Local Government
Reporter

Home renovations in residential zones — finally a logical approach to public notification in South Australia

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The procedural aspects of residential development under the Development Act 1993 (SA) (the Act) in South Australia can often be complex. This complexity has arisen through a combination of legislation not "keeping pace" with modern forms of residential development, the unintended consequences of legislative amendments and judicial interpretation of the Act and the Development Regulations 2008 (SA) (the Regulations).

Under s 38(1) of the Act, development applications can be assigned to four public notice categories, being category 1, category 2A, category 2 and category 3.

Category 1 development applications are not publicly notified. In fact, s 38(3) prevents the relevant authority[1] for a category 1 development applications from, on its own initiative, seeking the views of the owners or occupiers of adjacent land to the development site in relation to the granting or refusal of development plan consent.[2]

Category 2A development applications must be notified to the owners or occupiers of each piece of adjoining land to the development site.[3]

Category 2 development applications must be notified to the owners and occupiers of adjacent land[4] to the development site.[5] For a period of ten (10) business days after notice is given, the relevant authority must make category 2 development applications available for inspection and members of the public may make a representation to the relevant authority supporting, or objecting to the proposed development.[6] The applicant is provided with the representations and is given an opportunity to respond. The representations and response are then considered by the relevant authority in determining whether or not to grant development plan consent.

Category 3 development applications must be notified to the owners and occupiers of adjacent land, any other owner or occupier of land which, according to the relevant authority, would be directly affected to a significant degree by the development if it were to proceed and the public generally.[7] Category 3 development applications must be made available for inspection, representations can be made and responses given as is the case for category 2 development applications. Representors for category 3 development applications are able to appeal decisions of the relevant authority to grant development plan consent to the relevant development application.[8]

As a result of these provisions and the relative advantages and disadvantages that they pose to applicants and members of the public, arguments over public notice categories are commonplace in the Environment, Resources and Development Court of South Australia and the Supreme Court.

Public notice categories for residential development is often assigned according to Sch 9 of the Regulations.[9]

Part 1, cl 2 of Sch 9 provides that the following relevant forms of development are category 1:

> Except where the development is classified as *non-complying* under the relevant Development Plan, any development which comprises—
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> (a) the construction of any of the following (or of any combination of any of the following):
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> (i) 1 or more detached dwellings;
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> (ii) 1 or more single storey dwellings;
>
> (iii) 1 or more sets of semi-detached dwellings, provided that no such dwelling is more than 2 storeys high;
>
> (iv) 3 or more row dwellings or 1 or more additional row dwellings, provided that no such dwelling is more than 2 storeys high; or
>
> (b) the alteration of, or addition to, a building so as to preserve the building as, or to convert it to, a building of a kind referred to in paragraph (a); or
>
> …
>
> (d) the construction of (or of any combination of) a carport, garage, shed, pergola, verandah, fence, swimming pool, spa pool or outbuilding if it will be ancillary to a dwelling[.]

Until recently, the categorisation of dwelling alterations and additions was complicated by case law authorities from the South Australian courts, primarily *Verdouw v City of Unley*[10] (*Verdouw*).

In *Verdouw*, the Full Court of the Supreme Court determined that a proposal to construct a carport next to an existing dwelling was not a category 1 form of development under the equivalent of Pt 1 cl 2(b) of Sch 9 to the Regulations.[11]

It is important to note that *Verdouw* was decided under the Development Regulations 1993 (SA) which did not include the equivalent of Pt 1 cl 2(d) of Sch 9 to the Regulations. The only basis for the proposed carport to be determined as a category 1 development application at the time was if cl 2(b) applied.

The rationale of the court in determining that the proposed carport was not a category 1 development application was that a dwelling has essential and non-essential parts to it. As a dwelling can function as a dwelling with or without a carport, the court found it did not "preserve" the dwelling as a dwelling.

Part 1 cl 2(d) of the Regulations was inserted to limit the operation of *Verdouw.* Unfortunately, however, it does not expressly include rooftop decks, patios, façade treatments, balconies, retaining walls and other developments usually associated with residential development.

The ratio in *Verdouw* has been used to challenge decisions to assign residential development applications to category 1 on the basis that the relevant dwelling alteration or addition is not "essential" to a dwelling; does not, therefore "preserve" the dwelling as a dwelling; and does not attract the operation of Pt 1 cl 2(b) of Sch 9 to the Regulations.

Until recently, there were no case law authorities directly on this point.

The recent decision of the Environment, Resources and Development Court (ERD Court) in *Fandi v City of Burnside*[12] has "filled the gap" left by *Verdouw* and has greatly limited its operation such that all dwelling alterations and additions can now be determined to be category 1.

This decision concerned a challenge to the assignment of a proposal for alterations and additions to an existing dwelling, including renovations to the upper storey of the dwelling to create new and larger bedrooms, balconies and a covered outdoor area as a category 1 development application.

The respondent council had determined that the development application was category 1. This decision was challenged by adjacent land owners to the site of the proposed development.[13]

In defence of its decision, the respondent council argued, amongst other things, that the Full Court's reasoning in *Verdouw* did not apply to circumstances where an alteration or an addition is an integral part of a dwelling, and that the dwelling would not be converted to another form of building as a result of the alteration or addition.

The ERD Court agreed with this reasoning and found that the proposed development was correctly determined to be a category 1 form of development.

This case provides certainty in the categorisation of residential development for all relevant authorities and will assist applicants in ensuring that residential development is processed and assessed quickly and without the risk of a third party appeal. Where a development application proposes alterations and additions to an existing dwelling, the development application will be category 1 on the basis of Pt 1 cl 2(b) of Sch 9 to the Regulations provided that no change in land use to the dwelling is proposed. Where residential development is not attached to an existing dwelling, it will be category 1 if it falls within Pt 1 cl 2(d) of Sch 9 to the Regulations.

We wait, with anticipation, the full commencement of the Planning, Development and Infrastructure Act 2016 (SA) and the associated Planning and Design Code (PDC) which will occur on 1 July 2020 for metropolitan council areas and in or around April 2020 for regional council areas.

Under the new Act, procedural "pathways" for development applications (and associated public notice requirements) will be determined by the PDC.

It is possible that, through careful drafting in the PDC, procedural decisions on residential developments could be made simpler and less open to legal challenges. Whether this is achieved or not remains to be seen.

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Footnotes

1. In accordance with s 34 of the Act and Sch 8 of the Planning, Development and Infrastructure Act 2016 (SA), the relevant authority for a category 1 development application is either a council or the State Planning Commission.
2. According to s 32 of the Act, development cannot be undertaken unless the development is an approved development. According to s 33 of the Act, development applications may

require one or more consents before they are finally approved. Development plan consent is required for all developments other than those captured by s 33(4a) of the Act and Sch 1A of the Regulations.

3. There are, presently, no category 2A developments under the Act or Regulations. The creation of category 2A is an example of "appetite" for legislative change being lost over time. The original provisions amending s 38 to include category 2A were inserted into the Act on 1 March 2009 as a result of uncommenced portions of the Development (Assessment Procedures) Amendment Act 2007 (SA) coming into force as a result of s 7(5) of the Acts Interpretation Act 1915 (SA) which provides that if a proclamation is not made for the commencement of an Act before the second anniversary of its assent, it will come into operation on that anniversary. The original provisions relating to category 2A developments intended that any category 1 development application posing building work on a boundary would be category 2A, and that the owner or occupier of the land adjoining that boundary would be notified. On the very same day, those provisions were amended by the Development (Planning and Development Review) Amendment Act 2009 (SA) to their present form which effectively neuters these provisions by making their operation effectively subject to regulations, which regulations do not exist.
4. The term "adjacent land" is defined in s 4 of the Act.
5. See s 38(4) of the Act. There are presently no regulations which pertain to section 38(4)(b) of the Act.
6. Regulations 34 and 35 of the Regulations.
7. Section 38(5) of the Act. Public notice is achieved through publishing a copy of the notice in a newspaper circulating generally throughout the area of the state in which the relevant land is situated on at least one occasion — see reg 33(2) of the Regulations.
8. See ss 38(15) and 86 of the Act.
9. According to s 38(2) of the Act, public notice categories are assigned by a Development Plan or the Regulations. Many residential zones in Development Plans provide that public notice categories are those prescribed by Sch 9 of the Regulations.
10. *Verdouw v City of Unley* (2001) 113 LGERA 26; [2001] SASC 63; BC200101126. This decision was largely applied in *Baker v City of Norwood, Payneham and St Peters* (2003) 127 LGERA 200; 229 LSJS 242; [2003] SASC 282; BC200304722 (appealed on grounds not relevant to the definition of "dwelling" in *City of Norwood, Payneham and St Peters v Baker* [2004] SASC 135; BC200402895).
11. At the time of this decision, the Development Regulations 1993 (SA) were in force.
12. *Fandi v City of Burnside* [2019] SAERDC 30.
13. Section 86(1)(f) of the Act allows adjacent land owners and occupiers to challenge procedural decisions on development applications to the ERD Court.