When are planning 'decisions' made for the purposes of the Act: the Supreme Court decision in Hoff

Section 86 of the Development Act allows particular persons affected by a planning decision to appeal to the ERD Court. Section 86(4) provides that any such appeal must be brought within two months of the decision being made, although the Act does allow this time to be extended).

The question the Supreme Court had to deal with in Hoff & Anor v City of Mitcham & Ors [2016] SASCFC 3 was when the two month time limit commences.

This case involved an appeal regarding Council's decision as to the categorisation of a proposed development.

The proponents of the development sought approval for a two-storey dwelling incorporating an undercroft garage, cellar, privacy screen and front masonry fence in February 2014.

The relevant procedural history of the application was as follows:

The development application was lodged in February 2014.

1. On 8 April 2014, the Council informed the applicants (who were adjacent land owners) that an application had been made for a category 2 development.
2. In late April 2014 the applicants lodged representations with the Council opposing the development.
3. The applicants made submissions to the Development Assessment Panel on 6 November 2014, during which they asserted the development was category 3, not category 2.
4. On 12 November 2014 Council gave notice saying that, after taking into account all relevant matters, it had approved the development application.
5. On 2 January 2015, the Applicants filed an application in the ERD Court pursuant to section 86(1)(f) of the Act, seeking a review of Council's decision in respect of the categorisation of the proposed development, on the basis that it was a category 3 and not category 2 form of development.

The issue for the Court was whether the appeal was brought within the two month time limit prescribed by section 86(4) of the Act.

There were two possible dates from which the two month time limit could run – firstly, when Council informed the applicants that a category 2 application had been made (that is, on 8 April 2014) or, alternatively, when Council gave notice saying it had approved the development (12 November 2014). If it were the latter, the appeal would have been within the two month time limit. If it was the former, the appeal rights would have run out on 8 June 2014, some six months prior to the appeal being lodged.

The Hoffs argued that the decision regarding category was actually made at the same time that consent was granted, in November 2014, and therefore the application was within time. The Hoffs argued that, for the purposes of review, no 'decision' is made by a planning authority until the final determination as to whether or not to grant approval. If that decision is challenged, its validity depends upon each of the 'steps along the way' – including decisions on categorisation and whether a development is complying – also being valid.

The Council contended that the Act requires planning authorities to make a number of administrative decisions before the final determination of the application. By necessity, the decision as to category was made prior to the notification period (in April) and, accordingly, the two month time limit had expired before the appeal was brought by the Applicants.

The Applicants did not make an application for an extension of time. Therefore the only issue before the courts was when the decision regarding category was actually made.

The ERD Court held that the Council's decision regarding categorisation was made prior to the notification process, not at the time that Development Plan Consent was given. Therefore, the application was out of time and the appeal was dismissed.

The applicant appealed the decision to the Full Court of the Supreme Court, which reached the same conclusion as the ERD Court. The Supreme Court found that the time to appeal a decision as to categorisation runs from when that decision is made. Accordingly, the application was out of time.

In reaching this decision, the Supreme Court said that the Act clearly establishes an administrative scheme for the determination of development applications. Sections 35 and 38 expressly require planning authorities to make decisions about the nature of development. Further, there could be no right of review of categorisation in section 86 if they were not exercising an administrative power.

The decision on category, and therefore public notification, is made at a preliminary stage, meaning that the two month period to seek review of such a decision runs from that time. This remains the case despite the fact that an application for review which is brought before the Court may need to be put on hold while the development application is assessed. The Court found that whilst this situation is undesirable, it is unavoidable.

The reasoning in this decision is consistent with the Full Court in City of Marion v Paior. In that decision, the Court recognised that s86(1)(f) is designed to provide a person with the ability to challenge a preliminary step in the process, prior to the relevant authority's final determination. This is important because the categorisation decision affects subsequent procedures adopted by the authority for assessing and determining the development application.

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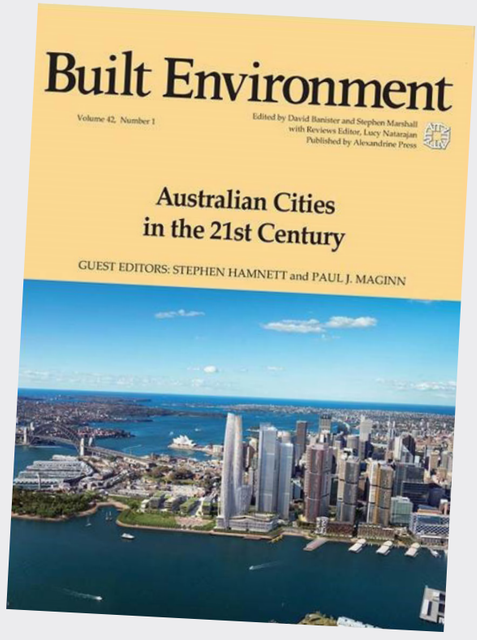

Emeritus Professor Stephen Hamnett LFPIA (UNISA) and Associate Professor Paul Maginn (formerly of UNISA and now at the University of Western Australia) have just published an edited collection of essays entitled 'Australian Cities in the 21st Century' in the international journal 'Built Environment' (Volume 42, No 1). This special issue includes authoritative papers by several of Australia's leading planning academics reviewing, amongst other themes, Planning for Suburbia, Transport Planning issues, Housing Affordability, Climate Change, Healthy Cities, Planning for an Aging Population, Integrated Disaster Planning, Multiculturalism and Metropolitan Planning, Planning for Remote Towns and the rapid growth of the Gold Coast as an 'adolescent' city.

Summaries of the individual papers and details of how to obtain them can be found at

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