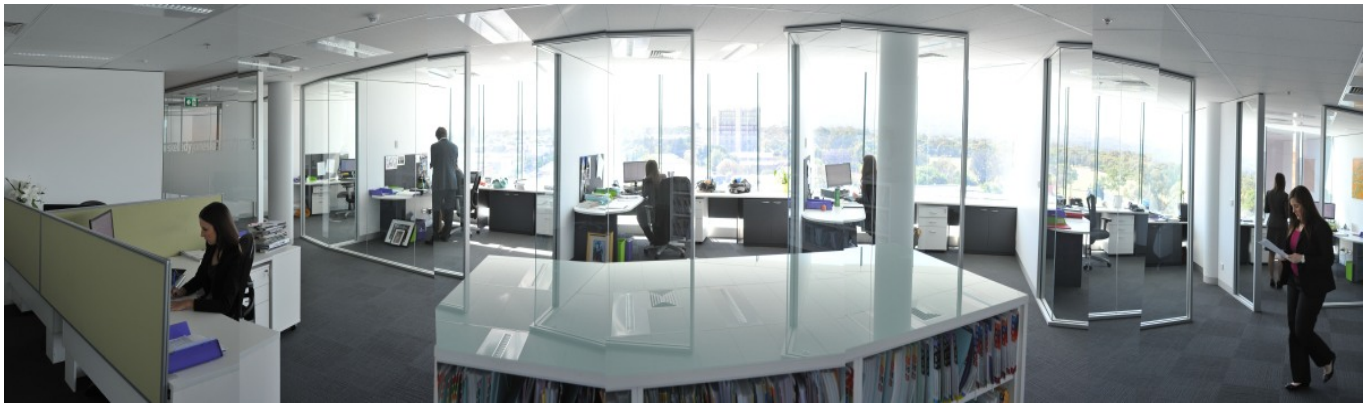
kelledy jones
LAWYERS



May 2013

LG Leader

Contents

CONTACT
T: (08) 8113 7100
F: (08) 8113 7199
E: info@kelledyjones.com.au

Address
Level 6, 19 Gilles St
Adelaide SA 5000

Postal Address
GPO Box 2024
Adelaide SA 5001

Outstanding Rates: why avoid section 184?

Natasha Jones

Some Council's appear to be avoiding the use of section 184 of the *Local Government Act 1999* to recover outstanding rates.

Generally, the reason is because the sale of a property is considered to be an extreme approach and not 'the right thing to do" by a public authority. This also includes concerns that the Council could be viewed as callous and harsh in its dealings with rate debtors.

Given Council rate revenue accounts for approximately 68%[1] of total revenue to fund Council services, activities, infrastructure and projects, it is important that a Council does not allow its outstanding rates liability to reach a significant level where it impacts available resources and affects service levels. Regardless of the level of outstanding rates, it is important that Council's use appropriate methods to ensure that costs incurred during the process can be recovered. Section 184 is one such appropriate method.

Section 184 of the Act provides councils with the power to sell land for the non-payment of rates that are outstanding for 3 years or more. This power can be used in circumstances where:

- the land is owner/occupied or occupied by a tenant;
- the land is vacant;
- the principal ratepayer cannot be located;
- the principal ratepayer is deceased;
- the Council has no reasonable prospect of selling the land within a reasonable time; or
- the current valuation is less than the amount of outstanding rates to enable the land to be transferred to the Crown or to the Council.

So whilst there may be exceptional circumstances and good reasons where it may be socially and morally inequitable to rely on a process under section 184, the reasons in favour of relying on it can, in many circumstances, be said to outweigh any reason for avoiding the use of it. This is because:

1. money to pay outstanding rates can be recovered;
2. it can reduce the Council's outstanding rate liability;
3. the commencement of the formal process can achieve positive results by the receipt of outstanding rates without the need to proceed to a formal sale;
4. the Council is entitled to recover costs at two different stages throughout the process;
5. the assessment record can be 'tidied' by the sale of land where the principal ratepayer has been deceased for a considerable period of time or where the valuation of the land does not exceed the amount of outstanding rates; and
6. it provides opportunity for the Council to tell " a good news story" and share with the remainder of its ratepayer base that it is taking action against recalcitrant ratepayers.

The above demonstrates just some of the reasons why section 184 should be relied upon rather than avoided. Further, there is probably no doubt that the balance of the ratepayer base which is funding and meeting the rates liability would not be too taken by the "Good Samaritan" role that a Council may take in such circumstances.

By the way, I have been advised to pay my income tax bill this year and not rely upon the 'Good Samaritan' approach of the ATO!

[1] Local Government Association Website (2013), "*Resourcing Council Services – Council Rates*."

EHA Conference Dinner

Orders issued requiring unauthorised development to be demolished – *City of Mount Gambier v Waye* [2012] SAERDC 66

Joanna Oborne

This recent decision from the ERD Court has highlighted the Court's willingness, in appropriate circumstances, to order the **demolition of unauthorised development**.

In this case, the respondent, Mr Waye, had constructed a carport/garage ("the Structure") on his land without first obtaining development approval from the Council.

The Council became aware of the Structure during its construction and repeatedly advised Mr Waye of his need to obtain development approval in respect of it. Despite this, Mr Waye continued to construct the Structure, and did not lodge a development application with the Council.

Accordingly, the Council commenced proceedings against Mr Waye in the ERD Court, under Section 85 of the *Development Act 1993* ("the Act"), seeking orders from the Court that the Structure be demolished.

Although Mr Waye did, once the proceedings were commenced against him, apply for development approval, he repeatedly refused to answer a request for further information from the Council, which was required in order for it to assess the application against the Building Rules. Therefore, although the Council was able to issue Development Plan consent in respect of the Structure, it was not able to assess it for Building Rules consent. Furthermore, it was the Council's opinion that the Structure did not comply with the Building Rules and that it was unsafe.

In all of these circumstances, the Court held that it was appropriate that Mr Waye be ordered to remove the Structure, especially given its potential to cause injury to a person entering and/or using the Structure.

This case, especially when read together with other judgments from the ERD Court over the past 12 months in which it has ordered convictions and substantial fines (in the order of $10,000) be imposed in respect of other matters involving unauthorised development (see, for example, *Corporation of the City of Port Augusta v Quality Roofing Services Pty Ltd* [2012] SAERDC 67; *City of Salisbury v Rocca (No. 2)* [2010] SAERDC 11), signify the willingness of the Court to avail itself of the range of enforcement powers granted to it under the Act, where the circumstances of the matter so require.

Elected member participation in section 41 Committees

Lisa Cameron

Section 41 of the *Local Government Act 1999* allows for the establishment of committees to assist Council in the performance of its functions, or in a manner as determined by council. This includes making enquiry into and reporting on matters that fall within councils' responsibility, providing advice or exercising, performing or discharging delegated powers, functions or duties of council. Membership of a section 41 committee is determined by council upon the establishment of the committee and can consist of both elected members and/or persons who are not members of the council.

The question arises as to the rights of elected members to attend at meetings of a section 41 committee and to participate in the business of the committee, despite having not been formally appointed as a committee member. The answer is simple in that an elected member, who is not a formally appointed committee member has no more right than a member of the public as concerns the attendance at and participation in, the business of the committee.

If elected members could include themselves in committee meetings on a whim, transparency and fairness of committee meetings could be put to question and community confidence in the deliberations undertaken at such meetings would be eroded.

Planning law reform gathers momentum – Parliament wrap-up

Victoria Shute

Following on from a series of significant law reforms passed in 2012 and the announcement of the Planning Improvement Project in February this year, a number of Bills proposing further planning law reforms are progressing through Parliament.

Two of the Bills currently before Parliament were introduced by Mark Parnell MLC – the *Development (Interim Development Control) Amendment Bill* and the *Development (Development Plan Amendments) (Notification) Bill*.

The Interim Development Control Bill passed the Legislative Council and was introduced into the House of Assembly on 21 March 2013. This Bill proposes to amend section 28 of the *Development Act 1993* ("the Act") so that the Minister's power to declare Development Plan Amendments to commence interim operation will only be able to be exercised where it is necessary to *"counter applications for undesirable development ahead of the outcome of the consideration of the amendment"*. Debate on this Bill is expected to continue prior to Parliament's winter break.

The DPA Notification Bill was introduced into the Legislative Council in April and proposes to amend sections 25 and 26 of the Act such that the written notice of a DPA must be given to owners and occupiers of land directly subject to a DPA or adjacent to land which is directly subject to a DPA, regardless of whether Process A, B or C is undertaken in regards to a DPA. Currently, the notice requirement only applies to DPA's undertaken in accordance with Process C. Debate on this Bill in the Legislative Council has been adjourned and is listed to continue prior to the winter break.

The third and most significant Bill affecting the planning system was introduced by the Government in the House of Assembly on 2 May 2013. The *Housing and Urban Development (Administrative Arrangements) (Urban Renewal) Amendment Bill* proposes to introduce significant precinct-based planning reforms into South Australia through the *Housing and Development (Administrative Arrangements) Act 1995*. A number of the proposed amendments are similar to the powers and functions of the Western Australian Planning Commission, which oversees the development of a number of specified areas in WA. The main reforms proposed by this Bill which are relevant to local government are:

- the Minister will, after consultation with the affected council or councils as well as DPAC and, in some circumstances, the DAC, be able to establish a "precinct";
- the Minister will appoint a "precinct authority", being Renewal SA or a council which:
    - may appoint panels to provide advice on planning and development within the precinct; and
    - must prepare and maintain a masterplan for precinct, and precinct implementation plans ("PIP's") which can apply to parts of the precinct, as well as the precinct as a whole;
- once a PIP is implemented (which can only occur after public consultation), development applications which are certified by the authority as being consistent with a PIP must be processed as "complying" developments and, where relevant, land division consent conditions and open space requirements must be taken as having been fulfilled;
- PIP details can be incorporated into Development Plans by the Minister without the need to undertake further public consultation;
- regulations may be made to grant any relevant statutory power or function to a precinct authority; and
- council by-laws which are inconsistent with a PIP will be read down to the extent of the inconsistency.

Debate on this Bill is scheduled to continue during May. We will monitor the progress of this Bill and provide updates where relevant.

Conflict of Interest: A Continually Evolving Issue

Michael Kelledy

As readers will be aware, the past few years have seen an increased level of activity from the Ombudsman's office in the investigation of allegations of a breach of the conflict of interest provisions by elected members. Coincidental with this, we have recently seen two District Court actions for alleged breaches of the conflict provisions result in interesting comment from the respective Judges about the operation of the provisions.

The Ombudsman has recently observed that the conflict of interest provisions are, as we all know, complex – and we would add, not always easy to apply in practice. On this basis it is appropriate for elected members to always err on the side of caution and consider what an informed reasonable person might think (rather than applying subjective views).

In this context elected members have long understood that whilst being a director or member of the governing body of a body corporate causes the elected member and that body to be closely associated meaning a 'prescribed interest' of that body is treated as a conflict of interest for the elected member. However, where that body is a non-profit association, the obligations of the elected member are limited to declaring an interest but no more – meaning the elected member may then remain in the meeting as a full participant.

The Ombudsman has recently advised of his view that where an elected member is simply a member of a non-profit association (i.e. not on the governing body) then whilst there is no 'close association' in those circumstances there is, nevertheless, still a 'personal' interest for the elected member. In these circumstances the elected member must disclose that membership as an interest but thereafter may (just as in the close association situation) remain as a full participant in the Council or Committee meeting.

With the commencement of the ICAC Act, the Ombudsman will be the 'Inquiry Agency' for these matters (and the other matters under Chapter 5, Part 4). Accordingly, we recommend careful adherence to conflict disclosures if a personal interest exists from membership of those local non-profit (community) associations that so many elected members are often participants in.

Setting the Record Straight: Continuing Offences for Failing to Register a Dog

Cimon Burke

It has recently come to our attention that there is confusion amongst Council regulatory officers as to whether expiations can be issued for continuing offences under the *Dog and Cat Management Act 1995* in relation to a failure to register a dog.

Our advice is that an expiation notice may be issued in respect of an unregistered dog under section 33(3) of the Act 14 days after an expiation notice was initially issued for an (unregistered dog) offence in respect of that dog under section 33(2) of the Act. The effect of section 33(3) of the Act is to create a continuing offence provision for failing to register the resultant effect of which is that a new offence occurs after every 14 days that the dog remains un-registered.

We are aware of a competing view that further expiation notices may only be issued under section 33(3) of the Act if a person has first been convicted of an offence under 33(2). Such interpretation is at odds with the relevant legislative provision. There are a number of reasons we hold this position. For example, in the event a Council expiates a person for an offence under section 33(1) of the Act, it cannot also prosecute the person for the same offence (unless the expiation notice is withdrawn or an election to prosecute is made etc.), meaning that section 33(3) would then have no work to do. Additionally, the competing interpretation does not, upon close examination, withstand scrutiny. If it were correct, it would place a contradictory interpretation upon the same words used in both section 33(2) and (3). That is, if the wording *"…is guilty of an offence."* at subsection (2) supports the issuing of an expiation notice or prosecution for the offence of non-registration, those same words at subsection (3) *"…..is guilty of a further offence…"* must do likewise. The words at subsection (3) cannot then be given an entirely different meaning.

Notwithstanding the above, even though a Council has power to issues expiations under section 33(3) for a new offence every 14 days that a dog remains unregistered, caution must be exercised in issuing multiple expiation notices for continuing offences to ensure a reasonable approach.

KelledyJones Contact List

Michael Kelledy
Telephone: (08) 8113 7103
Mobile: 0417 653 417
Email: mkelledy@kelledyjones.com.au

Natasha Jones
Telephone: (08) 8113 7102
Mobile: 0419 864 531
Email: njones@kelledyjones.com.au

Victoria Shute
Telephone: (08) 8113 7104
Mobile: 0423 004 339
Email: vshute@kelledyjones.com.au

Cimon Burke
Telephone: (08) 8113 7105
Mobile: 0422 165 614
Email: cburke@kelledyjones.com.au

Joanna Oborne
Telephone: (08) 8113 7106
Mobile: 0401 176 240
Email: joborne@kelledyjones.com.au

Lisa Cameron
Telephone: (08) 8113 7108
Mobile: 0428 268 358
Email: lcameron@kelledyjones.com.au

Wendy Bozzett
Telephone: (08) 8113 7101
Email: wbozzett@kelledyjones.com.au

Lawyers for Local Government