The Court noted in this case that the appeal had been brought as of right under the legislation. There was no suggestion that the appellant was seeking to have the second appeal determined by a different member of the Court. Although there was no change in the factual circumstances or in the legislation, the appellant has come up with a new argument as to why he was justified in seeking an increase in his water allocations. There was nothing to suggest that the appeal would inevitably fail.

Accordingly, the Court concluded that the appellant ought to be allowed to put its case.

Nicholson v City of Holdfast Bay 2006 SAERDC 71 - Extensions of time for third party appellants

By Stuart Henry – Barrister – Carrington Chambers

(Excerpts from paper presented to Planning Institute of Australia (SA) Conference - 8 February 2007)

In this case, a party by the name of Thomson lodged an objection to a proposed development by Blazon Constructions Pty Ltd, and gave his or her address as "C/- Mr and Mrs Nicholson, 16 Lucy May Drive, Seacliffe, SA, 5049". The Council granted consent, and on the 6th of October 2006 Mr and Mrs Nicholson purported to appeal against the decision of the Council. The appeal was lodged outside of the 15 day period provided for by Section 38, and the Court set the matter down for argument on whether the appeal was competent.

The appeal was 2 days out of time. The applicants said that they had misread the notice from the Council, and believed that they had 2 months in which to appeal. However, as it turned out the decision notification form with the company by a letter from the Council which clearly indicated that the appeal time was 15 business days.

The Court held, for two reasons, that it would not exercise any discretion in favour of Mr and Mrs Nicholson in extending the time to appeal. The first reason was that Mr and Mrs Nicholson did not lodge a representation themselves in respect of the application. Their names were simply provided as a contact address for Mr Thomson who had lodged a representation. Secondly, the Court rejected the reason proffered by Mr and Mrs Nicholson as to the reason for the delay, and held that the Council's letter had clearly set out the appeal rights and the appeal period.

However, the Court went on to consider whether the Court has any power to extend the time in which to appeal under Section 38 of the Development Act. The Court firstly noted that there is no expressed power in the Development Act for the extension of the appeal time in Section 38. In particular, the power in Section 86(4) does not apply to the time limit in Section 38(14).

The Court went on to consider whether the provisions of Section 48 of the Limitation of Actions Act, 1936, gives to the Court the power to extend the time for a would be appellant under Section 38 of the Development Act. The Court noted the argument of counsel for Blazon Constructions that an Appeal against a Planning Decision is not "legal proceedings" within the meaning of the Limitation of Actions Act. If that was correct, there would be no power to grant an extension.

3Gis -v- Development Assessment Commission 2006 SAERDC 89 - Challenge to 3G mobile phone tower

By Stuart Henry – Barrister – Carrington Chambers

(Excerpts from paper presented to Planning Institute of Australia (SA) Conference - 8 February 2007)

3Gis is a joint venture vehicle used for the provision of telecommunications infrastructure for Telstra and Hutchison, two of the four mobile phone carriers with coverage in the metropolitan area. The proposal was for a base station including monopole antennas and equipment hut located within the Glenelg Golf Course

in a special uses zone. Unlike previous cases, the facility was for use in the "third generation" network. This meant that the facility would have a capability going beyond simply voice transmissions, and would include the ability to provide video streaming, data transmission, and other internet related services.

In assessing the proposal, the Court noted that the telecommunications division of the development plan expressed two main themes; "the fulfilment of the need for telecommunications services, and the siting and design of telecommunication facilities to minimise visual impact".

The Commission challenged the need for the facility on the basis that the appellant had failed to prove the existence of any need for the services which would become available if the facility were installed. The argument was that most of the services to be supplied were available by other means, and the additional services to be supplied were of little importance and could not be defined as a need of the community within the meaning of Objective 87 of the Council's Plan. On this question, the Environment Court again noted the words of the Full Court in the Waite Institute case. The Court rejected the Commission's argument on the question of need, and held that the question was whether there is a need for the facility to be constructed, not whether there is a need for the services to be provided through that facility. The Court held "it is not therefore the task of a planning authority in a planning assessment to assess the social utility of providing the latest generation of telecommunication services. The question to be addressed in the planning assessment is whether the particular facility proposed is needed to provide the service and, if so, whether it's been located and designed to minimize visual impact." On this basis, the Court accepted the appellant's evidence that there was a need for the facility because of poor signal strength and reception standard within the area.

The Court turned its mind then to the question of visual impact. It found that the impact on the amenity of the local environment had been minimised by the designed approach including the setback of the pole from the public road, the placement of the monopole near existing material vegetation and the proposed landscaping.

The Court then prepared the proposed location with the alternatives which had been the subject of evidence. One alternative advocated by the Commission was held by the Court not to be a practical alternative for the proposed development. This was because it would not provide coverage as good as the proposed development, and its location on top of a ETSA stobie pole would necessitate shutting down electricity supplies to several suburbs in the event that maintenance was required for the telecommunications facility. Another alternative suggested by the Commission was for a facility to be located on the spire of a nearby church. It may have involved substantial strengthening works to the church's roof structure and it would not completely address the coverage difficulties within the area. The Court did find that the solution would be potentially less visually intrusive than the proposed development.

The Court commented on the attributes necessary for an alternative site to be regarded as viable for the purposes of the development plan assessment. It held that the alternative proposal must at least meet the same or very similar needs, in terms of telecommunication coverage. It also held that the alternative proposal would have to be feasible ultimately the Court held that the alternatives proposed by the Commission were not a basis on which to conclude that the proposed site did not warrant consent.

It should be noted that the Commission has lodged an appeal to the Supreme Court against the decision in 3Gis. At the time of writing, that appeal had not been called on for argument.