



# Supreme Court of South Australia

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## CITY OF MITCHAM v TERRA EQUITIES PTY LTD [2007] SASC 244 (4 July 2007)

Last Updated: 9 July 2007

### SUPREME COURT OF SOUTH AUSTRALIA (Land and Valuation Division)

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### CITY OF MITCHAM v TERRA EQUITIES PTY LTD

[2007] SASC 244

Judgment of The Honourable Justice DeBelle

4 July 2007

### ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING - DEVELOPMENT CONTROL

Application for development consent – demolition of existing dwelling and outbuildings – construction of five single storey dwellings – whether proposal consistent with Development Plan - calculation of site area of each dwelling – whether averaging process can be used to calculate site area of group dwellings – whether calculation of site area should include common driveways – appeal allowed.

*Development Act 1993* s 35(2); *Development Regulations 1993* Reg 3, referred to.

*Forest v City of Holdfast Bay* [1999] SAERDC 96, not followed.

*Coulton v Holcombe* (1986) 162 CLR 1; *Methuen-Campbell v Walters* [1979] QB 525;

*Milro Pty Ltd v Associated Securities Ltd* (1970) 92 WN (NSW) 173; *Moyes v J & L*

*Developments Pty Ltd* (2004) 236 LSJS 211; *Polites v City of Holdfast Bay* (No 2)

(1998) 72 SASR 475; *South Australian Housing Trust v Development Assessment*

*Commission* (1994) 63 SASR 35; *University of Wollongong v Metwally (No 2)* (1985)

59 ALJR 481; *Water Board v Moustakas* (1988) 180 CLR 491, considered.

### WORDS AND PHRASES CONSIDERED/DEFINED

"site area"

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CITY OF MITCHAM v TERRA EQUITIES PTY LTD  
[2007] SASC 244

**Land and Valuation Division**

- 1 **DEBELLE J.** The respondent, Terra Equities Pty Ltd ("Terra Equities") applied to the City of Mitcham ("the Council") for development consent to demolish an existing dwelling on an allotment of land and erect five dwellings on that allotment. The Council refused development consent. Terra Equities appealed against that decision to the Environment, Resources and Development Court ("the Environment Court"). A Commissioner of the Environment Court allowed the appeal and granted provisional development planning consent subject to a number of conditions. From that decision, the Council has appealed to this Court.
- 2 Terra Equities did not appear on the hearing of the appeal. Its solicitors had earlier informed the Court that it would abide the order of the Court.

**The Subject Land**

- 3 The subject land is in Price Street, Melrose Park. It is a rectangular allotment with a frontage of 32.08 metres and a depth of 65.68 metres. The area is some 2,107 square metres. Its area is a little larger than two residential allotments in this area. The land is flat. A single storey detached dwelling is erected on the land. The land was once used as a poultry farm. Five unroofed poultry sheds remain on the land. They are in a poor state of repair. Some old derelict corrugated iron sheds also stand on the site.

**The Proposed Development**

- 4 Terra Equities applied to demolish the existing dwelling and other structures and construct five single storey dwellings. The proposal is that two of those dwellings will have a frontage to Price Street and the other three will be at the rear of the allotment. A common driveway will run between the dwellings at the front of the allotment to provide access to the three dwellings at the rear. A plan of the layout of the dwellings is attached to these reasons. As is apparent from the plan, each dwelling is separate. It is not at present proposed to create a separate certificate of title for each dwelling. There is no binding obligation as to the tenure on which each dwelling will be held.

**The Locality**

- 5 Two planners gave evidence. Broadly speaking, they were agreed as to the area of the relevant locality. It was a small locality and could more accurately be described as a neighbourhood. Within that area, existing development primarily consists of single storey detached dwellings. There are two residential flat buildings adjoining the subject land on its western boundary. As one of the planning witnesses said, they are notable exceptions to the predominant character of the locality. On three allotments, semi-detached dwellings have been constructed. The Commissioner found that most dwellings are set in attractive, well-maintained gardens. There is ample space around the detached dwellings. A substantial number of mature trees are readily visible throughout the locality.

**The Development Plan**

6 The subject land is part of the Residential (Central Plains) Zone as prescribed by the Council's Development Plan. That zone is divided into a number of policy areas. The subject land is in Policy Area 8. The kind of development proposed for this zone is described by the objectives for the zone which are supported by a Statement of the Desired Character for Policy Area 8. The objectives of the zone state:

**Objective 1:** Development comprising primarily detached dwellings within Residential (Central Plains) Policy Areas, 8, 9, 10 and 12 undertaken in a manner that complements the predominant architecture, streetscape and low density character of existing development in the locality.

**Objective 2:** Development that accords with the desired character of the relevant policy area and allows for the retention of existing affordable housing wherever appropriate.

**Objective 3:** Provision of open space sufficient to meet the needs of the community.

The relevant parts of the Statement of Desired Character are in these terms:

This policy area is characterized by dwellings constructed mainly between the years 1920 to 1970. The predominant dwelling style therefore comprises a mix of villas, bungalows and tudors built generally prior to 1940, and art deco, austerity, contemporary and conventional house styles constructed between the wars and afterwards.

...

Specific features of the policy area that contribute to its character include a predominance of single-storey detached dwellings on generally spacious allotments with relatively uniform set-backs from road frontages. This results in the area's distinctive low-density character with generous proportions of open space, both in front of and behind dwellings, and wide and spacious streetscapes dominated by a combination of street trees and landscaped front gardens.

The provision of public open space and recreation throughout the area is generally poor, particularly in that part of the policy area north of Daws Road/Springbank Road. This constrains the appropriateness of the policy area to accommodate higher density development.

Future development within the policy area should complement the existing mixed character of development constructed between 1920 to 1970, by respecting and preserving the private open space and low density qualities of the area. The redevelopment of individual sites with replacement dwellings at higher densities has, in the past, often resulted in development significantly out of character with its locality and the loss of existing affordable housing stock. Such dwelling forms include blocks of low/medium rise flats or townhouses, including residential flat buildings that run down side property boundaries. These should not continue to be built as they do not complement or preserve the desired pattern and character of development.

New building forms should generally maintain the existing pattern and scale of detached dwellings with road frontage, although other forms of dwellings should also be provided to extend the range and choice of housing options available to the community.

To achieve new development at higher density than that prevailing, whilst maintaining the character of the area, such development should be located on larger sites (which may require the amalgamation of several existing allotments) to enable a planned and co-ordinated development. In such instances development should address the road frontage to maintain the existing streetscape character, and should either provide, or be located in proximity to, adequate public or private open space. New development should also ensure that site areas per dwelling are sufficiently large to provide an adequate provision of unbuilt-upon land, including private open space with each dwelling. Residential flat buildings may however be developed in duplex form in appropriate locations where they would be in context with existing streetscapes and the predominant character of the

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locality

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Those objectives are supplemented by principles of development control for both the Residential Zone and Policy Area 8.

7 It is necessary to notice Principles 1 and 2 for the Residential Zone which state:

1 Development within the zone should be primarily for detached dwellings; other dwelling forms may be appropriate where the external design and appearance of such dwellings complements the predominant architecture, streetscape and low-density character of existing development within the locality.

2 Development should be in accordance with the desired character of the relevant policy area.

Principle 3 lists the forms of complying development in the zone which are, essentially, a detached dwelling or single storey alterations to detached dwelling and a domestic out-building. A detached dwelling is a complying development only if it complies with the criteria prescribed by Table Mit/1 in the Development Plan.

8 For present purposes, the relevant principles of development control for Policy Area 8 are Principles 1, 2 and 3. They are in these terms:

1 Excluding residences comprising dependent relative accommodation, the minimum site area for a dwelling should be as follows:

- (a) 500 square metres for a detached dwelling;
- (b) 425 square metres for a semi-detached dwelling; and
- (c) 400 square metres for any other dwelling,

except as provided for under principle of development control numbered 2 of this policy area.

2 Excluding any land comprising or formerly comprising the western-most portion of Pasadena High School where a total development site is greater than 2250 square metres and each boundary of the site is not less than 35 metres long, the land may be developed to a comprehensive scheme with site areas of not less than 325 square metres per dwelling, following a unified design including such elements as building bulk, roof-form, external materials and colours.

3 New housing, and in particular development on sites comprising two or more dwellings, should maintain, or where appropriate, enhance the streetscape in the locality through:

- (a) front and side boundary set-backs and space around the proposed buildings being similar to that of existing residential development in the locality;
- (b) the bulk, height and scale of the development being compatible with the predominant single-storey character of detached housing in the locality however dwellings of two storeys in height may be appropriate on sites immediately abutting the western boundary of the Pasadena High School;
- (c) dwellings adjoining a street frontage having a siting and orientation to address the street in a manner similar to existing detached dwellings in the locality.

The punctuation of Principle 2 is inadequate. A comma should appear after the words "Pasadena High School". That is apparent when regard is had to the Plan Amendment Report which introduced that provision which came into force on 9 September 2004.

#### The Intent for this Policy Area

9 When read as a whole, the Objectives, Statement of Desired Character, and the Plan of Development Control express a clear intent that the area should remain an area essentially consisting primarily of detached dwellings. The manner in which the area which is Policy Area 8 has developed has resulted in an area predominantly consisting of single storey detached dwellings, described at one stage in the Statement of Desired Character as

...the area's distinctive low-density character with generous proportions of open space, both in front of and behind dwellings, and wide and spacious streetscapes dominated by a combination of street trees and landscaped front gardens.

That is entirely consistent with the Commissioner's findings as to the nature of the development in the locality in which the subject land is located. The clear intention of the Development Plan is that future development should be consistent with that character. The Statement of Desired Character speaks critically of the redevelopment in the past of some sites at higher densities and significantly out of character with the locality. It states that if redevelopment is to occur, it should be on larger sites, maintain the existing streetscape and provide adequate private open space. It is the provisions of the Development Plan as to redevelopment and standards of development which are particularly relevant in this appeal.

#### **The Commissioner's Reasons**

10 The Commissioner held that the proposed development should be classified as group dwellings and, as such, satisfied the minimum site areas in Principle 1. He then held that the Development Plan envisaged the possibility that medium density residential development was expected to occur in Policy Area 8 on larger sites. He concluded that the proposed development satisfied quantitative criteria in the Development Plan and decided that the development consent should be granted.

#### **The Development Plan is Misconstrued**

11 The Commissioner's reasoning failed to have due regard to the clear expression in the Development Plan of the intended form of development in Policy Area 8. The Statement of Desired Character for this policy area expressly states that the preferred form of development is for detached dwellings. The effect of the provisions relating to new development is that, if medium density development is to occur, it should be on larger sites created by the amalgamation of several allotments and such development "should also ensure that site areas per dwelling are sufficiently large to provide an adequate provision of unbuilt upon land, including private open space with each dwelling". The Development Plan does not seek medium density development in this policy area. Instead, it provides standards, should that development occur. The Development Plan expresses in unmistakable terms an intention that any medium density development should be consistent with the existing pattern of development in the area by preserving the "generous proportions of open space" around dwellings as well as "wide and spacious streetscapes". Although the Commissioner quoted the last paragraph of the Statement of Desired Character for Policy Area 8 in his reasons, he has had little regard to it in reaching his conclusion. In addition, his reasons do not have regard to the intention that medium density development should be located on larger sites created by amalgamating several allotments. The subject land has a width equivalent to that of two residential allotments in this locality. The land is deeper than allotments adjoining it on the eastern and western boundaries but it is not markedly deeper than many other allotments in the locality. The land is a large allotment but it

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12 The Commissioner has departed from the intent of the Development Plan in another serious respect. He has interpreted it to mean that development of larger allotments is to occur in accordance with the prescribed minimum areas for sites. He then added that there is a conflict between Principles 1 and 2 for Policy Area 8 on the one hand and Principle 3 on the other. The Commissioner's interpretation of the Development Plan fails to give effect to its true intent.

13 The Commissioner has treated the prescribed minimum standards in Principles 1 and 2 as some kind of norm. He said:

However, the very existence of Principle 2 supports the proposition that the development of larger sites, albeit not so large as to obtain the benefit of the smaller site areas referred to in that Principle, is to occur in accordance with the site area *minima* set out in Principle 1. If that interpretation is correct, and having regard to the wording of the Desired Character Statement, it is difficult to see how even detached dwellings, on sites as small as 500m<sup>2</sup>, could satisfy Policy Area 8 Principle 3(a), given that site areas for detached dwellings in the locality, on the evidence of Mr Batge, average 662m<sup>2</sup>.

This is to distort the plain meaning and intent of the Development Plan. Prescribed minimum standards are not a statement of desired standards. They are no more than minimum standards. Had the Council intended that the prescribed minimum standards should be the norm, it would have said so in the Development Plan. Furthermore, to interpret Principle 1 and Principle 2 as a desired standard is to focus on those principles only and to the exclusion of the other provisions in the Development Plan such as the Statement of the Desired Character of Policy Area 8 as well as the objectives and principles of development control for that Policy Area with their emphasis upon open space, noted in the next paragraph. The Commissioner has approached the issue on the footing that, if a proposal complies with minimum quantitative standards, it must be approved. That is not necessarily so. Compliance with minimum standards rarely leads to a grant of development consent. Regard must be also had to the qualitative provisions in the Plan when deciding whether it is proper planning to grant development consent.

14 The Development Plan emphasises that new development should have adequate open space, both around the development as well as for each building. It is pertinent to repeat, yet again, the relevant sentence in the Statement of Desired Character for the policy area.

New development should also ensure that site areas per dwelling are sufficiently large to provide an adequate provision of unbuilt-upon land, including private open space with each dwelling.

When Principle 1 is read with the terms of Principles 16 and 17 in the principles of development control which apply throughout the Council area, it is apparent that the reference to "site area" in Principle 1 is a reference to the area held exclusively with each of those kinds of dwelling. It is a reference to the land on which the dwelling stands as well as to the land which is exclusively enjoyed by the occupants of the dwelling. It will include any area of open space to be enjoyed by the occupants of the dwelling. Effect is also given to that intention by Principle 3 for Policy Area 8. Principle 3 is a criterion of a qualitative nature. When the Development Plan is read as a whole and understood in that way, it is readily apparent that there is no conflict between Principle 3 on the one hand and Principles 1 and 2 on the other. Principle 3 is intended to ensure that there is proper provision of space around a development as well as a reasonable area of open space capable of being enjoyed by occupants of each dwelling on the site. That is entirely consistent with the intent

expressed in the Statement of Desired Character.

- 15 The Commissioner has not correctly interpreted the provisions of the Development Plan. The Commissioner's reasons have allowed the tail to wag the dog in the sense that he has focussed on the minimum site areas, which are no more than a minimum, and has ignored the spirit and intent of the provisions relating to the Residential Zone and in particular those relating to Policy Area 8.

#### Site Areas

- 16 Mr Manos, who appeared for the Council, relied on other grounds in support of the appeal. It is not necessary to decide them all.
- 17 One important issue turns on the meaning and effect of Principle 1 of the principles of development control for Policy Area 8. The Commissioner found that the five dwellings constituted a group dwelling as defined in Schedule 1 of the *Development Regulations 1993*. Those definitions apply both to the *Development Regulations* and to the Development Plan in the absence of any expression to the contrary: Regulation 3 of the *Development Regulations*. There is no indication of any contrary intention in the Development Plan. Although Mr Manos submitted that the Commissioner had erred in deciding that this group of dwellings constituted group dwellings as defined, it is convenient to proceed on the footing that they are group dwellings.
- 18 Principle 1 requires a minimum site area of 400 square metres for any other dwelling than a detached or semi-detached dwelling. The Commissioner found that each dwelling in the proposed development had an average site area of 421.4 square metres which satisfied the standards in Principle 1. He reached that conclusion by dividing by five the total area of the site, 2107 square metres. For the reasons which follow, that is not the means by which the site area of each dwelling in this development is to be determined.
- 19 One obvious flaw in the Commissioner's approach is that it has no regard to what is the actual site area of each dwelling. At best, it could be called an overall average. However, that is to misdescribe it because it still fails to have regard to the actual site area of each dwelling. Principle 1 is concerned with the actual site area of each dwelling and not with average site areas.
- 20 In the case of the present development, the approach adopted by the Commissioner means that the common driveway has been included as part of the site area. In my view, a common driveway used by the occupants of other dwellings on the development site is not to be included in the site of a dwelling. The reference to "convenient and safe vehicle access and parking" in Principle 16 of the Council-wide principles of development control requires provision on the site of the dwelling for those facilities. It is not intended to include a common driveway used by the occupants of the dwelling as well as by others for the purpose of gaining access to each individual dwelling. A common driveway is not an area capable of being used and enjoyed exclusively by occupants of a dwelling. Another reason for excluding the area of a common driveway when calculating site area lies in the fact that it is capable of producing a quite misleading result, for example in a residential development which has a very substantial driveway.
- 21 This conclusion is not affected by the definition of the term "site". The term "site" is defined by the *Development Regulations* in these terms:

**site** means the area of land on which a building is built, or proposed to be built, including the curtilage of the building, or in the case of a building comprising more than one separate occupancy, the area of land on which each occupancy is built, or proposed

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If it is relevant, the definition reinforces the conclusion. The definition of "site" signifies that each building in a group of buildings is to have its own curtilage. It is inconsistent with that definition, as well as with the ordinary meaning of curtilage, if the occupants of one dwelling must share the curtilage of that building with the occupants of another dwelling. The notion of a common area used by others is entirely inconsistent with the concept of a curtilage.

22 The meaning of the land term "curtilage" was examined in *Polites v City of Holdfast Bay (No 2)* (1998) 72 SASR 475 at 481-483. It is unnecessary to repeat the discussion. The meaning in ordinary usage coincides with its legal meaning. In the *Oxford Companion to Law* (1980) "curtilage" is defined to mean:

A courtyard, yard, garden or piece of ground near and belonging to a house.

That definition is consistent with the definition in the *Oxford English Dictionary* and *Macquarie Dictionary*. The *Macquarie Dictionary* defines "curtilage" in these terms:

The area of land occupied by a dwelling and its yard and out buildings, actually enclosed or considered as enclosed.

Although dictionary definitions refer to an enclosed area, it is not necessary for the curtilage to be enclosed. It may extend to and include other areas such as ancillary buildings, structures or areas such as out houses, a garage, a driveway and a garden: *Methuen-Campbell v Walters* [1979] QB 525 at 543-544. In *Milro Pty Ltd v Associated Securities Ltd* (1970) 92 WN (NSW) 173 at 178-179, Hope J expressed the test for determining what falls within the curtilage in these terms:

What land subserves the purposes of the building? What land actually or supposedly contributes to the enjoyment of the building for the fulfilment of its purposes?

What falls in the curtilage is a question of fact and degree in every case. In *Polites* it was held that a driveway formed part of the curtilage of two dwellings. Notwithstanding that decision, I do not think that the common driveways in the present case form part of the curtilage of the five dwellings.

23 The common driveway divides the site areas of the two dwellings at the front of the site. It does not contribute to the enjoyment of either as each has its own individual driveway and the purpose of the driveway is to serve the three dwellings at the rear. The driveway does not, in any respect, serve those two allotments at the front. The separation of the driveway from those two allotments is emphasised by the fact that a fence is to be located between each of those two dwellings and the common driveway. Each of the three dwellings at the rear has its own driveway leading off the common driveway. The common driveway, as its name implies, is available for use by the occupiers of each of those three dwellings and visitors to each of those three dwellings. The curtilage of a dwelling is an area for the exclusive benefit of the dwelling. It is not an area used by occupants of other buildings for their own benefit. While the curtilage may in the case of a detached dwelling include driveways, I do not think that can properly be regarded as part of the curtilage in a residential development of the kind proposed because the driveway is for the benefit of occupiers of other dwellings on the site. It has a function very similar to that of a public street.

24 For these reasons, the common driveway must be excluded when calculating the site area of each dwelling. Mr Batge, the Council's planning witness, had calculated the site areas. If the common driveway is excluded, the site area of each dwelling will

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be

Dwelling	Square metres
1	375
2	375
3	315
4	315
5	378

Each dwelling falls well short of the standard prescribed by Principle 1. In the case of dwellings 3 and 4 the shortfall is particularly marked.

25 When the Commissioner determined the site area by dividing the area of the allotment by the number of dwellings, he was following the practice of the Environment Court: *Forest v City of Holdfast Bay* [1999] SAERDC 96 and the cases there cited. It appears to be a long established practice. I have no desire to play the role of iconoclast. However, an automatic, if not mechanical, practice of this kind which determines an average site area is not appropriate and should be discontinued. The practice fails to have regard to the various factors which in each case might affect the site area of each dwelling. Those will include factors inherent in the design of the proposed development as well as the terms of the Development Plan. The aim of this Development Plan is that an adequate site area be provided for each dwelling. Just as the question of what constitutes the curtilage is a question of fact and degree to be examined in each individual case, so too the question of what is the site area must be determined by considering the facts and circumstances of each individual case. No doubt, there will be occasions when it is appropriate simply to divide the area by the number of dwellings. In other cases it will not and the present case is an instance.

26 The Council did not make any submissions in the Environment Court on the question of site area. A party is bound by the conduct of its case and is not, as a general rule, to be permitted to raise a new argument which, whether deliberately or by inadvertence, it has failed to put during the hearing: *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8. However, when all the facts have been established beyond controversy or where the point is one of construction or of law, a court of appeal may find it expedient in the interests of justice to entertain the point, but otherwise the rule is strictly applied: *Water Board v Moustakas* (1988) 180 CLR 491 at 497. This is an instance where it is appropriate to permit a new point to be argued. The point on which Mr Manos relies is to be determined by the construction of the *Development Regulations* and of the Council's Development Plan and the design of the proposed dwelling. There is no need for any further evidence. All of the relevant evidence was led in the Environment Court.

27 The fact that the proposal falls short of the prescribed standard is not of itself a reason for holding that the proposal should not be granted development consent: *South Australian Housing Trust v Development Assessment Commission* (1994) 63 SASR 35 at 38. A development that fails substantially to comply with prescribed standards might be refused development consent either because a development is seriously at variance with the Development Plan (see s.35(2) of the *Development Act*) or otherwise fails to meet criteria of a qualitative nature specified in the Development Plan. The standards in the Development Plan are the goal to be aimed at. They are the preferred standards. The intent is that a development proposal should have regard to them. See *Moyes v J & L Developments Pty Ltd* (2004) LSJS

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A Group Dwelling?

28 Mr Manos contended that the Commissioner had erred in classifying the development as a group dwelling. Mr Manos submitted that the two dwellings on the Price Street frontage were in fact detached dwellings as defined. He submitted that, properly characterised, the proposed development consisted of two detached dwellings and three group dwellings.

29 The expressions "detached dwelling" and "group dwelling" are both defined in Schedule 1 of the *Development Regulations*. It is first necessary to notice the definition of "dwelling" which reads:

**dwelling** means a building or part of a building used as a self-contained residence.

Each of the units in this development is a self-contained residence and is, therefore, a dwelling. The definition of "detached dwelling" is in these terms:

**detached dwelling** means a detached building comprising one dwelling on a site that is held exclusively with that dwelling and has a frontage to a public road, or to a road proposed in a plan of land division that is the subject of a current development authorisation.

Mr Manos submitted that the two dwelling in front of the land were each on a site held exclusively with that dwelling. Each was divided from the other by the common driveway. As both had a frontage to Price Street which was a public road, he submitted that each was a detached dwelling. If it is assumed that each of the two dwellings has an exclusive site, each is a detached dwelling.

30 However, it is necessary to have regard also to the definition of "group dwelling". It is in these terms:

**group dwelling** means one of a group of two or more detached buildings, each of which is used as a dwelling and one or more of which has a site without a frontage to a public road or to a road proposed in a plan of land division that is the subject of a current development authorisation.

It is not entirely clear whether the definition of group dwelling applies to a group of detached dwellings where some have a frontage to a public road and others do not or whether it applies only to a group of dwellings where none has a frontage to a public road. I am inclined to the view that the former is the intent of the definition. On that basis, each of the five dwellings would be a group dwelling. However, for the reasons already expressed, it is not necessary to determine this question and I express no final view on it. It is preferable for the issue to be determined in a case where there is both a proponent and a contradictor.

### Conclusion

31 The Commissioner has erred in a number of respects. He has misinterpreted the Development Plan and in particular has not given proper effect to the Statement of Desired Character and principles of development control so far as they relate to medium density developments for Policy Area 8. The Commissioner has erred in his calculations of the site area of each dwelling. When properly calculated, each dwelling has a site area markedly below the prescribed minimum. The extent of the

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shortfall is indicative of other aspects of the proposal which fail to satisfy the criteria in the Development Plan. The proposal also fails to comply with Principle 3 of the principles of development control for Policy Area 8. That failure is the fact that the setbacks from the side boundaries and the space around the proposed buildings are not similar to that of existing residential development in the locality. As the Council's planner observed, this proposal creates what for the locality is "an uncharacteristically tight development".

- 32 Principle 3 applies to any form of new housing in the policy area and has a special application to sites comprising two or more dwellings. Its intention is to ensure that even medium density housing will have a reasonable proportion of open space around them in a manner similar to that in the case of existing residential development. It is intended to prevent medium density development which results in overdevelopment of a site, a factor all too frequently observed in a number of parts of metropolitan Adelaide. There is no inconsistency between medium density living and site which has a reasonable provision of open space for the enjoyment of those who reside in dwellings on the site.
- 33 As the Commissioner has erred in his understanding of the Development plan, the appeal must be allowed.
- 34 This is not a case where it is appropriate to remit the matter to the Environment Court for hearing and determination in accordance with these reasons. The Commissioner's reasons for allowing the appeal are seriously flawed. The proposed development falls so far short of the minimum site areas and fails to satisfy other provisions of the Development Plan to such an extent that the only proper course is to restore the decision of the Council. The problems with the development stem from the fact that Terra Equities seeks to overdevelop the site, that is to say, the site is not sufficiently large to accommodate what is proposed. The proposal is so inconsistent with so many prescribed standards in the Development Plan that it is apparent that development consent must be refused. This is an unusual course for this Court to adopt. The Court does not decide issues as to the planning merits of a proposal. As a general rule, once it has corrected an error of law, it will remit the matter to the Environment Court for hearing and determination in accordance with its reasons. However, the issues are so clear in this present case and depend so directly on the terms of the Development Plan that it is appropriate for this Court to decide the issue.
- 35 For all of these reasons the appeal will be allowed. The decision of the Environment Court will be set aside. The appeal by Terra Equities of the Council's decision will be dismissed. The Council's decision refusing development consent will be restored