City of Port Adelaide Enfield v Moseley [2008] SASC 88

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Two recent Court decisions have paved the way for relevant authorities to refuse, or refuse to deal with, development applications for built form in the nature of *de facto* land divisions where no actual division of the land is proposed.

De facto land division proposals often arise in circumstances where developers try to avoid Development Plan provisions which desire certain minimum site areas (e.g. building a number of dwellings as group dwellings rather than detached dwellings so as to take advantage lesser sit e are requirements for the former) or discourage particular forms of development (e.g. hammerhead development). In such circumstances the developer will seek approval for the built form only, and seek to divide the land once construction has commenced (or completed). In such circumstances it becomes very difficult for an authority to refuse approval for the land division.

In *City of Port Adelaide Enfield v Moseley* [2008] SASC 88 Justice Debelle recognised this, saying: "With all respect to the Commissioner, he has erred in stating that an approval of this [built form] proposal would not prejudice or pre-empt consideration of a decision whether to approve an application to divide this allotment. That assertion flies in the face of reality. Furthermore, to approve a development not knowing whether there is to be a successful application for land division can only be described as an extraordinary, if not cavalier, approach entirely at odds with the goal of orderly and economic development and the application of sound planning principle."

His Honour went on to hold that, where the development of land intended by a developer is the erection of buildings on separate allotments, any application for the built form alone should be either refused or held in abeyance until an appropriate approval for land division had been obtained. The Court confirmed that the relevant Council should have required the applicant to apply for approval to divide the land in accordance with the applicant's intentions before determining the application for built form, and that on appeal the ERD Court should have either dismissed the appeal or stayed it until the relevant land division approval was obtained.

This case follows similar reasoning to that found in *Kermode v City of Mitcham* [2007] SAERDC 57, an earlier decision of the ERD Court. It is interesting to note that the Supreme Court reached the same conclusion independently and without reference to the ERD Court decision.

In *Kermode's case* the ERD Court said that, "a developer who wishes to construct a [second] dwelling [on an existing allotment] in the nature of a detached dwelling must first secure development authorisation to divide the land or have evidence of the creation of some other sufficient form of tenure" (emphasis in original). The Court noted that a relevant authority cannot, in the absence of any other sufficient form of tenure, give proper consideration to a development that is intended to be a detached dwelling where the application for the dwelling is submitted in the absence of any application to create a separate allotment for that dwelling.

The Court held that, as in *Moseley's case*, the Council should have required the applicant to apply for approval to divide the land in accordance with the applicant's intentions before entertaining the application for built form. The Court noted that such application could also be made contemporaneously with the built form application.