and breakfast” in effect, suggesting that approval was sought for either two uses or for a building in a particular form, to be used in a specified way. Either the application was seeking approval for a dwelling, as defined, which incorporated both form and use and use as a bed and breakfast for travellers’ accommodation or a building in the form of a dwelling that was intended to be used as a bed and breakfast or travellers’ accommodation facility. The Court noted that in some applications it was
necessary to distinguish between the form of the building and the use for which approval is sought. It noted previous Supreme Court authority in Stewart v McQuade & Ors (1997) EDLR 267 to the effect that while the form of a building may be very influential, in the end it is the proposed use of the building which will provide the answer in many cases.

The Court concluded that it was the intention of the developer as to the use of the building that will be determinative of the nature of the development for which approval is sought. While the form of the building was that of a dwelling, the proposed use was as a bed and breakfast facility, with the foreshadowed intention at some point in the future to change the use to a dwelling. The Court found that the nature of the use the subject of the application was as a bed and breakfast facility for up to 6 travellers. The Court said, having reached that conclusion, the next step was to ascertain whether the proposal fell within any of the defined land uses in the Regulations. Whether a bed and breakfast facility or otherwise falls within the defined term “motel”, however else it may be described, is the approach to be taken consistent with the recent Supreme Court decision in Chappel Investment Company Pty Ltd & Smallcombe Investment Company Pty Ltd v City of Mitcham [2009] SASC 23.

The nature of the development was found to be a motel and that the application should have accordingly been processed as one for a non-complying kind of development.

The Court then went on to consider whether it had jurisdiction in the circumstances. The Respondents’ contended that the Court had no jurisdiction to quash or set aside the consent granted by the Council because:

- the right of appeal by a representor is limited; and
- there is no power in the ERD Court to quash or set aside a consent.

In determining this question the Court reviewed a number of earlier decisions including Stirling District Environment Association Inc v Adelaide Hills Council & Anor [1998] SAERDC 467; Taylor & Ors v City of Mitcham & Earl [1999] SAERDC 20 and Frayne v City of Unley & Ors [2001] SAERDC 78.
The Court noted that the extent of the right of appeal by a third party on a category 3 development is limited to “what should be the decision of the relevant authority as to Development Plan consent”.

Since those matters were determined, the Court noted that Section 86(1)(f) had been added to extend the types of application that may be made to the Court. It is expressed in the following terms:

“(1) The following applications may be made to the Court –

... (f) a person who can demonstrate an interest in a matter that is relevant to the determination of an application for a development authorisation by a relevant authority under this Act by virtue of being an owner or occupier of land constituting the site of the proposed development, or an owner or occupier of a piece of adjacent land, may apply to the Court for a review of the matter with respect to-

(i) a decision under the Act as to the nature of the development, including any decision that is relevant to the operation of section 35;
(ii) a decision under section 38 as to the category of the development.
...”

The Court suggested that given the availability of this new remedy, there was an argument that Parliament did not envisage such a remedy being available to a representor through an appeal under Section 86(1)(b), limited as it is by Section 38(6) of the Act. Of course, it is not a pre-requisite for a person to have made a representation in respect of a proposal, before applying to the Court for a review of the authority’s decision under Section 86(1)(f) of the Act. The representor is entitled to be given notice of a decision on the application and has a right of appeal which is limited to what should have been the decision of the relevant authority.
The Court found, regardless of what had been said in a number of the earlier decisions, that it had jurisdiction to set aside or quash a decision of the relevant authority, if in the course of appeal proceedings, or upon an application for review, it became apparent that a decision was bad because the application was not assessed in accordance with the requirements of the Act. If this were not so, the Court said that it would:

“...in appeal proceedings, hear the merits appeal as to what the decision of the Council should have been, and either be forced to repeat the same error as the planning authority before it, or consider refusing the appeal on the merits because the decision was bad in a procedural sense. Neither of these courses is satisfactory.”

Under Section 88 of the Act, the Court noted that its powers included to reverse any decision and “quash the planning decision notification or the authority that issued”. It noted that “quash” means to make void, annul or set aside.

The Court adopted what was suggested to be a “common sense outcome”, preferring to adopt a wide interpretation of its powers in Section 88 of the Act and remitted the application to the Council for it to process it as a one for a non-complying kind of development in the nature of a “motel”. The appropriate course was held to be the remission of the application to the Council as the Court had no jurisdiction to hear an appeal on the merits, when the decision had been made other than in accordance with the law.

10. Application for review – Public notification category – Time limits – Importance of forming & recording relevant opinions

The provisions of Section 86(1)(f) of the Act now enable an interested person who is an owner or occupier of land constituting the site of a development or a piece of adjacent land to apply to the ERD Court for a review of a decision as to the nature of the development and its classification as complying, on merit or non-complying or a review of a decision made under Section 38 as to the category of the development.
There have now been a number of such applications for review that have been considered by the ERD Court. The question of the time within which such applications must be brought was considered for the first time in the matter of Jaric v City of Charles Sturt & Anor [2009] SAERDC 33.

The proceedings involved a property at Euston Terrace, West Croydon owned by a Mr and Mrs Pirrotta. Mrs Jaric owned an adjoining property. Mrs Jaric sought a review of the decision of the Council that the development application made by Mr and Mrs Pirrotta was a category 2 development. She contended that the application proposed Category 3 development. The Council argued that Mrs Jaric’s application was out of time.

The subject proposal involved four elements namely, alterations to an existing dwelling on the land, the demolition of a free standing garage, the construction of a new freestanding garage and the construction of a 1990mm high masonry wall along the Rosetta Street boundary of the land.

As the provisions for the Zone did not assign a category to any form of development, the development had been considered under Regulation 32 and Schedule 9 to the Regulations.

That element of the development involving the alteration and addition to the existing detached dwelling was not in dispute as it clearly fell within Clause 2(1)(b) of Schedule 9 as being an element of the development that was category 1.

The demolition of the freestanding iron garage was said by Council staff to have been of a minor nature only, having regard to its age and condition and therefore treated as falling within Clause 2(1)(f) (now Clause 2(g)) of Part 1 of Schedule 9 such that this element was category 1 development.

The replacement of the freestanding iron garage with a new masonry freestanding garage having its northern wall constructed on the southern boundary of the subject land and eastern wall set back 1 metre from the Rosetta Street boundary, was not a category 1 development as it was to be constructed within 600mm of a boundary. However, it was said by the Council that by Clause 16B in Part 2 of Schedule 9 (now
Clause 20), the free standing garage would be a category 2 development being ancillary to the dwelling.

In relation to the 1990mm high masonry wall proposed to be constructed on part of the Rosetta Street boundary, the Council suggested that this was a kind of development which was of a minor nature only and thus constituted category 1 development pursuant to Clause 2(1)(f) of Part 1 of Schedule 9 (now Clause 2 (g)).

The Council’s categorisations in respect of the demolition of the free standing garage and the construction of the Rosetta Street masonry wall were challenged by Mrs Jaric.

For a development to properly be assigned to Category 1 on the basis of Clause 2(1)(f) of Part 1 to Schedule 9, the relevant authority must have formed an opinion that the development first, is of a minor nature only; and second, will not unreasonably impact on the owners or occupiers of land in the locality of the site of development.

The delegate of the Council exercising this power gave evidence that in their opinion, the demolition of the garage and construction of the masonry fence were minor. It was apparent that no opinion had been formed as to the second limb of the test namely, whether the proposal would unreasonably impact on the owners or occupies of land in the locality. The Court made it clear that for a development to be assigned to category 1 by virtue of the relevant clause, the Authority must form an opinion that the development fits both descriptions therein. Even had the Council officer had the authority to form the opinions on behalf of the Council; the Court suggested that it appeared that the delegate did not form any opinion as to the impact on owners or occupiers of land in the locality of the demolition of the existing shed or of the construction of the masonry wall. On this basis no opinion had properly been formed by the relevant authority in terms of Clause 2(1)(f) of Part 1 of Schedule 9. In such circumstances, these elements would have been assigned to category 3. Had the Court had jurisdiction, it indicated that it would have remitted the matter back to the Council for the relevant authority to properly consider these elements of the proposed development and consequently reconsider the assigning of a category to the development as a whole.
However, the Court declined jurisdiction finding that the application for review had not been brought within the time period allowed by the Act.

Opinions as to the category of the development were formed by Council officers on 14 December 2007 and 11 February 2008. Development Plan consent was granted to the application on 21 October 2008 and Mrs Jaric's application was lodged on 23 December 2008. Section 86(1) sets out the nature of applications that may be made to the ERD Court, of which paragraph(f) is but one. The Court suggested that Section 86(4) would appear to speak to all of those applications. It provides:

> “An application must be made in a manner and form determined by the Court, setting out the grounds of the application, and, unless otherwise specifically provided under another provision of this Act, must be made within two months after that applicant receives notice of the decision to which the application relates unless the Court, in its discretion, allows an extension of time.”

The Court suggested therefore that on its face, the subsection requires any application made under Section 86(1)(f) to be made “within two months after the applicant receives notice of the decision to which the application relates”. The Court noted however that the flaw in that argument was that the applicant seeking a review of the matter with respect to a public notification categorisation, where it is other than the applicant for consent, is not entitled to receive notice of the decision made under Section 38 of the Act as to the category of the development.

The Court noted that there was no obligation in Section 38 to inform persons who were owners or occupiers of a piece of land adjacent to the subject land as to the category into which a proposed development fell. The Regulations address the giving of notice where that is required because a development is either a category 2 or category 3 development. Interestingly, Regulation 33 which addresses the giving of such notice, does not require that the category be identified. Nevertheless, the notification given to Mrs Jaric did identify the development as being a category 2 development. It followed that if Section 86(4) applied, Mrs Jaric's application for review should have been made within two months of receiving her category 2 public notification from the Council. If this was correct, the Court noted that her application was approximately 6 months out of time.
The Court found that Section 86(4) did apply to applications under Section 86(1)(f). It suggested that while the relevant authority is not required, when giving public notification to notify the category to which the development has fallen, it seems that logically this would happen and that such would necessarily be involved in advising recipients of such notice as to the extent of their rights. Significantly though, the Court noted that no notification would be necessary where an application is identified as being a category 1 development. In that case, no notification was required to be given and therefore a potential applicant would not receive notice of any “decision” as to the category of development. This would seem to be a very strong argument against why the two month time limit within sub-section 4 should not apply to applications under Section 86(1)(f) of the Act.

However, because the application for review involved a decision that the development was a category 2 development; the Court suggested that it “need not be concerned with a period in which an application must be lodged where the applicant seeks to challenge a decision that the development is a category 1 development”. The Court went on to consider whether it should exercise its discretion to extend the time for the making of the application having regard to the factors of the length of the delay, the reasons for the delay, whether prejudice would be suffered by any other person if an extension of time was granted, whether there was an arguable case and the public interest.

While there was an arguable case that the Council’s determination may not have been properly made, the Court concluded that it was not appropriate to extend the time for review because of the significant delay in lodging the application and the prejudice that would be suffered by the developer who had obtained development authorisation some 3 weeks prior to the application for review being made to the Court.

Interestingly, the Court concluded that even were it wrong as to the application of the two month time limit to applications for review under Section 86(1)(f) such that there was no limit for the making of any such application to the Court; such an application in the interests of fairness, should be made within a reasonable time period following the determination of the category of development. Given the circumstances it concluded that an application more than 6 months after the date on
which the applicant for review was informed of the public notice category that had been assigned, was not reasonable. Further, any such application made well after the grant of development plan consent and after not only building rules consent, but also development approval had been granted was said to be entirely unreasonable.

It would appear that when the review powers were introduced by way of Section 86(1)(f) of the Act that the issue of time limits for the making of such applications may not have properly been considered. If this is in fact the case and in respect of a challenge to a category 1 development or as to the nature of the development by a person other than the applicant there may well be no time limit for the making of such an application for review. Questions as to extensions of time therefore would not be relevant but rather the delay in the making of such applications may be relevant to the Court’s discretion and the making of any remedial orders. It remains uncertain in any event as to the remedial powers of the Court if such applications for review are brought after the relevant consent has been given.

11. Interpreting a development approval – inconsistent Development Plan and Building Rules consents

How one is to interpret the terms of a development authorisation and the material to which one may have regard in interpreting that authorisation was the subject of consideration in Adelaide Corporation Pty Ltd v City of Charles Sturt [2008] SAERDC 41.

The case involved an appeal by Adelaide Corporation against an enforcement notice issued by the Council in relation to its development of land on Port Road, Woodville for the purposes of a service station. Adelaide Corporation had constructed a cross over permitting access to and from Jervois Street which the Council argued was contrary to a series of approvals for the establishment of the integrated service station complex. The notice directed that the alleged unauthorised access not be used and that the road verge, footpath and kerbing be reinstated. On appeal the appellant argued that the cross over had in fact been approved by the Council. Two applications were relevant in this regard.

The first application made in May 2004 sought provisional development plan consent for a new integrated service station. At that point the application included
two crossovers to Jervois Street, in addition to two crossovers to Port Road. However, the proposal was subsequently amended to delete all vehicle access to Jervois Street. This arose out of concerns expressed by neighbours in the public notification process. In a response to representations the appellant’s planners stated by letter dated 15 September 2004:

“The access for vehicles for the integrated service station development and the future use will be from Port Road. There is no intention to provide any form of access to and from the site to Jervois Street and there will not be any increase in the traffic along Jervois Street that will be attributable to this proposed development.”

Provisional Development Plan consent was granted to the first application on 20 June 2005 subject to a number of conditions. The first condition required the development to be undertaken in accordance with the submitted details and approved plans.

The “approved plans” included a plan labelled C1. It showed a 100mm high concrete kerb at the end of the car park aisleway adjacent Jervois Street. The Court noted that such a kerb was clearly inconsistent with the provision of vehicular access to Jervois Street. Another plan labelled “Site and Floor Plan” had a notation at the end of that aisleway “no access to Jervois Street”. Both plans had curved lines at either side at the end of the aisleway which might have otherwise been interpreted as suggesting a crossover, but for the kerb shown on C1 and notation on the Site and Floor Plan which it was noted would clearly contradict that interpretation. Such would also be contradicted by the September 2004 letter.

A second application was lodged seeking a variation to the first provisional Development Plan consent. It was accompanied by a planner’s letter dated 14 May 2007. It described the application as one that proposed “minor variations” to the existing provisional Development Plan consent. In this regard it stated:

“Fundamentally we contend that these changes are minor in nature and will not alter the operational aspects of the original proposed development. Specifically the proposed variations entail:
• Decreasing the floor area of the proposed convenience store from 795sq m to 671sq m;
• An additional car parking space;
• The rotation of the fuel canopy to promote directional, convenient movement throughout the fuel area;
• Repositioning of the egress fronting Port Road;
• Relocating the existing approved free standing pylon signs;
• Slightly altering the car parking layout configuration to facilitate efficient vehicle movement through the site; and
• Improving other aspects of the design and layout using the latest design standards of the applicant.”

No mention was made of a crossover to Jervois Street. Provisional Development Plan consent was granted to the second application in June 2007.

The site plan the subject of the provisional Development Plan consent for the second application, Drawing Number 06/JN722/sk01a had a line depicting the boundary between the site and Jervois Street. It also had lines curving away from the car park aisleway just inside the Jervois Street boundary and continuing to the carriageway. The only note at the Jervois Street boundary concerned the closure of the existing crossover. At the Port Road boundary there were three notes concerning crossovers, two of which related to existing crossovers, one of which said “new crossover to Council requirements”.

The applicant then obtained Building Rules consent for the second application from a private certifier. A number of plans were the subject of that consent. A site plan, Drawing Number 06/JN722/sk01a had a note at the Jervois Street carriageway in line with the end of the car park aisleway which said “New cross over to Council requirements”. A note under the heading “Drawing Revisions” suggested that kerbs had been deleted. However, the stormwater plan and details (Drawing Number C1 Issue B) and the Grading, Paving and Finish Plan and details (Drawing Number C2 Issue B) showed a concrete kerb 100mm in height for the length of the boundary to the site and Jervois Street. The Concrete Pavement Joints Plan and Details Plan, which was Drawing Number C3 Issue B showed concrete pavement joints extending...
to the carriageway of Port Road and the crossovers to Port Road, but no such joint
in the area which the appellant argued was intended to be the crossover to Jervois
Street.

Development approval was granted on 6 August 2007. The crossover from the site
to Jervois Street was constructed.

The question for determination by the Court was whether the development approved
included a crossover to Jervois Street for the use of motor vehicles entering and
leaving the land. The ERD Court’s consideration commenced with a reference to
the Full Court decision of Oakden Shopping Centre v City of Port Adelaide Enfield
(2004) 137 LGERA 189 which considered the question of how the interpretation of a
development approval should be approached. The Court referred to the judgment of
Doyle CJ where at page 197 he said:

“A development authorisation is a unilateral document issued by
the relevant authority. It is not an agreement between the
applicant and the authority.

The meaning of a development authorisation is to be determined
objectively. The inquiry is as to the meaning that the terms of the
authorisation would have to a reasonable person. The meaning of
a development authorisation is not determined by inquiring into the
subjective intention of the applicant for authorisation or of the
relevant authority.

A development authorisation is intended to operate for the benefit
of the applicant and subsequent owners of the land. It is an
important document, with enduring legal effects.

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.

……

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 may be permissible in this case to refer to some of the correspondence between the Council and Oakden. That correspondence might constitute details submitted with the application, for the purposes of condition 1. As well, it might be appropriate to refer to the correspondence if it is thought to be uncertain whether the pylon signs were part of the development, the subject of the application."

A Council planner gave evidence that it was his understanding that the amendment in September 2004 to the first application resulted in no vehicular access to Jervois Street being proposed or approved. Neither did he understand the second application to include a variation of the Jervois Street boundary to introduce a new crossover. The second application had therefore been processed as a Category 1 development and no planning assessment had been ever made of a Jervois Street crossover. The Court found that while this evidence was of interest by way of background, it could not be determinative. The Court said that the relevant test to be applied was rather what meaning the development approval would have to a reasonable person.

The appellant called evidence from an architect who advised that in architectural practice, the conventional method of showing a formed access or crossover from a site to an adjacent street which had a kerb involved two solid lines from the property
boundary across the road reserve to the kerbside. The Court went on to consider what meaning the various approvals would have to a reasonable person. In this regard, Judge Cole said:

“For present purposes, I take it that the reasonable person is literate but has no particular expertise in architecture, engineering, town planning or law. He or she has sufficient understanding of the development control system to undertake a reasonably comprehensive enquiry into the meaning of an approval and he or she can read plans….. the question to be answered is what a reasonable person would make of the plans and documents”.

In interpreting the first provisional Development Plan consent the Court noted that the September 2004 letter had to be considered as part of the first application given Condition 1 of the approval. It contained information upon which the applicant clearly intended the Council to rely. The Court found that a reasonable person attempting to interpret the first provisional Development Plan consent would have regard to the documents forming part of the application as referred to in Condition 1. Accordingly, it would have been abundantly clear from the September 2004 letter that no crossover to Jervois Street was proposed. Such was also clear from the Site and Floor Plan and the Plan C1.

As the second application was a variation of the first, the Court found that it would not be possible for a reasonable person to understand the development approval in relation to the second application without first understanding the scope of the provisional Development Plan consent in relation to the first application. However, the Court found that it would be obvious to a reasonable person that if a crossover to Jervois Street were to be proposed that such would be a significant change to the proposed development having regard to the consent granted for the first application. The impact on residents of Jervois Street would be very different were vehicular access to be provided.

The Court found that a reasonable person would find the suggestion that a crossover to Jervois Street was proposed as being inconsistent with the May 2007 letter, which described the variations as “minor”. The listed variations in that letter did not include the crossover. Judge Cole suggested that a reasonable person
would notice the inconsistencies in the plans. A specific note about a new crossover to Jervois Street did not appear in the provisional Development Plan consent plans for the second application. It did appear in one of the Building Rules consent plans, but then on the engineering drawings, the 100mm kerb across the Jervois Street boundary was shown. The Court found that a reasonable person would resolve the inconsistencies in the plans by relying upon the clearly expressed statement in the September 2004 letter that no crossover to Jervois Street was proposed and the absence of any statement to the contrary in the correspondence accompanying the second application.

The Court concluded that notwithstanding the inconsistencies in a number of the approved plans that the crossover constructed from the site to Jervois Street had not received development approval.

Adelaide Corporation appealed this decision to the Full Court of the Supreme Court. In its judgment in *Adelaide Corporation Pty Ltd v City of Charles Sturt* [2008] SASC 260 the Full Court dismissed the appeal. It agreed that the meaning of the second consent was to be determined by considering not the subjective belief of the agents of the applicant, the applicant itself or Council officers who dealt with the application, but rather by considering the meaning that a reasonable person would understand it to have after considering the relevant documents.

The second plan had removed the text indicating that there would be no access to Jervois Street, and it had marked lines suggesting a crossover was proposed. However, in the absence of any text identifying the lines as a crossover access (in the context of the rest of the plan which did identify other access points by text) it was objectively uncertain whether a crossover was being proposed. Given that uncertainty, the Court agreed that a reasonable person would resort to the letter of 14 May 2007 to resolve the uncertainty. It made no reference to a proposed crossover between the site and Jervois Street. Accordingly, the Court found that the second consent understood objectively did not incorporate consent for crossover access to Jervois Street.

The Supreme Court reached its conclusions on a slightly narrower basis than the ERD Court who placed some reliance in the response to representations letter of 15 September 2004. As that letter had not been expressly incorporated into the first
consent, nor had it been stamped by the Council; the Supreme Court suggested that it may not be permissible to refer to it but made no final conclusion in this regard. It found that it was not necessary to refer to it in any event given the approved plans. Finally, the Supreme Court noted that the ERD Court had made passing reference to plans submitted for the purposes of obtaining Building Rules consent. The Supreme Court did not rely on those plans in interpreting the meaning of the development plan consent suggesting that it doubted that it was permissible to rely on these for this purpose.

12. Characterising the nature of development – ancillary and incidental or new and separate use – addition of retail fruit and vegetable sales to an existing retail nursery

While the Virginia Nursery on Gawler Road at Virginia started life as a wholesale nursery with little or no retail sales to the public, as a result of a number of approvals over the years its emphasis has very much moved to the retailing of plants and other associated goods and materials including pots, statues and fountains to the public. It advertises regularly in this regard in both the press and on television.

An appeal last year in Eliza Jane Investments Pty Ltd v City of Playford [2007] SAERDC 72 involved a proposal to incorporate a restaurant within the existing retail plant nursery. The subject land was situated within a Horticulture Zone where a restaurant was designated as a non-complying form of development. The appeal to ERD Court was against the Council’s characterisation of the proposal as a “restaurant” and thus a kind of development that was non-complying in the Zone. Judge Trenorden ultimately found that the restaurant did not form an additional, separate land use independent of the retail nursery but rather, as proposed, should be characterised as a use that was subordinate for the purposes of the existing dominant use of the retail plant nursery. Accordingly, she found that the proposal was not for a kind of development expressed as non-complying in the Horticulture Zone.

The application the subject of appeal in the most recent decision of Eliza Jane Investments Pty Ltd v City of Playford (3) [2008] SAERDC 77 sought approval to vary an earlier consent by converting an area previously identified as a “garden accessories sales area” and “storage” to an area for the sale of fruit and vegetables.
The planning consultant for the applicant suggested that “the subject development is a reasonable variation to the approved non-complying development and should be assessed as a merit form of development”. The area proposed for fruit and vegetable sales, excluding storage was shown in the proposal plans as 165sq metres. The Council determined the development to be non-complying and refused to grant development approval describing the proposal as “change of use to sale of fruit and vegetables”. The applicant appealed against the Council’s decision to classify the proposal as a non-complying development in the Horticulture Zone. Amongst the kinds of development expressed to be non-complying within the Zone was the following:

“Shop, other than a shop involving the retail sale of products grown on the same site as the shop”.

The appellant argued on appeal that the retail fruit and vegetable sales component of the business would not be a separate use of the site but rather would be part and parcel of an integrated business.

As to the characterisation of the existing approved use it was submitted in the alternative that either the existing use was a shop involving the retail sale of products grown on the same site or alternatively that it was an existing non-complying form of development.

The primary case argued that the addition of fruit and vegetable sales would amount merely to a change in the retail product mix and would not change the characterisation of the existing use. Alternatively, it was put that the addition of fruit and vegetable sales to an existing non-complying form of development would not change the character of the existing use such that the proposed development should not be treated as non-complying.

The Court suggested that there was some difficulty in determining the precise meaning of the non-complying designation with respect to the exclusion being a shop involved in the retail sale of products grown on the same site as the shop. While there was some evidence that some of the plants sold in the retail plant nursery were seedlings that were being grown on the applicant’s land, there was also evidence that plants were brought in from other sources and progressed on the
subject land, to the extent that it was argued that they were “grown” on site, prior to retail sale.

The first task of the Court was to characterise the nature of the existing use. The use approved had been described as a “shop (retail plant nursery)”. The existing approved use of the subject land was characterised by the Court as that of a retail plant nursery including incidental and ancillary uses. Products sold in the retail plant nursery included seedlings and plants which had been either entirely or partly grown on the subject land or the adjacent land controlled by the applicant. The Court assumed that some of the plants for sale on the subject land had been grown thereon, at least in part, and that that was sufficient to constitute a “shop involving the retail sale of products grown on the same site”, such that the existing approved use was not a non-complying kind of use.

The question for determination then became whether the new use namely, the retail sale of fruit and vegetables, was an additional or different use. While the fruit and vegetable retail sales area was to have its own checkout area and be a separate profit centre, it was to be a part of the overall business conducted on the subject land. Its entry was to be through the main doors of the retail plant nursery building and it was to have the same hours of operation. The area was to be managed as part of the nursery business and not leased for operation by a separate entity. The Court found that while the fruit and vegetable sales would not be independently operated, it was to operate as an independent profit centre within the overall business and thus would not be inextricably bound into it. It was suggested that it would not be an essential part of the whole business in the same way that the garden accessories and garden supplies could be said to be a necessary part of the retail plant nursery business.

The Court found that the fruit and vegetable sales area would clearly be identifiable as a separate shop within the overall retail nursery complex and would have its own identity despite common access and operating hours. Having so concluded the Court found that the shop was a non-complying kind of development as it was clear that it would not involve the retail sale of products grown on the same site.

The Court went on to find that, even if the existing approved use was properly characterised as a non-complying form of development, the question that would
then need to be posed would be whether the proposal was so closely identified with the existing use of the land that it takes on its character as was discussed in Potter v City of Holdfast Bay [2005] SASC 354. The Court concluded that the proposed fruit and vegetable sales area would not even in that event be so closely identified with the existing retail plant nursery that it would take on the character of the plant nursery. Accordingly, even if the existing approved use was non-complying, the proposal was for a separate shop not falling within the exception and was thus a kind of use expressed to be non-complying.

This decision was the subject of an appeal to the Supreme Court which was heard on 6 July 2009 with judgment being reserved.

The Full Court of the Supreme Court delivered its decision on 1 September 2009 dismissing the appeal against the decision of the ERD Court finding that the subject application did involve a change of use which would constitute non-complying development in Eliza Jane Investments Pty Ltd v City of Playford [2009] SASC 260.

The Supreme Court noted that the proposed area for fruit and vegetable sales was approximately 165sq metres to be located in a separately partitioned area with substantial display units and four checkouts that would only service the fruit and vegetable sales area.

The Appellant argued that the proposal involved a variation under Section 39(6) of the Act which did not constitute “development”. In this regard the Supreme Court noted that not all variations to an existing development authorisation will constitute “development”. It gave by way of example, an application for variation to a condition of an existing authorisation that might only involve a change of a particular material to be used in construction or the change in position of a partition. However, the Court found that if the proposal involved “development”, Section 39(7)(b) ensured that it would be required to be assessed against, amongst other things, the provisions of the Development Plan. The two questions to be answered were first, whether the subject application involved “development” by way of a change in the use of land and then second, whether the proposed new use constituted a non-complying kind of development.
In answering the first question the Court reviewed a number of the landmark cases which discussed the concept of what would amount to a change in the use of land. These included *City of Mitcham v Fusco* 124 LGERA 196; *Prestige Car Sales Pty Ltd v Town of Walkerville & Shuttleworth* (1979) 20 SASR 514 and *Foodbarn Pty Ltd v Solicitor-General* (1975) 32 LGRA 157.

The Supreme Court found the existing approved use on the land to be a “shop (retail plant nursery) including certain incidental and ancillary uses”. The Court found that the ERD Court was correct in concluding that the activity of fruit and vegetable selling did not fall within this genus and that the sale of fruit and vegetables could not be described as being incidental to the activities of a shop which is a retail plant nursery. The proposal was said to be a change in use regardless of whether the sale of fruit and vegetables was subordinate to the sale of plants and incidental or ancillary activities. The Court found that it did not matter how the sale of fruit or vegetables was managed or whether it was a separate “profit centre” as the discreet activities on or use of the land would change. That change accordingly was required to be assessed against the Development Plan. As the proposal was for a change in the use of the land, the Court found that it proposed a non-complying form of development as it squarely answered the description of a “shop, other than a shop involving the retail sale of products grown on the same site” and therefore dismissed the appeal.

13. Requirement for both quantitative & qualitative assessment – questions of weight and relevance of any identified departure from policy – consideration of a proposal as a whole rather than assessment of particular issues in watertight compartments

In *AG Building & Developments Pty Ltd v City of Holdfast Bay & Tanti* [2009] SASC 11 the Supreme Court allowed an appeal against a judgment of the ERD Court which refused consent to the proposed construction of a residential flat building of 5 apartments and a common gymnasium over three levels with an underground basement car park on the Esplanade.
The ERD Court concluded that the proposal was “marginal and borders on non-compliance with the Development Plan guidelines relating to:

- dwelling density;
- site coverage;
- building height;
- cutting and filling of land form;
- side and rear building set backs;
- driveway set backs;
- overshadowing/natural light protection of the adjoining dwelling to the south;
- car parking provisions; and
- vegetation enhancement.

The ERD Court Commissioner had found that while non-compliance with individual policy requirements were not fatal to the proposal in themselves, collectively and cumulatively they were sufficiently significant so as to warrant refusal.

Justice Bleby in the Supreme Court on appeal considered each of the issues identified by the Commissioner and whether he had erred in his approach to the assessment task. The Supreme Court identified numerous errors in approach to specific principles including dwelling density, site coverage, building height, cutting and filling, side and rear set backs and car parking. The Supreme Court found that in many instances the Commissioner’s application of the Plan had been too literal focusing on the quantitative provisions contained in design techniques to the exclusion of a qualitative assessment of the development. The Court noted that design techniques were simply one way of possibly satisfying the associated principle and did not purport to be an exclusive way of doing so. To concentrate solely on a design technique was said to fail to properly consider the substance of the related principle. It noted that in any assessment it is important to look at the purpose behind a particular provision. It is not sufficient for example, to simply say that a proposal does not satisfy a particular provision without determining the intent of the relevant provision.

The Supreme Court found that the Commissioner had misapplied a number of provisions and placed too much emphasis on design techniques. The emphasis on
what was required in assessing a proposal was not to examine the particular issues in watertight compartments, but rather as part of a single complex planning problem as to whether the proposal as a whole should be supported. It recognised that while individual issues need to be assessed, it is important to consider the proposal as a whole and the relevance of any particular departure from a principle must be assessed by reference to other relevant provisions and by the effect of the departure on other considerations relevant to the development at its particular location.

As to the approach of the Commissioner, the Court said:

“The Commissioner’s approach seems to have been entirely quantitative: if the proposal did not comply with a particular guideline or suggested Design Technique, it did not comply, and if there was a sufficient number of individual relatively minor shortcomings (we were not told how many would do), collectively they became significant and constituted a sufficient departure from the Development Plan to warrant refusal. There was little qualitative assessment of the supposed shortcomings against the more general requirements of the relevant Objectives and Principles of the Development Plan.”

The Court emphasised that where non-compliance is identified the Authority must assess the weight to be given to those particular features of non-compliance in their proper context. Likewise the Court said, it does not follow that because some minimum quantitative standards or guidelines are not met, that a proposal must be rejected. All of the issues identified by the Commissioner were said to be interlinked. As to what was required, the Court concluded:

“What was needed, and what was lacking, was some assessment of the relevance of any particular supposed departure by reference to other relevant Principles, and an assessment of the effect of the departure on other considerations relevant to that development and its particular location. This, of necessity, required a qualitative assessment which is lacking in the Commissioner’s reasons. It required an assessment not of particular issues in watertight
compartment, but rather as part of a single complex planning problem – whether the proposal as a whole should be approved.”

The Supreme Court allowed the appeal and remitted the matter to the ERD Court for further consideration. I note that the ERD Court recently issued judgment in the matter again refusing the appeal.

14. Shop – do trades sales constitute retail sales – sale by wholesale

In the case of Aretzis Investments Pty Ltd v City of Mitcham [2009] SAERDC 53 the ERD Court had cause to consider whether a proposed Solver Decorator Centre was a non-complying development in the nature of a shop or whether it was operating more as a wholesaler rather than a retailer.

Aretzis had appealed against the Council’s determination that the development was for a shop and therefore a non-complying kind of development in the Industry/Commerce (Melrose Park) Zone. “Shop” is defined in Schedule 1 to the Regulations to include:

“premises used primarily for the sale by retail, rental or display of goods, foodstuffs, merchandise or materials…”

Aretzis contended that the proposal would primarily be used for trade sales rather than retail sales such that what it was proposing did not meet the definition of “shop”.

In contending that the premises would not be used by Solver primarily for the sale by retail of Solver products it was suggested, based on operations at a related decorator centre, that sales would be predominantly wholesale and trade. The suggested breakup of sales was 70% to the building trade and 30% retail.

The Council contended that the extent to which sales are directed or made primarily to tradespersons was irrelevant. It relied on the authority of Happy Valley Hardware & Garden Centre & Anor v City of Noarlunga & Harmony Corporation [1994] EDLR 172. That case involved a proposed Bunnings hardware store where the Court had found that nothing turned on the distinction between trade sales and sales to non-
trade customers and that the premises would not be used for the purposes of wholesaling.

The Court ultimately rejected the suggestion that sales to members of the building trades constituted wholesale sales rather than retail sales. It went on to consider the difference between sale by retail and that by wholesale. It noted the relevant definitions in the Macquarie Dictionary being:

“Retail: the sale of commodities to household or ultimate consumers, usually in small quantities (opposed to wholesale)”

“Wholesale: the sale of commodities in large quantities, as to retailers or jobbers rather than to consumers directly (distinguished from retail)”

It was put on behalf of Aretzis that a professional painter was not the ultimate consumer of the container of paint that he or she may buy but rather that they purchase the paint wholesale and then retail it to the ultimate consumer. In considering the role of the skilled painter who might buy paint from Solver at a trade price, the Court suggested that the paint was purchased to enable the painter to fulfil contracts with customers. This involved the skilled painter consuming and using the paint in the course of providing the contracted service of painting or decorating. It was said that the building tradespersons used the materials purchased by them in conducting their business to provide the relevant contracted service. It was found not to be relevant that the skilled painter will charge his or her customer for the tins of paint purchased insofar as they were materials necessarily used to perform the relevant contract. The sale of paint to someone else to on sell was said to be sale by wholesale whereas the sale of paint directly to consumers will be a sale by retail. In this regard the Court said:

“The retailer sells to consumers, being persons who purchased the paint to use or consume themselves. There is no distinction between the home handy person, who purchases paint to use it to paint his or her own house or other building, and the skilled painter, who purchases the paint to perform the contracted service of decorating a customer's house or building.”
The fact that a retailer might offer a discount to tradespersons was not to the point. This “trade sale” would only be a sale by wholesale, if the paint was purchased to be on sold or retailed to a person who would then use the paint. The Court concluded that where the paint is sold to a person who intends to use it, whether for their own purposes or to provide a service to a customer, the sale would remain one by retail.

The Court found that the purchase of paint from Solver by a tradesperson was not a sale by wholesale, but a retail transaction, even though the tradesperson may pay less for the paint than a member of the public who is not of the building trades. The proposed decorator centre was therefore development in the nature of a shop and thus the Council was held to have been correct in concluding that it was a non-complying kind of development in the Zone.

15. Indoor Recreation Centre

In the decision of Willcocks v City of Whyalla [2009] SAERDC 23, the ERD Court had to consider whether a proposed “Curves” gym, to be undertaken within an existing building, was a proposal for a “indoor recreation centre”. This was the first time that the Court had to consider that expression. The reason the Court was required to consider whether the proposal amounted to an indoor recreation centre was because the relevant development plan prescribed that indoor recreation centres were non-complying within the Residential Zone (within which the subject land was located).

The Development Regulations 2008 provide, in Schedule 1, that “indoor recreation centre” is defined to mean “a building designed or adapted primarily for recreation, but does not include a stadium or amusement machine centre”.

The third party appellant argued that the Curves gym would be used for recreational purposes and that this would result in the building housing the gym being an indoor recreation centre. The Council and the applicant argued to the contrary.

The Court found that the proposed “Curves” gym was “a very limited form of gym, which provides only circuit training and does not provide the other elements of a contemporary gym, which might include a free weights room, treadmills and cycles,
studio classes, a swimming pool and squash courts”. However, the Court did find that the activities offered by the Curves gym fell within the meaning of “recreation” as that word is used within the definition of “indoor recreational centre”.

In this case, the Curves gym was proposed to occupy approximately 38% of the total leasable floor space of the relevant building. An existing café occupied about 55% of the floor space. The Court appeared to tacitly accept that the building being disposed in such fashion meant that it was not adapted “primarily” for recreation. The Court also noted that no physical adaptation of the building was necessary in order to establish the Curves gym, and the judgment appears to support the view that the absence of any “adaptation” of the building also meant that the proposal did not seek to establish an indoor recreation centre.

The primary reasoning of the Court is set out in paragraph 14 of the judgment:

“In considering whether a proposed land use falls within the definition, it is important not to lose sight of the term itself. The question here is whether the use proposed for approximately 80 square metres of floor space for the Curves gym is an indoor recreation centre. Clearly, it is not the case that all recreation undertaken indoor will amount to an indoor recreation centre. Issues of fact and degree are relevant. In this case, the 80 square metres space in question is part of premises of approximately 210 square metres and those premises comprise one of two buildings on the land. When used as a town planning description rather than a marketing term, the word “centre” implies premises of considerable size and, generally, the presence of a number of elements related to an overarching kind of land use. A single shop is not a shopping centre, but a group of shops may be. A single doctor’s consulting room is not a medical centre, the premises containing the consulting rooms of a number of health practitioners may be. In the same way, I do not consider that a single exercise circuit occupying 80 square metres of floor space in premises containing other uses that are not recreational uses can be called an indoor recreational centre for town planning purposes. The “Curves” use is an undefined use.”
We note that the reasoning adopted by the Court in this case means that a single stand alone gymnasium facility will rarely be an “indoor recreation centre”. This is different to the case law from the Victorian Civil and Administrative Tribunal (for example see Buzza v Banyule City Council [2007] VCAT 1846), and planners with experience in Victoria should be aware of this difference between the planning regimes of that State and this State.

16. Rural Land Division

Much of rural South Australia is disposed of as farming properties of a considerable size. However, the underlying land is frequently disposed of as a number of allotments, sometimes hundreds or more, which make up any one farming property. From time to time owners of these allotments consider that undertaking a land division or boundary realignment to create different sized or shaped allotments may be commercially beneficial, especially if done so as to facilitate a change of use of the affected land.

The ERD Court had occasion to consider one such application for boundary realignment in the matter of Tiger Plains Pastoral Company Pty Ltd v Mid Murray Council [2009] SAERDC 5. In that case the developer owned land within the “paper township” of Mount Mary, together with a number of large allotments to the east of that township. The total amount of land held by the developer was just shy of 3,000 hectares. The smaller allotments, of which there were many, were in the order of two to five hectares each in area, whilst the larger allotments ranged from 31.8 hectares to almost 200 hectares in area, with most falling within the range of 130 to 190 hectares. The developer proposed to realign the boundaries of the existing allotments to create 35 allotments out of an existing 39 allotments, which allotments would range in size from 57.8 hectares to 133 hectares. Throughout the hearing of the appeal, the new allotments were called “lifestyle allotments” by the developer. The Court held that this phrase was “really a marketing term”. The Court found that, as a matter of practical reality, what has been proposed was the creation of allotments commonly known as “rural living” allotments.

Although the property had been used for grazing in the past, the developer made it clear that it had no wish to conduct grazing operations on the land in the future. The developer sought to justify the creation of the rural living allotments by reference to
conservation principles. That said, the developer did not dispute that the divided allotments would be more valuable, per allotment, than the existing configuration of the land would be if it were sold off as individual allotments.

The position adopted by the Council was that this division would facilitate, or at least result in an expectation of, the use of the divided allotments for rural living purposes. The Council contended that this was inimical to the desires which the development plan expressed for the Rural Zone. The Court agreed, finding at paragraph 38:

“All of the [Rural Zone] Provisions taken together, give a clear indication of what the Development Plan seeks for the land in land use terms. Quite simply, it is to remain in use for primary production. Rural Living is to be undertaken only in areas set aside for that purpose by the Development Plan. The land is not within such an area. The Development Plan goes so far as to contemplate specifically a desire to place a caravan on rural land for habitation purposes, and seeks to prevent that from occurring.”

The Court also accepted the evidence of the Council’s planner, which was that prospective purchasers would not necessarily seek to use the divided allotment for ecologically sensitive purposes. Rather, the Court accepted that many members of the community would expect to be able to build a dwelling on an allotment. The Court also thought that it was likely that prospective purchasers would seek to use the allotments for trail bike riding, shooting, and other uses inconsistent with both pastoral uses and conservation. The Court noted that it was relevant that the developer did not propose to constrain the use of the land by means of any Land Management Agreement, or Heritage Agreement under the Native Vegetation Act.

Significantly, on the developer’s own case, the Court held that the division of the land would make the land more expensive and therefore less attractive to purchasers who wished to use the land for grazing. The Court therefore found that the proposal was at odds with the desires of the Development Plan.

In relation to Native Vegetation, each party called an expert or experts in Native Vegetation and/or fauna. On the developer’s case, the conversion of the smaller allotments previously part of the Mount Mary paper township into parts of larger
allotments would increase the likelihood of conservation efforts for that land, and would be of ecological benefit. However, the Council’s native vegetation expert (a member of DWLBC’s Native Vegetation Unit) was concerned that the redistribution of allotment boundaries would introduce new boundaries through areas of intact native vegetation which might then be subject to clearance as of right under the Native Vegetation Regulations.

The Court did not accept as likely the belief of the developer’s experts that the divided allotments were likely to be purchased by ecologically minded owners intent on conservation. The risks of additional native vegetation clearance identified by the Council’s expert were tacitly accepted by the Court.

The Court also noted that the appellant’s argument sought to rely upon a land use which was not desired nor encouraged by the Development Plan, namely the use of land within the Rural Zone for conservation purposes, rather than primary production purposes. The Court noted that a change of policy to permit or encourage such conservation uses would need to be done by way of amendment to the development plan rather than the presentation of evidence in a planning appeal.

It is interesting to note that the Court considered that, if the division were to be approved, it would be appropriate to require the developer to upgrade the access roads to each allotment so as to ensure all weather access for prospective purchasers. The developer had proposed to leave the access tracks as presently existing, which in some weather situations were impassable. Whilst not requiring bituminisation or other sealing of the roads, the Court did find that it would be inappropriate not to provide all weather access.

17. Alternative Designs to Accommodate Significant Trees

The significant tree provisions of the Development Act and Development Regulations continue to provide much work for both Councils and applicants alike, to say nothing of the enforcement and prosecutions which arise when significant trees are damaged without approval. However, one matter which had remained thus far substantially unexplored, was what circumstances were necessary to take advantage of the proviso in most development plans which anticipates that significant trees may be removed if there are no reasonable alternative design
options or design solutions for development of land which would result in the tree being retained.

The facts considered by the Court in Reetz v City of Onkaparinga [2009] SAERDC 26 were as follows.

An allotment of approximately 300 square metres had been created in 2001 or 2002 by dividing a corner allotment. On that allotment was a very large River Red Gum, with a trunk circumference of 4.1 metres (measured one metre above natural ground level) and with a canopy spread of approximately 15 metres. Expert advice was received to the effect that, in order to avoid damaging the tree, construction works should not occur within an eight metre radius of the trunk of the tree. Any usable building area was sited behind the tree and had dimensions approximately 9 metres by 13 metres boundary to boundary. The relevant development plan provisions sought side set backs of two metres for single storey dwellings and three metres for upper storey components of two storey dwellings (plus additional setbacks for walls exceeding 6 metres in height), together with a rear set back of eight metres. Those principles also included a desire that any land division within the policy area result in allotments of not less than 900 square metres. Policy area provisions also sought generally single storey development, and identified that more than one storey would only be appropriate where not bulky in appearance and the change in storeys would align with the topography of the land.

The policy area provisions also placed considerable emphasis upon the retention of vegetation and the maintenance of a green canopy over the policy area. The subject land in question was within a residential locality which was, by and large, densely vegetated.

The appellant proposed to remove the River Red Gum and construct a single storey dwelling.

On appeal, the Council’s case was that a relatively modest two storey dwelling, of approximately the same floor area as the proposed single storey dwelling could be constructed outside the tree exclusion zone, towards the rear of the property, in a manner which would not necessarily be particularly out of keeping with the locality, and which would result in the retention of the tree. The appellant’s case was that
the dwelling form which the Council suggested as a reasonable alternative design was so far out of keeping with the desires of the development plan (taken as a whole), that the better planning outcome was the removal of the tree and the construction of a dwelling which substantially complied with the relevant set back requirements, and which would provide replacement landscaping (albeit not on such grand scale) as part of the proposal. The appellant did, however, concede that the additional cost of the Council’s alternative design was not unreasonable (being approximately $30,000 more than the $100,000 anticipated to be spent by the appellant).

The Court held that, in the circumstances of this case, the better planning outcome was the removal of the tree and the construction of the proposed dwelling, rather than the retention of the tree and the construction of a dwelling in a form such as was proposed by the Council (which the Court found was significantly at odds with the relevant principles of the development plan).

The Court found that any development option which retained the tree, would be severely constrained by the resultant building envelope, and would require the construction of a two storey building, significantly closer to side and rear boundaries than desired by the development plan with private open space either placed in the small area which would remain behind the dwelling (in which case it would not meet the area and linear dimensions desired by the development plan for private open space), or situated in front of the dwelling, where it would necessitate both privacy screening and some form of protection from falling tree limbs. Garaging or a carport would also need to be situated in front of the dwelling. Additionally, north facing upper level windows (other than any upper level windows in the south western portion of the front façade) would need to be obscure glazed or otherwise screened to prevent overlooking of neighbouring properties.

The Court concluded that in those circumstances, there was no reasonable alternative design option or design solution which would allow the subject tree to be retained. Accordingly, the Court allowed the appeal.
18. Division of Contaminated Land

As the role of “brown fields” sites as a significant part of urban renewal continues to grow, it is timely that both the ERD Court and the Supreme Court have considered a case concerning the division of contaminated land.

A developer owned an allotment fronting Wood Avenue, Brompton. It had a total area of approximately 690 square metres, and on it stood an old dilapidated concrete block building, sited toward the rear of the allotment, which had historically been used for industrial purposes. The developer proposed to divide the land into three separate allotments each having an area of approximately 230 square metres. A portion of the land within the vicinity of the existing building had been identified by an environmental consultant as being contaminated to such an extent that residential use was not considered appropriate without the land being first remediated.

The balance of the land was contaminated but only to such an extent as to require a particular layout of built form development so as to hard seal the areas affected by contamination. The division in question proposed to divide off the land which did not require remediation for residential use, as two allotments, and to leave the balance of the land (which required remediation) in a third allotment. The developer did not propose to remediate the land nor enter into any binding arrangement whereby the funds obtained from selling the newly created allotments would be applied to the remediation of the land.

Both at first instance before the ERD Court, and on appeal before the Supreme Court, the developer argued that because the proposed division was for “residential purposes” this both extinguished the existing use rights of the land for industrial purposes (which would otherwise have attached to the land), and would also ensure that any future use of the land was “residential”. This, the developer argued, meant that it was appropriate for the division to gain the benefit of a particular “bonus” mechanism within the relevant development plan, which permitted formerly commercial or industrial sites to be divided into smaller allotments than would otherwise be the case and developed with houses. Without the bonus mechanism, two of the proposed allotments fell short of the minimum allotment size by about 10%. 

The developer also argued that the Court, if it was concerned either about a continued industrial use of the land, or remediation of the land in the future, should impose conditions requiring that the divided allotments not be used other than for residential purposes, and that no development occur on the severely contaminated rear allotment until it had been remediated. However, the developer did not at any stage volunteer to remediate the land itself, nor accept a condition requiring it to do so.

In *ACN 068 691 092 Pty Ltd v City of Charles Sturt (No. 2)* [2008] SAERDC 92, the ERD Court held that the land probably enjoyed existing use rights for industrial use, although the Court ultimately found that the proposal did not merit consent regardless of whether existing use rights attached to the land. In the absence of existing use rights, the Court held that the land was vacant and that there was no use which might be made of the land as of right. Further, the Court held that the division of the land would not imbue the land with any use rights, nor constrain the use to be thereafter made of the land (other than in practical terms arising from the size and configuration of allotments created).

In this assessment, the Court expressed concern that the proposal created the potential for remediation of the severely contaminated allotment to be deferred indefinitely, with the attendant possibility that remediation might eventually occur in close proximity to established residential uses on the other two allotments. Ultimately, the Court concluded that the bonus mechanism in development plan did not apply, the allotments were sufficiently undersized so as to bring them into conflict with the clearly expressed intent of the development plan, and the contamination issues were such that the proposal should be refused. The appellant appealed to the Supreme Court.

On appeal (*ACN 068 691 092 Pty Ltd v City of Charles Sturt* [2009] SASC 127) the developer alleged that the ERD Court had erred in the approach that it had taken.

In its judgment dismissing the appeal, the Supreme Court made particular reference to Principle 250 of the Development Plan, which desired that, in order to prevent harm to human health or the environment, “development should not be undertaken on contaminated land or potentially contaminated land unless: (a) the land was
remediated to a level that makes it suitable and safe for the proposed use; or (b) the
land will be maintained in a condition or the development will be undertaken in a
manner that will not pose a threat the health and safety of the environment or
occupiers of the land or land in the locality”.

The Supreme Court held that, although the proposed land division was “for
residential purposes” that did not terminate any existing use rights that might exist.
The Court said that the ERD Court was correct to find and give weight to the
proposition that the retention of the existing building on the proposed severely
contaminated allotment, and the absence of any proposal for decontamination of the
soil on that allotment, meant that the proposed division did not comply with the
desired future character for the relevant policy area. In particular, the Court noted
that decontamination of the soil might occur after rather than before housing was
erected on the other two allotments, contrary to the desires of the policy area.
Although the Supreme Court held that the ERD Court took an unnecessarily strict
view of the bonus mechanism, the Supreme Court held that the ERD Court was
correct to not apply the bonus mechanism because the mechanism hinged on a
requirement that the proposed development “involve the replacement of a non-
complying use”. The Supreme Court held that one could go no further than to say
that the proposal might or could involve the replacement of a non-complying use.
The retention of the existing building on the severely contaminated allotment
(together with the contamination on that allotment) meant that it was uncertain
whether that would be replaced and so it was inappropriate to apply the bonus
mechanism. The Supreme Court’s conclusion is instructive:

“To summarise, in my opinion the obstacles to the grant of consent
are these.

First, the proposal does not satisfy the aim of the Plan that
decontamination of the land occur before rather then after previous
uses of the land are replaced by a use for housing.

Second, the retention of the existing building and the possibility of
the continued use of that building for industrial or commercial uses
means that the proposed division is not one which in an unqualified
way contemplates the replacement of existing uses with housing.
Third, there is not a persuasive case for permitting a site area less than the minimum specified by Principle 8, having regard to the fact that the proposed development would permit the continuance of a non-complying use on proposed allotment 843, should there be existing use rights in respect of that allotment.”

The Supreme Court concluded that the ERD Court had not erred in its assessment, and dismissed the appeal.

19. **Addressing Contamination by Condition**

As noted in the previous entry in this paper, the ACN 068 691 092 Pty Ltd cases held that, in the context of the City of Charles Sturt Development Plan, it was inappropriate for a particular land division to proceed where there was no proposal to remediate the site to be divided. In the decision of *Murray v District Council of Lower Eyre Peninsula* [2009] SAERDC 52, the ERD Court considered whether it was appropriate to impose a condition on a proposed land division where part of the land to be divided was potentially contaminated.

In this case, the developer proposed to divide rural land within the Settlement Zone into five community allotments and a common property driveway. The Council approved the proposed division, subject to nine conditions, two of which were appealed. The contentious condition concerning road widths is not discussed in this paper as no matter of principle arises from the Court’s judgment.

Condition 2 of the development plan consent granted in respect of the proposed land division was:

> “The Community Scheme Description is to be amended to restrict the use of allotments 4 and 5 for small scale commercial and/or retail uses to cater for the needs of the community only, and not allow them to be used for sensitive uses such as any kind of residential, child care centre, kindergarten, etc.”

The Council, and on appeal the Court, had before it a letter from the land owner setting out his knowledge of the previous uses of the site, together with a environmental report from an environmental engineer of Maunsell Australia Pty Ltd.
That report concluded:

“Based on the site history review of proposed lots 4 and 5 (part lot 4 and part lot 12), Lincoln Highway, Gawler [the reference to Gawler is believed to be erroneous], the following conclusions were made:

• Generally, the likelihood of significant potential contaminating activities having occurred on the site is low.

• The above-ground petrol storage and dispensing tank is a very visible potential contamination source, although no significant spills or leaks were reported to have occurred.

• There is a low likelihood that soil in the location of the former sheds has been affected by termiticides used during the construction.

• The former CFS truck is unlikely to have been a source of significant contamination.

• The storage of farm machinery (as well as its maintenance and possibly refuelling) on site means there is a possibility of fuel, lubricant, engine/hydraulic fluid, and farming chemical contamination. Based on the likely presence of clay soil depth, as well as the expected depth to ground water, and absence of any obvious soil contamination, no investigation of ground water quality is considered necessary at this time.

While there was no obvious indicators of any contamination in the soil at the locations described above, further investigation could provide additional confidence regarding the presence or otherwise of contaminants in the soil at these locations. This investigation could take the form of limited soil sampling at the respective locations and analysis of samples at a laboratory for indicator compounds (e.g. heavy metals, hydrocarbons, pesticides).”
The Council relied particularly upon Principle 153 of its development plan, and it is clear that the Court in its judgment also relied upon that principle. Principle 153 defined both “contaminated land” and “potentially contaminated”, and then went on to state that, “where there is reasonable cause to suspect that land may have been contaminated or there is evidence of potentially contaminating activity, development of land should not proceed until an appropriate process of decontamination, applicable and appropriate to the proposed use of the allotment or site, have been undertaken”.

The Court noted that it was common ground that potentially contaminating activity had occurred on proposed lots 4 and 5. The Court said:

“In all of the circumstances, the Council had an adequate basis for the imposition of provisional development plan consent condition 2, and an adequate basis for refusing to remove that condition from the development approval. It is prudent to limit the use of lots 4 and 5 so that residential uses, or uses such as child care centres or kindergartens, where children may come into very close contact with the soil on the land frequently are not established unless and until soil samples have been taken and analysed. Should that process show that there is no contamination which could be potentially injurious to human health, then the condition could be reconsidered. Should contamination be present, then a decontamination process may have to be undertaken should any of the sensitive land uses be proposed.”

Accordingly, the Court dismissed the appeal. It is interesting to note that the Court upheld a condition which we respectfully consider was potentially ambiguous and/or of uncertain scope and which is any event did not address potential contamination directly (because it only required modification of the community scheme description, and did not directly constrain the future use of lots 4 and 5).

However, the lesson to be taken from this case is that, where a Council has an adequate basis to suspect that land may be contaminated or has previously been exposed to potentially contaminating activities it may well be appropriate to constrain the use to be made of allotments which are to be created from such land.
by way of conditions which require a further contamination assessment should sensitive land uses be proposed. The decision may indicate that the Court is likely to approach matters of contamination in a conservative manner.

20. Development next to Existing Unlawful Uses

On relatively rare occasions, development is proposed in close proximity to existing land uses which appear to be unlawful under current legislation. Usually, such uses breach the *Environment Protection Act 1993* in some way or another although breach of conditions of a liquor licence can also arise from time to time. The unlawfulness of the use usually arises from excess odour, noise, or other emissions. However, the uses in question are often long standing and entrenched within their locality, and have been the subject of little, if any, pressure to comply with the relevant requirements of the Environment Protection Act prior to the proposal of new development in close proximity.

As yet, we are unaware of any definitive exposition by the Courts as to how either a planning authority or, on appeal, the ERD Court, should consider such applications. In the matter of *Lam v Adelaide City Council* [2001] SAERDC 111, the ERD Court largely avoided dealing with the issue of a hotel’s non-compliance with its liquor license conditions concerning noise emissions. A similar matter was more recently considered in *Crown Marina Pty Ltd v City of Port Adelaide Enfield* [2009] SAERDC 3.

In that case, a developer proposed the construction of a three storey, four level building containing retirement village units, a “marina lounge” to service an approved (but not yet constructed 103 berth marina), and serviced apartments together with and ancillary facilities and parking at North Haven. A swimming pool, outdoor car parking, and other outdoor recreational areas were proposed as part of the development.

The development was proposed to occur next to land used as a boat repair yard. During the appeal, a matter which assumed critical importance was whether the proposed development provided sufficient acoustic measures so that the occupants would not be unreasonably affected by the day to day activities of the boat yard.
The evidence led by the Council was that the operations of the boat yard resulted in certain activities occurring relatively frequently which would, if the proposed development were to proceed, result in the boat yard being unable to comply with the Environment Protection (Noise) Policy 2007 made under the Environment Protection Act. Key amongst those activities were two activities. The first was “needle-gunning”, and the second “grit-blasting” of boat hulls. Needle-gunning, which would occur for in the order of 15 minutes to an hour, no more frequently than once a fortnight, resulted in a noise reading exceeding 90 decibels measured at the face of the proposed building (without taking into account any attenuation by proposed new boundary walls). The grit-blasting was not measured, but was estimated to result in a noise approximately 85 decibels or thereabouts at the face of the relevant building (again, without taking into account the attenuating features of proposed new boundary walls). The grit-blasting would be unlikely to occur more than 2 to 5 times a year, but when undertaken would operate continuously for eight hours a day for two to three days.

All parties before the Court appeared to accept that the boat yard use would breach the Noise Policy if the proposed development were constructed. The developer contended that the boat yard currently breached the Noise Policy, and the Court should only have regard to noise emissions from the boat yard which did not exceed the Policy. That is, the developer argued that the Court should approach the issue as if the boat yard were constrained to the limits set in the Policy (or, alternatively, it would not be a detrimental feature of the proposed development if it were to result in the boat yard being constrained to those levels). The Council contended to the contrary, and made specific reference to the provisions of the Policy which acknowledge that some dispensation might be afforded to long-standing existing uses. In addition, the Council argued that the Court should take into account the full gamut of noise emitted, whether lawful or unlawful.

The Court considered it unnecessary to express a concluded view on the issue. However, the Court did prefer the acoustic expert called by the Council, who adopted a conservative approach in relation to the possible intensification of noise generating activities (both lawful and unlawful activities) of the boat yard. The Court identified that the construction of a retirement village and serviced apartments in very close proximity to a boat yard could give rise to a potential for complaints, and indirectly, long term restrictions and limitations on the boat yard’s use of the land.
and its activities, which was contrary to the desires of the development plan to maintain existing commercial uses in the relevant zone. The Court also had regard to the evidence that the boat yard activities would, in accordance with the WHO Guidelines, have caused the majority of people enjoying the outdoor spaces of the retirement village and serviced apartments to be “moderately annoyed” when the noisiest of the boat yard’s activities were undertaken. The Court also considered it to be a factor against the grant of consent that the proposed retirement village units and serviced apartments would only be compatible with the neighbouring boat yard use if the proposed acoustic treatments (which included total enclosure of private open space balconies) were used when noise-generating activities occurred.

21. Unclear Development Plan Maps

By and large, maps within development plans delineate zone or policy area boundaries using cadastres (allotment boundaries) – although not always current cadastres! This means that it is usually relatively trivial to determine where a zone boundary lies, and thus, whether a particular proposed development lies within or without (or partly within) that zone. However, the Flood Zone found in the development plans which deal with land bordering the River Murray is determined in most areas by the high water level of the 1956 flood. This level is, unfortunately, not one particular level AHD, but rather a number of levels, each dependent on the local pool level for the River in that area. To further confuse matters, in certain areas the Flood Zone boundary has been altered to follow nearby cadastres.

In the various development plans that contain the Flood Zone, the boundary is depicted by a line about 0.5 mm or so thick. At a scale of 1:40,000, the width of the Zone boundary represents about 20 m. This makes it almost impossible to determine, from the map alone, whether a particular development on an allotment not much deeper than 20 m sited under the boundary line, is within the Flood Zone or outside it. That was the case in Davies v Development Assessment Commission [2009] SAERDC 82.

In Davies’ case whether the development was within the Flood Zone assumed critical importance because the proposed development was non-complying in the Flood Zone. To make matters worse, the development had already been completed
under a previous approval which was quashed the previous year in the course of hotly-contested judicial review proceedings.

The appellant called expert cartographic evidence from a “spatial consultant” to the effect that the margins of error arising from the digitisation of the 1956 flood line from historic photographs, and then the transfer of those digital images from one system to another, was such that one could not be sure that the proposed development lay within the Flood Zone. However, the expert did show that the river-side balcony of the proposed development clipped the zone boundary. The appellant argued that he should have the benefit of the doubt; if the development was not provably within the Flood Zone it should not be dealt with as non-complying.

The respondent called a Mapping Project Officer in the Development Plan Mapping Unit in the Department of Planning and Local Government. He gave evidence as to the creation of the development plan maps and provided an enlargement which he had prepared, based on the records maintained by the Department. The enlargement was accepted by the Court as evidence of the actual Zone boundary as if it were an enlargement of the relevant map in the relevant development plan. That enlargement showed that the Zone boundary ran directly through the building proposed to be legitimised.

The Court therefore held that the proposed development was correctly classified as non-complying.

RECENT ENFORCEMENT DECISIONS

22. Exemplary Damages

Section 85(6)(g) of the Development Act empowers the ERD Court in enforcement proceedings brought under Section 85 to order that a respondent pay exemplary damages. In most cases these will be payable to the Council bringing the enforcement proceedings. However, this power is rarely invoked by an applicant, and even more rarely granted. In District Council of Mallala v Rutra Investments Pty Ltd [2009] SAERDC 35, the ERD Court had to determine whether either the respondent company, or its director, (who was a personal respondent to the proceedings) should be ordered to pay exemplary damages.
Briefly summarised, the facts pertaining to this matter are as follows. In March 2007 the company purchased the subject land. Less than two months later the Council received a written complaint concerning the condition of the land. The Council then inspected the land and observed that a variety of items had been placed on it, namely, numerous concrete blocks, piles of bitumen waste, wooden pallets, shipping containers, a crane, construction materials and an earth moving vehicle. There were also a large number of vehicle tyres on the land but it was accepted by the Council that these predated the purchase of the land by the company. In late May 2007 an enforcement notice pursuant to Section 84 of the Development Act was served on the company. The notice directed the removal of the “waste, construction materials, machinery and vehicles including the concrete blocks, bitumen waste, tyres, wooden pallets, shipping containers, the crane, and the earth moving vehicle” within 28 days from the date of the notice.

The notice was not appealed against, but was not complied with. At the time of the hearing in 2009, the Court found that land remained in a similar state to when it was inspected in May 2007.

The Court held that the storage on the land of concrete blocks, road building profile, shipping containers, shed components and other building materials, and a crane was not occurring as part of the general farming use which might lawfully be made of the land. The Court also found that a waste bin on the land did not relate to a general farming use of the land except in some minor fashion, and the tyres clearly did not relate to farming. The Court found that the Council’s allegation of a change of the use of the land without development approval to be proven on the balance of probabilities. Relying upon the Supreme Court decision of *Braunack v Goers* (1979) 23 SASR 1, the Court held that the change of use was a continuing breach which occurred day by day and so the continued presence of the tyres was part of the change of the use of the land undertaken by the company and its director.

The Court also noted that the alleged breach of the Act, namely the failure to comply with the Section 84 enforcement notice, overlapped with the change of use alleged. Implicitly, the Court accepted that that breach had also occurred.
The Council had also alleged a breach of Section 19 of the Act, in that Mr Dyna, the
director, had used abusive or threatening or insulting language to officers of the
Council. However, the Court noted that, such events having occurred in the past, it
did not appear that it was possible to “remedy” or “restrain” such events within the
meaning of Section 85(1) of the Act. Accordingly, the Court declined to grant any
relief in relation to that particular breach of the Act.

In relation to the claim for exemplary damages, the Court noted that the purpose of
an award of exemplary damages is to “punish conscious wrong doing in
contumelious disregard of another’s rights”. The Court held that it was an
appropriate matter for exemplary damages to be awarded. The Court noted that the
company and its director had been given adequate notice that the continued use of
the land was unlawful by means of the Section 84 enforcement notice some two
years prior and also in the course of conversations between the director and officers
of the Council. When he gave evidence, the director also displayed a disregard for
his obligations under the Act. He made it clear that it would be easy for him to
arrange to remove the offending items and material but that he was choosing not to
do so for his own convenience and to avoid expenditure. The Court noted that the
unlawful use of the land had a detrimental effect upon the appearance of the land
which is a detriment to the public interest under Section 85(7).

The Court awarded $3,000 as exemplary damages, and further ordered the
company and the director to remove the offending items being stored on the land
and to refrain from doing so in the future.

The company and the director were also ordered to pay the Council’s costs.

23. Failure to Use, Maintain or Operate in Accordance with Approval

Section 44(3) of the Development Act 1993 is a curious provision, because it rarely
appears to have work to do. That Section provides that it is an offence to fail to
ensure that a development is used, maintained and operated in accordance with (a)
any relevant development authorisation; and (b) any plans, drawings, specifications
or other documents submitted to a relevant authority that are relevant to any such
approval.
In reality however, town planning crime is generally restricted to either (a) undertaking development without approval (contrary to Section 44(1)), (b) undertaking development contrary to a development approval (contrary to Section 44(2)), or (c) contravening or failing to comply with a condition imposed upon a development approval (contrary to Section 44(4)). It is difficult to envisage circumstances where a person who does not ensure that development is used maintained and operated in accordance with the relevant development approval would not either be undertaking development contrary to that approval or alternatively contravening one of its conditions. And in that case it would make more sense to prosecute for a Section 44(2) or (4) offence because the maximum penalty is twice what it is for a Section 44(3) offence!

However one such instance of an offence against Section 44(3) arose in a prosecution which alleged that land owner had failed to ensure that one of a pair of Strata Titled units was used only as one unit and not, in fact, converted into two units. The case is City of Charles Sturt v H&M Enterprises Pty Ltd & Vetouladitis [2008] SAERDC 76.

The facts were that the personal defendant (Mr Vetouladitis) and his wife initially purchased the unit in 1999, but in 2000 transferred it to the corporate defendant. At the time of purchase of the property, it was advertised for sale as a unit and a granny flat. However, the relevant development approval provided for only one dwelling within the unit (with the “granny flat” forming an integrated part of the unit).

The Council became aware of the two-dwelling arrangement in 2002 and in late 2002 a development application was lodged seeking approval to use the property in this fashion. The application was refused in November 2002. However, the unit was not reconverted into one dwelling.

In January 2004 the Council brought proceedings under Section 85 of the Act seeking that the building on the land be altered so as to return it to one dwelling. This resulted in a development application being made for certain works to effect the “re-integration” of the granny flat and the main unit. Although initially refused, upon appeal consent orders were entered granting planning consent, and development approval for those works was thereafter obtained. The Section 85 proceedings were
resolved by consent orders which required the defendant to undertake the approved reintegration works within 3 months.

In 2007, the Council inspected the property and noticed that, although an archway had been cut between the separate living areas of the unit and the granny flat, that archway had been blocked with a door and bolted shut with a lock. Further, although the separate external gate which led to the granny flat had been taped up and painted over (so as to disguise it as part of an external wall) it had not been removed as required by the previous orders.

In light of the history of the matter the Council determined that it should prosecute the corporate defendant and its director. Both parties pleaded guilty, and made submissions in relation to sentence.

The Court accepted that the defendants inherited an existing unlawful situation, but became aware of its unlawful status in 2002 and were thereafter on notice of its unlawful status. The Court noted that there had been a clear and deliberate disregard of the law, particularly in light of the previous proceedings. The Court held that the corporate defendant had done what it wanted rather than comply with the arrangements put in place in 2005.

The Court noted on the other hand that the offence was regulatory offence and that there had been no negative consequences for the community or any individual members of the community arising out of the particular offending. The granny flat, the Court noted, had not been leased out since 2002 but it had instead been used by the personal defendant and his wife and children intermittently when visiting Adelaide from time to time.

The Court noted that deterrence was a primary consideration in sentencing. The Court accepted that the offence was at the lower end of the scale and that a penalty in the order of 10% to 15% of the maximum was appropriate. The Court noted the maximum penalty for the offence was $60,000, and the Court imposed a penalty of 15% (namely $9,000). That was discounted 25% for a plea of guilty at the earliest opportunity, resulting in a fine of $6,745. The Court accepted that the personal defendant would in reality bear the costs of paying for the corporate defendant’s
fine, and so fined him a nominal penalty only, being $500. The Council was awarded its costs. A conviction was recorded against both defendants.

24. Prosecution for Unlawful Building Work

Most Councils would be familiar with the attitude which some builders (hopefully a minority!) display toward the requirement to obtain development plan consent. To them, a development plan consent is often obtained on a “close enough is good enough” basis after which one may make any number of “minor” changes, get the buildings rules plans signed off, and then build to those plans even if they bear little resemblance to what was granted development plan consent. However in the case of the prosecution of Nikolaos Anargyros and Grafo Pty Ltd (City of Port Adelaide Enfield v Anargyros [2008] SAERDC 81 and (No. 2) [2009] SAERDC 15), even the building rules consent was treated with disregard.

In or around 2003 the previous owners of the land in question obtained development approval for the construction of two two-storey semi-detached dwellings. The dwellings in question had been designed by an architect to respond sympathetically to the Historic (Conservation) Policy Area within which the land was located. The building rules consent identified that the building would be timber framed and have wall heights not exceeding 6 metres.

The land was sold to Grafo Pty Ltd, Mr Anargyros, and to other members of Mr Anargyros’ family. Thereafter, on the version of events put forward by the defendants, Mr Anargyros was, by and large, the person responsible for the development that then occurred on the land.

Development approval to demolish the existing dwelling on the land was granted to Mr Anargyros, and demolition occurred. Thereafter a building comprising two two-storey semi-detached dwellings, together with detached building containing two garages, were constructed on the land within the original approved footprint. Possibly for this reason, the Council did not notice that the buildings being constructed differed from those approved until substantial sections of the superstructure were complete. The differences between what had been approved and what had been built were numerous, and included different fenestration, protruding upper storey “window pods”, different roof parapets, different roof gabling
to the garages, different balustrading and glazing, 6.7 metres high external walls, and different framing (steel rather than timber). In addition, a 2 metre high masonry wall for which no approval had ever existed or had been sought was built on the front boundary of the land.

Upon realising what had occurred, the Council instituted enforcement proceedings under Section 85 of the Development Act 1993 seeking to have the buildings either demolished or brought into compliance with the approved plans. In response, a “retrospective” development application was made to vary the approved plans to reflect what had been constructed. That application was refused, and a planning appeal instituted, which was successful. Judgment in the planning appeal was handed down in March 2007, but building rules consent was not obtained until almost 18 months later. This necessitated an application for an extension of the development plan consent which, given the buildings were already constructed and occupied, the Council granted.

Subsequent to the result of the planning appeal, the Council determined to prosecute the owners of the land, and the directors of Grafio Pty Ltd, for breaching the Development Act by constructing the buildings contrary to the 2003 development approval.

As a result of an agreement reached between the prosecution and the defendants, Mr Anargyros and Grafio Pty Ltd pleaded guilty and the complaints against the other defendants were withdrawn. However, Mr Anargyros and Grafio Pty Ltd contended that they should be sentenced on the basis that the offending was done in circumstances where Mr Anargyros (as agent for Grafio) believed that he had approval for what was being built. The prosecution alleged that Mr Anargyros had no such belief and that knew that he required at least a variation to the previous planning consent and fresh building rules consent to build what he built. Because this was an aggravating factor, the Council was obliged to prove it beyond reasonable doubt.

The matter proceeded to a disputed facts hearing wherein the Council called three witnesses who had dealt with the original development application and with Mr Anargyros’ subsequent activities. Those witnesses gave evidence that at all times, Mr Anargyros had been told that he would need at least a variation to the existing
development approval to be approved in order to build what he wanted to build. All witnesses gave evidence that they had never at any stage purported to grant such consent nor suggested that Mr Anargyros might proceed without obtaining any variation approval.

Mr Anargyros gave evidence himself, which was to the effect that he believed, that after he had met with the Council’s independent heritage advisor, and she had indicated “in-principle” support for his variations, that he did not need to do anything more than file amended plans with the Council (which he duly did).

However, the legal team engaged by the Council had very carefully prepared for cross-examination of Mr Anargyros. Mr Anargyros denied strenuously that he had ever held himself out as a planning and development consultant. However, he was forced to admit that he did in fact do so from the period of 1989 to 1995 when confronted with the letterhead of the planning consultancy business of which he was the managing director for that period.

Mr Anargyros also gave evidence that he considered that the changes that he proposed to make to the approved plans were “minor and cosmetic”. Although his evidence changed from day to day, at one point he did concede that the change from timber framing to steel framing was not minor or cosmetic. He gave evidence that he thought he did not need to make application for variation of the original approval because the changes were simply minor and cosmetic. However, the Council had obtained (under subpoena) from the City of Unley a development application which had been lodged by Mr Anargyros containing plans drawn by Mr Anargyros seeking approval for the variation of a particular development in ways which were, objectively viewed, more minor than what had been proposed to be changed on the subject land. That application was lodged within days of Mr Anargyros dropping off his amended plans with the prosecuting Council. The document was damming evidence that Mr Anargyros was well aware of the mechanisms under the Development Act to make application for a variation to an existing approval and that he chose not to do so on this occasion.

The Court found that Mr Anargyros clearly knew that he required a building rules consent in order to build his buildings, and that the building rules consent forming part of the approved development could not have been appropriate because it
showed a timber framed building. The Court did not accept Mr Anargyros’ evidence as to how he thought an appropriate building rules consent somehow might arise from the drawings of his steel work contractor being forwarded to the Council (which they were not).

Because Mr Anargyros was cross-examined over two days, he had an overnight period within to consider his evidence of the previous day. On the second day, he gave evidence which contradicted his earlier evidence. He also gave evidence which contradicted the sworn evidence which he had given to the Court previously during the course of the planning appeal. In addition, Mr Anargyros claimed to have a very good recall of the dates and the events of the meetings which he had had with the Council’s heritage consultant, but he seemed to find it very difficult to recall other dates and details around that time.

The Court rejected Mr Anargyros’ evidence comprehensively, and found that Mr Anargyros knew that he did not have development approval for what he actually built.

In sentencing the defendants, the Court noted that at the time of the offending, the maximum penalty for each offence was $30,000. The Court said, in passing sentence:

“The offences came about because of Mr Anargyros’ approach to development project. He paid scant regard to the requirements imposed upon a developer by the development control system and attempted to circumvent that system for the convenience and profit of himself and Grafio Pty Ltd. The attitude he exhibited when giving evidence both to the development system and the possible effect of his actions upon purchasers of the dwelling[s] was careless and irresponsible. However, I bear in mind that the building work was ultimately judged worthy of approval and that the land use was the same as the land use in the 2003 approval. Mr Crocker [the Council’s barrister] submitted that the offences were in the more serious range and Mr Stathopoulos [the defendant’s barrister] submitted that they were in the lower order of offences under Section 44 of the Act. I consider that they fall near the
middle of the range in respect of Mr Anargyros, and slightly below that level in respect of Grafio Pty Ltd. I bear in mind that, although there was a different basis for the charges in relation to the fence [the two metre high masonry wall constructed without approval] from the charges in relation to the dwellings and the garages, they were all part of a single development project."

The Court convicted both defendants, and fined Mr Anargyros $14,000 in relation to the dwellings, and $10,000 in relation to the unapproved masonry wall. In respect of Grafio Pty Ltd a fine of $9,000 was imposed in relation to the dwellings and a fine of $6,000 in relation to the masonry wall.

Prior to the disputed facts hearing, the parties had agreed that the defendants would pay the prosecution's costs fixed in a certain amount up and until that date. The parties were unable to reach agreement as to what should occur in relation to costs of and subsequent to the disputed facts hearing. The Court accepted that the prosecution should have its costs, and in light of the complexity of the matter, that it was appropriate to award costs in accordance with the Supreme Court scale (rather than the considerably less generous Magistrates Court criminal scale). In relation to the matter of costs the Court said:

“It seems to me, however, that in all of the circumstances of the disputed facts hearing in this matter, it is appropriate that costs be awarded in accordance with the Supreme Court scale. Detailed knowledge and understanding of the development control system, both at a technical and practical level, was required of both counsel and solicitor. Technical understanding of building techniques was also required. Mr Anargyros was evasive, and his evidence was, at times, contradictory. The detailed knowledge of his past experience with the development control system, which was obtained by the solicitor for the complainant [Council], was of considerable assistance in clarifying the extent of his knowledge of his understanding of the system. Having regard to all of these matters, the higher scale is appropriate.”
The parties later agreed that the prosecution’s cost should be fixed in the sum of $17,000.

25. Prosecution for Unlawful Change of Use

One difficulty which most councils face from time to time is what to do with premises which regularly attract complaint due to their unsightly nature. Section 254 of the Local Government Act 1999 empowers councils to issue orders, directing the owner or occupier of the land to take such action as is considered necessary to ameliorate an unsightly condition. However, as explained by the Full Court of the Supreme Court in Becker v City of Onkaparinga (2005) 242 LSJS 418, Section 254 does not permit the Council to prohibit the creation of unsightly premises in the future (i.e. after the unsightly condition has been cleaned up). A further difficulty with Section 254 is that each order must be specific to a particular unsightly condition. If the condition changes, a new order is required. In the case of frequently changing situations, the continual change in appearance of the property may be sufficient to forestall the effect of a Section 254 order indefinitely. A yet further difficulty is that it is generally accepted that if the unsightliness of a property is not visible from the public realm (i.e. only visible from adjoining private land) it will be difficult to satisfy the necessary criteria for order making, namely, that the premises “detract significantly from the amenity of the locality”.

In light of these difficulties, councils are now starting to approach inappropriate land use issues as town planning problems.

One such issue came to light in a regional town. (As of writing, final judgment has not yet been delivered, although a finding of guilt has been made. Names have therefore been omitted.) For a number of years the owner of a corner allotment in a Residential Zone permitted another person (“Person A”) to cohabit on the land, together with certain children. Person A was a habitual hoarder of old vehicles, scrap or old machinery, second hand furniture and appliances, and various building products and materials. These were strewn around the land, both in the front yard and the rear yard (which was visible from the street because, inevitably, old vehicles were placed on the land so that the rear gates were jammed open).
The council made many entreaties requesting that the land be cleaned up to little avail. At least two orders under Section 254 were served without success. The Council then took prosecution proceedings against both the owner and Person A in the ERD Court for breach of Section 44(1) of the Development Act 1993 – undertaking development without approval. In connection with those proceedings, the Council sought remedial orders under Section 106 of that Act. The power to order such remedial orders is similar in scope, although somewhat less broad, than those available under Section 85. Further, the power under Section 85(12) for a relevant authority to undertake itself works ordered by the Court in the default of the person the subject of the order, is not available in respect of Section 106 orders.

The council successfully proved that the use being made of the land was a use going above and beyond the ordinary residential use of the land (and hence a new use for which development approval was required but had not been obtained). The Court accepted that scale of the junk strewn around the property amounted to a junk-yard or similar use (in addition to the ongoing residential use). As of writing, Person A has yet to be sentenced or otherwise dealt with, but the Court has intimated that it is minded to order a clean-up of the land under Section 106 and also impose a good behaviour bond for 3 years which will be breached if Person A fails to clean up the land or, having cleaned it up, recommences a junk yard use.

The owner successfully sought a separate trial and their trial is as yet only part heard.

26. Prosecutions for Tree Damaging Activity

Prosecutions by Councils for damage to significant trees, and in particular removal of significant trees, continued apace in 2008-2009. Whilst the level of success such prosecutions are having in deterring persons from damaging significant trees remains anecdotal, those Councils which are undertaking such prosecutions are frequently finding that the exercise is more or less cost neutral (when successful) and so have embraced such actions as part of their enforcement strategy. One should remember that fines paid are remitted to the Council bringing the prosecution.
Tree-damaging activity in relation to a significant tree is a form of development under the Development Act 1993. Therefore, the usual offence provisions, and in particular Section 44(1) (undertake development without approval), apply. The maximum penalty for tree-damaging activity is $120,000. Where there is more than one tree, ordinarily the tree-damaging activities will charged as separate counts, each carrying a $120,000 maximum fine.

As in the previous year, it appears that those Councils which have initiated prosecutions for unlawful development have done so judiciously, (presumably after receiving legal advice that they have good prospects of success) because none of the matters have run to trial. All have resulted in guilty pleas being entered. That said, there are two actions presently pending before the Environment, Recources and Development Court where the defendants have indicated that, at present, they intend to plead not guilty.

In the matter of City of Tea Tree Gully v Zoontjens [2009] SAERDC 11, the Court sentenced a defendant who had lopped four branches from a Eucalyptus tree. The tree had suffered a major branch failure in December 2003 which had prompted concerns from the neighbours of the defendant. The defendant and his partner were also concerned about the safety of their child in relation to further falling branches from the tree.

In order to address the defendant’s concerns, and those of his neighbours, he obtained access to a cherry picker and then on 20 January 2008 he lopped four branches from the subject tree. The defendant then, in an act of unwitting bad judgement, contacted the Council to enquire as to whether it might assist him in disposing of the branches which he had lopped from the tree. Instead the Council prosecuted him.

The Court held that the result of the offending was a tree with diminished amenity value, which may well require tree surgery in the interests of safety in the future owing to the amateurish lopping carried out by the defendant. It was not disputed that the defendant did not know that it was an offence to undertake tree-damaging activity without obtaining development approval for such. On this occasion, the Court accepted a submission that no conviction to be recorded against the defendant. The Court took into account the defendant’s age (37 years old), the fact
that he was in a stable relationship with one child, the fact that he was in regular employment and had no prior convictions, and the fact that the defendant was of good character and was a community minded person.

The Court held that the offending was at the lower end of the scale, and noted that appropriate penalty might be in the order of 10%. The Court imposed a fine of $10,800 (being 9% of the maximum) and then discounted the matter by the fine by a further 25% on account of the defendant’s early plea of guilty and his cooperation with the prosecution. The resultant fine was $8,040. The Court also ordered that the defendant pay the prosecution’s costs fixed in the sum of $2,000 together with an amount of $141 for Court fees including the laying of the complaint and summons.

In the matter of City of Charles Sturt v Andary Group Investments Pty Ltd (Unreported, Environment, Recourses and Development Court of South Australia per Judge Cole, 15/07/2009, Action No. 354/2008) the Court had to consider the appropriate penalty to be imposed upon a company which was the owner of land upon which a significant tree was felled at the direction of one of its directors. Initially the Council laid a complaint against the two directors of the company, the company itself, and also the tree lopper alleged to have undertaken the removal. As part of an agreement between the defendants and the prosecution, upon the company pleading guilty, the complaints against the two directors were withdrawn. The complaint against the tree lopper continues in a separate action and has not yet been determined.

The circumstances of the offending were agreed between the parties and have some curious features. In 2007 Mr Andary, a director of the defendant company, approached a tree lopper to provide a quote for the removal of a different tree. The quote appeared to the director to be exceptionally good value, and on the spur of the moment he asked the lopper to provide a quote for the removal of two other trees, one of which was the significant tree the subject of the prosecution. The lopper then measured the subject tree at one metre above ground level and advised Mr Andary that the circumference of the tree was over the threshold. The contractor then advised Mr Andary that bark could be removed from the tree so as to bring it under the threshold for the tree to require approval for removal. The contractor then removed bark from the exterior of the tree, and then remeasured the tree, and told
Mr Andary that it was now under the threshold and could be removed. Mr Andary agreed to its removal on behalf of the company.

The Court held that Mr Andary was wrongly advised by the tree lopper:

- “Firstly, the bark could be removed from the tree before it was measured. This is wrong and in itself constitutes tree damaging activity. Bark is part of a tree.

- The second wrong advice that the contractor [tree lopper] gave Mr Andary was, having removed the bark, the contractor told Mr Andary that the circumference at the relevant point was under two metres. It was not.”

In relation to the second of those conclusions, it is clear that the Court did not accept that removal of the bark actually changed the tree’s circumference for the purposes of determining whether it was a significant tree. We understand that the tree lopper will contend that this position is erroneous as part of his defence of the prosecution which remains outstanding against him. It will be interesting to see what the Court determines after having heard full argument on that matter.

The tree in question was a large SA Blue Gum, which the Court found would have provided some amenity value in its locality. The Court noted that there was no suggestion that the tree was rare, that it had any historical association, particular botanical interest, or value as habitat.

The Court noted that Mr Andary offered a high degree of cooperation with the Council.

The Court held that the offence, on the basis of the plea and the agreed facts between the parties, was at the lower end of the scale. On account of the relatively early plea of guilty, and the degree of cooperation, the Court applied a discount of 20%. The fine that would have been imposed was $10,000 but with a 20% discount became $8,000. The usual victims of crime levy of $70 was also imposed and by agreement, an order was entered that the defendant company pay the prosecution’s costs fixed in the sum of $2,000. A conviction was recorded against the company.
In the matter of *City of West Torrens v Kyros* (Unreported, Environment, Recourses and Development Court of South Australia per Judge Cole, 13/05/2009, Action No. 47/2009) the Court was called upon to pass sentence upon the owner of land from which an African Tulip tree of a mature height and girth had been removed upon the owner’s direction. The tree was removed for the comfort of the tenant of the land (the owner lived elsewhere), and not for any financial gain or commercial motive by the land owner.

The Court held that tree in question was not particularly visually notable or important, although it did provide some shade to the adjacent pavement and a nearby bus stop. The Court noted that no community concern or disquiet had arisen following the removal of the tree.

The Court accepted that the landowner was let down by the tree lopper whom she had engaged who had failed to advise her of the need to obtain development approval. The Court also accepted that the defendant was entirely ignorant of the need to obtain development approval, and would have sought such if she was aware of that requirement. The defendant was a 33 year old woman with two small children who was engaged in a family business. She had a security agent’s licence which she hoped to use to change careers in the future. She provided two glowing character references to the Court, and the Court accepted that the defendant was involved in community fundraising and community activities and had no prior convictions. The defendant was contrite, regretted her conduct and the Court accepted that she was unlikely to reoffend in the future.

In all the circumstances, the Court accepted the request not to record a conviction, but did not accept a submission that the defendant should be discharged without penalty on the basis that the offending was trifling. The Court also declined to order that the defendant enter into a good behaviour bond rather than imposing a fine.

The Court noted that the offending was at the very lowest end of the scale, and imposed a fine one tenth of the maximum, namely $12,000. That figure was then discounted by 25% on account of the early plea and the full cooperation that the defendant has given to the Council, and had agreed to also give in relation to the outstanding prosecution against the tree lopper. The resultant fine was $9,000,
together with a victim’s of crime levy of $70. By agreement the defendant was ordered to pay the prosecution’s costs fixed in the sum of $1,200.

Another recent matter was *City of Onkaparinga v Sarkis* [2009] SAERDC 72. In that case Mr Sarkis, a co-owner of land with his wife, was caught in the act of removing two large gum trees. Thankfully he was caught early, and a significant portion of each tree remains standing and each has grown new growth. Mr Sarkis told officers at the time that he was trying to remove the trees due to safety concerns.

Prior to the attempted removal of the trees, Mrs Sarkis had submitted to the local council an application for approval to remove those trees. As part of the application, Mrs Sarkis identified Mr Sarkis as the contact person, and gave his mobile telephone number. The application also included a document which said words to the effect that “we need to remove these trees to build another dwelling”. The Sarkises owned an adjoining vacant allotment and it was easy to infer that a co-ordinated multi-dwelling development would be facilitated if the trees were removed. Significantly, the Sarkises also owned some 10 other properties, and were in the process of developing other land within the council’s area by cutting off the back of a corner allotment and building an additional dwelling.

Mr Sarkis pleaded guilty, and the council submitted that Mr Sarkis should be sentenced on the basis that the trees were attempted to be removed so as to further commercial ends, and that he knew that their removal had previously been refused, and that he knew that damaging significant trees required approval. The council failed in respect of each of its contentions.

Mr Sarkis gave evidence, and was described by the Court as “an impressive witness”. He gave entirely believable, credible evidence that his wife was the main “dreamer” behind their joint property developments but, due to her primary occupation as a doctor, was difficult to contact. Therefore his name and mobile number were frequently provided, and he would take messages for his wife. He gave evidence that he had never seen anything to do with the tree removal application lodged by his wife (a fact generally supported by the council’s own documents). He also gave evidence, which the Court accepted, that as a non-native English speaker he generally relied upon his builder or other advisors when signing forms like development applications and did not read them closely. This was
important because Mr Sarkis had previously filled out a development application form for development in an adjoining council area which had specifically asked about significant trees. In respect of that development, Mr Sarkis had (correctly) written “no trees”. The prosecuting authority said this was evidence that Mr Sarkis had at least some appreciation for the importance of significant trees and their connection with development control laws. The Court rejected this contention.

Accordingly, he was sentenced on the basis that there were no aggravating circumstances. He was fined $8,000 for both trees together, reduced by 25% for his plea of guilty and co-operation to result in a total fine of $6,000. Because the prosecution failed in the disputed facts hearing (and so would have paid the defendant’s costs for that), but would have been awarded its costs of the balance of the proceedings, the Court ordered that each party bear its own legal costs.