

Aged Care

February 2009

Supreme Court Places Roadblock on Retirement Village Development

On 5 February 2009, the Full Court of the Supreme Court of South Australia delivered a judgment with enormous ramifications for the retirement village sector.

The decision is *Chappel Investment Company Pty Ltd and Smallacombe Investment Company Pty Ltd -v- The City of Mitcham.*



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The retirement village developer sought approval from the council for the development on a disused quarry site for a number of buildings to be used as a retirement village. The development was, apart from one detached building, a series of individual buildings with apartments on various levels. Each of the apartments was self contained.

A retirement village was not defined in the *Development Regulations* under the *Development Act*, or in the development plan for the council. The law requires that the nature of the development must be determined, so that it can be either a complying development or a non-complying development. Certain types of development are listed in zones as either complying or non-complying. If a development is not listed in either, then it is dealt with on a consent on merit approach. Most applications for retirement villages over the past decade have been dealt with as an undefined use and

therefore as a consent on merit approach. If it is a non-complying development, then no appeal lies from a decision of a council or other relevant development authority, refusing the consent to the development, or imposing a condition on the consent.

The Court decided that despite the fact that this was clearly a retirement village, it was in fact a development which was best described as a "residential flat building". The development regulations say that a residential flat building is a single building in which there are two or more dwellings, but does not include a semi detached dwelling, a row dwelling or a group dwelling.

Once the Court came to the conclusion that this was a residential flat building, it then became a non-complying development under the development plan for the council, and therefore no right of appeal existed from the decision of the council to refuse consent for the development.



Therefore, apartment style retirement villages are actually residential flat dwellings, and as such may be non-complying developments under many development plans of councils. However, a retirement village may also be what is known as a group dwelling under the development regulations. A group dwelling is defined as "one of a group of two or more detached buildings, each of which is used as a dwelling and one of more of which has a site without a frontage to a public road or to a road proposed in a plan of division..."

Many retirement villages would fit this description. Retirement Villages operators would need to check whether a development plan lists a group dwelling as non-complying.

Unless the retirement village developer appeals to the High Court, and succeeds, this decision is the law in South Australia.

We will keep you posted, as there are moves afoot to make representations to the Government to remedy the problem.

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