



## CONSTRUCTION LAW UPDATE No. 706

### A sea change on coastal views

It may be that a recent decision of the SA Supreme Court has redefined the law in South Australia in relation to protecting coastal views. In *Hutchens v City of Holdfast Bay* [2007] SASC 238, Justice DeBelle considered whether the existing views of owners of apartments (Hutchens and Totos) one block back from the Esplanade at Seacliff should prevail over the right of the owners of an esplanade block (Mila Enterprises) to construct a three storey building, blocking their views.

#### The common law position

The common law does not protect views. "Common law" means the law that is put in place by courts, as opposed to legislation by parliament. Where landowner A enjoyed a sweeping vista of the coast and landowner B wanted to construct a building that would block the views enjoyed by A, the common law said that A's views did not give rise to a property right.

Over the years, many landowners have felt unjustly dealt with by losing their views in these circumstances, but have been unable to prevent the loss of their views by approaching the courts, or indeed obtain compensation for lost views.

#### Development Plans and legislation

While this has been the position at common law, some Councils have recognised that their residents pay a high price for spectacular views and in NSW, some of the coastal councils have introduced development plans that expressly protect the right to existing views. In such cases, the provisions of the development plan govern the planning process.

Of course, at the time of the introduction of a development plan that protects existing views, there is a significant upheaval in property values. Those who have a panoramic vista enjoy an increase in their property value, while those who own under-developed seafront land, suffer a loss in value.

#### The Seacliff facts

Mila Enterprises applied for permission to demolish an existing two storey shop and dwelling located on their Esplanade block at Seacliff, to replace it with a three storey building. The Development Plan allowed for the construction of three storey

buildings on the Esplanade to a height of 10.5 metres. On the north side of the subject land was a three storey residential flat building and on the south side, a two storey hotel. The land sloped up steeply from the Esplanade. Hutchens and Totos lived in a two storey residential complex immediately to the east (behind) the subject land in a building that had been constructed to take advantage of the west facing views of the coast.

#### The history of the appeal

The Holdfast Bay Council approved the Mila Enterprises application to build the three storey building that blocked the views enjoyed by Hutchens and Totos. Hutchens and Totos appealed to the Environment and Resources Development Court where a Commissioner found that there was no basis to protect their views and dismissed the appeal. They further appealed to the Supreme Court.

#### The Supreme Court decision

Justice DeBelle commenced his analysis by surveying the existing common law on views. He noted that while the capacity to enjoy a view has been reflected in the value of land, views are not specifically protected by common law. He reviewed case law going back as far as 1610 and noted a 1911 case where the performance of unauthorised works that obstructed views resulted in an award of damages.

He then considered the various decisions in NSW where the relevant planning legislation expressly protected views. He noted that two of the cases that resulted in the demolition of the upper storey of completed developments that blocked views relied in part on legislation that required the consideration of "the social effect and the economic effect" of the development.

#### Amenity

His Honour then turned to consider the meaning of the word "amenity". Most development plans have a general provision that requires the protection of the "amenity" of the area in which the proposed development is to be constructed. His Honour concluded that views are one aspect of amenity.

His Honour said that amenity has a private and public aspect. That is, the amenity of the area is to be assessed on the basis of its appeal to a member of the public who visits the area, but also on the basis of the enjoyment of each citizen who lives in the area.

The Holdfast Bay Council's Development Plan required that dwellings be sited to gain maximum advantage of views. His Honour said that it was likely that the Hutchens and Totos' apartments had been constructed with this in mind.

The Development Plan required that any proposed development should have regard to existing development and not impair the amenity of the locality. There was also a general requirement that development should preserve important views.

Justice Debelle noted that unlike some other zones within the Development Plan, the zone applicable to the subject land did not expressly protect existing views.

#### **The impact on the existing views**

His Honour noted that the appellants enjoyed an existing view of the coast, with a clear view of the sea and the horizon. He said it is a notorious fact that coastal and sea views are highly regarded and are in keen demand. He said that if the proposed building was constructed, the appellants would have nothing but the barest glimpse of the sea and the horizon on either side of the new building and instead of a pleasant view would look directly at the rear walls and roof of the new building. He categorised their loss of view as extreme.

His Honour commented that it was unlikely that development consent would be refused for a single storey house in front of an existing single storey house, notwithstanding that the existing house might enjoy expansive views.

Justice Debelle concluded that the Mila proposal was such a complete obliteration of the views enjoyed by Hutchens and Totos that it was entirely inconsistent with the provisions of the Development Plan that protect views. He said that while no one has a monopoly on views, it was possible for Mila Enterprises to construct a new building at a level which would permit those behind to continue to enjoy their views and therefore development consent should be refused. He allowed the appeal.

#### **Conclusion**

Justice Debelle has not altered the common law position. He has however made it clear that the definition of "amenity" includes the private views enjoyed by existing residents.

The decision sets a new benchmark in terms of the value of existing views. It is likely to have an impact on the value of coastal property.

The greatest impact is likely to be on the development of multi storey buildings on the coastline that impact on the views of existing multi storey buildings.

It is not known whether the decision is to be the subject of further appeal.

*Contributor:* Tom Grace

Tom is a former engineer who ran his own construction company for 20 years before becoming a construction lawyer. He has wide experience in the engineering and construction fields and specialises in the resolution of commercial disputes.

Tom also acts for clients in respect of planning appeals.

#### **Contact Details**

Tom Grace – Partner  
Direct: (08) 8110 8004  
[tom.grace@feg.com.au](mailto:tom.grace@feg.com.au)

June 2007

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Fenwick Elliott Grace is a law firm that specialises in providing legal services to the construction and engineering industries.

Office: Level 10, Optus Centre  
431 King William Street  
ADELAIDE SA 5000

Ph: (08) 8110 8000  
Fax: (08) 8231 2922  
Web: [feg.com.au](http://feg.com.au)

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