



# Development Assessment Panel

28 June 2010

MID MURRAY COUNCIL

DEVELOPMENT ASSESSMENT PANEL

Agenda

Meeting to be held in the Meeting Room of the Mannum Council Offices,  
49 Adelaide Road, Mannum

Monday 28 June 2010, 10.00am

1. PRESENT

Frank Wieser (Presiding Member), James Miller, Ross Dawkins, Jeff Howie,  
Mick Morrissey and Marie Rudloff

2. IN ATTENDANCE

Kelvin Goldstone, Director – Development & Environmental Services  
Geoff Parsons, Manager – Development Services  
Melissa Marschall, Minute Secretary

3. COMMENCEMENT AND WELCOME AM

4. APOLOGIES

Graham Gaston

RECOMMENDATION

moved that the apology be received.  
Seconded

5. CONFIRMATION OF PREVIOUS MINUTES

(Page 2652 – 31/5/2010)

Minutes of the Mid Murray Council Development Assessment Panel meeting held on  
31 May 2010.

RECOMMENDATION

moved that the minutes of the Mid Murray Council Development  
Assessment Panel Meeting held on 31 May 2010 be taken as read and confirmed.  
Seconded

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6. DECLARATION OF INTEREST BY MEMBERS OF PANEL

7. DEVELOPMENT REPORT

RECOMMENDATION

moved that the report be received.

Seconded

8. LATE CORRESPONDENCE

9. OTHER BUSINESS

10. NEXT MEETING

To be held in the Council Chambers, Main Street, Cambrai on Monday, 26 July 2010, commencing at 10.00am.

11. CLOSURE

MID MURRAY COUNCIL

**DEVELOPMENT ASSESSMENT PANEL**

**Development Report**

**Meeting to be held in the Meeting Room of the Mannum Council Offices,  
49 Adelaide Road, Mannum**

**Monday 28 June 2010, 10.00am**

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**MID MURRAY COUNCIL – DEVELOPMENT REPORT**  
**7.1 DEVELOPMENT APPLICATION 711/126/09 – M AYLES**

<i>Reporting Officer:</i>	<i>Geoff Parsons</i>
<i>Position:</i>	<i>Manager – Development Services</i>
<b>Development No.</b>	<b>711/126/09</b>
<b>Applicant</b>	<b>M Ayles</b>
<b>Subject Land</b>	<b>Allotment 267 of FP177149, Part Section 260, Morphett Flat Road, Morphett Flat, Hundred of Eba</b>
<b>Proposal</b>	<b>Dwelling Alteration (Partial Enclosure of the Ground Level of an Existing Elevated Dwelling)</b>

### ***INTRODUCTION***

Development Plan Consent is sought for the enclosure of the ground level of an existing elevated dwelling located in the "shack area" at Morphett Flat.

Originally the application sought Development Plan Consent for the existing dwelling on site (despite the fact it had already received approval) and the ground level enclosure in order to allow the Council to impose conditions limiting the floor area without any argument concerning the legal right to do so.

However through an appeal against the classification of the application, the ERD Court determined that the application was for dwelling alterations only (i.e. the underfloor enclosure) and not the existing dwelling on the land.

The background to this matter is discussed further below.

### ***BACKGROUND***

- On 22 December 2006, development application 711/625/06 was received by Council. The application sought Development Plan Consent to establish an elevated detached dwelling together with a wet area at ground level (8.58 square metres) and enclosure on the western elevation only with roller doors.
- Development Plan Consent was issued on 17 January 2007.
- On 27 June 2007 Council's Manager – Regulatory Services attended the site and discovered construction of the dwelling had commenced prior to Building Rules Consent and Development Approval having been issued. In addition the ground level of the elevated dwelling was being enclosed which was both not in accordance with the approved plans or conditions of the Development Plan Consent.
- On 27 June 2007 Council's Manager - Regulatory Services spoke to Martin Ayles and issued a Section 84 Notice requiring all work on the development cease immediately and that all external wall frames, internal wall frames and cladding at ground level (which had not been approved) be removed.
- On 6 July 2007 Development Approval was issued for the application. In addition Council's Manager – Regulatory Services undertook a further inspection of the property and it was revealed that the Section 84 Notice had been complied with. This was confirmed to in writing in correspondence to Martin Ayles dated 9 July 2007.

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- On 27 February 2008, Council's Manager – Regulatory Services undertook a further inspection of the property where it was revealed that the northern, southern and waterfront elevations of the ground level of the elevated dwelling had been fully enclosed. No development approval had been issued for this development and it was not in accordance with the approved plans nor the conditions of approval. In addition Martin Ayles was aware of the requirement to seek development approval having been informed of this through the previous Section 84 Notice and associated discussions.
- A second Section 84 Notice (dated 11 March 2008) was issued to Martin Ayles. The Notice required all external wall frames, internal wall frames and cladding on the underside level of the dwelling which have not been approved to be removed.
- On 22 July 2008 Norman Waterhouse, on behalf of Council, wrote to Martin Ayles and noted he must ensure compliance with the notice or risk further enforcement proceedings.
- On 27 November 2008 Botten Levinson, on behalf of Martin Ayles, confirmed they would be lodging a development application to legalise the work that had been undertaken.
- Development application 711/126/09 was subsequently lodged and fees were paid on 1 April 2009.
- Council staff were of the view that the proposal constituted non-complying development. In addition, and as mentioned above, staff were also of the view that what was being applied for was an alteration to an existing dwelling, not the development as a "whole". The decision of Council staff with regards to the classification of the application (and accordingly the nature of development) was appealed to the ERD Court.
- The ERD Court ruled that what was being applied for was an alteration to an existing dwelling, but overturned Council's decision in relation to the classification of the dwelling, saying it must be assessed as a "merit" form of development. It is suggested that this decision reflects existing poorly worded policy in the Development Plan, as the Judge noted the Plan could benefit from a thorough redrafting.

Consequently the application has been assessed through the "merit" assessment process and is now presented to the Development Assessment Panel for a decision.

If the decision of the Panel is to grant Development Plan Consent to the proposal then the matter will be finalised. If the decision to refuse the application then the decision of Panel may be appealed. In any case it is likely Council will continue to pursue prosecution proceedings.

***DESCRIPTION OF PROPOSAL***

The application seeks Development Plan Consent to enclose a section of the ground level of the existing elevated detached dwelling on site.

The area to be enclosed at ground level would total approximately 210 square metres (approximate due to wall thickness etc). The area is enclosed using a mixture of roller doors and removable panels (refer plan W2 attached). The removable panels and roller doors are beige in colour (matching the remainder of the building), and the removable panel detail is noted in writing at the top right hand corner of plan W2.

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The plans note that 10 square metres of the enclosure will be used as a wet area (this was approved through development application 711/625/06 – although the location and floor area of the wet area have changed), 44 square metres will be used for storage and 156 square metres will be used as a garage. The ‘break up’ of this area is explained in further detail in the assessment section of this report.

***SUBJECT LAND AND LOCALITY***

The subject land is identified as Allotment 267 of FP177149, Part Section 260, Morphett Flat Road, Morphett Flat, Hundred of Eba, as contained in Certificate of Title Volume 5881 Folio 520.

The land falls within the Shack Settlement Policy Area as noted on Maps MiMu/5 and MiMu/66 in Council's Development Plan.

The allotment is mostly rectangular in shape, with the exception of those boundaries adjacent the River Murray. The land enjoys direct access to the River Murray and is accessed by vehicles via Morphett Flat Road adjacent the north western boundary of the land.

The area of the allotment totals 17179.4 square metres (i.e. 1.7 hectares), and together with other land in Morphett Flat, the allotment is one of the largest to be covered by the Shack Settlement Policy Area.

The land contains an existing elevated detached dwelling together with associated decking/verandahs and the land also contains rainwater tanks, a small domestic outbuilding, a boat ramp and a jetty.

The land also contains several stands of native vegetation, mostly in the form of native trees.

Attached are maps which identify the subject land and locality of the subject site.

***NATURE OF THE LOCALITY***

The allotment is situated at the southern end of the Morphett Flat shack area. Land to the north contains other allotments forming part of the Morphett Flat shack area (i.e. holiday homes on large allotments) and also rural land parcels, most of which appear to have been left as natural “floodplain” land.

Land to the south of the subject land contains the Brenda Park shack area and other rural land used for grazing, together with natural scrub land.

The River Murray lies immediately east of the subject land, and land to the west is used for rural/agricultural purposes.

The land is approximately 2.2km from Morgan (in a straight line). The area becomes busy, particularly in the summer months and at holiday time, due to the large number of shacks and houseboats located in the area.

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***REFERRALS***

One referral was required to be undertaken to the Minister administering the River Murray Act (DWLBC on the Minister's behalf) pursuant to Schedule 8 Part 2 (19)(g).

The Department of Water, Land & Biodiversity Conservation have responded allowing the development to proceed subject to a number of conditions and notations. A copy of their correspondence is attached.

***CLASSIFICATION***

Council staff considers that the application should have been assessed as non-complying development by virtue of Principle of Development Control 25 of the Shack Settlement Policy Area which states:

*PDC 25 – The following kinds of development are **non-complying** in the Shack Settlement Policy Area:*

.....  
*Dwelling alterations and additions, except where there is conformity with Principles 11 and 13.*  
.....

Principle of Development Control 13 of the Shack Settlement Policy Area states:

*PDC 13 – Underneath areas of elevated dwellings:*

- (a) *should not be used for living purposes;*
- (b) *may be used for storage purposes, or for a toilet, or a shower, or laundry facilities(subject to limits scheduled below); and*
- (c) *may be enclosed using roller doors, removable panels, or other material which can be easily removed during times of flood;*
  - *Maximum area for storage purposes – 54 square metres*
  - *Maximum area for use as toilet/shower/laundry facilities – 10 square metres*
  - *No storage of caravans.*

The ERD Court found that the application complied with the above provision because only 44 square metres was being used for storage and 10 square metres for wet area. Despite the fact 156 square metres was proposed to be enclosed for use as a garage, the Court found there was no limit in the Principle of Development Control above in relation to the area for a garage, and subsequently, the proposal complied with the Principle of Development Control and the application should be assessed as a "merit" form of development.

With the highest level of respect, Council staff still consider their interpretation of the policy to be correct, but nevertheless a thorough re-drafting of the policy is currently underway, and in accordance with the determination of the ERD Court, the application has been processed as a "merit" form of development.

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***PUBLIC NOTIFICATION***

Principle of Development Control 26 of the Shack Settlement Policy Area resulted in the proposal being assessed as a Category 1 development.

Accordingly no public notification was undertaken.

***RELEVANT PROVISIONS OF THE MID MURRAY COUNCIL DEVELOPMENT PLAN***

**Council Wide**

*Objectives:* 1, 6, 7, 14, 15, 36, 51, 52, 55 & 56

*Principles of Development Control:* 1, 6, 34, 35, 43, 134, 139, 140 & 188

**River Murray Zone**

*Objectives:* 1, 2, 17, 19 & 20

*Principles of Development Control:* Nil

**Shack Settlement Policy Area**

*Objectives:* 1, 3, 4 & 6

*Principles of Development Control:* 1, 2, 9, 11, 12, 13, 24, 25 & 26

**ASSESSMENT**

As noted in the background section of this report this matter has a substantial history. It is now the responsibility of the Development Assessment Panel to determine whether the development (i.e. the enclosure of the ground level of the dwelling) meets the provisions of Council's Development Plan.

The issue of flooding in relation to the development is considered to be the most pertinent, and is addressed below in detail. Prior to examining this issue however, a summary of the other components of the development and their compliance, or otherwise, with the Development Plan is provided for below:

- Visual Amenity – The materials used, and the external colours and finishes comply with requirements of Council's Development Plan, and are considered to be visually appealing. However, the size of the ground level enclosure is considered to be contrary to the established character of a majority of the shack area, and consequently detrimental to the amenity of the locality.
- Native Vegetation/Bushfire – The development does not extend outside of the “footprint” of the existing elevated dwelling, and as such the development did not require the removal or trimming of any native vegetation, thereby complying with the requirements of the Development Plan.

In addition, and with respect to bushfire, the development does not increase the risk to the building with respect to bushfire. While the original dwelling was approved prior to the gazettal of the Bushfire Management PAR (Ministerial), it still complies with a majority of the Development Plan provisions which were introduced.

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The development proposed is considered to comply with Principle of Development Control 188 (page 44, Development Plan, consolidated 13 December 2007).

- Stormwater/wastewater – The development will not generate any additional stormwater flows given that is located within the “footprint” of the existing elevated dwelling. Consideration was given as to whether it would potentially interfere with a drainage line etc., but this does not occur.

For the purposes of wastewater, the applicant originally obtained approval from Council’s Environmental Health Department for the wet area underneath the dwelling (in the format of that currently constructed). No additional wet areas are proposed at ground level and accordingly there are no further issues with respect to wastewater.

- Other Considerations – Privacy (in terms of impacts on adjoining owners) and overshadowing are not issues which require consideration in this instance given the type of development proposed and the size of the allotment, plus the location of the development within it.

The bulk and scale of the development may be considered acceptable when viewing the development in isolation and forgetting the sensitive location. However, approved development within the shack areas exhibits a built form which limits the enclosed area at ground level for elevated dwellings and the development is not consistent with this established pattern of built form. Consequently the development displays a bulk and scale not commonly seen in shack areas which is considered to be detrimental to the established character of the area.

To summarise, the aspects of the development noted above, with the exception of those relating to the amount of ground level enclosure, are generally considered to comply with the relevant provisions of Council’s Development Plan.

However, further detailed discussion is required with respect to the form of the development and its potential impact given it is located within a floodplain.

#### Flood Impact

Council’s Development Plan, through the following provisions, notes the importance of maintaining control of developments within the recognised floodplain areas to ensure the danger to the development is minimised and the developments impact in the event of a flood is also minimised:

*Council Wide Objective 6 – Land liable to flooding from the River Murray, either kept free of development which could be damaged or which would impede floodwaters, or designed and located to minimise property damage or impede flood waters.*

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*Council Wide Objective 51 – Protection of life and property from the effects of flooding.*

*Development in floodplains of the River Murray Valley and Marne Valley increases the risk of both life and property. Areas known to be subject to occasional flooding should be kept free of new development or developed to protect property whilst development itself should not impede the flow of flood waters.*

*Council Wide Objective 52 – Prevention of development which could lead to a potential hazard in the event of a major flood.*

*Control of all development within floodplains is necessary to ensure that hazards are not created.*

*Council Wide Principle of Development Control 6 – Generally buildings should not be erected on land liable to inundation by water other than in designated areas and where designed to protect property and maintain flood flows.*

Additional provisions also reiterate the importance of either keeping flood prone land free from development, or ensuring it is designed appropriately to ensure the protection of the development, and that the development does not interfere with the flood flows or pose a hazard in the event of a flood.

Obviously the Shack Settlement Policy Area encourages the development of dwellings/holiday homes, and accordingly, as noted above the design of those developments must be managed and should be in accordance with the design criteria incorporated in the Development Plan to ensure that the objectives of the Development Plan are achieved.

#### Design

Shack Settlement Policy Area Principle of Development Control 13 states:

*Underneath areas of elevated dwellings:*

- (a) *should not be used for living purposes;*
- (b) *may be used for storage purposes, or for a toilet, or a shower, or laundry facilities (subject to limits scheduled below); and*
- (c) *may be enclosed using roller doors, removable panels, or other material which be easily removed during times of a flood:*
  - *Maximum area for storage purposes – 54 square metres*
  - *Maximum area for use as a toilet/shower/laundry facilities – 10 square metres*
  - *No storage of caravans*

The applicant's lawyer has argued that the proposal complies with the above provision. This argument is based on the fact that the area proposed to be used for storage is 44 square metres, the area proposed for use as a laundry/shower/toilet is 10 square metres, and the remainder of the ground level enclosure is proposed to be used as a garage area (156 square metres).

The applicant's lawyer argues that the development complies with the above as the development conforms to the limits specified above (because the Development Plan does not specify a limit for "garaging" area).

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Further it is argued that because part (b) specifies the limits, and part (c) does not specify any limits, then so long as the enclosure for storage and wet areas does not exceed 54 and 10 square metres respectively, and amount of the ground level can be enclosed assuming it is used for an alternative acceptable purpose.

With respect, Council staff considers the above view to be a misinterpretation of the policy. The above view is a strict and narrow interpretation of the quantitative sections of the Principle of Development Control and does not consider the qualitative aspects of the Principle of Development Control. In addition the Principle of Development Control is taken out of context and argument provided does not consider other provisions of the Development Plan which provide a greater level of clarity with respect to the intent.

**Assessment**

It is considered that while Principle of Development Control 13 of the Shack Settlement Policy Area does not specifically note the limits imposed on ground level enclosure, it is essential that the Principle of Development Control be read as a "whole" as opposed to picking individual sections of it to support a particular view.

The intent of the provision is further demonstrated in the associated Design Technique 13.1, and in particular, the diagram at the top of page 103. The diagram shows an arrow pointing to a shaded area (i.e. the enclosed area) at ground level and notes that it is for 54m<sup>2</sup> maximum storage area and 10m<sup>2</sup> toilet/shower/laundry area.

Furthermore, part (d) of the Design Technique notes that the 10 square metres of wet area need not be enclosed using removable panels. Such wording is considered to indicate that the enclosure limits relate to the permitted uses for the ground level enclosure area, and that the two are not to separate.

A design technique is not a binding provision of Council's Development Plan, and only indicates one way of satisfying the associated Principle of Development Control and therefore no decision should be based on a proposals compliance or otherwise with a design technique. However they are useful in demonstrating how a proposal may comply with a Principle of Development Control, and in this circumstance, Principle of Development Control 13 of the Shack Settlement Policy Area.

Further evidence of the intent of the Development Plan with respect to ground level enclosure can be seen in the diagram beneath Principle of Development Control 10 in the Shack Settlement Policy Area on page 96 of the Development Plan. Again an elevated dwelling is shown with only a portion of the ground level enclosed.

Moreover the need to ensure appropriate building design is reiterated through the Development Plan (in the provisions noted in 'Flood Impact' section of this report above) and in other parts of the Plan such as the Desired Future Character Statement of the Shack Settlement Policy Area:

*...the area is located in the flood plain and re-occurring flooding will occur from time to time. To minimise damage, building layout restrictions are specified.*

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If the intent of the Development Plan (specifically through Principle of Development Control 13 of the Shack Settlement Policy Area) was to allow unlimited ground level enclosure, on the proviso it was undertaken with removable panels and only used for a use which is not storage, wet area or living area, then the wording of Principle of Development Control 13 is both inappropriate and misleading, and the various diagrams through the Shack Settlement Policy Area are incorrect.

One final argument to support the proposal has been put forward, that being that the enclosure has been undertaken using roller doors/removable panels, and therefore the entire underfloor enclosure is able to be removed in the event of a flood, thereby ensuring the development won't impede flood waters and that development won't pose a hazard, in accordance with the provisions of the Development Plan.

Council staff agree it is of the upmost importance to ensure that ground level enclosure is undertaken using removable panels/roller doors and, despite the lack of information in this regard, it appears that the development has been undertaken such that the panels are removable (further detail should be requested should the Panel decide to grant Development Plan Consent to the proposal).

However compliance with this aspect of Council's Development Plan is not considered to be sufficient justification to vary, so significantly, from the provisions regarding limits on ground level enclosure.

Lastly it is important to note that while removable panels is an important component of any ground level enclosure development within the flood plain, there is no guarantee that such panels will be removed in the event of a flood. Accordingly the larger the enclosed area at ground level, the greater the risk that the development will be damaged in the event of a flood, divert the flow of flood waters, and cause a hazard to other property & life.

#### *CONCLUSION*

It is considered that it is the clear intent of the Development Plan to place restrictions of the amount of ground level enclosure that can be undertaken below an elevated shack. The development which has been undertaken is not in accordance with those restrictions.

It is suggested that such variance with the Development Plan cannot be overlooked, or be considered acceptable in this circumstance. The development is significantly over the enclosure limit envisaged and the only arguments provided to support such variance is that it complies with the strict quantitative sections of Principle of Development Control 13 (If read in a certain way) and some additional information regarding case law and the interpretation of the Development Plan. Such arguments do not provide sufficient rationale to vary from the provisions and intent of Council's Development Plan.

Council's Development Plan places a strong emphasis on ensuring control of all development within flood plains is controlled to ensure that such development will not be damaged by flood waters, will not pose a hazard in the event of a flood, and will not impede the path and flow of flood waters.

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The development is contrary to the design principles applying to it and justification for this lack of compliance is not sufficient. Accordingly it is considered that the development is at variance with the relevant provisions and Council's Development Plan and should be refused.

#### RECOMMENDATION

moved that pursuant to Section 35(2) of the *Development Act 1993*, Development Application 711/126/09 is not "Seriously at Variance" with the relevant provisions of the Mid Murray Council Development Plan but is sufficiently at variance to warrant refusal for, amongst others, the following reasons:

- 1) The application is at variance with Principle of Development Control 13 of the Shack Settlement Policy Area because the design of the development is in excess of the limits specified.
- 2) The application is at variance with:-

Council Wide Objectives 6, 7, 51 & 52  
Council Wide Principle of Development Control 6  
River Murray Zone Objectives 1 & 19  
Shack Settlement Policy Area Objective 4.

The proposal does not incorporate the design measures contemplated by the Development Plan to ensure the risk to the development from flooding is minimised and to ensure the development will allow the free flow of flood waters and will not be a hazard to life or property in the event of a flood.

Seconded

Kelvin Goldstone  
DIRECTOR – DEVELOPMENT & ENVIRONMENTAL SERVICES