

Attachment 8.13

**Confidential - Legal proceedings regarding unauthorised signage at 137
Commercial Road, Port Noarlunga South**

137 pages

Agenda 7 February 2006

10.1 Update on court proceedings

Report seeking Council confirmation of the direction of the prosecution action for alleged breaches of the Development Act 1993.

This is an update on a previously reported project, concept or issue.

General Manager: Terry Sutcliffe General Manager City Compliance

Report Author: Chris Button Manager Public Health & Safety
(chrbut@onkaparinga.sa.gov.au)

Contact Number: 8384 0765

File Reference:

Attachments: 2 (4 pages)

1 Executive Summary**1.1 Topic**

Report seeking Council confirmation of the direction of the prosecution action against Barry Becker (formerly Oxer) for alleged breaches of the Development Act 1993.

1.2 Context

Members are aware that Barry Becker was prosecuted in the Magistrates Court for breach of an Order pursuant to Section 254 of the Local Government Act 1999. The Supreme Court of South Australia on appeal subsequently overturned this prosecution. Council has now received legal advice on how to proceed with this matter following the decision of the Supreme Court.

1.3 Suggested Outcome

That Council resolve to proceed with legal action to control the display of signs at 137 Commercial Road Port Noarlunga South by initiating proceedings under Section 85 of the Development Act 1993.

2 Recommendation(s)

- 1.(a) That under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item.**
- (b) That the Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the report at the meeting on the following grounds:**
 - Section 90(3)(h) legal advice;**
 - Section 90(3) (i) information relating to actual litigation, or litigation that the Council or Council committee believes on reasonable grounds will take place, involving the Council or an employee of the Council.**
- (c) That accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.**
- 2. That Council resolve to proceed with legal action to control the display of signs at 137 Commercial Road Port Noarlunga South by initiating proceedings under Section 85 of the Development Act 1993.**
- 3. That an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the abovementioned document (or part of such document) including the minutes and the report of the Council relating to discussion of the subject matter of that document, having been dealt with on a confidential basis under Section 90 of the Act, should be kept confidential on the grounds of information contained in Section 90(3) (h) & (i) until a summons has been served on Mr Becker.**

Key Factors

3 Discussion

Members will be aware of the long-standing issues relating to the display of signs on a residential property at 137 Commercial Road, Port Noarlunga South. We successfully prosecuted Mr Becker in the Magistrates Court for breach of an order under Section 254 of the Local Government Act prohibiting him from displaying signs on his property. The Supreme Court of South Australia overturned this prosecution on appeal from Mr Becker and the Section 254 order. The basis of the Supreme Court's decision was not the original grounds of the appeal lodged by Mr Becker but rather the wording of the Section 254 order.

The order required that Mr Becker remove all signs and refrain from replacing those or similar signs. The Supreme Court found that while we had the ability to order the removal of the signs we did not have the ability to order him to refrain from replacing them. The order was therefore ruled invalid.

The action was initially taken in response to resident and Elected Member complaints regarding the appearance of the property. However, there have been minimal complaints in recent times, since initiation of the legal action under Section 254 of the Local Government Act.

In their deliberations the members of the Supreme Court did state that it was reasonable for Council to deem that the premises were unsightly and it was also suggested that the displays on the property could constitute illegal "development" as defined under the Development Act 1993.

Following the decision of the Supreme Court legal advice was sought on how to proceed given that decision. Such advice has now been received and is contained at Attachment 1.

In summary this advice is clear that, given the above decision, Section 254 of the Local Government Act 1999 would no longer be effective in this case. The preferred avenue to proceed is by initiating proceedings under Section 85 of the Development Act 1993.

Mr Becker has continued to display signs on his property (Attachment 2 – photograph taken 6/12/05). While the number and nature of signs make this property unsightly as determined by our original order, the displays are in excess of what would normally be expected on a residential property and also constitute development. Accordingly, this report seeks that Council resolve to commence proceedings under the Development Act to place controls on this activity.

Council has the option of pursuing this matter further in accordance with legal advice received, or taking no further action. In any legal action there is a risk of the action being unsuccessful. In addition, there has been some media coverage in the past which has defended Mr Becker's actions and has been critical of Council.

Conversely, not taking action would send a signal that the use and appearance of the property is considered by Council to be appropriate in a residential area. Not taking action may also compromise Council's ability to take action in relation to other properties in the future which are considered unsightly or on which unauthorised display of signs has occurred.

3.1.1 A Summary of Action to date

Council Reference	Stage of process; Or What has already been agreed
Council Meeting 25 January 2005	Council confirmed the content of the Order pursuant to S254 of the Local Government Act 1999 and

Confidential Agenda 7 February 2006

	resolved to proceed with issue of the Order.
Council Meeting 24 January 2006	Seeks that Council resolve to initiate proceedings under section 85 of the Development Act.
	Further reports and updates through Weekly News and/or Council reports as required.

MICHAEL RODER**BARRISTER**

14 December 2005

Norman Waterhouse
Lawyers
Level 15
45 Pirie Street
ADELAIDE SA 5000

Attention: Paul Kelly

Dear Paul

Becker v Onkaparinga

I have been asked to advise on the further options which may be open to Council in relation to the display of signs by Mr Becker.

The Development Act

There is a strong argument that Mr Becker has undertaken unauthorised development contrary to the provisions of the *Development Act* in two ways.

First I consider that Mr Becker has used his residential land in a way which is inconsistent with the ordinary residential use of land and constitutes a distinct use of land in itself. It may be difficult to categorise that land use but it is recognisable as a use distinct from residential use or anything ordinarily incidental to it.

Further in my view, it is strongly arguable that the erection of each and every sign individually constitutes an additional act or activity constituting development under Schedule 2 of the *Development Regulations* in that it constitutes "*a commencement of the display of an advertisement, but not including a change made to the contents of an existing advertisement if the advertisement area is not increased.*"

The *Development Act* defines "advertisement" as meaning "*an advertisement or sign that is visible from a street, road or public place or by passengers carried on any form of public transport*". It is therefore likely the Court will conclude that the commencement of the display of each sign is development in itself.

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If Council were to pursue a case based on breaches of the *Development Act*, I would recommend that it issue proceedings pursuant to Section 85 in the Environment Resources and Development Court seeking orders by way of injunctions prohibiting Mr Becker from using his land for the display of signs and from commencing the display of any sign that is visible from a street, road or public place or by passengers carried in any form of public transport (other than advertising display containing an advertisement set out in Schedule 3 of the *Development Regulations*) without first obtaining development approval. There is a reasonable possibility that the Court may make an interim order pending the final determination of the case requiring Mr Becker to remove the existing signs.

Proceedings under Section 85 of the *Development Act* are preferable to issuing a notice under Section 84, because:

1. Section 84 notices are more useful where there is a real possibility that the notice will be complied with.
2. Experience suggests that it is more likely that the Court will make an interim order by way of injunction in cases where it is satisfied by evidence that there is a prima facie case under Section 85.
3. Generally an order of the Court under Section 85 is more likely to be effective because defiance of the order may result in punishment for contempt of Court.

It is almost certain that Mr Becker will raise the constitutional argument in any proceedings under the *Development Act*. It is likely that if Mr Becker is unsuccessful, he will seek to have his case heard by the High Court. The scope of the constitutional privilege is in the early stage of its development and is still far from settled. It requires a balancing between the legitimate maintenance of public order and the implied right to freedom of expression on political issues.

There are reasonable prospects of succeeding on the constitutional point. It can be confidently said that there is less chance of the constitutional point succeeding in a case challenging the provisions of the *Development Act* than Section 254 of the *Local Government Act*. This is because the *Development Act* does not absolutely prohibit the impugned activity. It seeks to regulate it by requiring development approval. If a more detailed advice is required on the constitutional point please let me know.

Section 254 of the *Local Government Act*

I would not recommend using Section 254 of the *Local Government Act* in light of the decision of the Full Court. The effect of the decision of the Full Court is that Section 254 of the *Local Government Act* is not suitable to regulate activity of this nature by a person such as Mr Becker. The Full Court has found that the Council cannot make an order against Mr Becker restricting him from erecting further signs.

In my view the use of the procedure under the *Local Government Act* is not suitable because:

1. it cannot be used effectively to control future signs; and
2. the notice provisions are such that Mr Becker is likely to make arrangements to change the signs prior to any order being made.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Michael Roder', with a stylized, flowing script.

Michael Roder

10. Confidential Items

10.1 Update on court proceedings

Cr Greaves MOVED:

- 1.(a) That under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item.*
- (b) That the Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the report at the meeting on the following grounds:*
 - Section 90(3)(h) legal advice;*
 - Section 90(3) (i) information relating to actual litigation, or litigation that the Council or Council committee believes on reasonable grounds will take place, involving the Council or an employee of the Council.*
- (c) That accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.*

Seconded by Cr Taylor.

CARRIED

Cr Taylor MOVED:

- 2. That Council resolve to proceed with legal action to control the display of signs at 137 Commercial Road Port Noarlunga South by initiating proceedings under Section 85 of the Development Act 1993.*

Seconded by Cr Ferguson.

CARRIED

Cr Taylor MOVED:

- 3. That an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the abovementioned document (or part of such document) including the minutes and the report of the Council relating to discussion of the subject matter of that document, having been dealt with on a confidential basis under Section 90 of the Act, should be kept confidential on the grounds of information contained in Section 90(3) (h) & (i) until a summons has been served on Mr Becker.*

Seconded by Cr Erwin.

CARRIED

Agenda 17 April 2007

6.7 Update Of Legal Action - 137 Commercial Road Port Noarlunga South

Report providing update and seeking direction on legal proceedings against the owners of 137 Commercial Road Port Noarlunga South

This is an update on a previously reported project, concept or issue.

General Manager: Terry Sutcliffe, General Manager City Compliance

Report Author: Chris Button Manager Public Health & Safety

(chrbut@Onkaparinga.sa.gov.au)

Contact Number: 8384 0765

File Reference:

Attachments: 5

Attachment 1 - 3 pages

Attachment 2 - 1 page

Attachment 3 - 2 pages

Attachment 4 - 3 pages

Attachment 5 - 2 pages

1 Executive Summary**1.1 Topic**

Report providing update and seeking direction on legal proceedings against the owners of 137 Commercial Road Port Noarlunga South.

1.2 Context

Council has been seeking to control the display of signs at the above address since 2002. There have been three previous reports to Council on this matter the last being in February 2006. That report, whilst confidential at the time, is contained at Attachment 1 as the provisions of the release clause have been met. At that time Council resolved to proceed with control of signs at this address by initiating proceedings under Section 85 of the Development Act 1993.

A series of preliminary steps in that process have been completed and the matter was set down for trial on 16 April 2007. Prior to that date Council received a letter (Attachment 2) from Langsford's Solicitors who are acting on behalf of Mr Becker and Ms Inglis. This letter advised that they were prepared to lodge a development application for the display of signs on their property and sought the legal proceedings be discontinued or adjourned to allow that application to be lodged.

Council's response through our solicitors (Attachment 3) seeks that a development application be lodged by 5 April 2007 and advises of our willingness to adjourn the matter pending such lodgement. We are also aware

that Ms Inglis has contacted a number of Elected Members seeking their assistance in this matter.

Given the above exchange of letters and the requests to members, it was deemed that this was an appropriate time to bring the matter back before Council for further direction.

1.3 Suggested Outcome

That Council determine its position on how to proceed with this matter.

2 Recommendation(s)

- 1. That Council determine its position in relation to the display of signs at 137 Commercial Road, Port Noarlunga South.**

Key Factors

3 Discussion

Council originally initiated action in relation to this property in response to complaints from Elected Members, Members of Parliament, and the public, at the time, regarding the appearance of the property.

Council staff acting under delegation, originally issued an order pursuant to Section 254 of the Local Government Act in January 2004. These actions were endorsed by Council in February 2004. At that time Council delegated to the Chief Executive Officer to "seek compliance with the relevant legislation for signs on the property at 137 Commercial Road, Port Noarlunga South". On this basis, legal proceedings were commenced during 2004. Council has been kept informed of the progress of this matter via Weekly News and further reports to Council in January 2005 and February 2006. On both occasions when reports were presented, the Council resolved to proceed with the legal action against Messrs Becker & Inglis.

The legal advice received from Michael Roder in December 2005 (Attachment 4) advises that there is strong argument that the display of signs on this property is unauthorised development. On that basis Council in February 2006 determined to proceed with the current action. After preparation of affidavits and other documents permission to issue to a summons was granted by the Environment Resources and Development Court in August 2006. Since that time there has been a conference and preliminary hearings in an attempt to progress the matter.

On 31 January 2007 the Mayor and the General Manager City Compliance met on site with Mr Becker and Ms Inglis following a request to the Mayor to explore options for a compromise solution to this issue. At this meeting it was proposed that the current legal proceedings could be suspended if Mr Becker and Ms Inglis were to lodge a development application.

This proposal was set out in a letter from the General Manager City Compliance dated 5 February 2007 (attachment 5). On 12 February 2007 we were advised that Mr Becker and Ms Inglis would not be lodging a development application. Accordingly the preliminary hearing set down for 13 February 2007 went ahead and a trial date was set down for 16 and 17 April 2007. The exchange of letters previously outlined (attachments 2 & 3) has now resulted in the adjournment of those proceedings.

There appears to be two options for Council to consider in this matter

1. Discontinue proceedings and take no further action in relation to the display of signs at 137 Commercial Road Port Noarlunga South. This option would save resources in pursuing the matter but does expose Council to the risk of an application for a claim against us for any costs incurred in the action to date by Becker/Inglis. There may also be significant consequences by way of precedent when we wish to control other forms of illegal development, particularly relating to the display of signs on residential properties. If Council were to decide on this option an appropriate resolution may be:

- *That Council discontinue the current enforcement action in the Environment Resources and Development Court pursuant to section 85 of the Development Act 1993 in relation to the display of signs at 137 Commercial Road Port Noarlunga South subject to an agreement from Becker/Inglis on any further costs or claims by them not being pursued; and*
- *Take no further action in relation to the display of signs at that property unless there are significant changes to the type and manner of signs displayed at that location; and*
- *That Mr Becker and Ms Inglis be advised of Council's decision.*

2. Confirm its previous decision to pursue the matter under Section 85 of the Development Act 1993 and agree to the adjournment of that action to allow for the lodgement and assessment of a development application for the display of signs at 137 Commercial Road Port Noarlunga South. Such action would be consistent with our compliance obligation to ensure the provisions of the Development Act are upheld. It is also consistent with action taken by staff under delegation to date, based upon the expectation that a development application would be lodged as per the letter from Langsford Solicitors dated 23 March 2007. Note that such a development application had not been lodged by 5 April 2007 as requested, and had not been lodged at the time of finalisation of this report.

Legal advice confirms that the adjournment of proceedings is appropriate once a development application has been lodged, as the court would in all likelihood defer hearing the matter until such an application has been assessed. Such adjournment also allows for the abandonment of proceedings should that application be successful. If Council were to decide on this option an appropriate resolution may be:

- *That Council proceed with legal action to control the display of signs at 137 Commercial Road Port Noarlunga South by continuing with proceedings under section 85 of the Development Act 1993 currently before the Environment Resources and Development Court and,*
- *That Council note the adjournment of those proceedings to allow for the lodgement and assessment of a development application for the display of such signs, and agree to the adjournment continuing providing an application is lodged by 30 April 2007.*
- *That Mr Becker and Ms Inglis be advised of Council's decision*

The direction of Council is now sought on the matter.

Attachment 6 7

Update of Legal Action – 137 Commercial Road Port Noarlunga South

11 pages

10 1 Update on court proceedings

Report seeking Council confirmation of the direction of the prosecution action for alleged breaches of the Development Act 1993

This is an update on a previously reported project concept or issue

General Manager	Terry Sutcliffe General Manager City Compliance
Report Author	Chris Button Manager Public Health & Safety (chrbut@onkaparinga.sa.gov.au)
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1 Executive Summary

1 1 Topic

Report seeking Council confirmation of the direction of the prosecution action against Barry Becker (formerly Oxer) for alleged breaches of the Development Act 1993

1 2 Context

Members are aware that Barry Becker was prosecuted in the Magistrates Court for breach of an Order pursuant to Section 254 of the Local Government Act 1999. The Supreme Court of South Australia on appeal subsequently overturned this prosecution. Council has now received legal advice on how to proceed with this matter following the decision of the Supreme Court.

1 3 Suggested Outcome

That Council resolve to proceed with legal action to control the display of signs at 137 Commercial Road Port Noarlunga South by initiating proceedings under Section 85 of the Development Act 1993.

2 Recommendation(s)

- 1 (a) That under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item
- (b) That the Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the report at the meeting on the following grounds
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- (c) That accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential
- 2 That Council resolve to proceed with legal action to control the display of signs at 137 Commercial Road Port Noarlunga South by initiating proceedings under Section 85 of the Development Act 1993
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Key Factors

3 Discussion

Members will be aware of the long-standing issues relating to the display of signs on a residential property at 137 Commercial Road, Port Noarlunga South. We successfully prosecuted Mr Becker in the Magistrates Court for breach of an order under Section 254 of the Local Government Act prohibiting him from displaying signs on his property. The Supreme Court of South Australia overturned this prosecution on appeal from Mr Becker and the Section 254 order. The basis of the Supreme Court's decision was not the original grounds of the appeal lodged by Mr Becker but rather the wording of the Section 254 order.

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The action was initially taken in response to resident and Elected Member complaints regarding the appearance of the property. However, there have been minimal complaints in recent times, since initiation of the legal action under Section 254 of the Local Government Act.

In their deliberations the members of the Supreme Court did state that it was reasonable for Council to deem that the premises were unsightly and it was also suggested that the displays on the property could constitute illegal "development" as defined under the Development Act 1993.

Following the decision of the Supreme Court legal advice was sought on how to proceed given that decision. Such advice has now been received and is contained at Attachment 1.

In summary this advice is clear that, given the above decision, Section 254 of the Local Government Act 1999 would no longer be effective in this case. The preferred avenue to proceed is by initiating proceedings under Section 85 of the Development Act 1993.

Mr Becker has continued to display signs on his property (Attachment 2 – photograph taken 6/12/05). While the number and nature of signs make this property unsightly as determined by our original order, the displays are in excess of what would normally be expected on a residential property and also constitute development. Accordingly, this report seeks that Council resolve to commence proceedings under the Development Act to place controls on this activity.

Council has the option of pursuing this matter further in accordance with legal advice received, or taking no further action. In any legal action there is a risk of the action being unsuccessful. In addition, there has been some media coverage in the past which has defended Mr Becker's actions and has been critical of Council.

Conversely, not taking action would send a signal that the use and appearance of the property is considered by Council to be appropriate in a residential area. Not taking action may also compromise Council's ability to take action in relation to other properties in the future which are considered unsightly or on which unauthorised display of signs has occurred.

3.1.1 A Summary of Action to date

Council Reference	Stage of process, Or What has already been agreed
Council Meeting 25 January 2005	Council confirmed the content of the Order pursuant to S254 of the Local Government Act 1999 and resolved to proceed with issue of the Order.
Council Meeting 24 January 2006	Seeks that Council resolve to initiate proceedings under section 85 of the Development Act.
	Further reports and updates through Weekly News and/or Council reports as required.

Langsfords solicitors

Employment and Compensation Law

Suite 9, 9-13 Market Street
Adelaide, SA 5000
Phone (08) 8231 3611
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ssimonla@bigpond.net.au

23 March 2007

Our ref 06039-854 doc
Your ref 0248975

Mr David Billington
Messrs Norman Waterhouse
Lawyers
GPO Box 639
ADELAIDE SA 5001

Via email dbillington@normans.com.au 23/3/07

Dear Mr Billington,

RE BECKER AND INGLIS at CITY OF ONKAPARINGA -ERD - 06-311

I refer to your letter of 1 March 2007

I have taken my clients' instructions on the contents of your letter. My clients are prepared to make a Development Application to seek approval to display on their land a number of signs displaying the type of political message of the kind that they have displayed now for a number of years. They are prepared to make this application without prejudice to their right to argue on any later occasion if such be necessary that the relevant provisions of the *Development Act* should be read down, or alternatively, be held to be *ultra vires* insofar as they contravene the implied constitutional limitation concerning freedom of political communication. My clients propose that current proceedings be discontinued or adjourned to enable my clients to make such an application.

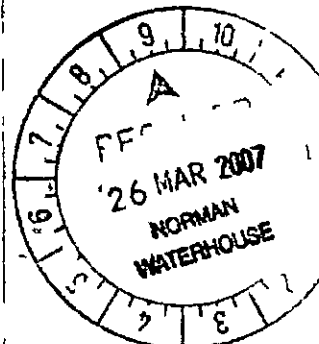
My client, Ms Inglis, the second respondent, recently discussed these issues with the Mayor of the City of Onkaparinga concerning *inter alia* the difficulty in adapting the current form of application for development to the respondent's particular and somewhat unusual circumstances. I am instructed that the Mayor, Ms Rosenberg, indicated that assistance from the Corporation could be provided to ensure that the application was properly made. I have not yet any specific instructions as to the time frame within which such an application would be made or determined. However, my clients are prepared to undertake to make the application as soon as reasonably possible.

Would you please let me have your response to this proposal?

'WITHOUT PREJUDICE'

Yours faithfully


SIMON LANGSFORD



normanwaterhouse

Ref 0248975\DXB0886458

2 April 2007

WITHOUT PREJUDICE

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Dear Mr Langsford

City of Onkaparinga v Becker & Inglis - ERD-06-311

I refer to your letter of 23 March 2007

You have stated that your clients are prepared to lodge a development application for their activities, being the display of signs on their land. I note that such application will be made on a without prejudice basis.

You have invited the Council to adjourn or discontinue the present proceedings to allow your clients the opportunity to lodge a development application, and for any such application to be processed.

I am instructed as follows:

The Council is willing to adjourn the present proceedings to permit your clients to lodge a development application for their activities. It is envisaged that an adjournment of eight weeks, with liberty to apply, would be sought from the Court.

In order to allow sufficient time to advise the Environment, Resources and Development Court of the parties' request for an adjournment of the trial of the matter, the Council requires that any development application be lodged by your clients no later than close of business on **Thursday 5 April 2007**.

Should Mr Becker or Ms Inglis require assistance in lodging or completing their application, the Council invites them to contact Ms Renee Mitchell, Manager of Development Services, on 8384 0584.

AS/NZS ISO 9001:2000
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advoc asia

Auckland Beijing Brisbane
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Jakarta Kuala Lumpur
Manila Melbourne Perth
New Delhi Perth Singapore
Sydney Taipei Tokyo

2 April 2007

Please contact me if you have any questions about this letter

Yours faithfully
NORMAN WATERHOUSE

A handwritten signature in black ink, appearing to read 'D. Billington', with a long horizontal stroke extending to the right.

David Billington
ASSOCIATE
Direct Line (08) 8210 1263
e mail dbillington@normans.com.au

CC Mr C Button
City of Onkaparinga
By email

MICHAEL Roder

BARRISTER

14 December 2005

Norman Waterhouse
Lawyers
Level 15
45 Pine Street
ADELAIDE SA 5000

Attention Paul Kelly

Dear Paul

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Section 254 of the *Local Government Act*

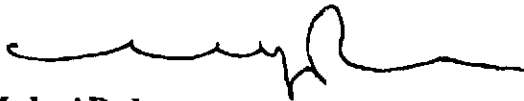
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Yours faithfully

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Michael Roder



**City of
Onkaparinga**

05 February 2007

Mr B Becker and Ms J Inglis
137 Commercial Road
PORT NOARLUNGA SOUTH SA 5167

Dear Mr Becker and Ms Inglis

Further to our site meeting on Wednesday, 31 January 2007 at your home at 137 Commercial Road, Port Noarlunga South with Mayor Rosenberg, I write to confirm discussions at that site meeting regarding a potential compromise to resolve the current issue of display of signs on your residential property

I must state clearly that the contents of this letter are entirely without prejudice (including with respect to the present legal proceedings in the Environment, Resources and Development Court) and any resolution will be subject to a decision of Council in the future, and the outcome of a due process of assessment of any development application pursuant to the *Development Act 1993*

We have discussed in the past the option of you rationalising the extent and location of signs displayed on your residential property to ensure it more readily met the accepted and expected appearance of a residential property

It is Council's contention, and the basis of Council's current legal action, that the display of signs on a residential property requires approval under the Development Act. However, there may be an option for display of signs on your property that is acceptable to Council (subject to obtaining the necessary consents and approvals under the Development Act) and also achieves your objectives, as follows

- Signs are only to be displayed in specified locations on the property (suggested to be limited to flush against and not protruding above the side fences of your property, and upon the shade cloth that partially encloses your front verandah)
- The area and location of sign panels is clearly documented by you in a development application under the Development Act

Note that it is not proposed that Council would seek to control the messages displayed on the signs through a development application

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■ **Contacts**

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■ **Postal address**

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□ **Aberfoyle Park office**

The Hub
Aberfoyle Park
Fax (08) 8270 1155

■ **Willunga office**

St Peters Terrace
Willunga
Fax (08) 8556 2641

Enclosed is a guideline for lodgement of a development application, and a development application form. The expected fees for such an application are \$474.00. Council staff can assist you in the process of completing a development application form and advising on any supporting documentation if required. Please contact either Chris Button or Renee Mitchell at our Noarlunga office if you require any further information.

Could you please advise Chris Button in writing of your intentions in relation to this letter by Friday, 9 February 2007 prior to the present legal proceedings resuming in Court on 13 February 2007. This will enable us to make a decision as to whether to seek an adjournment of the Court action pending a development application being determined, or whether the matter proceeds to determination by the Court.

Yours sincerely

Terry Sutcliffe
General Manager City Compliance

Encl Development Application Form
Guideline for lodgement of a development application

.7 Update Of Legal Action - 137 Commercial Road Port Noarlunga South

Cr Apap MOVED

- 1. That Council discontinue the current enforcement action in the Environment Resources and Development Court pursuant to section 85 of the Development Act 1993 in relation to the display of signs at 137 Commercial Road Port Noarlunga South subject to an agreement from Becker/Inglis on any further costs or claims by them not being pursued; and*
- 2. Take no further action in relation to the display of signs at that property unless there are significant changes to the type and manner of signs displayed at that location; and*
- 3. That Mr Becker and Ms Inglis be advised of Council's decision.*

Seconded by Cr Swann.

LOST

Cr Peat MOVED

- 1. That Council proceed with legal action to control the display of signs at 137 Commercial Road Port Noarlunga South by continuing with proceedings under section 85 of the Development Act 1993 currently before the Environment Resources and Development Court.*
- 2. That Council note the adjournment of those proceedings to allow for the lodgement and assessment of a development application for the display of such signs, and agree to the adjournment continuing providing an application is lodged by 17 May 2007.*
- 3. That Mr Becker and Ms Inglis be advised of Council's decision.*

Seconded by Cr Fletcher.

CARRIED

**CITY OF ONKAPARINGA
AGENDA FOR THE DEVELOPMENT ASSESSMENT PANEL MEETING TO BE HELD ON 26
JUNE 2008**

Item 2.1.3 Ms JP Inglis and Mr BJ Becker

1. Executive Summary

Application No	- 145/1540/2007/3X
Applicant	- Ms J P Inglis and Mr B J Becker
Description of Development	- Placement of blackboards displaying, in chalk, comments of a political nature
Property Details	- 137 Commercial Road, PORT NOARLUNGA SOUTH SA 5167
Owner of Land	- Ms J P Inglis and Mr B J Becker
Zone	- Residential
Form of Assessment	- Merit
Public Notification Category	- Category 3
Representations	- Three in first notification. Plus five in second notification (one technically invalid as a representation)
Agency Consultations	- Nil
Seriously at variance	No
Author	- Dennis Batge, Consultant Planner
Attachments	- a. Application Documents b. First Representations c. Second Representations d. Applicant's Responses e. Legal Advice f. Correspondence – Minister for Urban Development and Planning
Recommendation	- Refuse

2. Summary of Proposal

2.1 Description of Proposal

The proposal comprises the display of up to ten (10) blackboards with legs to a maximum size excluding the legs, of 2.43 metres (8 feet) x 1.21 metres (4 feet) in any location on the subject land. Plans submitted as part of the application indicate that the display area is between the front of the applicant's dwelling and

the front (Commercial Road) boundary of the allotment. The plans also note that there would be no display on the Council owned roadside verge.

Table Onka/8 of the City of Onkaparinga Development Plan states "The following types of signs are non-complying in all zones within the City of Onkaparinga: ...

- 7 Portable/mobile advertisements or advertising displays that exceed one square metre in advertisement area.

The proposed signs are portable and exceed one square metre in area and accordingly the proposal is for a non-complying kind of development.

The matter is referred to the Panel for determination at the discretion of the General Manager City Development under the Panel's terms of reference, as an application relating to a matter with a history of significant community interest.

2.2 Description of the Site and Locality

The site of the development comprises a residential allotment with a frontage to Commercial Road of 19.2 metres and an area of 746.4 square metres. It contains a detached dwelling set back 9 metres or thereabouts, from the Commercial Road boundary of the subject land.

The locality is typically residential. It comprises detached dwellings fronting Commercial Road which carries high volumes of traffic. GERALTON Street forms a junction with Commercial Road on the northern side of No.135 Commercial Road. That street also has detached dwellings fronting it, but on smaller allotments. The eastern side of Commercial Road is a large area of relatively flat, unbuilt land that is not a reserve but owned by the South Australian Housing Trust which is likely to be developed for housing at some time in the future.

The amenity of the locality is generally typical of the wider residential area, comprising single storey dwellings of modest standards but generally well maintained. The presence of high traffic volumes on Commercial Road reduces the level of amenity below that of premises removed from that road. This does not however impact on the quality of the built form and it remains a relatively neat and pleasant place in which to live.

2.3. Background

The proposal has arisen from the activities of the applicants who have for some considerable time displayed messages generally, but not exclusively, of political or semi-political nature in front of their dwelling, on blackboards or similar items. These displays have also at times included the base of the stobie pole adjacent the frontage of the subject land.

The issue first arose in the second half of 2002 soon after Mr B Becker (then known as Mr B Oxer) and Ms Inglis purchased the subject property in April 2002 or thereabouts. Soon thereafter, the issue of signboards on the land was brought to Council's attention from a number of sources. The activity, primarily

utilising chalk boards for the display of messages has generally been ongoing since that time according to Council records.

Council attempted to control the placement of the signs/boards under Section 254 of the Local Government Act but the Full Court of the Supreme Court ruled that these provisions only deal with individual display events and cannot be used to direct a person to refrain from ongoing activities such as have been undertaken by Ms Inglis and Mr Becker.

Following the action under the Local Government Act, Council sought further legal advice as to the status of the activity under the Development Act. The legal advice of Barrister, Michael Roder, is that a strong argument exists that the activity is:

- Unauthorised development (and therefore requires development approval).
- The land use is distinctly separate from the residential use of the land.
- Each and every sign represents an act or activity constituting development under Schedule 2 of the Development Regulations.

The above information relating to the background of this application is provided for contextual purposes only and does not have any significant bearing on the Panel's assessment and determination of this matter against the relevant provisions of the Development Plan. The Panel is only concerned with the planning issues that relate to the application as it has been lodged.

To ensure procedural correctness and fairness, Council referred the application to the Minister for Urban Development and Planning for determination by the Development Assessment Commission but the Minister advised that Council's Panel is the appropriate authority to determine the application.



3. Consultation

3.1 Public Notification

The application has been the subject of Category 3 public notification on two occasions. In the first instance it was notified as a consent kind of development. However subsequently it was recognised that in accordance with Table Onka/8 that portable signs of the size proposed are non-complying and that a fresh notification identifying the development as non-complying was required.

Category 3: Notice of the application is given to adjoining properties and properties likely to be directly affected by the proposal, and a public notice placed in the Advertiser. The applicant may respond to any written representations received.

Representations - First notification.

Name & Address	For	Against	Wish to be heard
Robert Catchpole, 6A Brittain Drive, Pt. Noarlunga South, (owner 135 Commercial Road)		X	N
Andrew & Ann Jacks, 32 Kreig Road, Evanston Park, SA		X	N
JE & D Thomas, 129 Commercial Road, Pt Noarlunga South		X	N

Representations - Second notification:

Name & Address	For	Against	Wish to be heard
Jason Smart, 141 Commercial Road		X	
DP & RL Hopkins, 18 Larboard Street, Seaford.		X	
MB Hurst, 68 Cambridge Street, Port Noarlunga South.		X	
Robert Catchpole, 6A Brittain Drive, Port Noarlunga South.		X	
One representation signed but with no name or address and is therefore invalid.		X	

Legal advice has been obtained with respect to the legal status of the first representations. That advice is attached and confirms that notwithstanding the second round of notification the status of the first set of representations is unchanged. The Panel should therefore have regard to them in the assessment of the proposal.

**CITY OF ONKAPARINGA
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JUNE 2008**

Although none of the representors have requested to be heard, the applicants have requested to make either written or personal representation.

Summary of Representations and Applicant's Response:

First Notification

Issue (Attachment A)	Applicant's response (Attachment B)
<p>The display adversely affects the ability to let premises next door to the subject property. Potential tenants find the material offensive. Worried about renting the (adjacent) property.</p> <p>Visitors could be offended.</p> <p>Tenants worry about their safety living next door to the subject property because of the signage.</p> <p>Comments made on the boards might cause some form of tension or unwanted meetings in the area.</p> <p>The comments are unpleasant and give the area a bad name.</p>	<p>They dispute the validity of the Catchpole and Jacks representations as they have not fully completed the representation forms.</p>
The signage devalues the area and is an eyesore/unsightly/messy looking.	
The signs distract traffic and are a hazard.	
<p>There are many other ways for the applicants to make their comments on their beliefs without being intrusive to others in the community. The applicants have had an extremely good run and now a decision should be made for the benefit of the majority of residents who have spent money on their dwellings.</p>	
People passing in cars are distracted by the boards and could cause accidents.	

Second Notification

Issue (Attachment A)	Applicant's response (Attachment B)
It appears as if anything can be written on the front of the property. It affects the prices of homes in the locality.	No proof provided with respect to loss of value.
Boards have been found in neighbouring premises.	They advise that they certainly did not place boards on a neighbouring property.
An eyesore degrading the area not suitable for a residential area and a safety issue. Distraction for drivers going by.	-

**CITY OF ONKAPARINGA
AGENDA FOR THE DEVELOPMENT ASSESSMENT PANEL MEETING TO BE HELD ON 26
JUNE 2008**

Issue (Attachment A)	Applicant's response (Attachment B)
There are better forums to present the comments that have no impact on road safety.	-
Not impressed at all.	-
Blackboards often include unsubstantiated defamatory comments against named individuals.	The Australian Constitution protects their right to political comment.

Location of Representors



Representors' properties are shown with a number in a yellow dot and are as follows:

1. Robert Catchpole (non-resident owner)
2. Jason Smart
3. MB Hurst
4. A & A Jacks (non-resident owner)
5. J & D Thomas

DP & RL Hopkins are located too far south to be shown on a map.

3.2 Agency/Internal Consultation

External agency or internal consultation was not required.

4. Assessment

4.1 Land Use

An important consideration in the assessment of the proposal is the determination of the nature of the proposed use and its relationship to the residential use of the subject land.

Section 4 of the Development Act defines an advertisement as meaning "*an advertisement or sign that is visible from a street, road or public place or by passengers carried on any form of public transport;*"

In accordance with Schedule 2 paragraph 7 of the Development Regulations "a commencement of the display of an advertisement" is an act that constitutes development. To further assist in determining the status of the proposal, the common meaning of sign and advertisement has also been considered. The Macquarie dictionary with respect to an advertisement provides the following meaning "*any device or public announcement, as a printed notice in a newspaper, a commercial film on television, a neon sign etc. designed to attract public attention...*" A sign is described as "*an inscribed board, space, etc. serving for information, advertisement, warning etc., on a building, along a street or the like*".

The proposal can reasonably be considered to comprise signs or advertisements and is therefore "development" in accordance with the above provisions of the Development Act and Regulations. This has been confirmed by legal advice.

It is also arguable that the proposed display of signs is a change in the use of land in the nature of the commencement of a new "signage/political comment" use in addition to the existing residential use of the land.

The proposal is not considered to be typical of residential land use or activity usually found within a residential zone or area. The display of blackboards or other forms of sign boards or other similar structures or non-structural items in front of, or around a dwelling, is not something that ordinarily occurs nor is it anticipated or expected as part of normal residential use of residential land.

Due to the visual impacts of the sign boards individually and collectively they are a departure from the normal use of residential land for ancillary activities such as outdoor recreation, passive leisure activities, ancillary outbuildings structures, landscaping and landscape features that are typically the practice or custom of the community generally. The visual impacts and on occasion at least, the visual clutter is something that sets the activity apart from that which is normally associated with dwellings and with the desired level of amenity within the Residential Zone in accordance with Council Wide Residential Objective 1 and Principle of Development Control 1 and Objective 2 of the Residential Zone.

4.2 Development Plan

The following provisions of the Development Plan are considered relevant to the assessment of the proposal:

Council Wide

Appearance of Land and Buildings

Objectives

Objective 1: *The amenity of localities not impaired by the appearance of land, buildings and objects.*

Principles of Development Control

- 1** *The appearance of land, buildings, and objects should not impair the amenity of the locality in which they are situated, and should be consistent with the desired character for a zone or area expressed by its provisions.*
- 2** *Within residential areas:*
 - (a) development should maintain or enhance the desired character and appearance of any zone, area or locality;*

Outdoor advertising

Objectives

- Objective 1:** *An urban environment and rural landscape not disfigured by advertisements.*
- Objective 2:** *Advertisements not hazardous to any person.*
- Objective 3:** *The scale and style of outdoor advertising designed to enhance the image of local businesses whilst promoting the desired character and amenity of localities.*
- Objective 4:** *The prevention of the proliferation of advertisements by promoting the rationalisation and common sharing of advertising displays.*
- Objective 5:** *To increase the effectiveness of existing advertisements by the reduction of the overall number of existing advertisements.*
- Objective 7:** *The prevention of the establishment of advertising displays in inappropriate locations and localities.*
- Objective 8:** *To ensure that advertisements are attractive, simply worded, legible and durable.*

Principles of Development Control

NB: For non-complying outdoor advertising refer to Table Onka/8.

- 1** *The location, siting, size, shape and materials of construction, of advertisements should be:*

- (a) *consistent with the desired character of areas or zones as described by their objectives;*
 - (b) *consistent with the predominant character of the urban or rural landscape;*
 - (c) *in harmony with any building or site of historic significance or heritage value in the locality; and*
 - (d) *generally consistent with [Table Onka/7](#) - Design Guidelines for Outdoor Advertising.*
- 2 *Advertisements should not detrimentally affect by way of their siting, size, shape, scale, glare, reflection or colour the amenity of areas, zones, or localities, in which they are situated.*
- 3 *Advertisements should not impair the amenity of areas, zones, or localities, in which they are situated by creating, or adding to, clutter, visual disorder and the untidiness of buildings and spaces.*
- 5 *The scale of advertisements should be compatible with the buildings on which they are situated and with nearby buildings and spaces.*
- 6 *Advertisements should be constructed and designed in a workmanlike manner.*
- 10 *Advertisements should not create a hazard to persons travelling by any means.*
- 23 *Advertisements should relate to the use of the land upon which they are situated. "Third party" promotional or directional advertisements are not appropriate.*
- 24 *Within all Residential, Country Township and Tourist Accommodation – type zones, advertisements or advertising displays which relate to non-residential land uses should:*
- (a) *be no greater in advertisement area than three square metres, if affixed to a building;*
 - (b) *be no greater in advertising display area than two square metres per side if freestanding, and be located so as to ensure public safety; and*
 - (c) *be no greater in height than four metres from natural ground level.*

Residential development

Objectives

Objective 1: *Safe, pleasant, convenient and efficient residential zones, conducive to a sense of community.*

Objective 2: *Residential areas primarily used for residential purposes in well designed, safe and attractive environments, conveniently linked to community and other facilities and services.*

Principles Of Development Control

General

- 4 *Development in a residential zone should not impair its character or the amenity of the locality as a place in which to live.*

Non-residential Development in Residential Zones

- 18** *Non-residential forms of development should enhance the ability of residential areas to meet the needs and desires of local resident populations.*

Residential zone

Objectives

- Objective 1:** *A zone primarily comprising low-density and medium-density housing of varied form to accommodate a wide range of life-style needs.*
- Objective 2:** *A high standard of residential amenity and a pleasant living environment.*
- Objective 3:** *Development designed in context with the positive features of the particular locality.*
- Objective 4:** *The creation or maintenance of cohesive residential communities supported by compatible local community, recreational and educational facilities.*

Principles Of Development Control

Form of Development

- 5** *Non-residential development should be compatible with the primary function of the zone in terms of desired character, amenity, service provision and household need.*

Table Onka/8

Non-complying Outdoor Advertising

- 7** *Portable/mobile advertisements or advertising displays that exceed one square metre in advertisement area.*

Character and Amenity

The proposal introduces up to 10 signboards to the curtilage of the detached dwelling on the subject land and, given the intent and purpose of the signs to convey messages to the public, to the streetscape as viewed from Commercial Road. There are numerous aspects of the proposal that are considered to have a negative impact on the character and amenity of the locality contrary to the provisions of the Development Plan that seek:

- Development that does not impair the amenity of the locality in which it is situated, and is consistent with the desired character for a zone or area.
- Development that achieves the desired character as determined by the Desired Character Statement for the Residential Zone and the other Development Plan provisions that influence or determine that character of an area.

- Advertisements that are related to business activities – there is not contemplation of signs or advertisements of the kind proposed in this application on residential land.
- A high standard of residential amenity and a pleasant living environment.
- Well designed, safe and attractive living environments.
- Development designed in the context of the positive features of the relevant locality in which the land is situated.
- The creation and maintenance of cohesive residential communities within the Residential Zone.

The proposed signs are contrary to these desired characteristics of development within the locality for the following reasons:

- The collection of sign boards placed at the front of the dwelling (whether as currently used or as more formal structures) create a visual impact and clutter that is neither characteristic of the locality or in keeping with the desired character for the area.
- A collection of signs regardless of whether they are for business, political statements, messages or other statements of the residents views, beliefs or opinions are not consistent with accepted norms within the community.
- The activity is not of a nature or design that in any way reflects or is compatible with the positive features of the locality that includes the visually positive effects of landscaped areas in the front yards of dwellings.

In addition to the above, where non-residential development is to be undertaken within the Residential Zone, the Development Plan requires that it be compatible in terms of visual and functional aspects of the development with the primary function of the zone in terms of desired character, amenity, service provision and household need. This proposal is not considered to display merit in this regard. The activity is not considered compatible with the desired character for the Residential Zone and it will not provide any service or meet any identifiable need of households in the area and visually detracts from the amenity of the locality.

The message displayed on an advertisement is not normally a relevant consideration in a planning assessment. However, this particular application relates to an application for sign boards that are intended to display a particular kind of message, in this case, messages of a political nature. The specific content of each political message is not however, considered relevant to the assessment and determination of this application. However, as is evidenced by some of the comments of the representors concerning this application, there is a potential for land owners and residents in the locality to find such ongoing activities in a residential area to be unattractive, objectionable or disquieting.

4.3 Purpose and Location of Advertisements

The Development Plan deals comprehensively with advertising displays in its Council Wide provisions. In summary, it seeks:

- An urban and rural landscape not disfigured by advertising displays.
- Advertisements that are not be hazardous to anyone.
- The proliferation of advertisements being prevented.
- Prevention of displays in inappropriate locations and localities.
- Advertisements that promote local businesses and are located on those business premises and not elsewhere.

The proposal is for displays that advertise or communicate the applicant's political or social viewpoints and although the advertisements are not for a business they are similar to advertising by interest groups, political parties or candidates. Such advertising is not contemplated by the City of Onkaparinga Development Plan. It contemplates business advertising on land and buildings used for business in appropriate locations. A residential property in the Residential Zone is not considered to be the sort of place or land use in which such displays are contemplated by the Development Plan. On these grounds the application is considered inappropriate.

4.4 Non-Complying Status of Advertisements

The fact that a kind of development is non-complying is not something that automatically determines the outcome of a planning assessment. In this matter the fact that the kind of development proposed is listed as one of a number of forms of advertisements that are listed as non-complying in Table/Onka 8 provide some guidance as to acceptable uses or forms of advertisements within the City of Onkaparinga. This list excludes among other things forms of advertisements that are animated, flash, revolve or move, bunting and portable or mobile advertisements that exceed one square metre in area. These kinds are all forms of advertising which generally create a higher level of visual impact and are therefore assigned non-complying status providing a planning authority with the ability to preclude them without right of appeal against such a decision. In this instance the proposal is for not just one, but up to 10 signboards each in excess of one square metre in area. This, particularly in a residential area, is considered to have a visual impact well beyond that which is contemplated by the Development Plan when considered as a whole.

4.5 Traffic Impacts

The display of messages in the manner proposed has the potential to distract the drivers of vehicles on Commercial Road and could encourage drivers to suddenly slow in an endeavour to ascertain the nature of the signs and the messages on them or out of curiosity. This is likely to create a traffic hazard for the users of Commercial Road which has a speed limit of 70kph past the subject

land and is a single lane in each direction with limited opportunities for emergency accident avoidance manoeuvres.

4.6 Seriously at Variance

Section 35(2) of the Development Act states "*Subject to subsection (1), a development that is assessed by a relevant authority as being seriously at variance with the relevant Development Plan must not be granted consent.*" Section 35".

It is considered that the proposal conflicts with the relevant provisions of the Development Plan and as such does not warrant approval, however, it is not considered to be so seriously at variance with the Onkaparinga (City) Development Plan that the Panel could not approve it.

5. Conclusion

The proposed development is for the display of up to 10 advertisements or signs on residential premises. Regardless of the number of signs involved the display of a sign in excess of an identification sign over 0.2 square metres is development and requires development approval. It is also considered to be an activity that, regardless of the number of signs involved, is not a kind of activity that is contemplated by the relevant provisions of the Development Plan.

It is important to recognise that assessment of this application has nothing to do with the applicants' implied constitutional right of freedom of political communication. Whether or not the applicants' signs are approved it does not prevent them holding or expressing their political views. The controls provided by the Development Act and the Development Plan are simply part of the framework of laws within South Australia within which a person who wishes to promote their views must comply. In much the same manner anti-littering laws affect the distribution of leaflets (political or otherwise). The Development Act affects the construction and display of signs bearing political content or otherwise.

The applicants may be motivated by their desire to publicly display and promote the views they hold, such displays and views are relevant to the assessment of the application. As stated in 4.2 above, it is the signboards themselves together with the fact that political messages may be displayed on them (but ignoring the details of what such messages may say) which must be assessed.

The Development Act and the Development Plan are the mechanisms within South Australia that guide and control the manner in which citizens' land is used and built upon. One objective of such controls is that land is not used in a manner that may be detrimental to others in the use of their land or in the use of public infrastructure i.e. Commercial Road. This is expressed as an object of the Development Act in Section 3(c) (iii) where it states "*to advance the social and economic interests and goals of the community;*" and in Section 23 (3) (ii) where the Act enables Development Plans to establish objectives or principles relating to "*social or socio-economic issues*". To this and other ends, the City of Onkaparinga Development Plan sets out objectives and principles relating to

the amenity of land and buildings and the Residential Zone in to promote a high standard of residential amenity and a pleasant living environment.

Issues of distraction and safety have been raised. It has long been recognised in planning that outdoor advertisements can be a cause of distraction to motorists using the public road system. The display of the boards and messages for which they are used do have a potential to cause distraction whether through curiosity, annoyance or other factor which may detract from road or pedestrian safety in the vicinity of the subject land.

The visual clutter that the proposal creates is not considered conducive to the enjoyment of other residential land in the vicinity of the subject land.

For the reasons outlined in this report, the proposal is not considered to have sufficient planning merit to warrant Development Plan consent.

6. Recommendation

That the Development Assessment Panel REFUSE Development Plan Consent for Development Application 145/1540/2007 for the placement of blackboards displaying, in chalk, comments of a political nature, for the following reasons:

The proposal would detract from the existing and desired character and amenity of the locality in which it is situated and does not sufficiently conform to the following provisions of the Onkaparinga (City) Development Plan:

Council wide

Appearance of land and buildings

Objectives

Objective 1: *The amenity of localities not impaired by the appearance of land, buildings and objects.*

Principles of Development Control

- 1** *The appearance of land, buildings, and objects should not impair the amenity of the locality in which they are situated, and should be consistent with the desired character for a zone or area expressed by its provisions.*
- 2** *Within residential areas:*
 - (a) development should maintain or enhance the desired character and appearance of any zone, area or locality;*

Outdoor advertising

Objectives

Objective 1: *An urban environment and rural landscape not disfigured by advertisements.*

Objective 2: *Advertisements not hazardous to any person.*

Objective 3: *The scale and style of outdoor advertising designed to enhance the image of local businesses whilst promoting the desired character and amenity of localities.*

Objective 4: *The prevention of the proliferation of advertisements by promoting the rationalisation and common sharing of advertising displays.*

Objective 5: *To increase the effectiveness of existing advertisements by the reduction of the overall number of existing advertisements.*

Objective 7: *The prevention of the establishment of advertising displays in inappropriate locations and localities.*

Objective 8: *To ensure that advertisements are attractive, simply worded, legible and durable.*

Principles of Development Control

NB: *For non-complying outdoor advertising refer to Table Onka/8.*

- 1** *The location, siting, size, shape and materials of construction, of advertisements should be:*
 - (a) consistent with the desired character of areas or zones as described by their objectives;*
 - (b) consistent with the predominant character of the urban or rural landscape;*
 - (c) in harmony with any building or site of historic significance or heritage value in the locality; and*
 - (d) generally consistent with Table Onka/7 - Design Guidelines for Outdoor Advertising.*
- 3** *Advertisements should not detrimentally affect by way of their siting, size, shape, scale, glare, reflection or colour the amenity of areas, zones, or localities, in which they are situated.*
- 3** *Advertisements should not impair the amenity of areas, zones, or localities, in which they are situated by creating, or adding to, clutter, visual disorder and the untidiness of buildings and spaces.*
- 5** *The scale of advertisements should be compatible with the buildings on which they are situated and with nearby buildings and spaces.*
- 6** *Advertisements should be constructed and designed in a workmanlike manner.*
- 10** *Advertisements should not create a hazard to persons travelling by any means.*
- 23** *Advertisements should relate to the use of the land upon which they are situated. "Third party" promotional or directional advertisements are not appropriate.*
- 24** *Within all Residential, Country Township and Tourist Accommodation – type zones, advertisements or advertising displays which relate to non-residential land uses should:*

- (a) *be no greater in advertisement area than three square metres, if affixed to a building;*
- (b) *be no greater in advertising display area than two square metres per side if freestanding, and be located so as to ensure public safety; and*
- (c) *be no greater in height than four metres from natural ground level.*

Residential development

Objectives

- Objective 1:** *Safe, pleasant, convenient and efficient residential zones, conducive to a sense of community.*
- Objective 2:** *Residential areas primarily used for residential purposes in well designed, safe and attractive environments, conveniently linked to community and other facilities and services.*

Principles Of Development Control

General

- 4** *Development in a residential zone should not impair its character or the amenity of the locality as a place in which to live.*

Non-residential Development in Residential Zones

- 18** *Non-residential forms of development should enhance the ability of residential areas to meet the needs and desires of local resident populations.*

Residential zone

Objectives

- Objective 1:** *A zone primarily comprising low-density and medium-density housing of varied form to accommodate a wide range of life-style needs.*
- Objective 2:** *A high standard of residential amenity and a pleasant living environment.*
- Objective 3:** *Development designed in context with the positive features of the particular locality.*
- Objective 4:** *The creation or maintenance of cohesive residential communities supported by compatible local community, recreational and educational facilities.*

Principles Of Development Control

Form of Development

- 5** *Non-residential development should be compatible with the primary function of the zone in terms of desired character, amenity, service provision and household need.*

**Development Assessment Panel Meeting
26 June 2008**

Item 2.1.3

Application No. 145/1540/2007

Ms JP Inglis & Mr BJ Becker

ATTACHMENT A

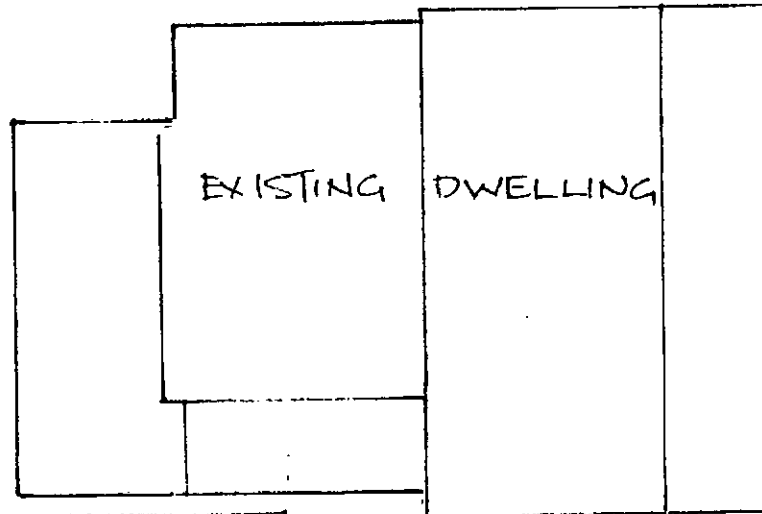
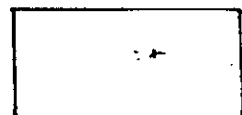
Application Documents



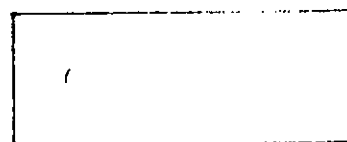
40 M.

9 M APPROX

19 M



BLACKBOARDS
TO BE LOCATED
IN FRONT
GARDEN



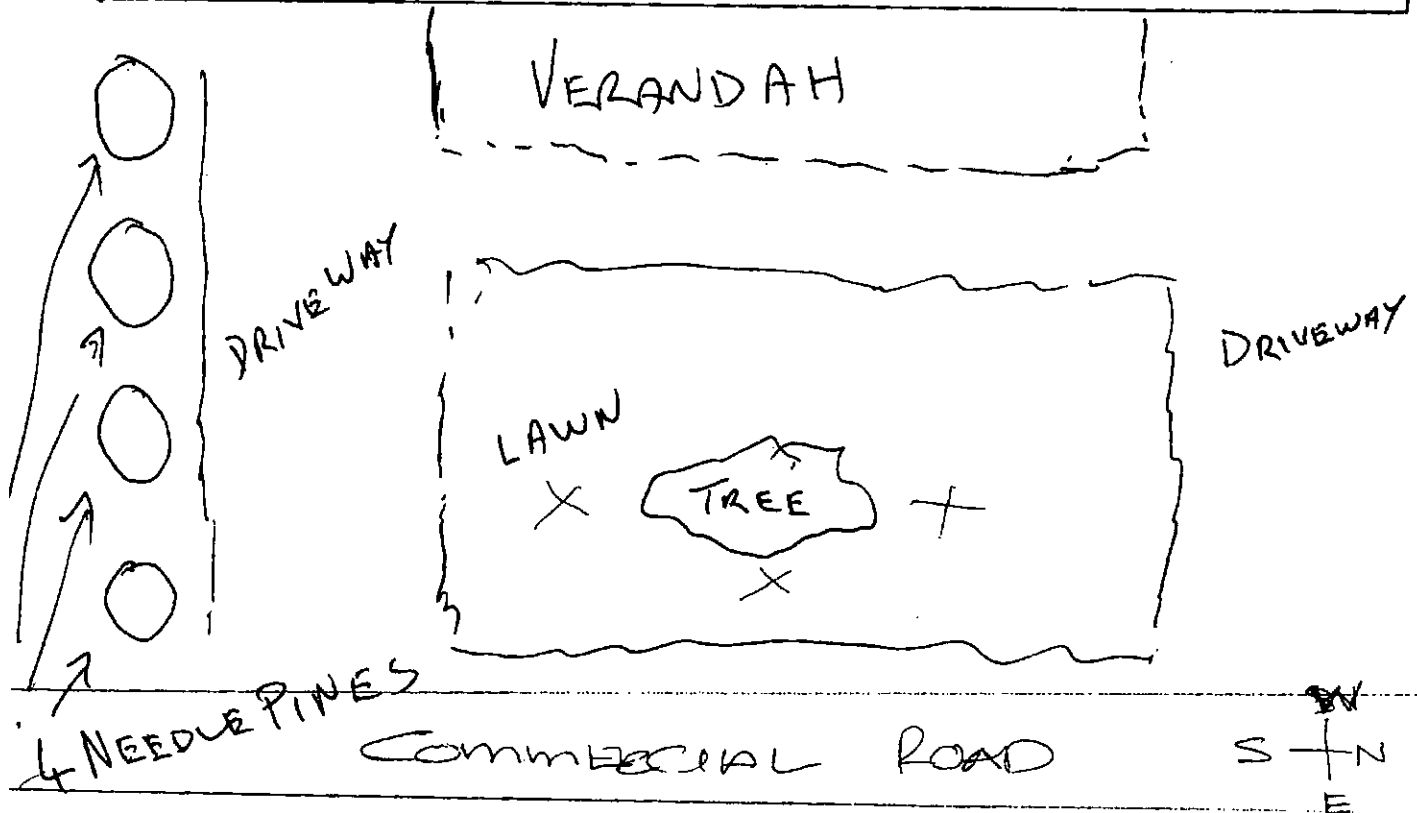
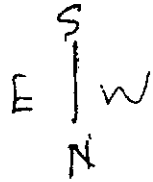
DRIVWAY

2 4 6 8 10

METRES

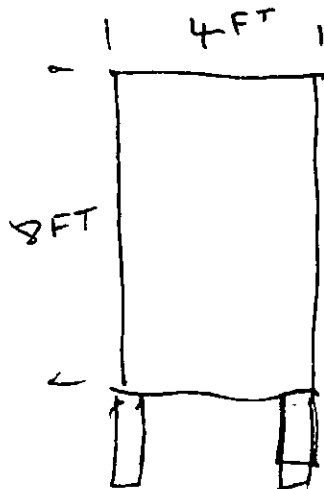
SKETCH OF PROPOSAL

AT 137 COMMERCIAL RD PORT NOARLUNGA.



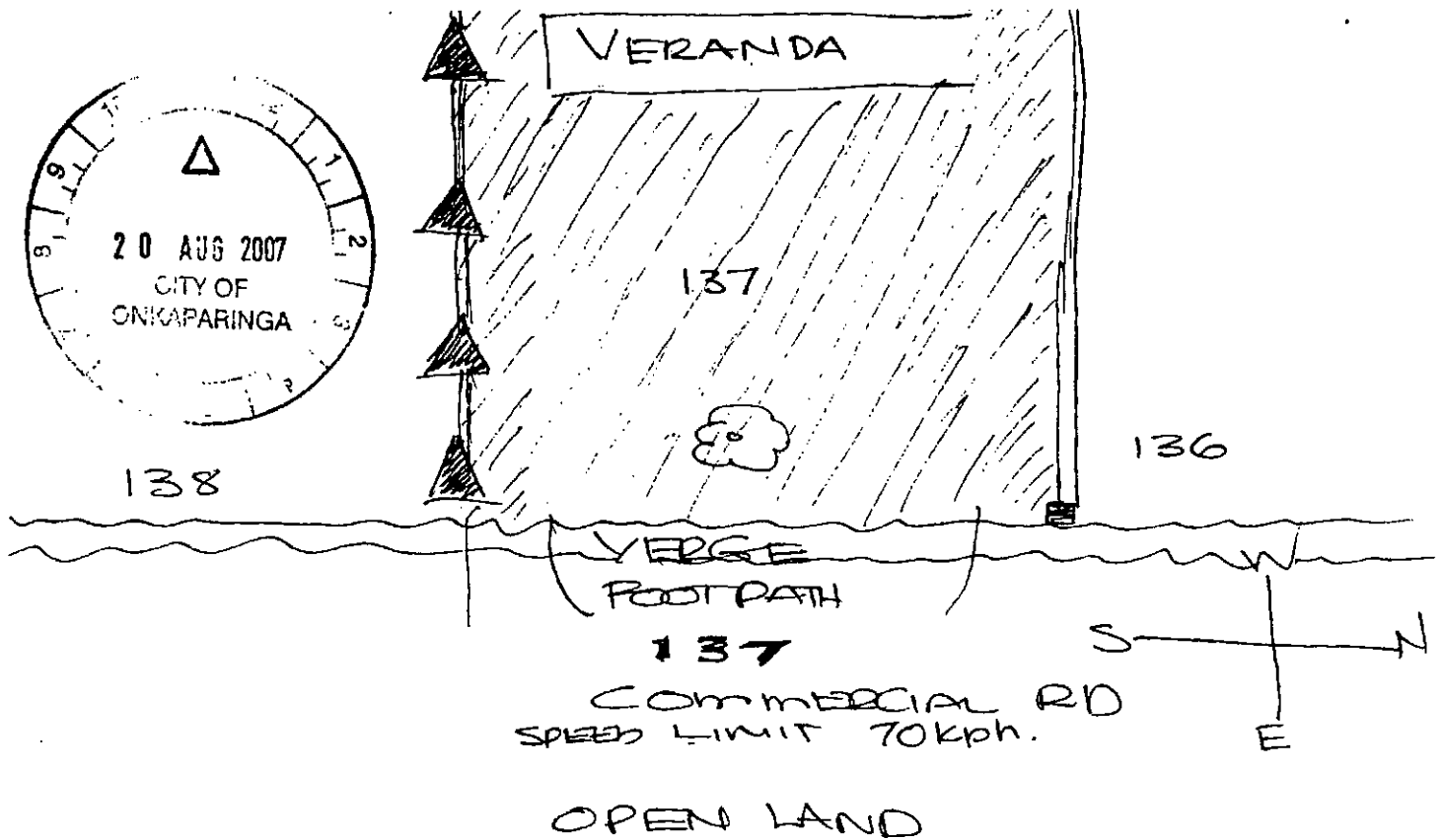
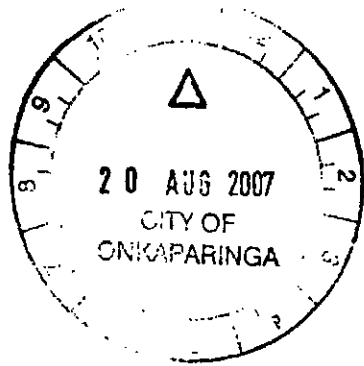
NO MORE THAN 10 BLACKBOARDS ON SITE

BLACKBOARDS NO BIGGER THAN 8^{FT} x 4^{FT} WITH LEGS,



NO RESTRICTION OF PLACEMENT
ON OWNERS PROPERTY
NOT TO ENFRINGE ON VERGE.

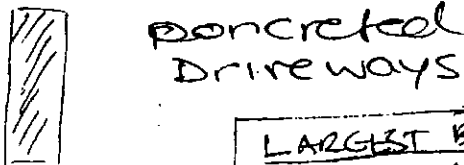
"ART" BY



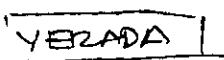
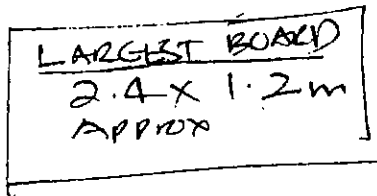
OPEN LAND

▲ pencil pines 4 x approx ~~10~~ feet High.

☁ mallee Bush.



concrete
Driveways

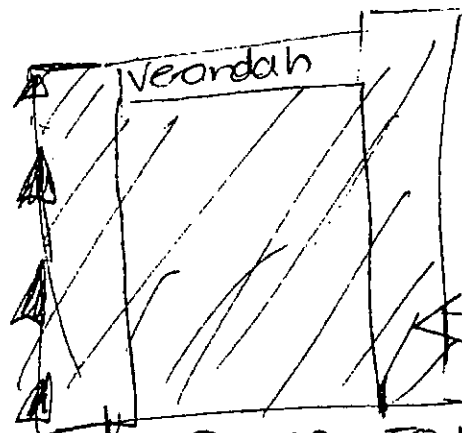


VERANDA



Lawned Area.

■ mail box.



BOARDS TO BE
PLACED AT VARIOUS
POSITIONS - SPOCC

~VERGE~ 'GREY AREA' - OF UNSPECIFIED MEASUREMENTS
COUNCIL 'Land'

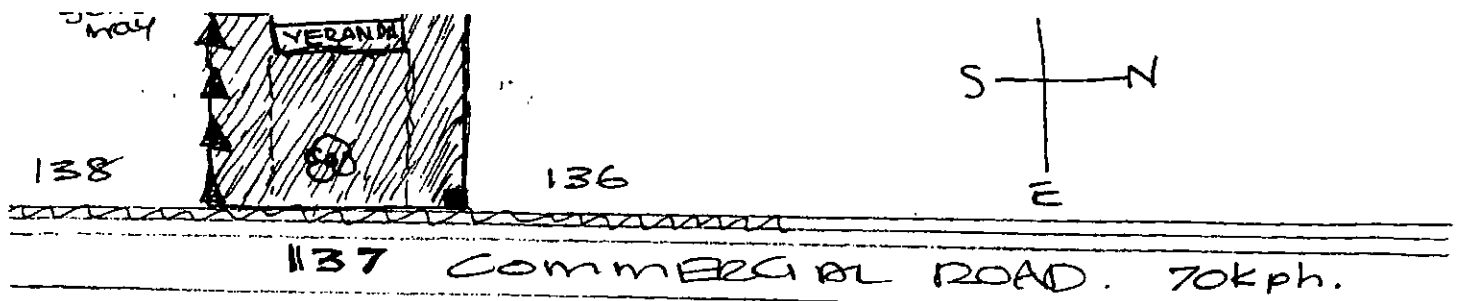
* ALL MEASUREMENTS : APPROX DEPTH

DEPTH:

DRIVE WAY TO GATE FROM 'VERGE'
SOUTHERN APPROX: 9 METERS
NORTHERN APPROX: 12 METERS

WIDTH:

LAWNED AREA: 12 METERS
BOTH DRIVEWAYS ~~3~~ 3 METERS EACH = 6 METERS
VERANDA 12 MTR



VERANDA
APPROX. 12M

TOP HALF COVERED WITH SHADE CLOTH: UPON WHICH WE SOMETIMES WRITE ^{IN} CHALK



SHADE AREA
DENDS:

The space that may have a 'BOARD' on it at any given time of any size. (tho no taller than 8ft).

Row of 4 Pencil Pines, APPROX 15 FT HIGH.

"VERGE"

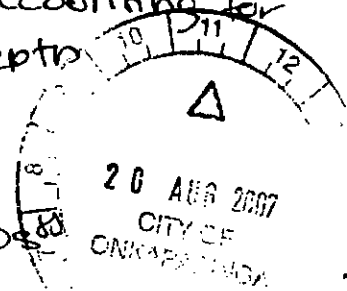
"GREY AREA" - SPECIFICATIONS UNKNOWN: accounting for approximate measures of depth



mallee Bush.

site for placement of ⁶ BOARDS

MAIL BOX



WIDTH OF EACH DRIVEWAY IS APPROX:

WIDTH OF LAWNED AREA:

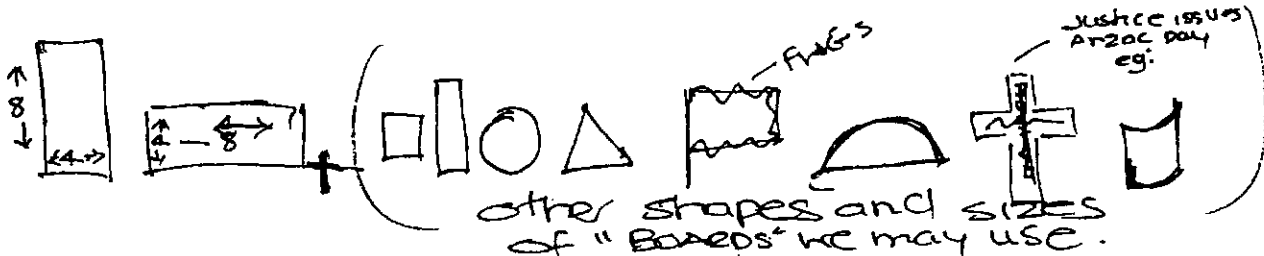
WIDTH OF VERANDA IS AS LAWNED AREA:

DEPTH OF SOUTHERN DRIVEWAY

APPROX: 9.16

DEPTH DRIVEWAY SOUTHERNSIDE

APPROX 12MTRS.



CERTIFICATE OF TITLE

REAL PROPERTY ACT, 1886



South Australia

VOLUME 5610 FOLIO 510

Edition 2

Date Of Issue 31/12/1998

Authority PS 8569492

I certify that the registered proprietor is the proprietor of an estate in fee simple (or such other estate or interest as is set forth) in the land within described subject to such encumbrances, liens or other interests set forth in the schedule of endorsements.

DEPUTY REGISTRAR-GENERAL



REGISTERED PROPRIETORS IN FEE SIMPLE

BARRY JOHN OXER AND JEANETTE PATRICIA INGLIS BOTH OF 137 COMMERCIAL ROAD
PORT NOARLUNGA SA 5167 AS JOINT TENANTS

DESCRIPTION OF LAND

ALLOTMENT 327 DEPOSITED PLAN 6017
IN THE AREA NAMED PORT NOARLUNGA SOUTH
HUNDRED OF WILLUNGA

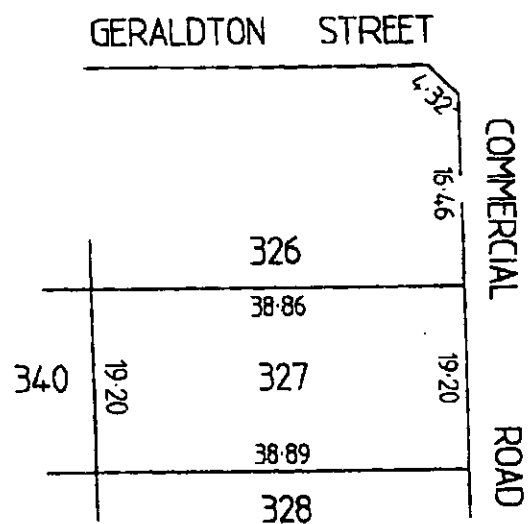
EASEMENTS

NIL

SCHEDULE OF ENDORSEMENTS

NIL

WARNING: BEFORE DEALING WITH THIS LAND, SEARCH THE CURRENT CERTIFICATE



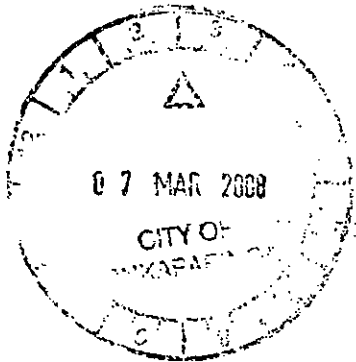
0 7.5 15 22.5 30 Metres

STATEMENT OF EFFECT

For Development Application 145/1540/2007/3X

1. THE NATURE OF 'THE DEVELOPMENT' AND ITS LOCALITY

- 1.1 The nature of 'the Development' namely, 'our acts and activities' of displaying boards written with comment and critique, are a medium for projecting community views about Governmental matters. The objective is to promote robust public debate about those matters by playing an active part in our system of participatory democracy. The aim is to contribute towards a natural conversation amongst our fellow citizens, discussion about our Country's future, thereby promoting a more open debate by releasing the shackles of politically correct speech, thus allowing greater freedom of ongoing dialogue between voters and Parliament leading eventually to improving government, at all levels.



- 1.2 **THE LOCALITY** of this activity is in the front yard of our own land, ideally situated facing Commercial Road Port Noarlunga South. There are no buildings at all on the land opposite our residence. There are no Bus Stops in front of or directly opposite our land.

The speed limit being 70 km/h restricts motorists from a comprehensive 'reading' of our display while driving along Commercial Road.

There is ample parking space on both sides of Commercial Road, for those who wish to engage in any discussion about our displays, as many do.

2. THE PROVISIONS OF THE DEVELOPMENT PLAN RELEVANT TO AN ASSESSMENT OF THE PROPOSAL

2.1 There are no provisions of the Development Plan that are inherently relevant to our particular matter. The Council has informed us that our displays are 'non-complying Advertisements' by reference to its interpretation of 7 of Table Onka/8, which refers to "portable/mobile advertisement". We refer to our Statement of Support, in which we have made it clear that we have not applied for approval for portable or moveable, nor fixed, permanent or other, 'display of advertising signs'. While we disagree with the Council's application of 7 of Table Onka/8 in our matter, a similar interpretation of 1 of Table Onka/8, as the speed limit on Commercial Road is less than 80km/h.

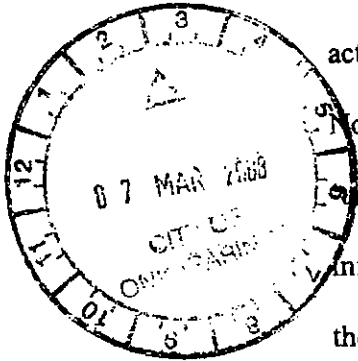


2.2 In light of the Council's civil proceedings brought against us for our 'unlawful' 'Acts' and 'Activities', it must be the Council's responsibility to identify concisely those 'provisions of the Development Plan for the City of Onkaparinga' which are relevant to its assessment that our 'acts and activities as citizens' are unlawful.

2.3 The City's Development Plan is one that demands the uniformity of an architectural design of the day, the implementation of which fails to take into account and discourage the uniqueness of the inhabitants, their requirements for a myriad of expressions of individuality and right human activities. It ought not to project a visage of conformity that belies the vitality, the living, breathing actuality of community 'mores', seemingly, the apparent only purpose of which is to gain the appreciation of tourists, and to add to the monetary value of buildings.

3. THE EXTENT TO WHICH THE PROPOSAL COMPLIES WITH THESE PROVISIONS

3.1 The Council has stated in a letter of 7 February 2008 from its solicitors that our 'development application concerns ongoing acts and activities which the Council considers are presently unlawful'. The Council has commenced civil enforcement proceedings in relation to these acts and activities'.



Notwithstanding the Council has deemed that we are 'acting' in an unlawful manner', and that our 'acts' are unlawful, we have yet to be informed of the precise legislation concerning the implementation of the City's Development Plan that overrides our constitutional freedom as citizens.

3.2 Our proposal merely seeks to enable us to continue to use our property in order to express in a realistic and appropriate way our constitutional right to discuss and debate political and governmental actions and activities. We do not seek to do so in a way that will unreasonably interfere with anyone else, including residents of the area or the users of Commercial Road or other nearby streets.

3.3 In so far as the provision of the City Development Plan could be read or understood to prevent us from exercising that constitutional right the terms of the Plan must be read down.

4. AN ASSESSMENT OF THE EXPECTED SOCIAL ECONOMIC AND ENVIRONMENTAL EFFECTS OF THE PROPOSAL ON ITS LOCALITY

- (a) The expected Social effects on the Locality**
- (b) The expected Economic effects on the Locality**
- (c) The expected Environmental effects on the Locality**

4.1 Social effects

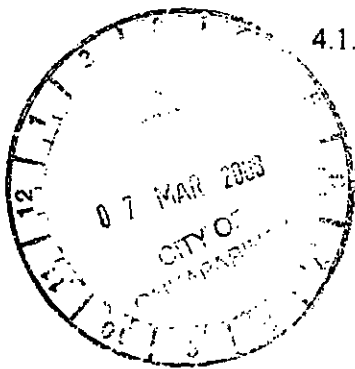
The only foreseeable social effects of the proposal are that:

4.1.1 Persons reading the signs will reflect (and hopefully, carefully) about the content of them and eventually consider those matters when exercising their democratic right to vote for candidates and/or political parties in Federal, State or Local Government elections.

4.1.2 Persons may discuss with others (including us) the contents of the signs. Apart from possible effect upon the public voting intentions the only social consequence is that members of the public may stop (either as pedestrians or as occupants of motor vehicles) in order to read the signs and, if we are visibly present, to discuss with us the content of them. This has been the experience of the past few years. There have been no heated verbal exchanges or disputations.

4.2 Economic effects

There is no foreseeable economic effect because no financial transactions are involved in any way.

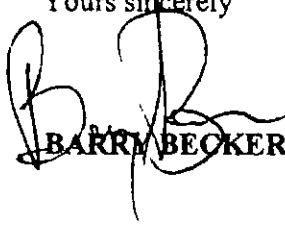
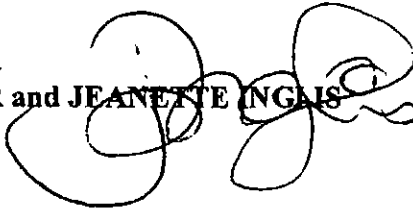


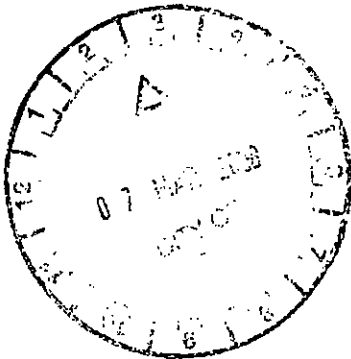
4.3 Environmental effects

There are no measurable or even identifiable environmental effects of the proposals. The signs are contained within the front yard and do not contain any toxic chemicals, pollutants or noise.

DATED the 7th day of March 2008.

Yours sincerely



BARRY BECKER and JEANETTE INGLIS



1/3

As directed by Her Honour, Judge Tremorden of the Environment Resources and Development Court on 18 December 2007 please find below our statement in support of our application to display, at our discretion, in our front yard, boards on which will be written political comment about Local, State and Federal governmental matters.

**STATEMENT OF SUPPORT
for Development Application 145/150/200/3X**

We, JEANETTE INGLIS and BARRY BECKER wish to make it clear to the members of the Development Panel, that our application was not made at our initiative, and has only been made at the request of and on the advice given by Mr Sutcliffe and Mayor Rosenberg during a visit to our home some months ago, as the way forward to the end of the proceedings brought by the Council against us.

Mayor Rosenberg stated that, personally, she has no issue with our front yard activities. She has, in fact, seen for herself the way the boards are displayed and secured and that the boards are on our land.

We firmly believe that the action we take in exercising our rights as citizens, has not been and cannot be legislated against according to the Commonwealth Constitution, which allows for the right of citizens to engage in as means by which they may promote their views concerning governance.

Previously, action taken by the Council to ban our activities using an interpretation of Section 254 of the *Local Government Act 1999* failed. It was found by the Full Supreme Court to be beyond the scope of the Council's power to, in effect, impose a

Ref: 06039-754.doc

213

mandatory open-ended injunction against us by placing not only our Boards, but anything at all in our front yard.

The City's Development Plan is now being employed in an effort to ban our activities. Table 8 of the City's Development Plan talks about types of 'non-complying outdoor advertising'. Mr Batge explained to us in his letter of 6 November 2007 that in accordance with Table 8 of the City of Onkaparinga Development Plan, 'the display of advertisements (including signs) of a portable nature that exceed one square metre in area are 'non-complying' and that we have the choice of allowing the application to proceed in its current form.

We were advised that the Council will now have to re-advertise the application to include the advice to the public that ours has been deemed a 'non-complying kind of development'. He also informed us that in choosing the option to go ahead with our application we would be left with no appeal rights against any decision made by Council or against any conditions that may be attached to any approval that may be granted.

The second option presented to us requires an application for approval of, for instance, a gaggle of poles permanently situated in our front lawn, on which to secure our boards. In our view, this is too silly to be adopted. In any case, we have no intention and never have had to make permanent any display of and on our boards.

We maintain our right as citizens to mount temporary and intermittent public displays on our own property, of boards written with comment concerning Local, State and

Ref: 06039-754.doc

313

Federal governmental and political matters, at the times we feel motivated and obliged to do so. We are unable to say when or if we will continue or not. We are unable to specify the size and shape of the boards we would use to illustrate our dissent and by which we would participate in the discussion about governance within Australia.

It is regretful that Council has taken the view that the legislation regarding 'advertising signs' should mean ...and boards chalk written by citizens containing only comment about political and governmental matters! We are sure that if the legislation was so, it would be written in specific and unambiguous terms. Even if it did so, the *Development Act* cannot take away our Constitutional rights to debate political and governmental matters.

Clearly, our boards are not 'advertisement signs'. We have not applied for the permanent or otherwise display of 'advertising signs', 'portable signs', 'fixed signs' nor 'moveable signs'.

We remain unconvinced that this costly pursuit by Council of our matter should even have proceeded for as long as it has.

In all patience and trust that this matter may very soon be finalized in a reasonable, fair, equal, impartial and just way, we are

Yours sincerely

Becker
Barry J. Backer and Jeanette Inglis

Ref: 06039-754.doc

CC 2 MICHELL

D. BATGE

8

25/11/2008

CC NORMAN WATERHOUSE : ATT: D. BILLINGTON

**Development Assessment Panel Meeting
26 June 2008**

Item 2.1.3

Application No. 145/1540/2007

Ms JP Inglis & Mr BJ Becker

ATTACHMENT B

**Representations
Closing 16 October 2007**

DEVELOPMENT ACT 1993
STATEMENT OF REPRESENTATION
Pursuant to Section 38 of the Development Act 1993

City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168
Fax No: (08) 8384 0592 (Please post original)

All sections of this form must be completed and the form returned to the Council by 5.00 pm on Wednesday 16 April 2008 (Attention: Dennis Batge) otherwise the representation will be invalid

REPRESENTATION IN REGARD TO:

Development Number:	145/1540/2007/NX
Applicant:	Ms J P Inglis and Mr B J Becker
Location of Development:	137 (Allot 327 in DP 6017) Commercial Road, PORT NOARLUNGA SOUTH SA 5167
Nature of Development:	Placement of blackboards displaying, in chalk, comments of a political nature
Zone:	Residential (Onkaparinga (City) Development Plan)

REPRESENTATION BY:

Name of representor(s):	M. B. Hays
Postal Address of representor(s):	68 Cambridge St Port Noarlunga South
Contact phone number:	

My interests are affected as: (please tick the following boxes as appropriate)

- ☒ the owner or the occupier of the property located at 68 Cambridge St Port Noarlunga South
- ☐ other (please state):

This representation* is (please tick one of the following boxes):

- ☐ In favour of the application for the reasons given below.
- ☒ Against the application for the reasons given below.

The specific reasons for my representation are as follows (if space is insufficient please attach further sheets).

Blackboard comments are directed at passing motorists and create a traffic hazard.
The blackboards are unsightly and impact on the value of nearby properties.
The blackboards often include unsubstantiated defamatory comments against named individuals.

The display of political comments in this manner is inappropriate for a residential area.

Please indicate whether you wish to be heard by Council in respect of your representation:

- ☒ I do not wish to be heard
- ☐ I wish to be heard in person or represented by (please specify name)

SIGNED:

M. B. Hays

DATE:

5/4/08

*All representations will become public documents and will be forwarded to the applicant for response pursuant to the provisions of the Development Act 1993.

DEVELOPMENT ACT 1993
STATEMENT OF REPRESENTATION
Pursuant to Section 38 of the Development Act 1993

DB

City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168
Fax No: (08) 8384 0592 (Please post original)

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Applicant:	Ms J P Inglis and Mr B J Becker
Location of Development:	137 (Allot 327 in DP 6017) Commercial Road, PORT NOARLUNGA SOUTH SA 5167
Nature of Development:	Placement of blackboards displaying, in chalk, comments of a political nature
Zone:	Residential (Onkaparinga (City) Development Plan)

REPRESENTATION BY:

Name of representor(s):	ROBERT CARHPole
Postal Address of representor(s):	6A BERTAIN Drive 5167
Contact phone number:	0417 821007

My interests are affected as: (please tick the following boxes as appropriate)

- ☒ the owner or the occupier of the property located at: 135 Commercial Rd.
- ☐ other (please state):

This representation* is (please tick one of the following boxes):

- ☐ In favour of the application for the reasons given below.
- ☒ Against the application for the reasons given below.

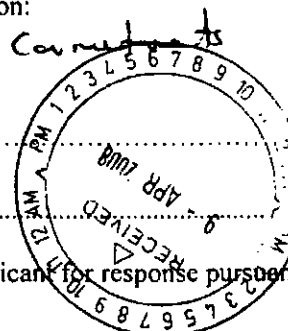
The specific reasons for my representation are as follows (if space is insufficient please attach further sheets).

I have already provided a submission in the first development application late last year my stance remains the same. I am somewhat confused as to why they still are able to maintain the signs.

Please indicate whether you wish to be heard by Council in respect of your representation:

- ☒ I do not wish to be heard *unable due to work commitments*
- ☐ I wish to be heard in person or represented by (please specify name)

SIGNED:  DATE: 7/4/08



*All representations will become public documents and will be forwarded to the applicant for response pursuant to the provisions of the Development Act 1993.

DEVELOPMENT ACT 1993
STATEMENT OF REPRESENTATION
Pursuant to Section 38 of the Development Act 1993

City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168
Fax No: (08) 8384 0592 (Please post original)

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REPRESENTATION IN REGARD TO:

Development Number:	145/1540/2007/NX
Applicant:	Ms J P Inglis and Mr B J Becker
Location of Development:	137 (Allot 327 in DP 6017), Commercial Road, PORT NOARLUNGA SOUTH SA 5167
Nature of Development:	Placement of blackboards displaying in chalk, comments of a political nature
Zone:	Residential (Onkaparinga (City) Development Plan)

REPRESENTATION BY:

Name of representor(s):	JASON SMART
Postal Address of representor(s):	141 Commercial Rd Port Noarlunga SA
Contact phone number:	0805931358

My interests are affected as: (please tick the following boxes as appropriate)

- ☒ the owner or the occupier of the property located at: 141 Commercial Rd Port Noarlunga SA
- ☐ other (please state):

This representation* is (please tick one of the following boxes):

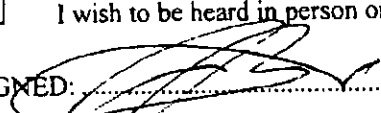
- ☐ In favour of the application for the reasons given below.
- ☒ Against the application for the reasons given below.

The specific reasons for my representation are as follows (if space is insufficient please attach further sheets).

It appears as if anything can be written at the front of this property. It affects prices in the local Area and Boards have been found thrown into my property.

Please indicate whether you wish to be heard by Council in respect of your representation:

- ☒ I do not wish to be heard
- ☐ I wish to be heard in person or represented by (please specify name)

SIGNED:  DATE: 3/4/08

*All representations will become public documents and will be forwarded to the applicant for response pursuant to the provisions of the Development Act 1993.

DEVELOPMENT ACT 1993
STATEMENT OF REPRESENTATION
Pursuant to Section 38 of the Development Act 1993

City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168
Fax No: (08) 8384 0592 (Please post original)

Am posting original today 15/4/08

All sections of this form must be completed and the form returned to the Council by 5.00 pm on Wednesday 16 April 2008 (Attention: Dennis Batge) otherwise the representation will be invalid

REPRESENTATION IN REGARD TO:

Development Number:	145/1540/2007/NX
Applicant:	Ms J P Inglis and Mr B J Becker
Location of Development:	137 (Allot 327 in DP 6017) Commercial Road, PORT NOARLUNGA SOUTH SA 5167
Nature of Development:	Placement of blackboards displaying, in chalk, comments of a political nature
Zone:	Residential (Onkaparinga (City) Development Plan)

REPRESENTATION BY:

Name of representor(s):	D.P + B.L. HOPKINS
Postal Address of representor(s):	18 LAMBTON ST. SEAFORD.
Contact phone number:	83863558

My interests are affected as: (please tick the following boxes as appropriate)

- ☒ the owner or the occupier of the property located at: 76 CAMBRIDGE ST. PORT NOARLUNGA SA
- ☐ other (please state):

This representation* is (please tick one of the following boxes):

- ☐ In favour of the application for the reasons given below.
- ☒ Against the application for the reasons given below.

The specific reasons for my representation are as follows (if space is insufficient please attach further sheets).

NOT ONLY AN EYESORE BUT A SAFETY ISSUE AS ANY PERSON
DRIVING BY WILL BE DISTRACTED BY THESE BLACK BOARDS.
IF YOU TRY TO READ THESE POLITICAL COMMENTS, THERE ARE
BETTER FORUMS TO PRESENT THESE COMMENTS, THAT HAVE
NO IMPACT ON ROAD SAFETY. WE HAVE NO POLITICAL BIAS.

WITH ANY OF THESE BLACK BOARD COMMENTS. The eyesore of the property due to
the display of the black boards are degrading the area. Not suitable displaying from suburban home especially
on main road where tourists would see as well. Not impressive at all.

- ☒ I do not wish to be heard
- ☐ I wish to be heard in person or represented by (please specify name)

SIGNED: [Signature] DATE: 6/4/08

*All representations will become public documents and will be forwarded to the applicant for response pursuant to the provisions of the Development Act 1993.

PN-REP

DEVELOPMENT ACT 1993
STATEMENT OF REPRESENTATION
Pursuant to Section 38 of the Development Act 1993

City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168
Fax No: (08) 8384 0592 (Please post original)

NOT A VALID REPRESENTATION

All sections of this form must be completed and the form returned to the Council by 5.00 pm on Wednesday 16 April 2008 (Attention: Dennis Batge) otherwise the representation will be invalid

REPRESENTATION IN REGARD TO:

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REPRESENTATION BY:

Name of representor(s):	
Postal Address of representor(s):	
Contact phone number:	

My interests are affected as: (please tick the following boxes as appropriate)

- ☐ the owner or the occupier of the property located at:
- ☐ other (please state):

This representation* is (please tick one of the following boxes):

- ☐ In favour of the application for the reasons given below.
- ☒ Against the application for the reasons given below.

The specific reasons for my representation are as follows (if space is insufficient please attach further sheets).

Too much of a distraction to motorists on a very busy Rd. also an eye sore. Plus we do not want to know his means political views.

Please indicate whether you wish to be heard by Council in respect of your representation:

- ☒ I do not wish to be heard
- ☐ I wish to be heard in person or represented by
(please specify name)

SIGNED: *[Signature]* DATE: *3 3 08*

*All representations will become public documents and will be forwarded to the applicant for response pursuant to the provisions of the Development Act 1993.

**Development Assessment Panel Meeting
26 June 2008**

Item 2.1.3

Application No. 145/1540/2007

Ms JP Inglis & Mr BJ Becker

ATTACHMENT C

**Representations
Closing 16 April 2008**

**DEVELOPMENT ACT 1993
STATEMENT OF REPRESENTATION**
Pursuant to Section 38 of the Development Act 1993

City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168
Fax No: (08) 8384 0592 (Please post original)

All sections of this form must be completed and the form returned to the Council by 5.00 pm on Tuesday 16 October 2007 (Attention Dennis Batge) otherwise the representation will be invalid

REPRESENTATION IN REGARD TO:

Development Number:	145/1540/2007/3X
Applicant:	Ms J P Inglis and Mr B J Becker
Location of Development:	137 (Allot 327 Sec 325 DP 6017) Commercial Road, PORT NOARLUNGA SOUTH SA 5167
Nature of Development:	Placement of blackboards (maximum 10 boards at any time) displaying, in chalk, comments of a political nature
Zone:	Residential (Onkaparinga (City) Development Plan)

REPRESENTATION BY:

Name of representor(s):	ANDREW AND ANN TACKS
Postal Address of representor(s):	32 KRIEGER ROAD, EVANSTON PARK, SA
Contact phone number:	8522 3608

My interests are affected as: (please tick the following boxes as appropriate)



the owner or the occupier of the property located at:



other (please state):

This representation* is (please tick one of the following boxes):



In favour of the application for the reasons given below.



Against the application for the reasons given below.

The specific reasons for my representation are as follows (if space is insufficient please attach further sheets).

COMMENTS MADE ON THE BOARDS MIGHT
CAUSE -- SOME FORM OF TENSION OR
OTHER FORMS OF UNWANTED MEETINGS ETC
IN THE AREA. IT COULD ALSO AFFECT OUR
TENANTS OR OTHER VISITORS

Please indicate whether you wish to be heard by Council in respect of your representation:



I do not wish to be heard



I wish to be heard in person or represented by

(please specify name)

SIGNED:

DATE: 12/10/07

*All representations will become public documents and will be forwarded to the applicant for response pursuant to the provisions of the Development Act 1993.

PN-REF

DEVELOPMENT ACT 1993
STATEMENT OF REPRESENTATION
Pursuant to Section 38 of the Development Act 1993

City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168
Fax No: (08) 8384 0592 (Please post original)

All sections of this form must be completed and the form returned to the Council by 5.00 pm on Tuesday 16 October 2007 (Attention Dennis Batge) otherwise the representation will be invalid

REPRESENTATION IN REGARD TO:

Development Number:	145/1540/2007/3X
Applicant:	Ms J P Inglis and Mr B J Becker
Location of Development:	137 (Allot 327 Sec 325 DP 6017) Commercial Road, PORT NOARLUNGA SOUTH SA 5167
Nature of Development:	Placement of blackboards (maximum 10 boards at any time) displaying, in chalk, comments of a political nature
Zone:	Residential (Onkaparinga (City) Development Plan)

REPRESENTATION BY:

Name of representor(s):	ROBERT CATCHPOLE
Postal Address of representor(s):	6A BRITAIN DR 5167
Contact phone number:	0417821007

My interests are affected as: (please tick the following boxes as appropriate)

- ☒ the owner or the occupier of the property located at: 135 Commercial Road
- ☐ other (please state):

This representation* is (please tick one of the following boxes):

- ☐ In favour of the application for the reasons given below.
- ☒ Against the application for the reasons given below.

The specific reasons for my representation are as follows (if space is insufficient please attach further sheets).

See attached letter

Please indicate whether you wish to be heard by Council in respect of your representation:

- ☒ I do not wish to be heard
- ☐ I wish to be heard in person or represented by
(please specify name)

SIGNED: _____

DATE: 2/10/2007

*All representations will become public documents and will be forwarded to the applicant for response pursuant to the provisions of the Development Act 1993.

Robert Catchpole
For
135 Commercial Road
Port Noarlunga South
5167
Sa

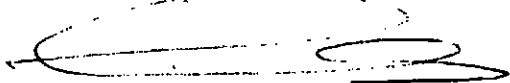
Re- Application Development Number 145/1540/2007/3X 137 Commercial Road Port Noarlunga

My comments in regards to the application are as follows

1. Adverse affect on the ability to let the premises next door to the proposed application. I have had trouble over the years letting the property as.
 - A. Potential clients find the material offensive and are generally worried about renting the property. I have had the property for Approx five years.
 - B. Clients are worried about the nature of the people as the signage is quite graphic in its descriptions and clients worry about their safety living next door.
2. The signage de-values the area in general and presents itself as an eyesore. The effect is that the ability to sell the property in the future would be greatly affected as people are extremely weary of living next door to the property because of the extensive signage.
3. The signage presents itself as a major distraction to traffic in both directions and in my opinion creates a hazard.
4. There are many other ways for the applicants to make comments on their beliefs without it being intrusive to others in the community. I feel that the applicants have had an extremely good run with the displaying of the signs and now I think a decision should be made for the benefit of the majority of residents in the area who have spent good money to better represent their dwellings in the area.

Regards

Robert catchpole



DEVELOPMENT ACT 1993
STATEMENT OF REPRESENTATION
Pursuant to Section 38 of the Development Act 1993

City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168
Fax No: (08) 8384 0592 (Please post original)

All sections of this form must be completed and the form returned to the Council by 5.00 pm on Tuesday 16 October 2007 (Attention Dennis Batge) otherwise the representation will be invalid

REPRESENTATION IN REGARD TO:

Development Number:	145/1540/2007/3X
Applicant:	Ms J P Inglis and Mr B J Becker
Location of Development:	137 (Allot 327 Sec 325 DP 6017) Commercial Road, PORT NOARLUNGA SOUTH SA 5167
Nature of Development:	Placement of blackboards (maximum 10 boards at any time) displaying, in chalk, comments of a political nature
re:	Residential (Onkaparinga (City) Development Plan)

REPRESENTATION BY:

Name of representor(s):	J. E + D. THOMAS
Postal Address of representor(s):	129 COMMERCIAL RD, PT. NOARLUNGA SA
Contact phone number:	8386 3234

My interests are affected as: (please tick the following boxes as appropriate)

- ☒ the owner or the occupier of the property located at: 129 COMMERCIAL ROAD PT. NOARLUNGA SOUTH.
- ☐ other (please state):

This representation* is (please tick one of the following boxes):

- ☐ In favour of the application for the reasons given below.
- ☒ Against the application for the reasons given below.

The specific reasons for my representation are as follows (if space is insufficient please attach further sheets).

PEOPLE IN CARS PASSING BY ARE DISTRACTED BY
CHALKBOARDS, COULD CAUSE ROAD ACCIDENTS. UNSIGHTLY
IN NEIGHBOURHOOD. SOME COMMENTS ARE NOT PLEASANT
TO READ, GIVING AREA A BAD NAME. GENERALLY
A MESSY LOOKING FRONT GARDEN

Please indicate whether you wish to be heard by Council in respect of your representation:

- ☒ I do not wish to be heard
- ☐ I wish to be heard in person or represented by
(please specify name)

SIGNED: Dennis Thomas DATE: 9/10/07

*All representations will become public documents and will be forwarded to the applicant for response pursuant to the provisions of the Development Act 1993.

**Development Assessment Panel Meeting
26 June 2008**

Item 2.1.3

Application No. 145/1540/2007

Ms JP Inglis & Mr BJ Becker

ATTACHMENT D

Applicant's Response

Becker / Inglis
137 Commercial Road
Port Noarlunga SA 5167

Dennis Batge
Consultant Planner
City of Onkaparinga

20 November 2007

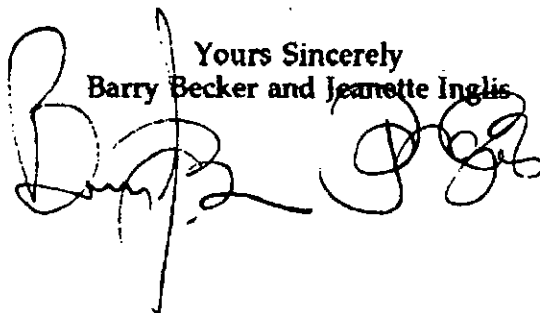
Refer DA No 145/1540/2007/3X and our letter dated 22 October 2007

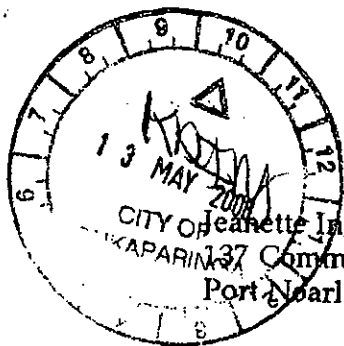
Dear Dennis Batge

Thankyou for your letter dated 15 November 2007, which we recieved today.

With reference to our letter of the 22 October, we returned 2 representations that we did not consider to be valid. Will you inform us if that is agreed or not.

Yours Sincerely
Barry Becker and Jeanette Inglis

Handwritten signatures of Barry Becker and Jeanette Inglis. The signature of Barry Becker is on the left, and the signature of Jeanette Inglis is on the right. Both signatures are in black ink and are stylized.



1/2

Sunday May 11/ 2008

**For the Attention of Dennis Batge
Authorised Officer - Consultant Planner
City Of Onkaparinga Council**

Refer: Property Application No. 145/1540/2007/NX

Dear Mr Batge

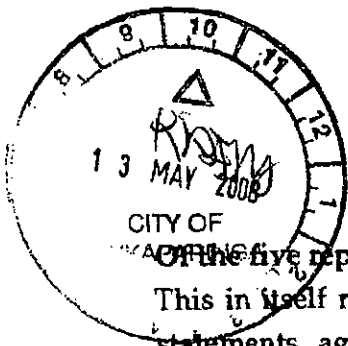
with reference to the representations forwarded to us dated 28 April 2008.
We are unable to agree that all representations are indeed valid.

At the top of the Statement of Representation it is clearly stated that 'ALL SECTIONS OF THIS FORM MUST BE COMPLETED AND THE FORM RETURNED TO THE COUNCIL BY 5.00 PM ON WEDNESDAY 16 APRIL 2008 OTHERWISE THE REPRESENTATION WILL BE INVALID.

Three representations are not stamped as received by Council on or by the due date, and, one of those three does not even have the name or address of the person who presented this representation.

These three Statements of Representation clearly breach the requirements of the Development Act 1993, pursuant to Section 38 of the Act, and we object strongly to these representations being heard, used or mentioned at all in any deliberations or with any reference in our application.

We expect by return mail, to be informed that the above mentioned representations have, upon your detailed consideration, been revealed as non compliant, and are in fact invalid.



2/2

Of the five representations, none of those wish to be heard by Council.

This in itself reveals an irresponsibility by the representees to back up their statements against our application, causing a deficiency of serious and informative open debate of our application.

In regard to the representation by Robert Catchpole, he does not state any reason, other than that he has already provided a submission. You will remember that Council has already made a mistake in the assessment of our application and has had to readvertise our application.

You will also remember that Mr Catchpole's first submission was not a valid one pursuant to the requirements of the Development Act 1993, as it had not been date stamped by Council to ascertain that it was received by the due date, as required under the Act.

Therefore we do not agree that Mr Catchpole's previous submission may now be attached to his latest representation. We expect to be informed in writing as to the validity under the Act, of Mr Catchpole's expectation that his previous representation would be attached to his latest submission.

In his Statement of Representation, Jason Smart 141 Commercial Road Port Noarlunga makes the unqualified and ill informed specific reason for his objection, that, "it affects the prices in the local area" There is no proof what so ever of this allegation.

As to boards being found 'thrown into his property', we will shortly be in contact with Mr Smart, to ascertain that the boards are indeed ours; assure Mr Smart that we certainly did not "throw boards into his property", and, as we have had effects stolen from our front yard, that we have alerted Police that our property has been stolen. It could hardly be in our interest to throw our property onto his.

Council has assured us, in documents, and for some years, that it is not concerned with what is written on our boards. Further more, the Australian (Commonwealth) Constitution protects our right of political comment.

In anticipation of the courtesy of a written response

Yours Sincerely
Barry Becker and Jeanette Inglis

**Development Assessment Panel Meeting
26 June 2008**

Item 2.1.3

Application No. 145/1540/2007

Ms JP Inglis & Mr BJ Becker

ATTACHMENT E

Legal Advice

Norman Waterhouse LAWYERS

BY EMAIL: denbat@onkaparinga.sa.gov.au
Ref: 0248975\DXB1135444.doc

4 June 2008

City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168

Attention: Mr D Batge

Dear Sir

Development Application 145/1540/2007/NX
J P Inglis & B J Becker

You have sought my advice in relation to a letter dated 11 May 2008 received by the Council from Ms Inglis and Mr Becker, the applicants in relation to the above development application (**Application**).

Ms Inglis and Mr Becker raise a number of concerns in relation to the public notification process undertaken by the Council in relation to the Application.

I understand that the Application was originally treated by the Council as proposing a form of development which was neither *complying* nor *non-complying* and therefore to be assessed *on merit*. The Application was notified to the public pursuant to Section 38(5) of the *Development Act 1993 (Act)*, and some representations received. Subsequent to that notification, the Council determined that the original treatment of the Application was in error. Pursuant to Table Onka/8 *Non-complying Outdoor Advertising*, item 7, the Application in fact proposed a *non-complying* form of development.

The Application was then re-notified and further representations received.

Earlier Representations

I consider that the earlier representations remain "representations" received in respect of the Application for the purposes of the Act, notwithstanding the Application was re-notified and further representations received.

The Act does not prohibit re-notification of an Application. The Act does not require expressly, nor impliedly (in my view), that only the most recent representations received by a Council should be considered.

Whilst the earlier representations must be considered in light of the representors' understanding of the Application at the time of representation, the representations are not invalid by reason of, or superseded by, the subsequent re-notification.

As a matter of fairness, the applicants should be informed that the Council intends to consider and have regard to the earlier representations, and copies of the same provided to

the applicants. The applicants should be allowed 10 business days to respond, unless such opportunity was already provided subsequent to the earlier notification.

Concerns as to Validity of Representations

Council Date Stamp

Ms Inglis and Mr Becker correctly identify that the making of representations is subject to a time limit. Regulation 35(a) of the *Development Regulations 1993 (Regulations)* provides that representations must be "lodged with the relevant authority [the Council] ... within 10 business days after the day on which a copy of the notice is published in a newspaper".

Regulation 35(a) further provides that any representation lodged after any such period cannot be taken to constitute a representation for the purposes of section 38(12) of the Act. (That is not to say the Council cannot have regard to a "late representation", but that issue falls outside the scope of this advice).

However there is no requirement anywhere in the Act or the Regulations that the Council apply a date stamp to any representation lodged with the Council. Whether or not the Council does so is purely a matter of internal administrative practice.

If, as a matter of fact, a representation was physically (say, over the front counter or at the Council's PO Box) or electronically (say, by email or fax) received by the Council on or before midnight on the tenth business day after the date of the relevant newspaper advertisement then that representation satisfies the requirements of Regulation 35(a) to be lodged on time.

The absence of a date stamp is not proof of anything. In the absence of a date stamp, the date of the representation (if faxed, emailed, couriered or hand delivered) may reasonably be assumed to be the date of lodgement of the representation unless there is some evidence to the contrary. In the case of a posted representation, the date of lodgement may be reasonably assumed to be one, or at most, two, business days after the date of the representation.

I note that the representations you have provided to me are dated, at latest, 7 April 2008. Thus, allowing for even two days postage, all representations would have been received by 9 April 2008 – well before the last day for the lodgement of representations (16 April 2008).

Incomplete Representations

Insofar as Ms Inglis and Mr Becker rely upon the warning statement on the template representation form that "all sections of the form must be completed ... otherwise the representation will be invalid", such reliance is misplaced.

Whilst the warning statement is a salutary reminder of the desirability of completing a representation form it is not (nor, I suspect, intended to be) an accurate re-statement of the law which governs representations.

The relevant law is that of the Act and the Regulations as explained by the Supreme Court in *Mackenzie Intermodal Pty Ltd v Lawson* (2003) 127 LGERA 219. That case considered whether a representation in the following terms was valid:

I OBJECT TO THIS APPLICATION 7.11.02 P Lawson

That was the entirety of the purported representation received by the Council. Amongst other failings, it failed to include Mr Lawson's address, it failed to set out the reasons for his representation, and it failed to state whether Mr Lawson wished to be heard by the Council.

The Supreme Court explained that strict compliance with the requirements of the Act and the Regulations was *not* mandatory, and held that Mr Lawson's representation was a "valid, albeit inadequate" representation, sufficient to give Mr Lawson appeal rights. The Court did note, however, that the failure to indicate that Mr Lawson wished to be heard by the Council meant that Mr Lawson had no right to be heard under Section 38(10)(b).

Bearing in mind the Supreme Court's explanation, I consider all representations received, except for that representation which does not specify the name of the representor, are valid.

The unnamed representation must, I think, be invalid and should be disregarded by the Council. The Act provides that a *person* may make a representation. In the absence of the name of the person who made the representation, the unnamed representation is not a representation at all.

Representors do not Wish to be Heard

There is no legal requirement that a person who makes a representation must speak to their representation. A person may or may not speak to their representation for any number of reasons. When a person does speak to their representation they do not do so under oath, nor in the manner of giving evidence.

I consider that the election of a person not to speak to their representation does not affect, in any way, the weight to be afforded to their representation.

Reference to Prior Representation

There is no legal prohibition on a person making a representation by reference to other documents (including prior representations) provided by that person to the Council.

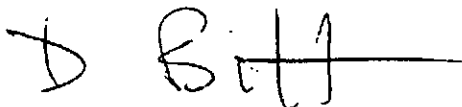
I consider Mr Catchpole's representation is valid and he is entitled to ask the Council to refer to his previous representation.

Effect on Property Values

Whilst the effect that a development may have on adjoining property values is generally an irrelevant town planning consideration, Mr Smart's representation is *not* invalid because it expresses that concern.

I trust that the foregoing assists.

Yours faithfully
NORMAN WATERHOUSE



David Billington
ASSOCIATE
Direct Line: (08) 8210 1263
e-mail: dbillington@normans.com.au

Dennis Batge - RE: Inglis & Becker - request for legal advice re process

From: "David Billington"
To: "Dennis Batge"
Date: 4/06/2008 1:37 PM
Subject: RE: Inglis & Becker - request for legal advice re process
Attachments:

Dennis

I **attach** my advice in relation to Ms Inglis and Mr Becker's letter.

I will try to get to your draft report later today.

For future reference we suggest the following process occur when re-notifying an application:

1. the first set of representations should be forwarded to the applicant within the usual ten day period after initial notification;
2. upon re-notification, all persons who made representations should be written to personally, advising of the re-notification and further advising that they should tell the Council whether they wish their initial representation to stand or whether they wish to replace it with a fresh representation;
3. upon close of the re-notification all representations and responses to the letters in (2) above received by the Council should be forwarded to the applicant within the usual ten day period;
- 3A. if (2) was *not* undertaken, all representations resulting from *all* notifications should be forwarded to the applicant within ten days after the re-notification, together with a letter advising that all representations received in response earlier notification(s) will be treated as "proper" representations (unless such are invalid for other reasons) and that the applicant should consider them in making any response; and
4. the history of the application should be clearly set out in the report to the Panel, and the earlier and later representations explained.

I trust that assists. Please call if you wish to discuss.

Kind regards

David Billington
Associate

Norman Waterhouse LAWYERS

Level 15, 45 Pirie Street, Adelaide SA 5000 • GPO Box 639, Adelaide SA 5001
T: 08 8210 1263 M: 0438 077 728 F: 08 8210 1234 W: www.normans.com.au

The contents of this email are confidential and are subject to this firm's usual disclaimer.

From: Dennis Batge [mailto:Denbat@onkaparinga.sa.gov.au]
Sent: Tuesday, 3 June 2008 4:27 PM
To: David Billington
Subject: Fwd: Inglis & Becker docs re Cat notice

As discussed David for your consideration and advice as to the standing of the first set of representors given the re-notification.

Regards

file:///C:/Documents and Settings/login/Local Settings/Temp/XPgrpwise/48469A8FNC... 5/06/2008

**Development Assessment Panel Meeting
26 June 2008**

Item 2.1.3

Application No. 145/1540/2007

Ms JP Inglis & Mr BJ Becker

ATTACHMENT F

**Correspondence
Minister for Urban Development & Planning**

The Hon Paul Holloway MLC
Leader of the Government in the Legislative Council

MUDP 07/0011 - UD07/D0482, UD07/D0498



**Government
of South Australia**

Minister for Police
Minister for Mineral
Resources Development
Minister for Urban
Development and Planning
Level 9, Terrace Towers
178 North Terrace
Adelaide SA 5000
GPO Box 2832
Adelaide SA 5001
DX 451
Tel 08 8303 2500
Fax 08 8303 2597
Int 61 8 8303 2500
ministerholloway@sa.gov.au

Date: 26/6/07

File No. <i>Dev</i> <i>A2</i>	Corresp. No.	Folio
----------------------------------	--------------	-------

Mr Terry Sutcliffe
General Manager – City Compliance
City of Onkaparinga
PO Box 1
NOARLUNGA CENTRE SA 5168

Dear Mr Sutcliffe

I refer to the letter from the City of Onkaparinga dated 15 May 2007 in which Council requests that the Development Assessment Commission act as the relevant authority for the Development Application by Mr Becker for various signs on his property at 137 Commercial Road, Old Noarlunga South (Application No. 145/1540/07).

I do not consider the Council's perception of bias or pre-judgment to be sufficient to warrant the Commission being the relevant authority, as there is no suggestion by the Council that it has acted improperly in its previous enforcement action under the *Local Government Act 1999* or the initiation of Section 85 proceedings under the *Development Act 1993*. On the application of Council, these proceedings have now been adjourned in the Environment Resources and Development Court to enable the assessment of a 'without prejudice' development application by Mr Becker.

In due course, a planning report will be considered by the City of Onkaparinga's Development Assessment Panel. This Panel has been appointed for its competence, expertise and independence. Recent legislative changes have allowed local planning panels to be formed so that matters such as these can be considered in a fresh and independent light. Accordingly, pursuant to Section 34(1)(b)(iii) of the *Development Act 1993*, I decline your request for the Commission to act as the relevant authority for the application.

If you require any further information please contact Mr Simon Neldner, Senior Planning Officer, Planning SA, Department of Primary Industries and Resources on telephone 8303 0662.

Yours sincerely

Paul Holloway
Leader of the Government in the Legislative Council
Minister for Police
Minister for Mineral Resources Development
Minister for Urban Development and Planning



**City of
Onkaparinga**

Your Ref:

Our Ref: 145/1540/07

15 May 2007

Hon Paul Holloway MLC
Minister for Urban Development & Planning
GPO Box 2832
ADELAIDE SA 5001

Dear Minister

Please find enclosed Development Application 145/1540/07 which is for the establishment of several signs at 137 Commercial Road, Port Noarlunga South. A recent report to Council is also enclosed, providing detailed information on the background of this matter.

Given the history of this issue, and previous reports to Council commenting on the likelihood of approval or otherwise of such a development application, the application has been referred to you pursuant to Section 34(1)(b)(iii) of the Development Act with a request that the Minister direct that the Development Assessment Commission be appointed as the authority to determine the application. This is on the basis that there may be a perception of bias or pre-judgement of the application by Council given the history of the issue.

The enforcement action under the Development Act initiated by Council is in abeyance pending the lodgement and assessment of the development application.

Please contact Renée Mitchell, Manager Development Services, on 8384 0584 if you require any further information.

Yours sincerely



Terry Sutcliffe
General Manager City Compliance

cc: B Becker & J Inglis

Encl.

N:\Management\Work in Progress\Minister Holloway re Becker DA.doc

■ **Contacts**

Phone (08) 8384 0666
mail@onkaparinga.sa.gov.au
www.onkaparingacity.com
ABN 97 047 258 128

■ **Postal address**

PO Box 1
Noarlunga Centre
South Australia 5168

■ **Noarlunga office**

Ramsay Place
Noarlunga Centre
Fax (08) 8382 8744

■ **Aberfoyle Park office**

The Hub
Aberfoyle Park
Fax (08) 8270 1155

■ **Willunga office**

St Peters Terrace
Willunga
Fax (08) 8556 2641

2.1.3 Mr BJ Becker & Ms JP Inglis – Category 3

Placement of blackboards displaying, in chalk, comments of a political nature at 137 Commercial Road, Port Noarlunga South

Decision:

Sharon Nash MOVED:

That the Development Assessment Panel REFUSE Development Plan Consent for Development Application 145/1540/2007 for the placement of blackboards displaying, in chalk, comments of a political nature, for the following reasons:

The proposal would detract from the existing and desired character and amenity of the locality in which it is situated and does not sufficiently conform to the following provisions of the Onkaparinga (City) Development Plan:

Council wide

Appearance of land and buildings

Objectives

Objective 1: *The amenity of localities not impaired by the appearance of land, buildings and objects.*

Principles of Development Control

- 1** *The appearance of land, buildings, and objects should not impair the amenity of the locality in which they are situated, and should be consistent with the desired character for a zone or area expressed by its provisions.*
- 2** *Within residential areas:*
 - (a) development should maintain or enhance the desired character and appearance of any zone, area or locality;*

Outdoor advertising

Objectives

- Objective 1:** *An urban environment and rural landscape not disfigured by advertisements.*
- Objective 2:** *Advertisements not hazardous to any person.*
- Objective 3:** *The scale and style of outdoor advertising designed to enhance the image of local businesses whilst promoting the desired character and amenity of localities.*
- Objective 4:** *The prevention of the proliferation of advertisements by promoting the rationalisation and common sharing of advertising displays.*
- Objective 5:** *To increase the effectiveness of existing advertisements by the reduction of the overall number of existing advertisements.*

Objective 7: *The prevention of the establishment of advertising displays in inappropriate locations and localities.*

Objective 8: *To ensure that advertisements are attractive, simply worded, legible and durable.*

Principles of Development Control

NB: For non-complying outdoor advertising refer to Table Onka/8.

- 1** *The location, siting, size, shape and materials of construction, of advertisements should be:*
 - (a) consistent with the desired character of areas or zones as described by their objectives;*
 - (b) consistent with the predominant character of the urban or rural landscape;*
 - (c) in harmony with any building or site of historic significance or heritage value in the locality; and*
 - (d) generally consistent with Table Onka/7 - Design Guidelines for Outdoor Advertising.*
- 2** *Advertisements should not detrimentally affect by way of their siting, size, shape, scale, glare, reflection or colour the amenity of areas, zones, or localities, in which they are situated.*
- 3** *Advertisements should not impair the amenity of areas, zones, or localities, in which they are situated by creating, or adding to, clutter, visual disorder and the untidiness of buildings and spaces.*
- 5** *The scale of advertisements should be compatible with the buildings on which they are situated and with nearby buildings and spaces.*
- 6** *Advertisements should be constructed and designed in a workmanlike manner.*
- 10** *Advertisements should not create a hazard to persons travelling by any means.*
- 23** *Advertisements should relate to the use of the land upon which they are situated. "Third party" promotional or directional advertisements are not appropriate.*
- 24** *Within all Residential, Country Township and Tourist Accommodation – type zones, advertisements or advertising displays which relate to non-residential land uses should:*
 - (a) be no greater in advertisement area than three square metres, if affixed to a building;*
 - (b) be no greater in advertising display area than two square metres per side if freestanding, and be located so as to ensure public safety; and*
 - (c) be no greater in height than four metres from natural ground level.*

Residential development

Objectives

Objective 1: Safe, pleasant, convenient and efficient residential zones, conducive to a sense of community.

Objective 2: Residential areas primarily used for residential purposes in well designed, safe and attractive environments, conveniently linked to community and other facilities and services.

Principles Of Development Control

General

4 Development in a residential zone should not impair its character or the amenity of the locality as a place in which to live.

Non-residential Development in Residential Zones

18 Non-residential forms of development should enhance the ability of residential areas to meet the needs and desires of local resident populations.

Residential zone

Objectives

Objective 1: A zone primarily comprising low-density and medium-density housing of varied form to accommodate a wide range of life-style needs.

Objective 2: A high standard of residential amenity and a pleasant living environment.

Objective 3: Development designed in context with the positive features of the particular locality.

Objective 4: The creation or maintenance of cohesive residential communities supported by compatible local community, recreational and educational facilities.

Principles Of Development Control

Form of Development

5 Non-residential development should be compatible with the primary function of the zone in terms of desired character, amenity, service provision and household need.

Seconded by Bill Coomans.

CARRIED

IN THE ENVIRONMENT, RESOURCES & DEVELOPMENT COURT OF SOUTH
AUSTRALIA

NO. 311 of 2006

BETWEEN

CITY OF ONKAPARINGA

Applicant

- and -

BARRY JOHN BECKER AND JEANETTE PATRICIA INGLIS

First and Second Respondents

ORDER

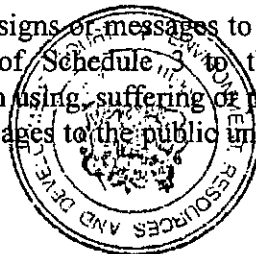
Judge:	Her Honour Judge Trenorden
Date of Order:	2 February 2010
Appearances:	Mr M Roder SC, for applicant Mr S Langsford, for first and second respondents

THE COURT DECLARES that:

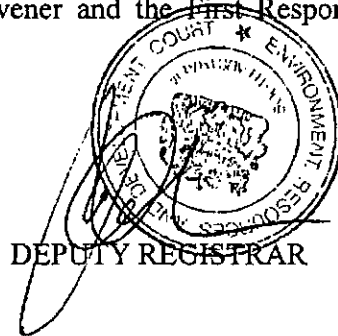
1. The First Respondent and the Second Respondent have breached Section 32 of the Development Act 1993 (hereafter referred to as "the Act") by changing the use of the land at 137 Commercial Road, Port Noarlunga South, SA (hereafter referred to as "the Land") without development approval, namely, by using the Land for the display of signs or messages to the public in addition to its residential use.
2. The First Respondent and the Second Respondent have breached Section 32 of the Act by undertaking an act or activity declared by regulation to constitute development without development approval, namely, by commencing the display of advertisements on the Land which advertisements are signs visible from a road or by passengers carried on public transport.

THE COURT ORDERS that:

1. The First Respondent and the Second Respondent must remove by midnight on 3 February 2010 all signs displayed on the Land as at the date of this order.
2. The First Respondent and the Second Respondent must forthwith cease changing the use of land by using the Land for the display of signs or messages to the public (other than signs which are specified in Clause 1 of Schedule 3 to the Development Regulations 2008), and are hereby restrained from using, suffering or permitting the use of the Land, for the display of such signs or messages to the public unless permitted by a development approval.



3. The First Respondent and the Second Respondent are hereby restrained from on the Land commencing the display of, or suffering or permitting the commencement of the display of, any sign visible from a road or by passengers carried on public transport (other than the display of such a sign which is specified clause 1 of Schedule 3 of the Development Regulations 2008) unless permitted by a development approval.
4. The First Respondent and the Second Respondent pay the Applicant's costs of and incidental to these proceedings as agreed or taxed.
5. No order as to costs between the Intervener and the First Respondent and Second Respondent.



ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT OF SOUTH AUSTRALIA

CITY OF ONKAPARINGA v BECKER & ANOR

[2010] SAERDC 1

Judgment of Her Honour Judge Trenorden

18 January 2010

ENVIRONMENT AND PLANNING - BUILDING CONTROL - COUNCIL CONSENT AND APPROVAL

Enforcement proceedings pursuant to s85 Development Act 1993 to restrain use of land for the purposes of the display of signs or other objects or devices containing written or graphic content - whether respondents have changed the use of the land - whether Council authorised to bring proceedings - whether the messages could be regarded as reasonably incidental to the residential use of the land. Finding the impact of the signs has a detrimental impact on the amenity of part of the locality - whether display of signs constituted display of advertisement - definitions of "sign" and "advertisement" considered - whether an order under s 85 is an injunction.

Held: That the respondents have breached the Development Act by undertaking acts and activities not exempt from development.

Development Act 1993; Development Regulations 1993; Local Government Act 1999; Trade Practices Act 1974 (Cth); Environmental Planning and Assessment Act 1979 (NSW), referred to. Corporation of the Town of Gawler v Minister for Transport and Urban and Planning and the State of South Australia [2002] SASC 85; The Corporation of the City of Noarlunga v Usher (1981) 29 SASR 109; City of Noarlunga v Fraser (1986) 42 SASR 450; Fraser v The City of Noarlunga (1985) 18 APAD 153; Re ICI Australia Pty Ltd and the Trade Practices Commission (1992) 38 FCR 248; Cardile v LED Buildings Pty Ltd (1999) 198 CLR 380; Sydney City Council v Building Owners and Managers Assoc of Australia Ltd (1985) 2 NSWLR 383; Cooney v Kuringai Corporation (1963) 114 CLR 582, considered.

CONSTITUTIONAL LAW

Applicant: CITY OF ONKAPARINGA **Counsel:** MR M RODER SC - **Solicitor:** NORMAN WATERHOUSE

First Respondent: BARRY JOHN BECKER **Counsel:** MS V LINDSAY - **Solicitor:** LANGSFORD SOLICITORS

Second Respondent: JEANETTE PATRICIA INGLIS **Counsel:** MS V LINDSAY - **Solicitor:** LANGSFORD SOLICITORS

Intervener: ATTORNEY-GENERAL **Counsel:** MR M WAIT - **Solicitor:** CROWN SOLICITOR'S OFFICE

Hearing Date/s: 03/12/2008 to 05/12/2008

File No/s: ERD-06-311

B

Respondents contend that the purpose in displaying the messages on the site was to exercise their freedom of expression in relation to political matters - Attorney-General for SA intervened - whether s85 of the Development Act is invalid because it restricts the implied constitutional freedom of political communication.

Held: s85 is not invalid.

Judiciary Act 1903 (Cth), referred to.

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1, considered.

CITY OF ONKAPARINGA v BECKER & ANOR
[2010] SAERDC 1

THE COURT DELIVERED THE FOLLOWING JUDGMENT:

- 1 The respondents Mr Becker and Ms Inglis are pensioners who jointly own land, the address of which is 137 Commercial Road, Port Noarlunga South (the subject land). They live in the dwelling on the land and have resided there since early 2002. On part of the land, between the dwelling and the road, the respondents have been displaying messages, many of which were political in content, on boards, blackboards and shade cloth. Development approval has not been obtained for the display of these messages.
- 2 The applicant, the City of Onkaparinga (the Council), successfully sought the issue of a summons pursuant to s 85 of the *Development Act* 1993, in 2006, in which the following orders (as amended) are sought against the respondents:
 1. That the First Respondent and the Second Respondent cease using, or suffering or permitting the use of, the land at 137 Commercial Road, Port Noarlunga South, SA ("the Land") and be hereby restrained by injunction from further using the Land, or suffering or permitting the use of the Land, for the purposes of the display of advertisements, signs, signboards, blackboards, hoardings, or other objects or devices containing written or graphic content of any kind unless permitted by a development approval.
 2. That the First Respondent and the Second Respondent cease displaying on the Land, or suffering or permitting on the Land the display of, a sign or signs visible from a road, street or other public place or by passengers carried on any form of public transport, such display having commenced on or before the date of this order, and be hereby restrained by injunction from commencing the display of, or suffering or permitting the commencement of the display of, a sign or signs visible from a road, street or other public place or by passengers carried on any form of public transport on the Land, unless permitted by a development approval or by virtue of Schedule 3 to the *Development Regulations* 1993.
 3. That the First Respondent and the Second Respondent comply with orders 1 and 2 herein within 28 days of such orders being made.
 4. That the First Respondent and the Second Respondent pay the Applicant's costs of and incidental to these proceedings.
 5. Such other Orders as the Court thinks fit.
- 3 The Council's case is that the respondents have contravened the *Development Act* by undertaking unauthorised development. Their case is that the act of displaying the messages on the subject land as indicated above, is development requiring authorisation under the *Development Act*, because it amounts to either:
 - (a) an additional act or activity constituting development, by Schedule 2 of the *Development Regulations* 1993, namely "the commencement of the display of an

advertisement, but not including a change made to the contents of an existing advertisement if the advertisement area is not increased" (Schedule 2, Clause 7); or

(b) a change in the use of the subject land, being a use which is neither part of the approved residential use nor an accessory use or a home activity, both of which are acts or activities which are not development by Schedule 3, Clause 5, *Development Regulations* 1993.

4 The respondents submit that the proceedings should be dismissed. They made the following submissions:

- (a) the equitable remedy of an injunction is not appropriately sought in the circumstances;
- (b) the display of messages by the respondents on their land is not development within the meaning of the *Development Act*;
- (c) the display of the messages is excluded from the definition of development by Schedule 3 of the *Development Regulations* 1993;
- (d) there is no evidence of the Council having authorised the proceedings;
- (e) in so far as the *Development Act* interferes with the respondent's political communications, it infringes the respondent's constitutional rights.

Whether proceedings have been authorised

5 At a very late stage, Counsel for the respondents asserted that there was no proof that the proceedings had been authorised by resolution of the Council. At the end of the day, this submission was not strongly pursued.

6 In response to the submission, counsel for the Council submitted that the presumption of regularity applies. That is, that the Council acted with proper authority in applying to institute proceedings. That presumption is rebuttable, upon proof by the challenging party.

7 I accept that the submission by the counsel for the Council is for the correct position at law. Where a person exercises a power it will be presumed from the exercise of the power, in the absence of evidence to the contrary, that the person exercising the power was duly authorised to do so, whatever the requirements for the authority: see *Corporation of the Town of Gawler v Minister for Transport and Urban and Planning and the State of South Australia* [2002] SASC 85 at [29], and the cases cited therein.

8 The respondents further submitted that the Council had not complied with the requirements of s 85(2), which is in the following terms:

- (2) proceedings under this section may be brought in a representative capacity (but, if so, the consent of all persons on whose behalf the proceedings are brought must be obtained).

9 The submission was as I understand it, that because a Council is the elected council of an area designated as a municipal or district council under the *Local Government Act*, it is a representative body, being representative of the electors within in the area of council and so is bound to comply with the requirements of s 85(2), with which it has not complied.

10 I do not accept the submission. Pursuant to s 35 of the *Local Government Act* 1999, a Council is a body corporate with perpetual succession. Accordingly, it is a person, and thus has a right as has any other person, under s 85(1) of the Act to apply to the Court for an order to remedy or restrain a breach of the Act.

The Facts and Background

11 The Court had before it a number of affidavits. Some of those affidavits tendered as part of the case for the Council, had exhibited to them copies of photographs of the messages displayed on the subject land. The respondents also tendered affidavits and gave oral evidence.

12 Formerly, the respondent Mr Becker lived at 14 St Peters Street, in the suburb of St Peters. While living there, from the early 1990s he began displaying political messages at his residential premises, by writing his political opinions as messages on banners, which he hung on the front fence of the premises. Subsequently, Mr Becker went to live at Port Noarlunga, in about 1999. There he joined the respondent Ms Inglis in her then retail business. They lived together and together they put on displays of political messages.

13 The respondents purchased the subject land with its dwelling early in 2002. Shortly thereafter, they began to display messages on boards on the subject land, positioned so that the messages can be seen by road users, and have continued to do so.

14 From the evidence, it is evident that the messages are written in white and coloured chalks on large blackboards and cardboard as well as being chalked or painted onto shade cloth. Some of the shade cloth is attached to the upper part of the verandah of the dwelling so as to partially shade the verandah, and was in existence when the respondents purchased the property. In about 2004, the respondents made shade cloth panels to fit between the verandah posts in the lower part of the verandah and installed them so as to provide complete shade for the east facing verandah. In addition, separate pieces of shade cloth each containing a message have been displayed on the subject land like banners,

suspended between trees growing on the subject land or a tree and a verandah post of the dwelling.

15 Generally, the messages seem to have been communications or comments by the respondents concerning individual politicians at all levels of government, the local council, political and government matters generally. Some of the signs have promoted particular causes ("save Aldinga scrub and public space") and others promoted the respondent Mr Becker's political ambitions. In October 2007, hand-chalked boards promoting commercial operations were displayed, but these kinds of messages are not usually displayed on the subject land.

16 It is clear from the photographs and the affidavit evidence that the boards displaying messages are not fixed in place and have been moved about from time to time. The messages vary, generally being changed regularly, and are not permanent. The shade cloth on the verandah has displayed messages from time to time, but not fixed messages. The messages on the boards are sometimes tagged or signed *GrafArti* or *Bazza*, both of which indicate Mr Becker's handiwork.

17 The boards and banners are generally large, with some being substantial. Generally, there are many boards displaying messages present on the land at the one time in addition to the messages on the verandah shade cloth and sometimes also banners.

18 According to the respondents, the messages have generally been statements about political and governmental matters. The messages have invariably been expressed in frank language. The reason for this choice of language is set out in the affidavit of the respondents (exhibit R8) as follows:

6. It is our view that discussions about political and governmental matters, especially where they take place in printed or electronic media, are carried out in artificial, obscure and/or politically correct language and that consequently, the opinions expressed are not conveyed adequately or effectively to ordinary Australian people. We believe that as part of our comment upon governmental and political affairs, it is appropriate to express ourselves in a completely different way. Our intentions in displaying messages on the blackboards on our property is only to promote discussion within our community about government or political issues that are a very real concern to the members of that community.

19 The lawful use of the subject land is for residential purposes; a dwelling and garage having been approved in the 1950s and a carport and verandah having been granted development approval in 1983.

20 Earlier, the Council in 2004, had issued an order to the respondents under s 254 of the *Local Government Act* 1999. In February 2004, the order was withdrawn and a fresh order under the same section was issued. In May 2004, the Council commenced criminal proceedings against the respondents under s 258 of the *Local Government Act* for contravention of the order issued under

s 254 of that Act. The respondent Becker was convicted on each of 5 counts of contravention of the order. Following an appeal to the Full Court of the Supreme Court, the appeal was allowed and the convictions were set aside on 16 November 2005.

21 An application for a summons to issue under s 85 of the *Development Act* was made to this Court in August 2006 and the Court granted permission for a summons to issue, in the same month.

22 Following commencement of these proceedings, the respondents agreed to make an application for development approval. According to their evidence, they "did so fully in the knowledge that (they) were not seeking permission for property development in its usual meaning for building works, advertisements or fixed signage". The Council refused to grant consent to the application.

The Site and the Locality

23 It is relevant to describe the site and the locality in the vicinity of the subject land. The subject land has a frontage to Commercial Road, on its eastern side, of 19.2m. The dwelling is set back some 9m from the western boundary of Commercial Road. It is within this area of setback, that is between the Commercial Road boundary and the dwelling (the site), that the messages are displayed.

24 Commercial Road runs in a north-south direction. The land on the western side of this road within the locality of the subject land is residential in character, comprising allotments with detached dwellings, having frontage to Commercial Road.

25 The land on the eastern side of Commercial Road comprises a large area of relatively flat, unbuilt on land owned by the South Australian Housing Trust. Commercial Road is a two-lane, dual carriageway road, with in addition, a bicycle lane and parking strip on each side. It apparently carries high volumes of traffic.

The Scheme of the *Development Act*

26 The object of the *Development Act* is set out in section 3. It is "to provide for proper, orderly and efficient planning and development in the State", and to that end, it provides for a strategic planning system, the creation of development plans with objectives and principles of planning and development, and establishes a system whereby any development, as the term is defined in the Act, may only proceed if it is an authorised development. At the relevant time, development could only become authorised development if an application had been made, the development had been assessed against the provisions of the relevant development plan and development consent had been granted. Other approvals, for example with respect to the Building Code, may have been necessary before a development approval was granted.

27 Thus, on the one hand the Act establishes a system for orderly and efficient planning, through the system of strategic planning and the development plans, and on the other hand establishes a system of development control whereby only that development which is proper, that is, has been assessed against the objectives and principles of planning and development set out in the development plans, and granted consent, may proceed. As part of the development control system, a planning authority is also given power under the Act to take action against persons who have undertaken development without approval.

28 In addition, the *Development Act* seeks to address other matters, such as regulating advertisements seemingly regardless of whether any particular advertisement is "development". Under s 74, if a Council forms the opinion that an advertisement or advertising hoarding disfigures the natural beauty of a locality or otherwise detracts from the amenity of the locality, it may order the owner or occupier of the land on which the advertisement or advertising hoarding is situated, to remove or obliterate the subject of the order, whether or not development authorisation has been granted. This is one example of the powers given to a Council to regulate development in the interests of proper and orderly planning.

29 It is appropriate now to consider whether the acts and activities of the respondents in placing and maintaining the blackboards, boards and shade cloth containing messages on the subject land constitute development within the meaning of the *Development Act*. "Development" is defined in s 4(1) of the *Development Act*. It was argued that the respondents' acts and activities may constitute development by falling within paragraphs (b) or (h) of the definition. They are set out below:

development means—

...

(b) a change in the use of land; or

...

(h) an act or activity in relation to land (other than an act or activity that constitutes the continuation of an existing use of land) declared by regulation to constitute development,

(including development on or under water) but does not include an act or activity that is excluded by regulation from the ambit of this definition;

Whether the acts or activities constitute a change in the use of the subject land

30 The first question is whether the use of the subject land remains solely residential, despite the acts and activities of the respondent in writing messages on boards and banners and displaying those boards and banners on the site so as to face Commercial Road.

31 Section 6 of the *Development Act* elucidates the concept of "change in the use of land". It provides that for the purpose of determining whether a change in the use of land has occurred, inter alia, the commencement of a particular use of the land will be regarded as a change in the use of the land if the use is additional to a previously established use of the land which continues despite the commencement of the new use.

32 It follows from this elucidation that in order to determine whether there has been a change of use in the circumstances of this matter, it is necessary to first determine whether a new use has commenced, or whether the use thought to be an additional use, is but part of the existing use. In the cases cited in argument, that is *The Corporation of the City of Noarlunga v Usher* (1981) 29 SASR 109 (*Usher*), and *City of Noarlunga v Fraser* (1986) 42 SASR 450 (*Fraser*), in the context of an existing residential use of land, much has turned on whether what is proposed is a hobby or associated with a hobby of one of the residents.

33 In *Usher*, an appeal from the Planning Appeal Board, decided under the *Planning and Development Act* 1966 and particularly the Metropolitan Development Plan Corporation of the City of Noarlunga Planning Regulations - Zoning, Mr Usher's erection of a radio tower and antenna at his dwelling house to enable him to pursue his hobby, namely that of amateur radio operator, was held to be part of the existing residential use of land, based on the definitions of "use of land" and "dwellinghouse" in the regulations. The meaning of "use of land" included "the use of any building ... on land", and the meaning of "dwellinghouse" included "a house designed for use as a dwelling ... together with such outbuildings as are ordinarily used therewith ...". The Planning Appeal Board had determined that a radio mast and antenna structure, because it was in furtherance of a hobby that was understood to be ordinarily carried on as part of the residential use of land, was part of the ordinary use of a dwelling.

34 On appeal, His Honour Wells J adopted the Board's reasoning including that statement that "there are many uses which, as a matter of fact, are part of such ordinary residential use", which was a reference to the meaning of dwellinghouse. Ultimately, because the case concerned the erection of a structure, the question for the Board on this point had been distilled to whether what was proposed for a hobby activity was so far out of line with the manner in which the particular hobby was normally practised that it should not be considered as being part of the ordinary residential use. Another way of expressing the question was whether the manner in which the hobby was proposed to be carried on was abnormal.

35 Thus, a hobby was seen to be part of the ordinary residential use unless the manner in which or by which it was to be practised, was to take it beyond the ordinary residential use. However, this decision was clearly made in the context of the meanings given to "dwellinghouse" and "use of land" in the zoning regulations, and the fact that what was proposed was a kind of structure.

36 The case of *Fraser* was an appeal in relation to the determination of the Planning Appeal Tribunal on the question of whether the construction of a large yacht in the back yard of a dwelling constituted "development". By the time Mr Fraser sought approval to construct a yacht in his backyard, the *Planning Act* 1982 and the Development Control Regulations had replaced the *Planning and Development Act* 1966 and the Zoning Regulations. The question was whether the act of and activity in constructing the yacht was development, either because it was the construction of a structure, or a change of use of the land.

37 At the time, the definition of "dwelling" in the Development Control Regulations did not include a reference to "outbuildings ordinarily used therewith" as had been included in the definition of "dwellinghouse" relevant in *Usher*. "Development" was defined in the *Planning Act* to include a change of use, and that term was elucidated in section 4a, in much the same terms as appears now in section 6 of the *Development Act*.

38 The Full Court agreed with the Tribunal that the construction of the yacht was not a structure.

39 The Tribunal in *Fraser v The City of Noarlunga* (1985) 18 APAD 153 accepted that the construction of the yacht was a hobby, but found itself unable to consider whether the hobby was within the ordinary residential use of the land, because of what it saw as a limited definition of "dwelling", the absence of protection for the continuation of existing lawful uses (the operation of the legislative provision protecting the continued use of land for the purposes for which it was lawfully being used (s 56(1)(a) of the *Planning Act*) had been suspended), and the lack of assistance provided by section 4a because it did not define the term "use". Indeed, the Tribunal concluded that under the legislation, "other activities carried on and outbuildings, usually associated with the ordinary house, appear to require separate consideration as "development", at least in the first instance".

40 The Tribunal posed the question as to whether there had been a change of use solely by asking whether "the physical use of part of the land (for building the yacht), which part was previously used as the back garden" constituted a change in the use of the land. Putting the question in this form led the Tribunal to conclude that the hobby of constructing the yacht in the backyard may constitute a change of use, and to turn to see whether the regulations had exempted such use of the land from the definition of "development". The Tribunal determined that it was exempted, and the question as to whether the construction of a yacht in the back yard constituted "development" did not need to be answered and was not answered.

41 The Full Court in *Fraser* interpreted this approach as meaning the Tribunal had decided that what it had concluded was a hobby use (the construction of a yacht in the backyard), was probably not part of the existing residential use, because it could be classed as a separate use of that part of the backyard where it

was being constructed. The approach of the Tribunal turned on its interpretation of the legislation. It did not consider whether the activity was within the ordinary residential use, before looking to whether it constituted an accessory use, because it did not think that course was open to it, given the legislative structure.

42 On appeal, the Full Court endorsed the Tribunal's approach.

43 The subject land is presently lawfully used for residential purposes by the respondents. They live there. There has been no change in that regard. Since shortly after the commencement of occupation of the dwelling by the respondents, they have also used the land to communicate their views on political and other matters and certain persons (generally politicians) through messages chalked or painted on blackboards, cardboard and shade cloth. The activities of the respondents could be said to be an alternative form of communication with other members of the community, as opposed to writing letters to newspapers, distributing pamphlets, making speeches in public places, or conveying their views through the internet, by means of a website, a blog or YouTube, for example.

44 There was no submission that the message boards are structures within the meaning of the *Development Act*.

45 The question then is whether the acts and activities of the respondents constitute a use additional to the residential use of the land. In *Usher* and *Fraser*, the application was in essence for the construction of something. In *Usher*, the application was treated as a land use application, in the context of the prevailing legislation. It was determined in the context of the relevant legislation that the application was not for an additional use of the applicant's land. In *Fraser*, it was held that what was proposed was not the construction of a building (as defined) and a question was whether it amounted to a change of use.

46 Mr Becker has been displaying his political opinions for public road users to view, since the early 1990s, and Ms Inglis with him since some time between 1999 and 2002. However else the acts and activities might be described, they could be described as a hobby of the respondents, although, unlike the situation in *Usher*, nothing turns on that.

47 There was no suggestion that the undertaking of the acts and activities has replaced the garden and driveway on the site in front of the dwelling. However, the site is being used for the display of messages on boards and banners, in addition to its use as a garden and driveway. The latter use is without doubt part of the normal residential use, but the display of messages as it is occurring on the site (particularly noting the number and size of the messages) may amount to an additional use of the subject land and therefore a change of use. Relevant parts of the legislation (the definition of development, the meaning of "change of use") are almost identical to that which was relevant in *Fraser*. While the definition of "detached dwelling" is different, in neither case do they include the extended

meaning given to "detached dwellinghouse" in the earlier legislation considered in *Usher*.

- 48 It seems to follow from the limited definition of "detached dwelling" that any additional use of land will require consent unless it is exempted from being development by the regulations, pursuant to the definition of "development" in the *Development Act*. As the Tribunal did in *Fraser*, I will now proceed to consider whether the acts and activities are exempt from "development", in which case any change of use would not be relevant.

An Accessory Use

- 49 The next question is whether the acts and activities involved in displaying the messages on the boards and shade cloth on the site amounts to an accessory use as described in Schedule 3, clause 5 of the *Development Regulations 1993*. Schedule 3 sets out acts and activities which are not development; clause 5 of the Schedule addressing the use of land and buildings. If the use of the subject land by the respondents to convey messages on boards and shade cloth can be ordinarily regarded as (and is in fact) reasonably incidental to the residential use of the land and is for the substantial benefit of the respondents, it would fall within clause 5(1) of Schedule 3 and thus not constitute development.

- 50 The question of whether a use of land was reasonably incidental to a residential use of land was considered in the cases of *Usher* and *Fraser*.

- 51 In *Usher*, the issue as to whether the proposed use was part of the ordinary residential use of the land was considered and determined, and then only in deference to the arguments was consideration given to whether the proposed hobby use was an accessory use as defined. Under the zoning regulations, "accessory use" was defined, in part, as follows:

... means a use made of land which is –

- (1) ordinarily regarded as, and is in fact, reasonably incidental to any particular use of land, and
- (2) for the substantial benefit of the person or persons who, in any capacity, is or are making use of the land ...

- 52 In considering whether a proposal could ordinarily be regarded as reasonably incidental to a residential use of land, Wells J in *Usher* commented, in *obiter dicta* (because he had agreed with the Planning Appeal Board that the construction of a radio mast and antenna was part of the residential use of the land), that the question was whether the proposal could *fairly* be regarded as reasonably incidental to a residential use. By way of explanation, His Honour said:

The relevant words are "ordinarily regarded as ... reasonably incidental", which, to my mind, emphasises the character of the *res* rather than its incidence within the community.

53 If this approach remains appropriate, the question becomes whether the expression of political and other messages on blackboards and shade cloth at the front of a dwelling can fairly be regarded, having regard to the array of chalked on blackboards and shade cloth, as reasonably incidental to a residential use of land.

54 By the time of *Fraser*, the legislation had changed. However, the concept of "accessory use" together with its meaning had been retained and was set out in the *Development Control Regulations* 1982 in the First Schedule, at paragraph 10(1), as follows:

(1) The use of land *and the use of any lawfully-erected building* which is ordinarily regarded as, and is in fact, reasonably incidental to any particular use of *the land and the building, or the land or the building*, and which is for the substantial benefit of the person or persons who, in any capacity, is or are making use of *the land and the building, or the land or the building*.

55 The words which did not appear in the "accessory use" definition considered in *Usher* have been italicised in the above quotation. The term "accessory use" was no longer mentioned, but a use that fell within the above description was an act or activity that was not development: regulation 5.

56 The effect of the changes, in contrast with what prevailed at the time of *Usher*, seems clear. At the time of *Usher*, a consent for a dwellinghouse was consent for a house, together with such outbuildings as are ordinarily used therewith (see the definition of "dwellinghouse" quoted in *Usher*). Under the *Development Control Regulations* in force at the time of *Fraser*, a dwelling was limited to a building or part of a building used as a self-contained residence and did not include outbuildings: see regulation 4. However, the erection or construction of an outbuilding in which human activity was secondary, and which was detached from and ancillary to another building on the site for which consent had been granted, was not development, provided it fell within certain specifications: see Schedule 1, para 7. It followed logically that the use of such an outbuilding should also be excluded from the definition of development, and thus not need consent. This is then the effect of the changes manifest in para 10(1), First Schedule, *Development Control Regulations*, compared with the definition of "accessory use" in the old *Zoning Regulations*.

57 The construction of the yacht was a once only activity. If its construction fell within paragraph 10 of the First Schedule of the *Development Control Regulations* 1982, the construction of the yacht was not development within the meaning of the *Planning Act*. White J (with whom the other judges of the Full Court agreed) said:

Concentrating solely upon the "change of use of the land" limb of the definition of "development", it can be seen that this "hobby" of accessory use of land (yacht building once only) falls quite readily into the kind of exempted use contemplated by par. 10.

58 In other words, it seems that if an act or activity can fairly be regarded as a reasonable incident of residential use of land and is in fact an incident of the particular residential use of land, and it is for the benefit of the occupiers of the land, then it would fall within the so-called "accessory use" and thus not be development.

59 However, as White J concluded in *Fraser*, "it is very much a question of fact and degree whether a particular example is or is not within the accessory use exempted by par. 10 of the First Schedule".

60 Scheduled 3 of the *Development Regulations* 1993 lists those acts and activities which are not development by reason of Regulation 7. Clause 5(1) of Schedule 3 of the *Development Regulations* is in almost identical terms to para 10(1) of the First Schedule of the Development Control Regulations that were relevant in *Fraser*. The principal difference is that the words *and is in fact* are bracketed. I do not see that anything turns on that difference.

61 The use of the site by the respondents is the expression and communication of the respondents' views - generally on political and governmental matters. As a matter of fact, it is an incident of *their* residential use of subject land. It would be unlikely to take place on the subject land if they did not live there. It has been an incident of the respondent Becker's use of his residential premises in the past. The respondents engaged in the use *on the site* because they live on the subject land. Thus it is in fact incidental to the respondents' use of the land for residential purposes.

62 However, the test has an objective element. The test is actually whether the activity can ordinarily or fairly be regarded as reasonably incidental to a residential use of the land. In determining this question, it is not appropriate to look at the incidence of this kind of activity in residential properties in the community. It is appropriate to look at the character of the activity: *Usher's* case (above). In the cases of *Usher* and *Fraser*, the subject matter was determined by the Planning Appeal Board and Tribunal respectively to be for the pursuit of a hobby, or according to White J in the case of *Fraser*, a temporary amateur activity as a means to pursuit of a hobby.

63 In this matter, as I have already concluded, the activity might also be said to be a hobby. It is the pursuit of the communication of opinions held by the two persons who reside on the land, with the intention of promoting thought and discussion within the community. However this particular hobby, if it can be called thus, is such that it has an impact on the locality, by virtue of the number and size of many of the boards and banners. This is relevant to the character of the activity.

64 The presence and nature of impacts must be relevant to whether the acts and activities can ordinarily or fairly be regarded as reasonably incidental to a residential use of land. There were impacts (visual and noise) on a neighbour of

the carrying out of the hobby activity in *Fraser*: see *Fraser* at 451. This aspect was not considered either in *Fraser*, which adopted the reasoning in *Usher*, nor in *Usher* which was not decided on the issue of accessory use, although it was clear from the then Zoning Regulations that if the structure would have a detrimental impact on the character or amenity of the locality, consent could be required. In *Fraser*, the cautionary comments of White J regarding hobby activities that would be "so bizarre, so out of line and so large in scale" as to be "demonstrably beyond the pale, demonstrably beyond the hobby class of activities ordinarily so regarded", although appearing to be referable through *Usher* to what falls within the ordinary residential use of the subject land, seem by the context to be more applicable to the question of what may ordinarily be regarded as reasonably incidental to any particular use of land.

65 The activity is the expression and communication of the respondents' views on political and government matters. It is carried out by the respondents and is for their benefit, as it enables them to express and communicate their opinions. It is the respondents' hope that the messages will cause members of the community to reflect, and discuss the matters raised. Thus, there may also be perceived community benefit arising from the activity - at least that is the hope of the respondents. However most benefit is gained by the respondents, as the activity is the means by which they express and communicate their views. It follows that the activities are for the substantial benefit of the respondents.

66 I have concluded that the number and size of the boards and banners on which messages are regularly displayed and the visual impact which results, is against the use of the site for the display of the messages being *ordinarily* regarded as reasonably incidental to the residential use of land. Put another way, the character of the use of the site, having regard to the dimensions of the boards and banners and the numbers of them, precludes it from being ordinarily regarded as reasonably incidental to the residential use of land. Perhaps the display of messages might ordinarily be regarded as reasonably incidental to the residential use of land, if carried out at a lower scale, but that is an issue for another day. The acts and activities of the respondents in displaying the messages on the site, on the facts, are in the class described as being beyond the pale, in *Fraser* and in *Usher*.

67 The use of the land by the respondents for the display of the signs cannot be ordinarily regarded as reasonably incidental to their residential use of the land, and so be exempt from "development" pursuant to clause 5 of Schedule 3 of the *Development Regulations*, even though the use is for the substantial benefit of the respondents, in that it facilitates the expression and communication of their views and opinions.

A Home Activity

68 As it was argued, I will also consider whether the activities of the respondents constitute the carrying on of a home activity on their land. If the

activities on the site constitute an additional use of the subject land, and thus a change of use of the land, they will not constitute development if they fall either within clause 5(1) or (2) of Schedule 3: see Regulation 7. I have already considered whether the activities fall within clause (1).

69 Clause 5(2) of Schedule 3 provides that inter alia, the use of land that is the carrying on of a home activity on land used for residential purposes, is not development. The term "home activity" is defined in Schedule 1 of the *Regulations* to mean the use of a site that, inter alia, does not detrimentally affect the amenity of the locality or any part of the locality.

70 It is generally agreed that the boards and shade cloths with messages chalked or painted thereon do have a detrimental impact on the amenity, at least on that part of the locality near to the subject land. It is the number and size of the messages and the boards and banners that gives rise to the detrimental impact on the amenity. The impact might not be detrimental, if the boards and banners were a smaller size and fewer in number. However I do not need to consider this further. I find that there is a detrimental impact on the amenity of part of the locality. It follows that the activities of the respondents do not fall within a "home activity" as defined and therefore cannot come within clause 5(2) of the Schedule 3 and so cannot not be development, on this account.

Whether the acts and activities are those declared by regulation to constitute development

71 The meaning of "development" according to the *Development Act*, includes an act or activity declared by regulation to constitute development (see paragraph (h)). Schedule 2 of the *Development Regulations* lists those additional acts and activities constituting development by virtue of regulation 6.

72 The Council relies on clause 7 of Schedule 2. That is set out below:

7 Other than within the City of Adelaide, the commencement of the display of an advertisement, but not including a change made to the contents of an existing advertisement if the advertisement area is not increased.

73 The respondents argue that the messages displayed on boards, blackboards and shade cloth do not constitute advertisements.

Advertisements

74 The term "advertisement" is defined in the *Development Act* to mean "an advertisement or sign that is visible from a street, road or public place or by passengers carried on any form of public transport".

75 The Macquarie Dictionary (3rd Edition) gives a meaning to "advertisement" that suggests a commercial purpose. The meaning is as follows:

Any device or public announcement, as a printed notice in a newspaper, a commercial film on television, a neon sign, etc, designed to attract public attention, bringing custom, etc.

- 76 The concept of an advertisement merely conveying information or opinion without commercial intent appears to be archaic: see the meaning of "advertising" in the Macquarie Dictionary (3rd Edition). The *Development Act*, on one view, would appear to intend "advertisement" as it is used in the Act to mean a sign promoting goods and services. This is borne out by the meaning given to "advertiser" which is as follows:

advertiser – in relation to an advertisement, means the person whose goods or services are advertised in the advertisement.

- 77 However, the list of acts and activities which are not development, set out in Schedule 3 to the *Development Regulations*, includes advertising displays. The advertisements described in clause 1 of Schedule 3 which might be contained in an advertising display include; traffic control devices, signs or notices displayed by reason of statutory obligation, signs displayed for the purpose of identification, direction, warning, etc, signs that announce a local event of a religious, educational, cultural, social or recreational character or an event of a political character, and real estate "for sale" and "for lease" signs. Many of the examples referred to in clause 1 of Schedule 3 would constitute a sign, but not an advertisement, as the terms are used in common parlance. However, examples of advertisements in a regulation (or Schedule thereto) cannot determine the content of the meaning of a word in the Act.

- 78 The question is whether Parliament intended the term "advertisement" to include all manner of signs, whether advertising goods or services, giving notice, giving directions or publicising events. The Macquarie Dictionary (3rd edition) definition gives 10 meanings of the noun "sign", including the following:

6. an inscribed board, space, etc., serving for information, advertisement, warning, etc., on a building, along a street, or the like.

- 79 Although it is not without doubt, I conclude that the meaning of "sign" in the defined term "advertisement" in s 4 of the *Development Act*, encompasses the boards and banners containing messages placed by the respondents on the subject land. Thus the respondents' boards and banners are advertisements.

- 80 In light of the broad meaning given to "advertisement" in the Act as encompassing advertisements and signs, there is no doubt the effect of clause 7 of Schedule 2 is that the commencement of the display of any sign, regardless of its content, is development and thus requires consent.

- 81 The next consideration, having reached this point, is as to whether the signs are not development because they fall within clause 1 of Schedule 3 of the *Development Regulations*, which exempts from "development" the

commencement of an advertising display containing advertisements of the nature listed in that clause. The term "advertising display" is not defined either in the Act or Schedule 1 to the Regulations. However, given that the signs on the subject land are visible from Commercial Road, they must fall within the meaning of "advertisement".

82 The signs do not fall within any of the paragraphs of clause 1, except possibly, paragraph (f). Under this paragraph, a sign that relates to an event of a political character will not be development if the total signage area of all signs of that kind displayed on the site is no more than 2m². It is clear from the evidence presented to the Court that the signs generally do not, and possibly have never, fallen into this category; that is that the total area of messages on all boards and shade cloth is 2m² or less.

83 I find that the acts and activities of the respondents are not exempt from the meaning of "development" by Schedule 3, clause 1. By virtue then of Schedule 2, clause 7, on each occasion the respondents commenced to display a sign, but not when they changed the contents of the sign, they commenced development.

The power of the Court to grant the orders sought

84 It was submitted on behalf of the respondents that what the Council is seeking from this Court is the equitable remedy of an injunction. Other submissions followed from this premise.

85 The premise is false. The right of a Council to apply to the Court is set out in s 85 of the *Development Act*. Nowhere in s 85, or indeed in the Act itself, is "injunction" mentioned. Historically, the equitable remedy of injunction was available essentially to protect a person's proprietary rights. The injunction as equitable remedy remains available for appropriate cases.

86 In the latter half of the 20th Century, parliaments have empowered authorities and other persons to apply to a Court to obtain an injunction to restrain a breach of legislation. These are generally known as statutory injunctions and sometimes public interest injunctions, and are most often found in modern regulatory and consumer protection legislation: See Young, Croft & Smith *On Equity* (2009 Thompson Reuters) at 1034. In some cases, the legislation uses the word "injunction": for example, see the *Trade Practices Act* 1974 (Cth). In other legislation, such as the *Environmental Planning and Assessment Act* 1979 (NSW) and the *Development Act* 1993 (SA), the word "injunction" is not used, but rather a person may apply to the relevant Court "for an order to remedy or restrain a breach" of the relevant legislation. In the cases of these Acts, the power of the Court is sometimes generally referred to as the power to grant an order in the nature of an injunction.

- 87 In the case of statutory injunctions or orders in the nature of injunctions, the remedy which a Court is empowered to grant takes its content from the terms of the legislation: See *Re ICI Australia Pty Ltd and the Trade Practices Commission* (1992) 38 FCR 248. In general terms, the power to grant a statutory injunction or order in the nature of an injunction empowers the Court to give a remedy in many cases where none would have been available in a Court of Equity: *Cardile v LED Buildings Pty Ltd* (1999) 198 CLR 380 at 394.
- 88 It is clear from the terms of s 85 that the Court has a discretion as to whether to grant the remedy sought, after hearing at least the applicant and the respondent, and being satisfied, on the balance of probabilities, that the respondent has breached the Act: See s 85(6). Reference to a breach of the Act includes a reference to a contravention or threatened contravention of the *Development Act*: s 83.
- 89 In *Sydney City Council v Building Owners and Managers Assoc. of Australia Ltd* (1985) 2 NSWLR 383, the New South Wales Court of Appeal heard an appeal from the decision of the Land and Environment Court granting orders against the Sydney City Council pursuant to s 123 of the *Environmental Planning and Assessment Act* 1979. One of the submissions on behalf of the Sydney City Council was that "breach" essentially meant something attracting criminal sanction (and argued that the Council had not undertaken any criminal act). Mahoney J (with whose reasons the other judges agreed) noted that the term "breach" was given a particular or extended meaning by s 122. That section decreed that a reference to a breach of the Act was a reference to a contravention of, or failure to comply with the Act. His Honour did not think that a contravention of, or failure to comply with an Act, carried with it the connotations of criminal consequences: *Sydney City Council v Building Owners and Managers Assoc. of Australia Ltd* (above) at 387. Section 123 of the *Environmental Planning and Assessment Act* provides a right to apply to the relevant Court for an order, as with s 85 of the *Development Act*. Section 122 of the New South Wales Act has its equivalent in s 83 of the *Development Act*.
- 90 The further submission on behalf of the respondents was that the Court must be satisfied beyond reasonable doubt as to the offending nature of the behaviour or activities of the respondents. That clearly is not so, as a reading of s 85(6) reveals. The Court has only to be satisfied on the balance of probabilities that a respondent to an application has contravened or threatened to contravene the Act.
- 91 The respondents referred to the High Court judgment in *Cooney v Kuringai Corporation* (1963) 114 CLR 582. That was a case of an injunction sought by a Council in 1963 to restrain the defendants from using their land and premises contrary to the zoning under a Planning Scheme Ordinance, without permission. The application was not brought pursuant to a right under any legislation, and thus is not relevant to the matter before the Court.

92 It was asserted that the Council is seeking an injunction to enforce criminal law, with reference to s 74 of the *Development Act*. Section 74 empowers the Council to issue an order requiring specified action to be taken where in its opinion an advertisement or advertising hoarding disfigures the natural beauty of a locality or otherwise detracts from the amenity of the locality, subject to certain exceptions, whether or not a development authorisation has been granted for the advertisement or advertising hoarding. The person to whom an order has been directed has a right of appeal under s 74, but will be guilty of an offence if he or she fails to comply with the notice within the time allowed (s 74(3)).

93 Section 74 empowers the Council to take action, if it forms the requisite opinion in relation to an advertisement or advertising hoarding, within the meaning of the Act. It is not of itself, a criminal provision. While I accept that in general terms, a court of equity was unlikely to grant an injunction where there was an alternative form of proceeding available, I do not accept that a Council must first proceed under s 74 before or in preference to applying for an order under s 85 of the Act. However, the opportunity available to the Council under s 74 may be a relevant consideration by the Court in the exercise of its discretion as to whether to make the orders sought.

94 The remaining argument to be addressed is the constitutional argument. It is not strictly necessary for me to address this argument, having regard to my conclusions in relation to whether the acts and activities on the site constitute development. However, in deference to the submissions, I will deal briefly with it.

The constitutional argument

95 In a notice issued pursuant to s 78B of the *Judiciary Act* 1903 (Cth), the respondents contended that s 85 of the *Development Act* was invalid insofar as it contravened their implied freedom of political communication, having contended that their sole purpose in displaying the messages on the site was to exercise their freedom of expression in relation to political matters. The Attorney-General for South Australia intervened in the proceedings pursuant to s 78A of the *Judiciary Act* to put submissions in support of the validity of s 85 of the *Development Act*.

96 As I have said earlier in these reasons, many of the messages displayed on the boards and banners on the site have been directed towards political and governmental matters. Thus, some, if not many of the messages have been political communications. There is a freedom of political communication implied from the Commonwealth Constitution; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Coleman v Power* (2004) 220 CLR 1.

97 Section 85 of the *Development Act* is a provision empowering this Court to make orders where the Court has been satisfied on the balance of probabilities, that the respondent has breached or contravened the Act. It follows that on occasion, it may be open to the Court to make an order against a respondent, the

effect of which will be to burden communication about political matters or to prevent a particular form of communication concerning political matters.

98 Section 85 does not directly restrict political communication. While that may be the impact of its exercise in a particular case, it exists as a machinery provision available to enforce the law set out in the *Development Act*. It is a means by which the Act, and in particular the restrictions therein, may be maintained and enforced.

99 The *Development Act* has as its objects, the proper, orderly and efficient planning and development within the State of South Australia. Section 85 is designed to serve this object by empowering this Court to restrain development undertaken contrary to the Act and therefore, contrary to proper or orderly planning or development.

100 It is clear in this case that an order made under s 85 would likely result in a cessation of activities detrimental to the amenity of the locality. The result of an order may also be improved safety for motorists and passers-by but I make no finding on that.

101 The control of development is in the public interest for reasons of amenity and safety, to name but two. Section 85 exists for the purpose of achieving this end and thus the objects of the Act, along with other enforcement provisions in the *Development Act*. It follows that s 85 of the Act is reasonably appropriate and adapted to serve a legitimate end.

102 Section 85 is not invalid as contravening the implied constitutional freedom of political communication.

103 Finally, I note in passing that the *Development Act* makes particular allowance for communication on political matters. It is open to a person to communicate concerning political matters by means of signs without obtaining development approval, provided the signs fall within the limits set out in clause 1 (Advertising displays) of Schedule 3 (Acts and activities which are not development) of the Development Regulations.

Conclusion

104 On the balance of probabilities, that the respondents have breached the *Development Act* by undertaking acts and activities, which are not exempted from development, without that development being authorised under the *Development Act*. It is appropriate that an order or orders be made to remedy or restrain the breach. It is submitted by the respondents that the orders sought, in proposed orders 1 and 2, are simply too wide, and that there are problems with the form of the orders sought in proposed orders 1 and 2.

105 I will hear the parties as to the appropriate form of order or orders.

RECORD OF OUTCOME

Outcome Type: Reserved Judgment Delivered

Court of Origin: **Supreme Court of South Australia**

Action Number: SCCIV-10-237

Between: Barry John BECKER, Appellant 1: Jeanette Patricia INGLIS, Appellant 2

AND CITY OF ONKAPARINGA, Respondent

AND ATTORNEY-GENERAL OF SOUTH AUSTRALIA, Other Party

14.10.2010 Reserved Judgment Delivered (Finalising)

- 1 That the appeal be dismissed.
- 2 That the appellants pay the costs of the first respondent and of the second respondent of the appeal.

For Appellant 1, 2 : Mr J Keen with Mr S Langsford

For Respondent 1 : Mr M Roder SC

For Other Party 1 : Mr M Wait

Full Court:

The Honourable Chief Justice Doyle

The Honourable Justice Duggan

The Honourable Justice Bleby

14.10.2010 9:26am - 9:29am

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

BECKER & ANOR v CITY OF ONKAPARINGA & ANOR

[2010] SASCF 41

Judgment of The Full Court

(The Honourable Chief Justice Doyle, The Honourable Justice Duggan and The Honourable Justice Bleby)

14 October 2010

**ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING -
DEVELOPMENT CONTROL - WHEN CONSENT REQUIRED -
MEANING OF DEVELOPMENT**

**ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING -
PLANNING OFFENCES - CHANGE OF USE WITHOUT CONSENT**

Appeal from the Environment Resources and Development Court – appellants found to have breached s 32, Development Act 1993 in displaying messages on signs without development approval – Environment Court ordered the signs be removed pursuant to s 85 – whether signs reasonably incidental to residential use of land – whether display of signs constituted a change of use in land – whether signs constituted the display of an advertisement.

Held: the display of the signs not reasonably incidental to residential use of land and constituted a change of use – signs properly constituted advertisements requiring development approval.

**CONSTITUTIONAL LAW - OPERATION AND EFFECT OF THE
COMMONWEALTH CONSTITUTION - RESTRICTIONS ON
COMMONWEALTH AND STATE LEGISLATION - RIGHTS AND
FREEDOMS IMPLIED IN COMMONWEALTH CONSTITUTION -
FREEDOM OF POLITICAL COMMUNICATION**

First Appellant: BARRY JOHN BECKER Counsel: MR J KEEN WITH MS K CLARK - Solicitor: LANGSFORDS SOLICITORS

Second Appellant: JEANETTE PATRICIA INGLIS Counsel: MR J KEEN WITH MS K CLARK - Solicitor: LANGSFORDS SOLICITORS

First Respondent: CITY OF ONKAPARINGA Counsel: MR M RODER SC - Solicitor: NORMAN WATERHOUSE

Second Respondent: ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA Counsel: MR M WAIT - Solicitor: CROWN SOLICITOR (SA)

Hearing Date/s: 07/09/2010

File No/s: SCCIV-10-237

A

Whether s 85, Development Act in its terms, operation and effect impermissibly interfered with the implied freedom of political communication – consideration and application of the test in *Lange v Australian Broadcasting Corporation* – consideration of the applicability of Canadian cases – whether signs constituted political communication – whether that communication was burdened – whether burden was reasonably appropriate and adapted to a legitimate end

Held: the order of the Judge pursuant to s 85 effectively burdened political communication – the burden imposed was reasonably appropriate and adapted to the legitimate end of ensuring compliance with s 32 – appeal dismissed.

Development Act 1993 (SA) s 4, s 32, s 74, s 85; *Development Regulations 1993* (SA) Sch 2 cl 7, Sch 3 cl 5; *Development Regulations 2008* (SA) Sch 2 cl 8, Sch 3 cl 1, 5; *Local Government Act 1999* (SA) s 254, s 258, Ch 11 Part 2 Division 6; *Acts Interpretation Act 1915* (SA) s 14; *Local Government (Elections) Act 1999* (SA); *Electoral Act 1985* (SA); *Constitution* (Cth); *Broadcasting Services Act 1992* (Cth) s 12, s 131-136; *Telecommunications Act 1997* (Cth) s 42, referred to.

Lange v Australian Broadcasting Corporation (1996) 189 CLR 520, applied.

R v Guignard (2002) 209 DLR (4th) 549; *Commonwealth v Bank of New South Wales* [1950] AC 235; *Cole v Whitfield* (1988) 165 CLR 360, distinguished.

Levy v State of Victoria (1997) 189 CLR 579, discussed.

Becker v City of Onkaparinga (2005) 242 LSJS 418; *Corporation of the City of Noarlunga v Usher* (1981) 29 SASR 109; *Corporation of the City of Noarlunga v Fraser* (1986) 42 SASR 450; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *McGinty v Western Australia* (1996) 186 CLR 140; *Cunliffe v Commonwealth* (1994) 182 CLR 272; *Coleman v Power* (2004) 220 CLR 1; *Roberts v Bass* (2002) 212 CLR 1; *Mulholland v Australian Electoral Commissioner* (2004) 220 CLR 181; *Roach v Electoral Commission* (2007) 233 CLR 162, considered.

WORDS AND PHRASES CONSIDERED/DEFINED

"advertisement"

BECKER & ANOR v CITY OF ONKAPARINGA & ANOR
[2010] SASCF 41

Full Court: Doyle CJ, Duggan and Bleby JJ

- 1 **DOYLE CJ.** I would dismiss the appeal. I agree with the reasons of Bleby J for so deciding.
- 2 **DUGGAN J.** I would dismiss the appeal. I agree with the reasons prepared by Bleby J.

BLEBY J.

Introduction

- 3 This is an appeal from a decision of a Judge of the Environment, Resources and Development Court ("the Environment Court").¹ The appellants, Mr Becker and Ms Inglis, were found to have breached s 32 of the *Development Act 1993* (SA) ("the Act") by changing the use of a piece of land that they own jointly, and thereby undertaking development, without development approval. The change of use was the commencement of a continuing display of written messages to the public from their land. A further breach found was that they undertook an act or activity declared by regulation to constitute development without development approval. The act or activity was the commencement of the display of an advertisement.

- 4 The appellants displayed messages, many of which were political in content, on boards, blackboards and shade cloth on the land without development approval. Because they were found to have breached s 32 of the Act by displaying these messages, the Judge ordered that the appellants remove all signs displayed on the land. The Judge also ordered that the appellants cease using the land for the display of signs or messages to the public, and that the appellants be restrained from using the land for the display of such signs or messages to the public without development approval.

- 5 By their notice of appeal the appellants contend that Judge erred in a number of respects. First, the appellants submit that the Judge erred in finding that their use of the land to display political and other messages on the blackboards and shade cloth was not reasonably incidental to their residential use of the land. Secondly, they submit that she erred in finding that the display of the blackboards and shade cloth with messages written on them had a detrimental impact on the amenity of a part of the locality near to the land. This point was abandoned on the hearing of the appeal. Thirdly, the appellants allege that the Judge erred in failing to find that their activities on the land fell within the definition of "home activity" in clause 5(2) of Schedule 3 of the *Development Regulations 1993* (SA). This point was also abandoned at the hearing. Fourthly,

¹ *City of Onkaparinga v Becker* [2010] SAERDC 1.

they allege that the Judge erred in finding that the appellants' conduct amounted to the display of "advertisements" or "signs" within the meaning of clause 7 of Schedule 2 of the *Development Regulations 1993*, even though the messages displayed concerned government and political matters. Fifthly, they allege that the Judge erred in failing to apply the powers of the Court under s 85 of the Act in a manner consistent with the implied constitutional freedom of political communication. A suggestion that s 85 of the Act itself infringed the implied constitutional freedom was not pursued on the appeal.

- 6 The Judge in her reasons and the grounds of the appeal refer to the *Development Regulations 1993*. Those regulations were replaced by the *Development Regulations 2008*. The conduct of the appellants and the conduct of the proceedings covered both sets of regulations. So far as is material to this action both sets of regulations, save for some renumbering, are in identical terms. However, as the actual orders made by the Judge have continuing effect and refer to the 2008 Regulations, I will refer only to those regulations and will refer to them as "the 2008 Regulations".

The Facts

- 7 Mr Becker and Ms Inglis jointly own a piece of land located in Port Noarlunga South. The suburb of Port Noarlunga South is part of the City of Onkaparinga ("the Council"), the first respondent.
- 8 The appellants purchased the land and the dwelling located on it in early 2002. They have been living together in the dwelling on the land since that time. Not long after they began residing in the dwelling, the appellants started displaying messages on boards, blackboards and shade cloth on the land. These were positioned so that the messages could be seen by road users. They have continued to display messages that are visible from the road.
- 9 The land fronts onto the western side of Commercial Road. It has a frontage of 19.2m. Commercial Road runs in a north-south direction. It is a two-lane, dual carriageway road that has a bicycle lane and a parking strip on each side. It apparently carries high volumes of traffic. The land on the western side of Commercial Road, where the appellants' land is located, is residential in nature. It comprises allotments with detached dwellings which front onto Commercial Road. The land on the eastern side of Commercial Road, opposite the appellants' land comprises a large, flat area of vacant land. The appellants' dwelling is set back about 9 metres from the western side of Commercial Road. It is in this space, between the dwelling and the western side of Commercial Road, that the messages were displayed. No fence separates the land and the western side of Commercial Road.
- 10 The messages were written on large blackboards, cardboard and shade cloth. The messages on the blackboards and pieces of cardboard were written in

white or coloured chalk. The messages on the shade cloth were either painted or chalked on. The Judge found that:²

...Some of the shade cloth is attached to the upper part of the verandah of the dwelling so as to partially shade the verandah, and was in existence when the [appellants] purchased the property. In about 2004, the [appellants] made shade cloth panels to fit between the verandah posts in the lower part of the verandah and installed them so as to provide complete shade for the east facing verandah. In addition, separate pieces of shade cloth each containing a message have been displayed on the subject land like banners, suspended between trees growing on the subject land or a tree and a verandah post of the dwelling.

- 11 Overall, the Judge found the boards and banners to be “generally large, with some being substantial.”³ It is clear that the messages were visible from the road.

- 12 The messages related mainly to political and government matters, although in October 2007 some boards displayed messages promoting certain commercial operations. As the Judge found:⁴

...Generally, the messages seem to have been communications or comments by the respondents concerning individual politicians at all levels of government, the local council, political and government matters generally. Some of the signs have promoted particular causes (“save Aldinga scrub and public space”) and others promoted the respondent Mr Becker’s political ambitions.

- 13 The content of the messages changed from time to time. Further, the blackboards and cardboard were not fixed in place and were moved about. However, at any one time quite a number of messages were displayed on either blackboards or cardboard in addition to the messages on the verandah shade cloth and, sometimes, the shade cloth banners. For the purpose of simplicity, I will refer to the blackboards, cardboard and shade cloth collectively as the signs.

- 14 The messages displayed were often expressed in crude or derisive language. The appellants explained that their reason for displaying the messages on the signs was to promote discussion within the community about government or political issues that are of “very real concern” to members of the community. They believe that most political discussion takes place in an artificial environment and that, as such, the opinions expressed are not conveyed “adequately or effectively to ordinary Australian people”. For this reason, they believe that it was necessary and appropriate to use the language that they did.

- 15 The Council became aware that the appellants were displaying messages on signs on the land in about June 2002. Between June 2002 and December 2003 the Council made a number of requests to the respondents to cease displaying signs on the land. In early 2004 the Council issued an order to Mr Becker and Ms Inglis pursuant to s 254 of the *Local Government Act 1999* (SA). In February

² [2010] SAERDC 1, [14].

³ Ibid [18].

⁴ Ibid [15].

2004 that order was withdrawn and a fresh order was issued under that section. The order prohibited Mr Becker from placing any hoardings, blackboards, signs, structures or similar objects on the land so as to be visible from Commercial Road. Mr Becker did not comply with that order.

16 In May 2004 the Council commenced criminal proceedings against Mr Becker under s 258 of the *Local Government Act 1999* (SA) for contravention of the order issued pursuant to s 254. Mr Becker was convicted on each of the five counts of contravention of the order. He appealed to the Full Court of the Supreme Court. The appeal was allowed and each of the convictions was set aside.⁵ In August 2006 these proceedings were commenced. Following this, the respondents made an application for development approval to allow them to display the signs on the land. The Council refused to grant development approval.

17 On 18 January 2010 the Judge found that the respondents had contravened the Act by undertaking acts or activities not exempted from development without development approval. The respondents appeal against that decision and the orders made by the Judge on 2 February 2010.

The Judge's Findings

18 In relation to the issues which remain in dispute on this appeal, the Judge found that the display of the signs was not part of the appellants' normal residential use of their home. From this finding it followed that the appellants had changed the use of the land, which in turn meant that they had undertaken "development" within the meaning of s 4 of the Act. Because they had undertaken this development without approval, the Judge found that the appellants had breached s 32 of the Act.

19 The Judge also found that the meaning of "sign" in the defined term "advertisement" in s 4 of the Act encompasses the signs containing the messages displayed on the land by the appellants. According to the Judge, this meant that pursuant to clause 8 of Schedule 2 of the 2008 Regulations, the commencement of the display of any sign, regardless of its content, is development which requires consent. Clause 1 of Schedule 3 of the 2008 Regulations did not operate to exempt the display of the signs from the meaning of "development" in the Act. The fact that signs were largely political in nature did not bring them within clause 1(f) of Schedule 3 as the Judge found that the signs generally had a total area of greater than 2m². It followed that each time the appellants had commenced to display a sign, but not when they changed the contents of a sign, they had commenced development for the purposes of the Act.

20 Finally, the Judge also rejected the argument put on behalf of the appellants at trial that s 85 of the Act was invalid insofar as it infringed on their implied

⁵ *Becker v City of Onkaparinga* [2005] SASCF 428; (2005) 242 LSJS 418.

constitutional freedom of political communication. The Judge found that the control of development is in the public interest for reasons of amenity and safety, that the object of the Act was to enable the proper, orderly and efficient planning and development in South Australia, and that therefore s 85 of the Act is reasonably appropriate and adapted to serve a legitimate end. On appeal, the appellants modified their argument on this point. Rather than seeking to challenge the validity of s 85 of the Act, the appellants' sought to argue that the power conferred by s 85 was limited by the constitutional freedom. In other words, the Court, in exercising its power under s 85 of the Act must do so in a manner that is consistent with the implied freedom of political communication. According to the appellants, the orders made by the Judge impermissibly restrict the appellants' ability to express their political views.

Whether there was a change of use of the land

21 Section 4 of the Act defines development as including:

...

(b) a change in the use of land;

... but does not include an act or activity that is excluded by regulation from the ambit of this definition;

22 It was common ground that, prior to the appellants occupying the land, the land had been used for residential use only. No signs had been displayed by the previous owners or occupiers. The regular and continuous display of signs of the size and number in question from the property was therefore a change of use in the land.

23 The appellants argued that the display of the signs was excluded from the definition of development by Regulation 7 of the 2008 Regulations, which excludes from the definition of development an act or activity specified in Schedule 3. Schedule 3, clause 5(1) of the 2008 Regulations relevantly provides:

5—Use of land and buildings

(1) The use of land and the use of any lawfully-erected building which is ordinarily regarded as (and is in fact) reasonably incidental to any particular use of the land and the building, or the land or the building, and which is for the substantial benefit of the person or persons who, in any capacity, are making use of the land and the building, or the land or the building.

24 From that it can be seen that there are three criteria which must be met. The use must be "ordinarily regarded" as reasonably incidental to any particular use of the land and/or building; it must in fact be reasonably incidental to such use; and it must be for the substantial benefit of the person or persons making use of the land and/or building.

25 The Environment Court Judge had little difficulty in concluding that the display of the signs was for the substantial benefit of the appellants as occupiers of the land. I would not disagree. The appellants have views on government and political matters that they want to express. The signs were their chosen means of expressing those views so that passing members of the public would be aware of them. That was to the benefit of the appellants.

26 The appellants argued that the public expression of views on government and political and other like matters of community concern is a normal and ordinary activity of an articulate citizen or occupier of residential premises. So be it. What the Environment Court was concerned with was not the fact of such articulation but the manner of doing so and whether the manner chosen by the appellants was ordinarily regarded as reasonably incidental to the residential use of the land or the building on it or both.

27 Wells J in *Corporation of the City of Noarlunga v Usher*⁶ said of the phrase "ordinarily regarded... as reasonably incidental" that it "emphasises the character of the *res*, rather than its incidence within the community". That means that one must pose the question whether the display of material of this nature, from a residential property is ordinarily regarded as reasonably incidental to the use of residential land. Obviously, many signs of an informative nature will be so regarded, such as the name of a house, and a land agent's "For Sale" sign. Such signs are directly related to and therefore incidental to the use of the land and building as a residence. Other signs of a temporary or seasonal nature, such as an illuminated Christmas message, may also be so regarded.

28 There are cases which accept that the pursuit of what has been described as a hobby, such as amateur radio transmission involving the use of an external antenna⁷ and the construction of a steel hulled yacht in the back yard of a house⁸ are regarded as reasonable incidental to the use of residential land. But just because an activity may be regarded as a hobby by the appellants does not mean that it is, by that fact, a permitted incidental use.

29 What is relevant to the assessment in this case is not only the nature of the messages being conveyed by the appellants but the fact that the messages were being conveyed by means of signs on residential property, the content of the signs, the nature of the signs, their size, number and method of display and their visual impact.

30 The Judge was correct in concluding that the display of signs of this nature and character is not ordinarily regarded as being reasonably incidental to the residential use of land. The Judge had also found, which is not now disputed by the appellants, that the signs had a detrimental impact on the character and

⁶ (1981) 29 SASR 109, 116.

⁷ *Corporation of The City of Noarlunga v Usher* (1981) 29 SASR 109.

⁸ *Corporation of The City of Noarlunga v Fraser* (1986) 42 SASR 450.

amenity of part of the locality. Activities which, because of their nature and effect, have that type of impact will seldom be regarded as being reasonably incidental to the residential use of land in a locality which comprises predominantly detached dwellings on individual allotments and which locality is predominantly residential in character.

- 31 The activity did not come within the exclusion specified in item 5(1) of Schedule 3 of the 2008 Regulations. It therefore amounted to a change of use for which development approval was required.

Whether the signs constituted the display of an advertisement or sign

- 32 Section 4 of the Act defines development as also including:

- (h) An act or activity in relation to land (other than an act or activity that constitutes the continuation of an existing use of land) declared by regulation to constitute development,

... but does not include an act or activity that is excluded by regulation from the ambit of this definition;

- 33 Regulation 6 of the 2008 Regulations provides that an act or activity in relation to land specified in Schedule 2 is declared to constitute development. Schedule 2 specifies the following as constituting development:

- 8 Other than within the City of Adelaide, the commencement of the display of an advertisement, but not including a change made to the contents of an existing advertisement if the advertisement area is not increased.

- 34 The expression "advertisement" is defined in the Act,⁹ and therefore for the purposes of the 2008 Regulations,¹⁰ as meaning "an advertisement or sign that is visible from a street, road or public place or by passengers carried on any form of public transport".

- 35 The question is therefore whether any or each of the signs in question was "an advertisement or sign". There was no question but they were visible from a street, road or public place, namely Commercial Road, Port Noarlunga South.

- 36 The appellants submitted that the expression "advertisement" is to be construed narrowly as a display with some commercial purpose. I disagree. The ordinary concept of advertisement is not limited to commercial advertising. It is commonplace to encounter political advertising, religious advertising and advertising by particular interest groups of their social or political views. All such will be encompassed by the common understanding of "advertisement" that is, the display of a message to the public.

⁹ Section 4.

¹⁰ *Acts Interpretation Act 1915* (SA), s 14.

37 The breadth of that expression is recognised by s 74 of the Act which deals with the regulation of advertisements. Subsection (1) enables the Development Assessment Commission or a council to order “the advertiser or the owner or occupier of the land” on which an advertisement or advertising hoarding is situated, in certain circumstances, to remove or obliterate the advertisement or to remove the hoarding. Subsection (2) provides for a number of exclusions from the operation of subs (1). They include an advertisement the display of which is authorised under the *Local Government Act 1999* (SA), under the *Local Government (Elections) Act 1999* (SA) or the *Electoral Act 1985* (SA). Chapter 11, Part 2, Division 6 of the *Local Government Act* enables the regulation by a council of moveable signs on a road. The Division is not limited to commercial advertising signs but to any signs. The signs authorised under the *Local Government (Elections) Act* and the *Electoral Act* are not commercial advertising signs. The very fact that those exceptions exist in s 74(2) is a clear indication that the expression “advertisement” as defined in the Act does not have the limited meaning intended for by the appellants, but rather that it has an expansive and all-encompassing meaning from which exclusions are necessary for the purpose of s 74(1).

38 The appellants submitted that their narrow interpretation of the word gained support from the definition in s 4 of the Act of “advertiser” which “in relation to an advertisement, means the person whose goods or services are advertised in the advertisement”. However, such support cannot be gained merely from the definition of the word “advertiser”. If it is to be found at all it will be found from the context in which the word is used. The only occasion on which the word “advertiser” is used is in s 74(1) of the Act which empowers the Development Assessment Commission or a council to serve notice on the advertiser or the owner or occupier of land on which an advertisement or hoarding is situated to obliterate the advertisement or remove the hoarding. The inclusion in the class of persons who may be required so to act of the owner or occupier of land is to cover the situation where the advertiser cannot be identified from the advertisement or where there is no advertiser, as defined, evident from the advertisement. Reference to the definition of “advertiser” therefore does not assist the appellants.

39 The word “sign” used in the definition of “advertisement” is not defined in the Act. The fact that that word is used as part of an inclusive definition along with the word “advertisement” in its ordinary meaning means that the definition of “advertisement” has the widest possible coverage. The appellants attempted to confine the meaning of the word “sign” by reference to the use of the word in the 2008 Regulations. That word cannot be limited in its meaning by purported limitations applicable to the same word contained in some parts of the 2008 Regulations.

40 Schedule 2, clause 9 of the 2008 Regulations includes the display of certain signs within the City of Adelaide as constituting development for the purposes of

the Act. It applies only to the City of Adelaide, and the clause itself contains its own expansive definition of "sign" with certain exclusions. The definition is, however, limited to the purposes of that item. It can have no bearing on the interpretation of the word "sign" in the *Development Act*.

41 Schedule 3, clause 1 of the 2008 Regulations excludes from the definition of development the commencement of an advertising display containing an advertisement that comes within the number of categories then listed. It was not suggested that any of the signs in question came within any of those categories. The signs were therefore not excluded from the definition of "development" by virtue of the exclusion contained in the definition of development.

42 The signs in question were plainly designed to capture public attention. They were clearly visible from the street. That was the purpose of their display. The appellants therefore undertook the "development" on each occasion that they commenced the display of a new advertisement or sign. As they did not have development approval they committed an offence on each such occasion.

The implied freedom of political communication

43 The above conclusions are subject to one possible overriding defence argued by the appellants. They submitted that the Judge erred in not reading down the operation of s 85 so that it did not impermissibly interfere with the implied freedom of political communication. Implicit in this submission is the contention that s 85 is capable of being read as permitting an impermissible interference with the implied freedom. For the reasons which immediately follow, I consider the terms, operation and effect of s 85 do not impermissibly infringe the implied freedom of communication on matters of government and political concern. Consequently, the question of reading down the section does not arise.

44 The implied freedom of communication on matters of government and political concern arises as a necessary incident of the system of representative and responsible government established by the terms and structure of the *Constitution*.¹¹ The freedom is not absolute. It exists and operates only to the extent that which is necessary for the effective operation of the system of representative and responsible government established by the *Constitution*.¹² As Dawson J said of the *Constitution* in *Levy v State of Victoria*:

¹¹ *Lange v Australian Broadcasting Corporation* (1996) 189 CLR 520, 559.

¹² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51, 76-7, 94-5; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142-4, 159, 169, 217-8; *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 126; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 235; *McGinty v Western Australia* (1996) 186 CLR 140, 182; *Cunliffe v Commonwealth* (1994) 182 CLR 272, 336-7; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561; *Levy v State of Victoria* (1997) 189 CLR 579, 606, 617, 624, 644; *Coleman v Power* [2004] HCA 39, [89], [195], [292], [320]; (2004) 220 CLR 1, 48, 77, 110, 121

Sections 7 and 24, together with ss 1, 8, 13, 16, 25, 28 and 30, provide the minimum requirements of a system of representative government but do not purport to go significantly further.¹³

His Honour concluded that “[w]hat is clear is that the freedom does not rest upon an implication drawn from any underlying or overarching concept of representative government”.¹⁴ It is only the system that is established by the *Constitution* that requires protection and consequently the content of the freedom will be necessarily limited to that particular system.

- 45 Unlike that which is found in the *United States Constitution* or the *Canadian Charter of Rights and Freedoms* (“the Charter”), the freedom does not confer personal rights upon individuals.¹⁵ Rather, the implication arising from the *Constitution* operates as a limitation on executive and legislative power. As McHugh J said in *Levy v State of Victoria*:¹⁶

The freedom protected by the Constitution is not ... a freedom to communicate. It is a freedom from laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution.

[Original emphasis]

- 46 It is this very fundamental difference which has given rise to significant caution being expressed by the High Court in utilising jurisprudence from the United States and Canada.

The test in *Lange*

- 47 The test for determining whether an impugned law infringes the implied freedom of political communication is that propounded in the unanimous decision of *Lange v Australian Broadcasting Corporation*,¹⁷ as modified by four judges in *Coleman v Power*.¹⁸

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate

¹³ *Levy v State of Victoria* (1997) 189 CLR 579, 606.

¹⁴ *Ibid* 607.

¹⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *Levy v State of Victoria* (1997) 189 CLR 579, 625; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 48; *Roberts v Bass* [2002] HCA 57, [65]; (2002) 212 CLR 1, 26; *Coleman v Power* [2004] HCA 39, [89]; (2004) 220 CLR 1, 48.

¹⁶ *Levy v State of Victoria* (1997) 189 CLR 579, 622.

¹⁷ (1997) 189 CLR 520.

¹⁸ [2004] HCA 39; (2004) 220 CLR 1.

end [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.¹⁹

48 Counsel for the appellant submitted that the second limb of the *Lange* test, that which is primarily concerned with the phrase “reasonably appropriate and adapted, involved a “proportionality” test or “weighing up” exercise, in a similar approach to that taken by the Canadian courts. Particular attention was drawn to the comments of Toohey J in *McGinty v Western Australia*.²⁰ His Honour contrasted the reliance made by counsel in that case on decisions of the United States Supreme Court with those of the Canadian courts. His Honour considered the latter to be more relevant because of the common English history shared between Australia and Canada.²¹ However his Honour only considered the usefulness of Canadian jurisprudence with respect to interpreting the concept of a right to vote and the equality of the vote. It was in this context that his Honour considered the Canadian concept of a right to vote as being fundamental to the idea of a representative democracy. Dawson J likewise considered the United States historical context to be inapt as the “democratic traditions of both Canada and Australia find their origins in the English model rather than in rebellion against it as is the case in the United States.”²² Their Honours’ reliance on Canadian jurisprudence was limited to the extent of determining whether a right to vote was implied within the text and structure of the *Constitution* and is not an endorsement on the usefulness of Canadian authorities in general.

49 The freedom in the Australian context arises as an implication derived from the text and structure of the *Constitution*. In contrast, the freedom of communication in the Canadian context is a substantive personal right vested in individuals.²³ Article 1 of the Charter provides for the relevant test for whether a law infringes a freedom:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In applying article 1 of the Charter, the Supreme Court of Canada has held that this test requires the relevant government authority to demonstrate the following:

The goal of the impugned law must be pressing and substantial. The law must be proportionate to the goal in the sense of furthering the goal, being carefully tailored to

¹⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567. In *Coleman v Power*, McHugh J at [92]-[93], 50, Gummow and Hayne agreeing at [196], 78, Kirby J agreeing at [211], 82, suggested the words “in a manner” to replace “the fulfilment of”.

²⁰ (1996) 186 CLR 140.

²¹ *Ibid* 202-3.

²² *Ibid* 187.

²³ Article 2(b) relevantly provides “Everyone has the following fundamental freedoms: ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.

avoid excessive impairment of the right, and productive of benefits that outweigh the detriment to freedom of expression.²⁴

The right in the Canadian context not only derives from a fundamentally different source, the test established by the Charter is markedly different from that encapsulated by the High Court in *Lange*.

- 50 It is true that the High Court refers to a test of proportionality. In *Lange*, in formulating the “reasonably appropriate and adapted” test above, the Court said:

Others have favoured different expressions, including proportionality. In the context of the questions raised by the case stated, there is no need to distinguish these concepts.²⁵

- 51 In *Coleman v Power* Kirby J was particularly critical of the “reasonably appropriate and adapted” test:²⁶

I will never cease to protest at this ungainly phrase “appropriate and adapted”. Just imagine what non lawyers must make of it? It involves a ritual incantation, devoid of clear meaning. ... It is an unhelpful formula for distinguishing permissible from impermissible or inadequate constitutional connection. Indeed, it is misleading in so far as it suggests that a court is concerned with the “appropriateness” of legislation. That is entirely a matter for the legislature, so long as the law is within power. It is for this reason that I prefer the alternative formula of connection – of “proportionality”.

[Footnotes omitted]

Nevertheless, his Honour considered that it was not the occasion to resolve the debate, and proceeded on the basis that there was little difference between the two phrases.

- 52 It is one thing to say that the second limb of the *Lange* test is better served by the “proportionality” test, or indeed that “reasonably appropriate and adapted” is equivalent to “proportionality”. It is quite another to say that this is equivalent to the concept of proportionality considered in the Canadian context. The Canadian concept of “weighing up” is inconsistent with the approach taken by the High Court. As McHugh J said in *Coleman v Power*, it is not a question of balancing a legislative or executive end against the freedom:²⁷

The question is not one of weight or balance but whether the federal, State or territorial power is so framed that it impairs or tends to impair the effective operation of the constitutional system of representative and responsible government by impermissibly burdening communications on political or governmental matters.

²⁴ *R v Guignard* (2002) 209 DLR (4th) 549, 561-2.

²⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562.

²⁶ *Coleman v Power* [2004] HCA 39, [234]-[235]; (2004) 220 CLR 1, 90.

²⁷ *Ibid* 49.

Similarly, Brennan CJ in *Levy v State of Victoria* considered an analogy made with respect to the United States freedom of speech inapt:²⁸

The analogy is attractive unless the different criterion of validity under our Constitution is steadily kept in mind. Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose.

[Footnotes omitted]

The Canadian concept of proportionality expressly considers a weighing up of whether an impugned law is proportionate in achieving a particular goal ensuring that there is a minimum impairment of the particular right. However, in Australia, it is not open for a court to consider whether some more limited restriction, would be more appropriate.²⁹ Rather, the court must consider whether the impugned law is reasonably appropriate and adapted to achieving a legitimate end. The phrase "reasonably appropriate and adapted" does not equate to "essential" or "unavoidable".³⁰ As the High Court has repeatedly confirmed, the Canadian concept of proportionality comes from a fundamentally different context and it is unhelpful and incorrect to draw any reliance from it or the authorities that discuss it.³¹

- 53 Counsel for the appellant also referred to decisions of the High Court and the House of Lords which interpreted the guarantee contained in s 92 of the *Constitution*, in particular for support of the proposition that a total prohibition is not valid regulation in this context. Leaving aside the fact that this case does not deal with a total prohibition for the moment, the guarantee in s 92 is materially different from the implied freedom and has been met with a significantly different interpretative approach. As Dawson J in *Levy* said:³²

The Constitution does not erect a guarantee of freedom of communication in the same way as it erects a guarantee of freedom of interstate trade under s 92. There the freedom is expressed to be absolute and, faced with the impossibility of absolute freedom in that context, the Court is required to balance that freedom against those other interests in an ordered society which must be recognised by the law.

²⁸ *Levy v Victoria* (1997) 189 CLR 579, 598.

²⁹ *Coleman v Power* [2004] HCA 39, [39]; (2004) 220 CLR 1, 31; *Rann v Olsen* [2000] SASC 83, [184]; (2000) 76 SASR 450, 483.

³⁰ *Mulholland v Australian Electoral Commissioner* [2004] HCA 41, [39]; (2004) 220 CLR 181, 199-200, Gleeson CJ; *Roach v Electoral Commission* [2007] HCA 43, [85]; (2007) 233 CLR 162, 199, Gummow, Kirby and Crennan JJ.

³¹ *Mulholland v Australian Electoral Commission* [2004] HCA 41, [25], [325], [347]; (2004) 220 CLR 181, 194, 295, 301; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 105, 125, 157-163, 189-91.

³² *Levy v State of Victoria* (1997) 189 CLR 579, 607.

54 It is that “balancing” approach that led their Lordships in *Commonwealth v Bank of New South Wales* to consider that “simple prohibition is not regulation”.³³ Further, the decision of the House of Lords in 1950 must be read in light of the High Court’s decision in *Cole v Whitfield*³⁴ and subsequent cases, which substantially reformulated the test for whether a law infringed s 92. I do not consider that recourse can be had with respect to the cases discussing s 92 to assist in determining whether s 85 infringes the implied freedom. Section 92 establishes an explicit guarantee which, as the High Court authorities point out, necessarily merits a very different interpretive approach from a principle that is implied from the structure and text of the *Constitution*. It is therefore incorrect to conflate consideration of authorities that discuss s 92 with those that discuss the implied freedom.

Does the law effectively burden political communication?

55 Section 85 of the Act provides for the procedure for which breaches of the Act may be enforced including, relevantly for present purposes, a breach of s 32 requiring that developments obtain approval under the Act. In the present case the Judge made an order pursuant to s 85(6)(c) which relevantly provides that the Court, if satisfied after a hearing that a respondent has breached the Act, may, by order “require the respondent to refrain, either temporarily or permanently, from the act, or course of action, that constitutes the breach”.

56 No challenge has been made with respect to the substantive provision that gives rise to the Court’s jurisdiction to make such an order, namely s 32 of the Act. Consequently no argument was put that a requirement, if it was a requirement, that the respondents seek development approval for the erecting of the signs was an impermissible burden on the freedom. Rather the appellants’ argument was that the effect of the orders which the Judge made pursuant to s 85 in response to a breach infringed the freedom. This presents rather a curious situation whereby the enforcement, or “mechanism”, provision is under attack rather than the substantive law which provides the basis for the offence. It is akin to challenging the powers vested in a Court to impose a sentence while ignoring the provision which establishes the crime. This is of significance in determining what needs to be considered with respect to the test enunciated in *Lange*.

57 Even if the refusal to grant development approval in respect of the signs were under attack, it would be difficult to see that s 32 and the associated provisions of Part 4, Division 1 of the Act would not meet the second limb of the *Lange* test. The legitimate end for which those provisions are reasonably appropriate and adapted is to ensure that the display of all signs and advertisements, whether or not they are about government or political matters, is done in a manner which complies with desired objectives and principles of

³³ *Commonwealth v Bank of New South Wales* [1950] AC 235, 311.

³⁴ (1988) 165 CLR 360.

providing for proper, orderly and efficient planning and development in the State. As can be seen from the provisions of Part 4, Division 1 of the Act and the several Development Plans to which they give effect, that process involves consideration of a wide range of matters including visual amenity and public safety.³⁵

58 I turn now to the test in *Lange*, in which the first question to be asked is “does the law effectively burden freedom of communication about government or political matters either in its term, operation or effect?”

59 Counsel for the respondents properly conceded that the signs involved communication about government and political matters as contemplated by the freedom. This concession was in light of the fact that the various messages related to issues relating to Federal, State and local government, to which the High Court has considered the freedom extends.³⁶ The messages concern various matters from the conduct of public officials, councils and politicians, to reform with respect to child sex offences and to matters involving the Federal Government’s international relations record. The tone of these messages is often quite florid and emotional, however this cannot be said to detract in any way from their nature as communication on political matters. The freedom “protects false, unreasoned and emotional communications as well as true, reasoned and detached communications”.³⁷

60 Similarly it was common ground that the effect of the order was to burden political communications. Whilst it cannot be said that s 85 is designed to burden political communications, the effect of the Judge’s order is that the appellants can no longer lawfully erect the signs that they previously had erected, at least in the manner in which they had previously done so.

61 Consequently the appellants satisfy the first limb of *Lange* test, namely that the effect of the order of the Judge pursuant to s 85 effectively burdens communication about government and political matters.

Is the law reasonably appropriate and adapted to serve a legitimate end?

62 Turning to the second limb, it is important first to ascertain the “legitimate end” that the operation of s 85 serves. As mentioned above, s 85 is in the nature of an enforcement provision, vesting the Environment Court with various powers with respect to breaches of the Act. The relevant breach in this case is a breach of s 32 providing that no development may be undertaken unless the

³⁵ See *Coleman v Power* [2004] HCA 39, [32], [296]; (2004) 220 CLR 1, 32, 111.

³⁶ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 216; *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211, 232, 257; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571-2; *Coleman v Power* [2004] HCA 39, [80], [229]-[232]; (2004) 220 CLR 1, 45, 88-9.

³⁷ *Levy v State of Victoria* (1997) 189 CLR 579, 623. See also *Coleman v Power* [2004] HCA 39, [197]; (2004) 220 CLR 1, 78.

development is an approved development. Proceedings under s 85 can be brought by "any person".³⁸ Sub-section (6) provides:

- (6) If-
 - (a) after hearing-
 - (i) the applicant and the respondent; and
 - (ii) any other person who has, in the opinion of the Court, a proper interest in the subject matter of the proceedings and desires to be heard in the proceedings,

the Court is satisfied, on the balance of probabilities, that the respondent to the application has breached this Act or a repealed Act; or

- (b) the respondent fails to appear in response to the summons or, having appeared, does not avail himself or herself of the opportunity to be heard,

the Court may, by order, exercise any of the following powers:

- (c) require the respondent to refrain, either temporarily or permanently, from the act, or course of action, that constitutes the breach;
- (d) require the respondent to make good the breach in a manner, and within a period, specified by the Court, or to take such other action as may appear appropriate to the Court;
- (e) cancel or vary any development authorisation (other than an authorisation granted by the Governor);
- (f) require the respondent to pay to any person who has suffered loss or damage as a result of the breach, or incurred costs or expenses as a result of the breach, compensation for the loss or damage or an amount for or towards those costs or expenses;
- (g) if the Court considers it appropriate to do so, require the respondent to pay an amount, determined by the Court, in the nature of exemplary damages—
 - (i) if the applicant is a council and the Crown has not become a party to the proceedings—to the council;
 - (ii) in any other case—into the General Revenue of the State.

⁶³ The legitimate end which s 85 serves is the compliance with various sections of the Act. In the present circumstances, as the Judge noted,³⁹ s 85 empowers the Environment Court to restrain development undertaken contrary to the Act. It is not expressly directed at political communication. Rather, it is directed at ensuring general compliance with the provisions of the Act, and providing remedies should a breach be properly established.

³⁸ Section 85(1).

³⁹ *City of Onkaparinga v Becker* [2010] SAERDC 1, [99].

64 As I have noted earlier, there is no challenge to s 32 or the action taken under it. Consequently it is not necessary to consider in resolving this appeal, whether a requirement that all development be approved under the Act or any particular approval process itself, could properly be considered "reasonably appropriate and adapted". Rather it is for this Court to consider whether the terms, operation and effect of s 85 are "reasonably appropriate and adapted" in enforcing the requirement of, in this case, s 32 that no development be undertaken without approval.

65 Sub-section (6) provides for a hearing on the merits of the application whereby the entity accused of breaching the Act is afforded a right to be heard. The Environment Court must evaluate whether a breach is established on the balance of probabilities. If the Court considers that a breach has occurred, various orders can be made. In the present case, the appellants were ordered to remove all signs displayed on the land by a certain date, were restrained from erecting further such signs and were ordered to pay the Council's costs of the proceedings.

66 The consequence of the Court's orders is simply that the breach of s 32 should no longer occur. No pecuniary penalties were imposed, and no criminal liability ensued. Whilst the Environment Court has the power to award damages if it considers it appropriate to do so, none were awarded in this case. There is no suggestion that the appellants are precluded from seeking the relevant development approval for the signs that they were ordered to remove. Indeed they did so in this case after the proceedings were commenced. The application was rejected by the Council. There is no challenge to that rejection. Had they not made the application when they did, there is nothing that would have prevented the application from being made after the making of the orders by the Environment Court.

67 It is difficult to see how this process could not be said to be reasonably appropriate and adapted to serving the object, namely compliance with s 32. Section 85 is unremarkable in its terms and the order of the Judge imposes no heavier burden on the appellants than to cease breaching the terms of the Act by removing the relevant signs within a specified period of time, to cease erecting any new signs, and to pay the costs of the Council's application. As noted earlier, the prohibition imposed on the appellants is by no means absolute. They were not precluded, by the order, from seeking the relevant development approval for the signs if they had not already done so. An analogy can readily be made with respect to any number of regulatory schemes, whereby a person must obtain a permit or licence to undertake a particular activity, without which the

activity is considered unlawful.⁴⁰ Indeed, some such schemes go far further than that prescribed in s 85, where criminal penalties for breaches are imposed.⁴¹

68 Counsel for the appellant submitted that the proper approach under s 85 in the present context was to either make no order as it would impair the freedom, or alternatively make some order regulating the number or size of the signs. I consider both of these submissions to be without merit. To expect the Environment Court, under s 85, to make an order allowing signs of a limited number or size would effectively involve the Court sanctioning a breach of the Act, and would circumvent the entire purpose of s 32 and the relevant approval processes under the Act. Similarly, whilst it may be said that the Judge in her discretion could have made no order, I do not consider that such an outcome properly achieves the object and purpose of s 85, as such an outcome would effectively ignore, or even excuse, a breach of s 32.

69 In *Levy v State of Victoria* the regulation sought to be impugned was one which prohibited persons other than the holders of a valid game licences from entering into a permitted hunting area at specified times. The appellant's purpose in entering at the prohibited time was to protest against Victorian hunting laws. The submission was put on behalf of the appellant in that case that the impugned regulation should have implemented a scheme whereby public safety is promoted, but at the same time leaving unlicensed persons free to protest in the hunting areas.⁴² The submission put by the appellants in this case, accepting that the conduct was unlawful, would be the equivalent to allowing Mr Levy to enter into the hunting area notwithstanding that the action constituted an offence. It is incumbent on courts to determine whether the making of certain conduct unlawful would be consistent with the implied freedom. However a consideration of the implied freedom does not require a court to consider whether unlawful conduct, otherwise validly rendered unlawful, should nonetheless be allowed. This is entirely inconsistent with the origins of the freedom as a limitation on executive and legislative power, rather than that of a substantive personal right.

70 Finally I deal with the appellants' submission that the effect of the order is to preclude the appellant's ability to communicate with respect to government or political matters. The appellants submitted that the only way they could readily communicate their messages was through the use of the signs erected on their property. However, as Brennan CJ noted in *Levy v State of Victoria*:⁴³

A law which is appropriate and adapted to the fulfilment of that legitimate purpose is not invalidated by limitations of legislative power implied from the terms and structure of the

⁴⁰ See, eg, *Broadcasting Services Act 1992* (Cth) s 12; *Telecommunications Act 1997* (Cth) s 42. See the discussion of Mason CJ in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 143.

⁴¹ See, eg *Broadcasting Services Act 1992* (Cth) ss 131-136; *Telecommunications Act 1997* (Cth) s 42(5).

⁴² *Levy v State of Victoria* (1997) 189 CLR 579, 627.

⁴³ *Ibid* 597.

Constitution merely because an opportunity to discuss matters of government or politics is thereby precluded.

71 As was the case in *Levy*, the prohibition in the present case is not a blanket prohibition.⁴⁴ The appellants can avail themselves of many other forms of communication in many different forums. Further, the prohibition is limited in that it only applies to signs without development approval.

72 It follows that the appellants are unable to satisfy the second limb of the *Lange* test, and their argument based on the implied constitutional freedom must fail.

Conclusion

73 For the foregoing reasons I would dismiss the appeal.


⁴⁴ See *ibid* 648.



20 February 2010



23 February 2010



BIKERS
FREEDOM
BY HIGH COURT
BAZZA BAN
BY BI-LAW
HOW FUAGT
IS THAT

12 November 2010

JUSTICE AS STYLE
The Kymster
Set FREE !!!
KYMSTER
4 MAYOR
ICAC ROSENBAG'S
CORRUPTED REGIME
KICK TATE OUT
ART BY BAZA SAYS SHAME IN COURT

14 December 2010

LIBERAL MANIFESTO
PARAGRAPH: 4
WE BELIEVE
IN THE MOST BASIC
OF FREEDOMS
OF PARLIAMENTARY DEMOCRACY
THE FREEDOM OF
THOUGHT, WORSHIP
SPEECH AND ASSOCIATION
GRAFART: IN CONTEMPT
BY BIZCA



11 January 2011

WE BELIEVE IN
THE MOST BASIC
FREEDOMS OF
PARLIAMENTARY
DEMOCRACY

A VIEW NOT SHARED BY
CHIEF JUSTICE JOHN DOYLE
AND HIS MATES DUGGAN & BILBY
GIVE ART. 1-10-2011

WE BELIEVE IN
FREEDOM
OF THOUGHT
AND SPEECH

AND CHALK

WE BELIEVE IN
FREEDOM
OF WORSHIP
AND ASSOCIATION

EVEN IF THERE IS NO LAW
IN AUSTRALIA THAT PROTECTS
FREEDOM

17 January 2011

Norman Waterhouse LAWYERS

BY EMAIL: renmit@onkaparinga.sa.gov.au
Ref: 248975\DXB01636589

17 January 2011

Ms R Mitchell
Manager Development Services
City of Onkaparinga
Ramsay Place
NOARLUNGA CENTRE SA 5168

Dear Renée

**Becker & Inglis - display of signs
Contempt of Court**

You have asked for my advice as to:

- the exact process required for us to initiate contempt of court proceedings
- the estimated costs for such action
- any timelines that are relevant

Contempt of Court – the Process

"Contempt proceedings are a special type of litigation that is, legally, brought by the Court itself rather than by a party. However, the party or person who requests the Court to take action will ordinarily be the main protagonist in the litigation (i.e. the party who leads the necessary evidence to prove the contempt). A party in that position can (and usually is) awarded costs if the proceedings are successful.

Contempt of court proceedings are also special in that, although they are not criminal proceedings, the allegations must be proved to the criminal standard (beyond reasonable doubt), and the Court may either impose fines or sentences of imprisonment upon persons found to have committed a contempt.

The proceedings are initiated by filing a document known as an "Application" with the Court together with a supporting affidavit or affidavits.

The affidavit will set out the evidence which appears to show a contempt of court, i.e. a breach of a court order. I would anticipate that the ranger with the most experience with the site would swear or affirm the relevant affidavit, setting out his or her inspections and exhibiting the photos taken on those occasions.

In addition, it is critically important that the requesting party proves that the relevant court orders were personally served upon Mr Becker & Ms Inglis. To that end the relevant ranger who undertook service would file an affidavit setting out what occurred.

The Application will request the Court to issue a Registrar's Summons to Mr Becker & Ms Inglis requiring them to attend at Court. A draft Registrar's Summons is prepared by the party who requests the party to issue contempt proceedings.

Once the Application, affidavit(s) and draft Registrar's Summons are filed with the Court, ordinarily the Court will administratively issue a Registrar's Summons and arrange for a Sheriff to serve the Summons upon Mr Becker & Ms Inglis. Occasionally, where the Court is unsure whether to commence contempt proceedings, it may ask the requesting party to furnish it with further evidence or submissions.

Once served with the Registrar's Summons, it will then be up to Mr Becker & Ms Inglis as to whether they defend the proceedings, or admit the contempt.

If we prove that Mr Becker & Ms Inglis either are, or have been, in contempt of court (i.e. they are or have been disobeying the orders of the ERD Court made in February 2010) then the Court has a number of options.

The Court can impose a fine. Alternatively it can impose a sentence of imprisonment. That sentence can be suspended upon Mr Becker & Ms Inglis entering into a good behaviour bond (which would require them not to commit further contempts). If further contempts were committed we could apply to have the bond revoked and, if successful, the imprisonment would most likely commence.

If Mr Becker or Ms Inglis were to again breach the Court's orders after serving a period of imprisonment, we would go through the same process again, but I imagine that the Court would order an immediate term of imprisonment for a somewhat longer period than the first time around. As I read the Court Rules, I believe the Court also has the power to imprison someone for a brief period and then suspend the sentence on condition that there be no more contempt. This gives an offender a brief taste of imprisonment and then leaves a further threat of imprisonment hanging over their head should they again commit a contempt.

Estimated Costs

The last contempt of court action I prosecuted cost around \$30,000. However, that was a particularly difficult action where the offender was already on a good behaviour bond (which my client successfully had revoked), and continually failed to attend court (so he ended up getting arrested, and then bailed, and then he breached his bail agreement so he was arrested again).

I would hope that in this matter it would cost in the order of \$5,000 - \$8,000 to get the necessary evidence ready and the contempt proceedings filed in Court, and then if they were defended, not more than another \$5,000 - \$8,000 to have the matter heard.

Those figures do not include any action which might be necessary to revoke a breached good behaviour bond, nor deal with any warrants for arrest, or bail hearings, or applications to enforce bail conditions, or the like.

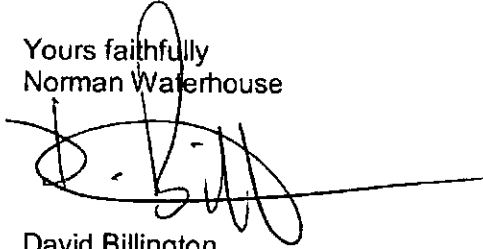
Timelines

There is no time limit within which to bring proceedings for contempt of court, but excessive delay may lead to an inference that the Council waives its rights. In the circumstances, where the Council has continued to attempt to have the display of signs brought under control, I do not think this could be construed as waiver. However, particularly in light of the three signs which you brought to my attention today, I think the time is approaching where contempt proceedings should be taken if the Council wishes to do so.

17 January 2011

I trust the foregoing assists. I would be pleased to answer any further questions you might have.

Yours faithfully
Norman Waterhouse

A handwritten signature in black ink, appearing to read 'D. Billington', with a long horizontal line extending to the right.

David Billington
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e-mail: dbillington@normans.com.au