



Agenda Report for Noting

Meeting Date: 2 April 2026

Item Name	ERD Court Decision – Private Bushfire Shelters	
Presenters	Nick Buick	
Purpose of Report	Noting	
Item Number	6.1	
Strategic Plan Reference	N/A	
Work Plan Reference	N/A	
Confidentiality	Not Confidential (Release Immediately)	
Related Decisions	N/A	
Conflicts Declared	Nil	
Is the Report author aware of any potential undeclared conflict?		NO

Recommendation

It is recommended that the State Planning Commission (the Commission) resolves to:

1. Approve the designation of this item as Not Confidential (Release Immediately)
2. Note the contents of this Agenda Report.

Background

Commission members may recall ongoing issues surrounding bushfire shelters being installed without approval and enforcement action being undertaken by some councils (notably Adelaide Hills Council) to ensure they are either removed or that the necessary development approval is obtained.

The Commission's key role regarding private bushfire shelters is in issuing concurrence (through its delegate, the Building Technical Panel (BTP) for private bushfire shelters that a certifier is seeking to issue a building rules consent for.

Section 102 of the *Planning, Development and Infrastructure Act 2016* (the Act) sets out that a development is an approved development if, and only if, a relevant authority has assessed the development against, and granted a consent in respect of, relevant matters (being planning, building and land division consent). For building consent to be granted, development must be assessed against "the relevant provisions of the Building Rules".

Section 118(5) of the Act then specifies that:

regulations made for purposes of this subsection may provide that building work of a prescribed class must not be granted a building consent unless the Commission concurs in the granting of the consent.

Regulation 45(6) of the *Planning, Development and Infrastructure (General) Regulations 2017* (the Regulations) prescribes that:

For the purposes of section 118(5) of the Act, building work comprising or including the construction or installation of a private bushfire shelter must not be granted a building consent unless the Commission concurs in the granting of the consent.

The Building Code of Australia (BCA) classifies private bushfire shelters as Class 10c buildings and they must meet the BCA Performance Requirement P2.7.6 Private bushfire shelter. Given there are no Deemed-to-Satisfy provisions, the Australian Building Codes Board (ABCB) developed and published a performance-based document, *Performance Standard: The Design and Construction of Private Bushfire Shelters* (Performance Standard) in 2014. Within this document, Performance Requirement P2.3 details guidance on achieving acceptable design solution. However, this document still requires professional judgement (such as considering building owner needs and site conditions) in mitigating life safety risks associated with the use of private bushfire shelters during a bushfire event.

In addition, the Department for Housing and Urban Development has developed and published a building advisory notice on private bushfire shelters on the PlansSA website: [https://plan.sa.gov.au/data/assets/pdf_file/0007/488212/Advisory Notice 03 18 - Private Bushfire Shelters.pdf](https://plan.sa.gov.au/data/assets/pdf_file/0007/488212/Advisory_Note_03_18_-_Private_Bushfire_Shelters.pdf)

That document sets out that a relevant authority is required to undertake a complete assessment of the private bushfire shelter and be of the view to grant building rules consent before applying to the BTP for concurrence. Building rules consent can only be granted after concurrence has been issued by the BTP.

Specifically, it advises that every application lodged for concurrence will require full and comprehensive documentation detailing how the criteria in P2.7.6 of the BCA and P2.3 of the Performance Standard has been achieved.

In short, the BTP needs to be satisfied, before concurring, that the building certifier assessed the application against the necessary technical documents and requirements to ensure it meets the performance standard for private bushfire shelters.

Previous bushfire concurrence matters

To date there have been 2 requests (1 refused / 1 under consideration) for the BTP to concur for the issuing of a building rules consent for a private bushfire shelter.

Both requests for concurrence involve bushfire shelters manufactured by Wildfire Safety Bunkers. Regarding the request for concurrence that was refused, there were no technical details provided (on the grounds the design is commercial in confidence) to enable a building rules assessment against the Performance Standard. As a result, the certifier was unable to substantiate to the BTP how they believe, through plans and specifications, that the shelter met the performance requirements and warranted consent being issued.

While the bushfire shelter for which concurrence was refused had previously been certified by the former Victorian Building Commission, the BTP had no knowledge of what that certification was based on.

Given the certification was also given some years ago, the BTP had no way of knowing if such a certification was based on the same bunker design for which development approval was being sought nor whether it met the current performance standards for private bushfire shelters.

Discussion

The Environment, Resources and Development Court recently (6 February 2026) delivered a judgement concerning a bushfire bunker installed without approval at a property in Stirling.

Background to appeal

The owners of the property installed, in October 2021, a prefabricated fire bunker they purchased from Wildfire Safety Bunkers. They did not obtain approval as required and in June 2022, the Adelaide Hills Council issued an enforcement notice directing them to remove the bunker. The landowners have appealed that notice (arguing the bunker does not require approval) and that appeal is yet to be determined by the Court (this is separate to the appeal the subject of this Agenda Report).

In summary there have been three applications for concurrence to the BTP for the bunker:

1. The first in May 2021, seeking approval for the bunker, was withdrawn.
2. A second application, in August 2022, was made after the Adelaide Hills Council issued the enforcement notice for its removal. That application was for a six person bushfire shelter. After referral of the application (assessed by a private certifier) to the BTP in June 2024, the application was denied concurrence. As a result, the second application was withdrawn.
3. A third application (the subject of this appeal) was made in May 2025 for the shelter to be used as storage unit. This application is the subject of the appeal and the subsequent decision of the Court.

Court decision

The Court considered an appeal by the landowners against the categorisation of the bunker as a private bushfire shelter (and not as a storage unit which they sought approval for). The Adelaide Hills Council, during verification of the application, determined the nature of the development to be a private bushfire shelter, as defined in the Regulations, and not as storage unit as the applicant contended.

In appealing the determination, the applicant argued that proposed modifications—such as welding a plate over a viewing hole, installing shelving, placing warning signage, and keeping the structure locked—meant it no longer functioned as a bushfire shelter.

The landowner also indicated that Wildfire Safety Bunkers told him that their bunkers had previously been “certified for use as bushfire shelters in multiple states, including at least one in South Australia. On that basis, the landowner believed it would be easy to obtain approval for the shelter.

The Adelaide Hills Council contended that the plans submitted with the application were the same as submitted with the first and second application, with the exception it was described as a storage unit and not a bunker.

In short, their argument failed. The Court held that the relevant authority must objectively determine the true nature of the development, and that the intentions of the current owners “may not be known shared or align with the intentions of future owners and occupiers of the land.” In that regard, the Court noted that no binding land-title notifications or enforceable conditions would prevent the structure from being used as a shelter if it were classified merely as an outbuilding.

The Court determined the structure was originally designed, manufactured and marketed as a private bushfire shelter and retained all the essential physical features of such a shelter, regardless of the owners' proposed modifications. Importantly, those modifications could be easily reversed and did not meaningfully change the structure's capacity to provide human shelter in a bushfire emergency.

The Court made it clear that the regulatory scheme clearly distinguishes private bushfire shelters from ordinary outbuildings because shelters carry serious life-safety implications and require greater oversight, including mandatory concurrence from the Commission.

Ultimately, the Court found that the structure remained, in substance and practical reality, a **private bushfire shelter** as defined in the Regulations. The appeal was dismissed, and the Council's characterisation of the development was upheld.

Current work on BTP request for further guidance on assessing applications for concurrence

In the Court's decision, it was noted (at paragraph 24) that as part of the second application for the bushfire shelter (where the BTP denied concurrence), the then Chair of the BTP advised the Adelaide Hills Council that they "have asked the Planning Commissioner to review the situation to action a way forward".

This refers to a letter the BTP wrote addressed to the Chair of the Commission in June 2024 requesting work be undertaken to review documentation available to the Department to determine if:

- a relevant authority can provide appropriate process and decision documentation to consent to the developments to the level required by the NCC, or
- the Minister can provide certification of this Bushfire Shelter.

In August 2024, a [review of the development approval process for private bushfire shelters in South Australia \(PDF, 459.9 KB\)](#) was undertaken by an independent consultant. The review considered the appropriateness of the current process given the high-risk nature of shelters, the quality of design and certification documentation required for assessment purposes and lastly identifying opportunities for improvements to the current ePlanning system. Several key stakeholders were interviewed, including shelter manufacturers, assessing authorities, interstate regulatory bodies and fire authorities. In summary the report concluded that:

the current system for approval of private bushfire shelters is maintained with minor post-approval improvements and additional advisory information and fact sheets published to help educate the industry on the process for approval of private bushfire shelters.

The Minister for Planning considered the Review's recommendations and agreed that:

1. Schedule 8 of the Regulations be amended to prescribe the specific technical documents to be provided when an application for a bushfire shelter is made.
2. Additional guidance be developed to better inform homeowners and practitioners about the approval process for bushfire shelters.

The additional guidance is being developed as part of bushfire code amendment package and will be released when the Code Amendment is adopted by the Minister.

Attachments:

1. ERD Court Judgement (#24470887)

Prepared by: Nick Buick

Endorsed by: Ben Sieben

Date: 25 March 2026

**MCBRIDE & ANOR v ADELAIDE HILLS COUNCIL
ASSESSMENT MANAGER [2026] SAERDC 2 (6 February
2026)**

Last Updated: 10 February 2026

ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT OF SOUTH AUSTRALIA

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MCBRIDE & ANOR v ADELAIDE HILLS COUNCIL ASSESSMENT MANAGER**[2026] SAERDC 2****Judgment of Commissioner Ryan****6 February 2026****ENVIRONMENT AND PLANNING - PLANNING - DEVELOPMENT ASSESSMENT AND CONTROL****ENVIRONMENT AND PLANNING - PLANNING - DEVELOPMENT ASSESSMENT AND CONTROL - CLASSIFICATIONS OF DEVELOPMENT AND GENERALLY - DETERMINING TYPE OR NATURE OF PROPOSED DEVELOPMENT****STATUTES - ACTS OF PARLIAMENT - INTERPRETATION**

The appellants have installed a prefabricated fire bunker on their land at Stirling (structure). They did not obtain the necessary consents and development approval from the relevant authority before doing so pursuant to the [Planning, Development and Infrastructure Act 2016](#) (SA) (Act). The Adelaide Hills Council (Council) issued an enforcement notice to the appellants pursuant to [s 213](#) of the Act directing them to remove the structure from the land. That notice has been appealed and that appeal has not yet been determined.

Following its installation on the land, the appellants have since decided that they will not use the structure for shelter in the event of a bushfire, rather, they now intend to use it for storage purposes only. They submitted a development application to the respondent, the relevant planning authority (respondent) for a development which they described as an outbuilding. The respondent verified the development as a private bushfire shelter. The appellants commenced an appeal against the respondent's characterisation of the development as a private bushfire shelter.

On appeal, modifications are now proposed to be made to the structure including; the welding of a metal plate over the viewing hole, the installation of shelving inside the structure, the erection of warning signage prohibiting the use of the structure as a shelter and a proposal that the structure be kept locked at all times when not in use. As a result of the modifications proposed, the appellants claim that the structure cannot be used as a private bushfire shelter. The respondent asserts that the modifications proposed could be easily reversed and notwithstanding the modifications, given the physical properties and attributes of the structure, it is capable of providing human shelter during a bushfire and it therefore is a private bushfire shelter, as defined under the [Planning, Development and Infrastructure \(General\) Regulations 2017 \(SA\) \(Regulations\)](#).

Held:

1. The appeal is dismissed.
2. Upon the receipt of a development application under the Act, a relevant authority must determine the nature of a development; [Rossi v City of Holdfast Bay Assessment Manager & Anor \[2022\] SAERDC 18](#), [47], applied. The authority must objectively examine the documents and other information before it and as a matter of practical reality decide what the nature of the development is. The intentions of an applicant may be relevant on occasion; [Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd \(2001\) 80 SASR 435](#), [10], [35], applied.
3. While form may be very influential, the proposed use of a building will often indicate the true nature of a development, particularly in circumstances where the form of a building may be deceptive. There is nothing deceptive about the form of the structure, which in this case is very influential, if not decisive; [Stewart v McQuade & Ors \(1997\) LGERA 127](#), distinguished.
4. The structure was designed, manufactured and marketed for the specific purpose of providing human shelter in the event of a bushfire. It retains all of the features necessary to provide shelter in a bushfire, with or without the modifications now proposed. That the manufacturer has changed the description of the structure to a 'storage unit' does not alter that position. The six person bunker and the storage unit as manufactured are physically and practically identical.
5. The legislative scheme draws a clear distinction between an outbuilding and a private bushfire shelter, not merely by definition, but by evincing an intention that the installation of private bushfire shelters be subject to greater regulatory oversight.

6. Notwithstanding the appellants stated intention to not use the structure for shelter, those intentions may not be known, shared or align with the intentions of future owners and occupiers of the land. In considering the circumstances of this case and the nature of this particular development, the considerations of the relevant authority and this Court on appeal, cannot be limited to only the appellants but must extend to others including future owners and occupiers; *Levin v Yarra Ranges SC* [2019] VCAT 123; *O’Toole v Yarra Ranges SC* [2019] VCAT 810; applied. There would be no prescribed particulars provided to prospective purchasers of the land indicating that the structure may only be used as an outbuilding and not as a private bushfire shelter under the *Land and Business (Sale and Conveyancing) Act 1994* (SA) upon the sale of the land.

7. The respondent has correctly determined that the nature of the development is a private bushfire shelter as defined under the *Planning, Development and Infrastructure (General) Regulations 2017* (SA) and not an outbuilding, *Chappel Investment Company Pty Ltd and Smallacombe Investment Company Pty Ltd v City of Mitcham* [2009] SASC 23, applied; *Pohl & Ors v Adelaide Hills Council & Anor (No. 1)* [2009] SAERDC 44, not followed.

Planning, Development and Infrastructure Act 2016 (SA); *Planning, Development and Infrastructure (General) Regulations 2017* (SA); *Development Act 1993 (now repealed)* (SA); *Planning and Design Code*; *Building Act 1993* (Vic); *Legislation Interpretation Act 2021* (SA); *Land and Business (Sale and Conveyancing) Act 1994* (SA), referred to.

Rossi v City of Holdfast Bay Assessment Manager & Anor [2022] SAERDC 18; *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd* (2001) 80 SASR 435; *Chappel Investment Company Pty Ltd and Smallacombe Investments Pty Ltd v City of Mitcham* [2009] SASC 23; (2009) 103 SASR 184; *Levin v Yarra Ranges SC* [2019] VCAT 1231; *O’Toole v Yarra Ranges SC* [2019] VCAT 810, applied.

Stewart v McQuade & Ors (1997) 94 LGERA 127, distinguished.

Pohl & Ors v Adelaide Hills Council & Anor (No.1) [2009] SAERDC 44, not followed.

Wong v Metcash Pty Ltd [2003] SASC 314, considered.

MCBRIDE & ANOR v ADELAIDE HILLS COUNCIL ASSESSMENT MANAGER

[2026] SAERDC 2

THE COURT DELIVERED THE FOLLOWING JUDGMENT:

1. Matthew McBride and Rosie Morison (*the appellants*) are the owners of 7 May Road, Stirling (*Land*) situated in the area of the Adelaide Hills Council (*the Council*). The Land is located in the Hazards (Bushfire – Medium Risk) Overlay within the Planning and Design Code (*the Code*) made under the *Planning, Development and Infrastructure Act 2016* (SA)

(*the Act*). As the Overlay name suggests, there is a potential danger from bushfire occurring on the Land which could threaten life and/or property.

2. Between 21 and 22 October 2021, the appellants installed on the Land what they have previously described as “a prefabricated fire bunker”.^[1] They purchased the bunker from the manufacturer, Wildfire Safety Bunkers (*Wildfire SB*). They installed it on the Land without first obtaining the necessary development approval under the Act.

3. On 16 June 2022, the Council issued an enforcement notice to the appellants pursuant to s 213 of the Act directing them to remove the bunker from the Land. The appellants appealed against that notice on 28 June 2022. That appeal has not yet been determined by the Court.^[2] The stated ground of appeal in those proceedings is that the structure does not require a development approval under the Act.^[3]

4. The appellants wish to retain the bunker on the Land for the purpose of storing materials only. They do not propose to use it as a private bushfire shelter. That is, they do not propose to use the bunker for human shelter in the event of a bushfire. They submit that if the structure is used for storage purposes only, that it may be properly characterised as an outbuilding and not as a private bushfire shelter. If they are correct about that, given its dimensions and the location of the structure on the Land, no development approval would be required for it to be constructed on the Land pursuant to the Act.^[4] If the structure is a private bushfire shelter, then a development approval is required under the Act.

5. On or about 13 May 2025, the appellants submitted a development application for the construction of an outbuilding on the Land. During the verification of the application, the relevant planning authority, the Adelaide Hills Council Assessment Manager (*the respondent*) determined that the nature of the development was a private bushfire shelter, as defined, under the *Planning, Development and Infrastructure (General) Regulations 2017 (SA) (Regulations)*.

6. On 1 July 2025, the appellants commenced an appeal against the respondent’s characterisation of the proposal. This decision concerns whether the respondent was correct in characterising the proposal as a private bushfire shelter.

7. At the hearing, the appellants relied on an affidavit of Mr Matthew McBride (*Mr McBride*) affirmed on 27 June 2022.^[5] The respondent relied on an affidavit of Council officer Mr Louis Palumbo (*Mr Palumbo*) affirmed on 23 September 2025.^[6]

8. Mr Palumbo is the Team Leader of Building Services at the Council. He holds accreditation as an Accredited Professional Building Level 1, granted by the State Government Accreditation Authority. He is the presiding member of the Council’s Building Fire Safety Committee established under the Act and a person with expertise in the area of fire safety.^[7]

9. For the reasons which follow, I have determined that the respondent has correctly characterised the development as a private bushfire shelter.

Background

10. The history of this matter is somewhat lengthy. It is necessary to set out that history in some detail so as to put the most recent development application submitted by the

appellants and its characterisation, the subject of this appeal, into its proper context. For the purposes of this decision, I will refer to the fire bunker or shelter by using the more neutral description of ‘the structure’.

11. On 12 June 2020, the appellants purchased the Land which at the time contained an existing dwelling. The dwelling was subsequently demolished in September 2020. At that time, the appellants were residing at a property in Aldgate.^[8] During the later part of 2020, the appellants commenced their plans to construct a new dwelling on the Land. At the same time, they decided that they would like to build a structure on the Land to meet the following primary needs; the storage of valuables, sentimental items and important documents during the bushfire season and the storage of homegrown fruit and vegetables during the period outside the bushfire danger season.^[9] Mr McBride further explained the proposed use of the structure (following its alleged unlawful construction on the Land) as follows:

Given that we had decided to include the structure, we also thought that the structure could potentially serve as a ‘last resort’ shelter in place option in case we ever became trapped on our property and could not leave the Land during a bushfire.^[10]

12. Their architect at the time suggested that they submit a separate development application for the structure rather than include it within the new dwelling application and recommended that they contact Wildfire SB.^[11] Mr McBride produced some materials to the Court which he had received from Wildfire SB in relation to the structure.^[12]

13. In early October 2020, Mr McBride spoke with the owner of Wildfire SB who told him that the fire bunkers had previously been certified for use as bushfire shelters in multiple states, including at least one in South Australia.^[13] On the basis of this information, Mr McBride believed that it would be easy to obtain development approval for the structure if one was in fact required.^[14] As will be explained, he was mistaken in this regard.

14. Mr McBride said that he considered that it would be necessary to install the structure before the new dwelling was built on the Land as there would be no suitable access to install it once the dwelling was built.^[15] On 5 October 2020, the appellants paid a deposit to Wildfire SB for a product described on the invoice as a “*six person bunker*”.^[16] On 7 May 2021, Wildfire SB sent an invoice to the appellants for the remainder of outstanding payment for the structure including the interstate freight cost to deliver it.^[17]

The first development application is submitted

15. Mr McBride said that before the installation of the structure on the Land, on 10 May 2021 he telephoned the Council and asked if he needed to submit a development application for it given its prefabricated construction. The person he spoke to at the Council told him that they were not sure. On the same day, Mr McBride sent an email to PlanSA in which he said:

We have purchased a prefabricated fire bunker from Wildfire Safety Bunkers and would like to know if we need development approval to have it installed. It comes as a single piece and has a Certificate of Accreditation from the Building Regulations Advisory Commission as a

Class 10c building (maximum one hour period)...We tried contacting our Council, but they were unsure, so I'm contacting you. I started filling out the online development form on PlanSA and saw there was an option for "private bushfire shelter", however that seemed aimed at construction of a shelter on-site, whereas ours is prefabricated and already certified, and just needs to be installed. So in that case it doesn't seem that we should need planning and building consent. Can you please let me know if we need development approval, and if so how we would go about that.^[18]

16. In response, unhelpfully, on 11 May 2021 he was told to contact the Council.^[19] The following day, a development application was submitted for the structure on the Land which was assigned development application number 21009293 (*first application*). The structure was described in the first application as a "*private bushfire shelter*".^[20] On 13 May 2021, Mr McBride received a notification from PlanSA indicating that a planning consent was not required^[21] as the first application comprised a development considered to be an *accepted* form of development under the Act.^[22] Although the first application did not require a planning consent pursuant to s 104(2) of the Act, a building consent and a development approval were still required under the Act.

17. Between May and August 2021, Mr McBride said that he received several requests for further information in relation to the first application. On 5 August 2021, he spoke with a Council officer, Mr Jeff Grinnell. Mr Grinnell suggested to him that he should seek to change the proposed use of the structure for safe storage purposes only.^[23] This suggestion arose as a result of Wildfire SB being unable to provide satisfactory information to the respondent in relation to the first application.^[24] Mr McBride decided to then seek to change the proposed use of the structure for safe storage purposes only. He sent a letter to the respondent requesting this amendment to be made to the first application.^[25] He explained his reasoning in the following way:

I agreed with Mr Grinnell's suggestion because...the primary purpose of the Structure was always to be used for safe storage, and the use by people would only ever be a 'last resort' option. I had originally only nominated the Structure's use as a bushfire shelter in the application out of an abundance of caution, and not because I ever expected to actually use the Structure as a bushfire shelter.^[26]

18. The appellants were advised that the first application could not be supported. On 11 October 2021 it was withdrawn.^[27]

19. On 26 October 2021, a development approval was granted for the construction of a dwelling on the Land.^[28]

20. Given Mr McBride was now considering that the structure would *only* ever be used for storage purposes, he looked into whether a structure proposed to be used in that way would require a development approval under the Act. He concluded that such a structure could be classified as an outbuilding and that no development approval would be required for its construction. He produced a copy of a fact sheet which he obtained from the Council.^[29] The fact sheet contained information about outbuildings which did not require a development

approval under the Act provided certain size and locational criteria were met.^[30] Mr McBride said that the fact sheet confirmed his belief that no approval was in fact required for the structure. The relevant information relating to outbuildings on the fact sheet was generic and not specific in nature.

The second development application is submitted

21. The Council first became aware that the structure had been installed on the Land on 7 June 2022 following an inspection which had been undertaken by a Council officer on that day.^[31] On 16 June 2022, the Council issued an enforcement notice to the appellants alleging that a prefabricated bushfire shelter had been installed on the Land without development approval and directed that it be removed from the Land within 14 days.^[32] The appellants commenced an appeal against the notice on 28 June 2022.

22. On 1 August 2022, the appellants submitted a second development application under the Act which was assigned development application number 22025991 (*second application*). The second application was described in the following way:

We have purchased a prefabricated six-person bushfire shelter from Wildfire Safety Bunkers. It comes as a single piece and has a Certificate of Accreditation from the Building Regulations Advisory Commission^[33] as a Class 10c building (maximum one hour period). This proposal is to install the shelter on our block of land.^[34]

23. The certificate of accreditation from the Victorian Building Regulations Advisory Committee was produced by Mr McBride.^[35] Mr Palumbo said that the plans in support of the second application were substantially the same as those initially provided to the appellants from Wildfire SB.^[36] Mr Palumbo explained that the second application was once again verified by the respondent as a private bushfire shelter. He said that it was considered to be an *accepted* form of development for which a planning consent was not required.^[37] However, the shelter still required a building consent and a development approval under the Act. The appellants had engaged a private certifier for the purposes of undertaking an assessment of the second application against the Building Rules and anticipated that a building rules consent would be granted to the structure.^[38]

24. In accordance with the requirements of the Regulations,^[39] the second application was referred to the State Planning Commission (*Commission*) for concurrence.^[40] On or about 4 June 2024, Mr Palumbo said he received an email from Ms Debbie Frisby, a member of the Commission's delegate, the Building Technical Panel (*BTP*), who advised him that concurrence in relation to the second application had been denied.^[41] There were no written reasons given by Ms Frisby as to why that was so. However, she advised Mr Palumbo that the BTP "*have asked the Planning Commissioner to review the situation to action a way forward*". The second application was then withdrawn.^[42]

The third development application is submitted

25. On or about 29 May 2025, the appellants submitted a further development application which was assigned development application number 25013904 (*third application*). The plans which were lodged in support of the third application were included within the respondent's tendered book of documents.^[43] Mr Palumbo said that these plans were the same as those which had been submitted earlier with the first application and the second application, except that the structure was now described on the plans as a 'storage unit' and not a 'bunker'.^[44] Notwithstanding the appellants' description of the proposal as a 'storage unit', the respondent verified the third application as a 'private bushfire shelter'.

26. This characterisation by the respondent is the decision that is the subject of this appeal. The appellants have a right of appeal against this decision, being a prescribed matter as defined under s 201(a) of the Act, pursuant to s 202(1)(b)(i)(B) of the Act.

The proposal before the Court

27. The appellants tendered a set of plans which they rely upon in substitution for the plans which were originally submitted with the third application (*the plans*).^[45] The plans indicate that the dimensions and fabric of the structure remain unchanged to that initially submitted in support of the third application. The structure is largely subterranean underneath an earthen mound with an entrance door and roof vent visible.^[46] A number of modifications are now proposed to be made to the structure as indicated on the plans, namely; (i) a welded metal plate is to be placed over the viewing hole;^[47] (ii) shelving is to be fixed to the internal walls of the structure;^[48] and (iii) signage is proposed to be displayed at the entry hatch and internally which states; "*Storage Only. Not For Shelter.*"^[49] It is also proposed that the structure will remain locked at all times other than when being accessed for storage purposes.^[50]

28. The appellants also tendered a document which was prepared by Wildfire SB described as 'storage unit specifications' which included a plan view, front and side elevations and horizontal and vertical sections of the structure.^[51] Although described by Wildfire SB as a 'storage unit', there is no physical or practical difference between the specifications of a 'storage unit' and a prefabricated 'fire bunker' also manufactured by Wildfire SB. The two products are in fact identical which fact is accepted by the appellants.^[52]

29. The appellants submit that the modifications proposed to the structure as identified on the plans, would render it incapable of being *used* as a private bushfire shelter. In respect of the welded metal plate to be placed over the viewing hole, the appellants contend that in bushfire conditions, any occupant(s) who sought refuge inside the structure would not know when it would be safe to open it and come out. As a result, it would not be safe to be used as a bushfire shelter.^[53] In addition, the installation of the shelving would result in very little room being available for anyone to occupy it. They also submit that if the structure is locked, as proposed, there would be difficulties associated with accessing the structure in a timely manner and that this would be another reason why it could not be safely used for shelter in the event of a bushfire.^[54] The warning signage would presumably deter people from using it, or at least this would be the intended effect of the warning signage.

30. The respondent contends that the proposed modifications could easily be reversed in the future. The welded metal plate to be placed over the viewing hole could be removed. The internal shelving could be removed. The locking mechanism could also be removed. The signage could also be taken down.

31. The respondent also argued that even if the shelving remained, it would still be possible for more than one person to fit inside it.^[55] At the hearing, the respondent tendered an extract from a website which was referred to on the plans concerning the proposed shelving to be affixed to the internal walls of the structure.^[56] The shelf product information indicates that the shelves would be heavy duty wall shelves having a load capacity of 100 kilograms.^[57] Given the weight load capacity of the shelves, it would be possible for a person weighing less than 100 kilograms to be placed on or sit on the shelving.

Private bushfire shelters in Australia

32. Mr Palumbo said that private bushfire shelters were relatively uncommon in Australia until the Victorian bushfires occurred in 2009^[58] and that they had not attracted specific attention from a building regulation perspective.^[59]

33. In 2011, the National Construction Code (*the NCC*) was amended to include a separate sub-classification, 10c, for private bushfire shelters in association with a Class 1 dwelling. Specific performance requirements were introduced for these structures.^[60] In addition to this, the Australian Building Codes Board made a performance standard in 2014 for the design and construction of private bushfire shelters to assist in attaining the performance requirements in the NCC.^[61] This standard set out nominated aspects of design for private bushfire shelters, including location and siting, access pathways between the dwelling and the shelter, provision of tenable conditions within a shelter, access doors or hatches and signage.^[62] Mr Palumbo said that these provisions of the NCC and the performance standard have not been materially amended.^[63]

Regulation of private bushfire shelters in South Australia

34. In 2010, the *Development (Private Bushfire Shelter) Variation Regulations 2010* (SA) were brought into operation. These regulations resulted in the following amendments to the *Development Regulations 2008* (SA) (now repealed):

1. the insertion of definitions for an outbuilding and a private bushfire shelter;
2. the requirement that a building rules consent must not be granted for building work comprising or including the construction or installation of a private bushfire shelter, unless the Building Rules Assessment Commission (as it then was), concurs in the granting of that consent; and
3. that provided certain situational parameters are met, the construction, installation or alteration of a private bushfire shelter would be a kind of development that did not require

the grant of a development plan consent (now referred to as a planning consent under the Act).^[64]

35. The existing regulatory settings were maintained following the transition to the Act and the Regulations. The requirement that a building rules consent must not be granted for building work comprising or including the construction or installation of a private bushfire shelter unless concurrence is provided by the Commission remains a mandatory procedural requirement in the assessment of private bushfire shelters under the Act. The Commission has delegated this function to the BTP.^[65] In respect of the second application, as mentioned earlier, the mandatory referral to the Commission resulted in its delegate, the BTP, refusing to grant concurrence with respect to the grant of a building consent for the installation of a bushfire shelter on the Land.

36. In December 2020, PlanSA produced a building advisory notice (07/20) in which it outlined some general information about the statutory requirements for obtaining planning and building consent for private bushfire shelters.^[66] This notice provided that the requirement for concurrence from the BTP was necessary given there were no nationally accredited private bushfire shelters and that there are significant life safety concerns associated with this type of structure. The notice included a list of the acceptance criteria that must be achieved in order for a bushfire shelter to meet the performance standards in the NCC.^[67]

37. In December 2022, PlanSA produced a further building advisory notice (02A/22) which set out additional information in relation to private bushfire shelters to be read in conjunction with the earlier notice (07/20).^[68] The notice provided:

There appears to be instances where Private Bushfire Shelters are being:

Installed or constructed without relevant approvals

Prefabricated as complete units and available in the Australian market for purchase

Identified by applicants as a 'storage' building in an attempt to be assessed as a Class 10a building.

Private Bushfire Shelters are classified by the NCC as Class 10c buildings and are "a structure associated with, but not attached to, or part of a Class 1a dwelling that may, as a last resort, provide shelter for occupants from immediate life-threatening effects of a bushfire".

Alternatively, Class 10a buildings are identified as "a non-habitable building including a private garage, carport, shed or the like". Motivation for incorrect classification could be to inappropriately circumvent the NCC performance requirements for Private Bushfire Shelters and avoid referral to the Building Technical Panel.

If there are buildings that resemble Private Bushfire Shelters that have been installed and not appropriately assessed under the Act, there is grave risk that the 'shelter' does not meet

the Building Rules, including Performance Requirements of the NCC. Therefore, the building may not function in the way anticipated, posing further life safety risks to occupants.

...private bushfire shelters will likely require ongoing maintenance to ensure that they continue to operate as designed and approved.

In accordance with the powers provided to relevant authorities under section 127 of the Act, it is highly recommended that the relevant authority includes condition(s) of consent relating to the ongoing maintenance of private bushfire shelters, to ensure the building will be prepared to operate at the level of performance assessed at the time of approval.

The *Land and Business (Sale and Conveyancing) Act 1994* requires that information is provided for the purposes of 'Form 1' Vendor Statement relating to the sale of property. The placing of an ongoing condition of approval (where relevant) should ensure that (if applicable) prospective owners are provided with information:

That there is an approved bushfire shelter on the land; and

There are maintenance requirements to ensure the building can operate at the level of performance assessed at the time of approval.^[69]

(My emphasis).

38. Mr Palumbo also produced a fact sheet prepared by the South Australian Country Fire Service relating to private bushfire shelters (bunkers). The fact sheet provides that private bushfire shelters may be dangerous if they are not properly designed, assessed and approved.^[70]

Submissions

The nature of a development

39. Upon the receipt of a development application under the Act, r 31(1)(a) of the Regulations requires a relevant authority to determine, amongst other matters, the nature of a development. This obligation is similar to the obligation of a relevant authority to determine the nature of a development pursuant to r 16 of the *Development Regulations 2008* (SA) (now repealed).^[71] In determining the nature of a development, the relevant authority must objectively examine the documents and other information before it, and, as a matter of practical reality, decide what the nature of the development is.^[72] The extent to which documents and other information may disclose the intentions of an applicant may also be relevant.^[73] The following principles are well established and were not in dispute:

1. it is the substance of the development that is important, not the mere form of the application;^[74]

2. the true nature of a development may not be stated in the application, and may need to be inferred from a combination of extraneous factors, including the applicant's intentions;^[75]

3. a 'practical and realistic assessment of what is proposed' is required;^[76] and
4. an applicant cannot seek to evade the requirements and intentions of the relevant planning framework by describing a proposal in a different way.^[77]

40. **Regulation 3(1)** of the Regulations defines an outbuilding and a private bushfire shelter as follows:

outbuilding does not include a private bushfire shelter;

private bushfire shelter means a building, associated with a Class 1a building under the *Building Code*, that may as a last resort provide shelter for occupants from the immediate life threatening effects of a bushfire event.

41. An "outbuilding" is also defined in the land use definitions table in the Code as follows:

A non-habitable detached building on the same site as a main building which is ancillary and subordinate to the main building and has a use and function which relates to the main building but does not include a private bushfire shelter.^[78]

42. A private bushfire shelter is not further defined in the land use definitions table in the Code.

43. The respondent contends that determining whether a structure is a private bushfire shelter requires an objective assessment as to whether, having regard to its physical properties and attributes, it is *capable* of providing human shelter during a bushfire. The respondent submits that the structure was designed, manufactured and marketed for the specific purpose of providing human shelter in the event of a bushfire. Given that is so, it must be a private bushfire shelter because it retains all of the features necessary to provide shelter in a bushfire including; siting in the ground with an earth covering; solid concrete walls and roof; a fire retardant access hatch; an access ladder; a ventilation system; and capacity for a number of human occupants.^[79] It was argued that the proposed modifications as identified on the plans will not physically prevent the structure from being used for human shelter during a bushfire and in any event the modifications could easily be reversed in the future without any regulatory oversight by the Council.

44. The appellants contend that the structure is not capable of being used as a bushfire shelter as a result of the modifications now proposed. In addition, they place particular emphasis on that aspect of the definition which contemplates that the structure must be capable of accommodating *more than one* occupant, by the specific use of the plural term *occupants* within the definition. Based on the definition alone, if the structure cannot accommodate more than one occupant, the appellants submit that it cannot be characterised as a private bushfire shelter.

45. The appellants initially argued that it was implausible that the structure could be used for a single person for shelter in the event of a bushfire.^[80] This was said to be so based on the internal dimensions of the structure once the space proposed to be occupied by the

existing internal ladder and proposed shelving is taken into account. They argued that “*only 1.87m² of “space” [will] be utilised by persons manoeuvring for storage*” and that “*plainly the 1.87m² available could not be used by a person for purposes of bushfire protection in an emergency*”.^[81] The appellants however later conceded that there would be enough space for one person to take shelter.^[82]

46. Notwithstanding this concession, the respondent nevertheless disagreed that *only* one person could take shelter. Even with the proposed modifications in place, the structure would be physically capable of accommodating more than one person, and potentially many people.^[83] The structure itself is designed for use by six people (without the proposed modifications in place) and has been manufactured by Wildfire SB as a six-person fire bunker. As manufactured (noting that there is no difference between the physical properties of the manufactured ‘storage unit’ product and the ‘pre-fabricated fire bunker’ product), there is 5.09m² of space to accommodate six people within the structure. This would equate to 0.84m² of available space per person. Based on the appellants calculations, there would be enough space to accommodate two people, not one. The respondent contended that in a life or death situation, comfort is not at a premium and that there would be space for people to take shelter in the structure,^[84] including for example on the shelves which, given their weight load capacity of 100 kilograms, could accommodate a person or a number of children, for example.^[85]

47. Putting aside the question of how many people could occupy the shelter, regardless, the appellants argue that *their intention* is to use the structure as a storage unit only and not for refuge during a bushfire. They contend that whether a structure is a private bushfire shelter turns on the intention of the likely occupants in the utilisation of the structure in the event of a bushfire event.^[86] They rely on the decision of this Court in *Pohl & Ors v Adelaide Hills Council & Anor (No. 1)*^[87] (*Pohl*) where the Court said that “*ultimately, it is the intention of the developer as to the use of the building that is determinative of the nature of the development for which approval is sought*”.^[88] They contend that because they intend to only use the structure for storage purposes, it does not fall within the ambit of the definition of a private bushfire shelter and cannot therefore be characterised as one.

48. In developing that argument, it was submitted that having regard to the definition of a private bushfire shelter under the Act, conceivably, any number of structures *could* provide immediate and safe shelter from the life threatening effects of a bushfire. The following submissions were made:

The question then turns on whether the structure may as a last resort provide shelter for occupants from the immediate life-threatening effects of a bushfire event. The definition of “private bushfire shelter” in the Regulations is curious in that on its face it could conceivably describe any number of structures as something that could, in the mistaken mind of the person seeking shelter, provide immediate shelter from the life-threatening effects in the event of a bushfire. Indeed, depending on the nature of the fire event and the nature of the structure a literal interpretation of the definition of “private bushfire shelter” in the

Regulations...could capture any number of outbuildings being that they would provide a level of shelter from the immediate life-threatening effects of a bushfire event.^[89]

49. The appellants submit that it could not have been the intention of Parliament to capture *any* structure associated with a Class 1a building as being a private bushfire shelter. Critically they argue that whether a structure is a private bushfire shelter turns on the *intention* of the likely occupants in the proposed utilisation of the structure in the event of a bushfire event.^[90] They also submit that the structure could only be characterised as a private bushfire shelter if it has been approved as such.^[91] If the Commission has not concurred in relation to the grant of a building consent for the structure, and it has not been approved as one, then it cannot be a private bushfire shelter for the purposes of the Act and the Regulations.^[92]

50. Further, they argue that if the structure was used as a private bushfire shelter, and not as an outbuilding, that this would be a contravention of the Act if it has been approved as an outbuilding.^[93] They submit that the Court is bound to assume that people will follow the law.^[94]

51. In response, the respondent argues that the appellants' approach to the characterisation of the structure is flawed for the following reasons.

Legislative context

52. The respondent contends that the language used in the statutory definition of a private bushfire shelter warrants particular attention in the assessment of this proposal. The respondent made three important observations in this regard. First, the language directs attention to a life or death situation. The words in the definition; "*as a last resort, for occupants from the immediate life-threatening effects of a bushfire event*" suggests that, in considering whether to take shelter, a person would likely have found themselves in a situation with a bushfire that poses a threat of *immediate harm*, where leaving the land is no longer safe. Potentially their house is under attack or under *imminent threat*, and the person is faced with a life or death situation. That is, to either take refuge in the shelter or face fatal consequences.

53. Secondly, and relatedly, when considering the context and purpose of the definition, it is one that is concerned with and is directed towards building safety and building regulation only. It is not a definition which serves any planning purpose, as many land use definitions do. In the majority of cases, private bushfire shelters are a form of accepted development which will not require any planning assessment to be undertaken or require the grant of a planning consent.

54. The respondent identified that there are only two contexts in which the definition appears in the Regulations, namely, r 45(6) and r 104(2). Regulation 45(6) concerns the procedural requirement that concurrence must be obtained from the Commission in relation to the grant of a building consent for a private bushfire shelter. Regulation 104(2) requires a statement of compliance to be provided with respect to completed building work for all building classifications, other than for Class 10 buildings, with the exception of swimming

pools and private bushfire shelters, (both of which are Class 10 buildings). The respondent submits that this is an important difference in considering the definition of a private bushfire shelter and the context in which it appears in the legislation, when compared to other land use definitions which appear in the Code. Such definitions in the Code are used for the purposes of undertaking an assessment of a development against the planning rules. They are not considered in the context of occupant safety and building regulation.

55. Thirdly, the definition does not import any requirement to have regard to the subjective intentions of an applicant. Rather, it requires the application of an objective test. The respondent submits that the definition could easily have provided for intentions to be a relevant consideration for the purposes of determining the nature of a development. For example, a private bushfire shelter could have been defined as; “*a building...that may, and is intended to, provide shelter for occupants from the immediate life threatening effects of a bushfire event*”. There is no reference to the *intended* use of the shelter in the definition at all. The use of the word *may* in the definition is also instructive.

The intention of the appellants

56. The respondent submits that intentions may change over time. Importantly, it was argued that they may change very quickly in an emergency, life or death situation as may be experienced during a bushfire. In such a situation, the respondent contends that one could reasonably expect that a desire for self-preservation would prevail over any earlier intention not to use the structure for shelter in the event of a bushfire. A desire for self-preservation would likely prevail over any other considerations including whether its use for shelter may amount to a contravention of the Act, or whether it may be contrary to the directions contained in the proposed signage, as identified in the plans.

57. Further, the appellants’ present intention to not use the structure as a human shelter may not be known and/or shared by future owners, occupiers or visitors to the Land. In *Levin v Yarra Ranges SC [2019] VCAT 1231(Levin)*, the Yarra Ranges Shire Council refused to grant a planning permit to construct a dwelling and associated vegetation removal, including the installation of a private bushfire shelter at a property in Warburton, which was located in an area of significant/extreme bushfire risk. The Council refused to grant the planning permit on grounds relating to bushfire risk. On appeal, the applicant submitted that it could be demonstrated how bushfire risk could be mitigated to an acceptable level.

58. The Tribunal was not persuaded by the applicant’s demonstrations in this regard. The Tribunal determined that the proposal ultimately relied upon the awareness and behaviour of the occupants of the dwelling to properly implement the bushfire protection measures and the bushfire management plan put forward by the applicant. While the applicant may be aware of the bushfire risk and the bushfire protection measures to minimise and mitigate risk, the considerations of the Tribunal were not limited to only the applicant and the current owner, but also extended to others, including future owners and occupiers. The member referenced the earlier decision of the Tribunal in *O’Toole v Yarra Ranges SC (O’Toole)*^[95] where the Tribunal stated:

...in response to the applicant's query about which lives are to be protected, I note that the lives to be protected are not just those of the applicant and others who may reside in the dwelling with him. It is also the lives of emergency service personal [sic] who may be called upon to defend the dwelling in the event of a bushfire, and, as planning permission runs with the land, it is also the lives of other future owners and occupiers of the proposed dwelling. [96]

(My underlining).

59. In this case, the respondent submits that notwithstanding the appellants current intentions to not use the structure for human shelter, those intentions may not be known, shared or align with the intentions of future owners and occupiers of the Land.

60. In response to this submission, the appellants contend that there would be two ways in which owners and/or occupants of the Land would be strictly on notice that the structure is not to be used for human shelter and only for the storage of goods. First, through the erection of the warning signage proposed in the plans and secondly, through the provision of the relevant prescribed information contained on a Form 1 that is provided under the *Land and Business (Sale and Conveyancing) Act 1992 (SA) (LB(SC) Act)* upon the sale of the Land.^[97]

61. Under the LB(SC) Act, a Form 1 is a disclosure statement which a vendor is required to give to a purchaser before settlement with respect to the sale of land. It is designed to ensure that a purchaser receives all prescribed information in relation to the land.^[98] If there are conditions that continue to apply in relation to a development authorisation that has been granted under the Act, the details of such conditions must be included within the Form 1 prescribed particulars that are provided to the purchaser. However, such conditions would only be provided on a Form 1 if there was a development authorisation granted to a development in place (which included conditions). The PlanSA building advisory notice published in December 2022 (02A/22), referred to earlier, specifically contemplates that a Form 1 would be used to notify prospective purchasers with any conditions that may have ongoing effect with respect to an *approved* bushfire shelter that may be located on the land. The same would apply to any other building that was the subject of a development authorisation granted under the Act.

62. The respondent argued that if the structure is an outbuilding, given its location on the Land and its dimensions, it would not require a development authorisation under the Act.^[99] That being so, there would be no ability for any conditions to be imposed in relation to a development authorisation granted in relation to the structure which would restrict the permitted use of the structure as an outbuilding only. There would therefore not be any prescribed information on a Form 1 provided to a prospective purchaser of the Land in this case.

63. The respondent argued that a future owner could observe the structure on the Land, and that there would be nothing to stop the modifications in the plans from being reversed. There would be no ongoing and binding conditions in place^[100] controlling the use of the structure that it only be used as an outbuilding and not as a private bushfire shelter.^[101]

The decisive form of the structure

64. The respondent submits that generally the proper characterisation of a building will be a function of both its form and its proposed use.

65. In *Stewart v McQuade & Ors, (Stewart)*,^[102] the Full Court of the Supreme Court determined that while the form of a building may greatly influence the proposed use of a building, it cannot be decisive. While form may be very influential, in the end, it is the proposed use of a building which will provide the answer in many cases. Both parties relied on this case in support of their respective submissions.

66. That case concerned land at Stirling owned by the McQuades, which contained an existing dwelling. The McQuades constructed a second building some distance away from the main dwelling. Planning consent was granted on the basis that the new structure was an ancillary building to the dwelling. During the assessment process, the Council had required amendments to be made to the plans to remove features associated with a self-contained residence, including re-labelling a “kitchen” as an “eating area” and removing a sink and stove from the proposed plans. These changes were required to ensure the building could not be characterised as a dwelling, as the planning scheme permitted only one dwelling per allotment, with any additional dwelling constituting a non-complying development. In granting consent, the Council also imposed a condition expressly prohibiting the use of the building as a dwelling, reinforcing its ancillary status.

67. Despite this, the building was constructed with a stove and sink installed, contrary to the approved plans. A neighbour, Mr Stewart, formed the view that the building was being used as a self-contained residence or tourist accommodation and commenced civil enforcement proceedings. Those proceedings were resolved by consent orders requiring the removal of the kitchen facilities, the termination of plumbing, and a prohibition on the use of the building other than as an ancillary building to the main dwelling.

68. The McQuades later applied to the Council for approval to reinstate the sink and stove, describing the existing use as an ancillary building. The Council refused to grant consent to the application, determining that the proposal would result in a change of land use to a self-contained or independent living unit, amounting to a second dwelling on the Land and therefore a non-complying development. The McQuades appealed that refusal, with Mr Stewart joined as a party. A preliminary issue arose as to whether the Council had correctly characterised the nature of the proposed development.

69. At first instance, the Court held that the proposal did not involve a change in land use. Significant weight was placed on the fact that the existing consent conditions remained unchanged, particularly the condition prohibiting the use of the building as a dwelling. The approval of these additional facilities could not alter the lawful use of the building. On appeal, the Full Court agreed. It rejected the argument that the installation of a fitting or fixture which enabled the building to be used as a dwelling necessarily meant that the proposal was in fact for a dwelling. The Court confirmed that the proposal did not change the nature of the approved use, emphasising that form alone cannot override binding conditions regulating how a building may be used. His Honour Doyle CJ explained the findings of the Court in the following way:

The emphasis in the definition of dwelling is upon the use of the building. No doubt that refers to the proposed use of the building. The form of a building may greatly influence the decision about the proposed use of the building, but in my opinion form cannot be decisive. This is particularly so when the form is deceptive (for example, a house proposed to be used as an office) or when a distinction has to be drawn between different structures which are all part of the one category (for example, distinguishing between a dwelling as defined and a semi-detached dwelling as defined). Thus, as I have already said, while the form of a building may be very influential, in the end it is the proposed use of the building which will provide the answer in many cases.

In the present case the issue before the Council and before the court below was whether the proposal was for the use of the building as a dwelling or as a building ancillary to a dwelling. In such a case it seems to me that it is the proposed use that is likely to be more significant than the form of the building. That is not to say that form is irrelevant.

In the present case the form of the building is such that it is capable of use as a dwelling, but in my opinion in the particular circumstances of this case did not provide a decisive answer to the question of the nature of the proposed development.

For those reasons, I do not accept the submission that the form of the building was decisive, and that the installation of a fitting or fixture which enabled the building to be used as a dwelling necessarily meant that the proposal was for a dwelling. In my opinion it was necessary to look further. In the present case there were existing restrictions on the use of the building and in that context, in my opinion, the court was entitled to conclude that the conclusion about the proposed use which would normally be drawn from the form of the building should not be drawn.^[103]

(My underlining).

70. In the case of a private bushfire shelter, the respondent contends that it is a type of building where form is very influential, if not decisive. This is because primarily the structure was purpose-designed and built for use as a last resort in an emergency situation.^[104] As previously identified, the specifications for a 'storage unit' and a 'prefabricated fire bunker' as manufactured by Wildfire SB are practically and physically identical. Contrary to the situation and the form of the building before the Full Court in *Stewart*, the form of a bushfire shelter is *not* deceptive. Rather, it has been designed and prefabricated for that very purpose. The respondent argues that it is precisely because the form of the building is not deceptive that the signage is proposed, as set out in the plans.

71. The respondent argued that in this case there is no need to distinguish between different kinds of structures within the same category as was the case in *Stewart*. In addition, importantly, in *Stewart*, there were existing restrictions on the use of the building as a result of the Council having imposed conditions on the original approval to reinforce the ancillary nature of the building the subject of the application, and that there would be no way to impose similar restrictions on the use of the structure in this case. *Stewart* may therefore be distinguished on these bases.

Consideration

More than one occupant

72. The appellants' contend that the structure cannot be characterised as a private bushfire shelter, as defined under the Regulations, because it is not capable of accommodating more than one occupant. I reject that contention for two reasons. First, even with the modifications in place, the structure would be capable of accommodating more than one occupant. There is standing room for at least one person and possibly two. If the structure was to be used as a shelter during a bushfire, considerations of comfort would not be foremost in the minds of those occupying it. Secondly, having regard to the weight loading of the shelving, it is possible that a person(s) weighing less than 100 kilograms could also lie or sit on the shelving. Even with the modifications in place, I am satisfied that more than one occupant could take shelter in the structure.

73. However, if I am wrong about that and if it was the case that only one person could occupy the structure, I find that the word "*occupants*" in the definition, being a word in the plural, may be construed as including the singular, in any event.^[105] The appellants accept that one person could occupy the structure in the event of a bushfire event.^[106] I therefore reject the argument that the structure cannot be characterised as a private bushfire shelter on the basis that it would not be possible to accommodate more than one occupant.

Intentions of the appellants

74. A central issue in this case is, notwithstanding the form of the structure, are the stated intentions of the appellants to not use the structure as a private bushfire shelter determinative in characterising the nature of the development. The appellants contend that form is not determinative and that the intended use of the structure is decisive, whereas the respondent advances the contrary position.

75. The respondent submits that the appellants intentions with respect to the proposed use to be made of the structure has changed over time. This change was said to have been brought about "*as things went on and it became apparent that the use for the personal shelter was going to be difficult in terms of obtaining approval, it would seem that that intention changed and that secondary purpose was abandoned*".^[107]

76. I accept that the appellants current intention to not use the structure for human shelter in the event of a bushfire is genuinely held. The appellants have at all material times maintained a bushfire action plan which involves the evacuation of the property in the event of a bushfire.^[108]

77. In their written submissions filed in advance of the hearing, the appellants submit that it has never been their intention to utilise the structure for human shelter in the event of a bushfire.^[109] However, having regard to Mr McBride's affidavit (affirmed in June 2022), he said that when they purchased the structure, they thought that the structure could *potentially* serve as a 'last resort' shelter in place option in case they ever became trapped at the property and could not leave the Land during a bushfire.^[110]

78. I accept that regardless of what their previous intentions may have been, that the appellants now wish to utilise the structure for some other purpose given the fact that it has been installed on the Land. Considering the effort and expense associated with the installation of the structure on the Land, it makes sense that they wish to be able to utilise the structure in some other way, if that is in fact possible. I therefore place little weight on the fact that when the first application was submitted, at that time at least, the appellants had *some* intention to use the structure as a shelter in the event of a bushfire. They have clearly now stated that this is no longer their intention, and that they propose to only use the structure as an outbuilding for storage purposes.

The form of the structure

79. As defined, under both the Regulations and the Code, an outbuilding cannot be a private bushfire shelter. The two structures have a different building subclassification for the purposes of the NCC. The additional requirements that apply with respect to the installation of a private bushfire shelter under the Act, a 10c building, do not apply in relation to a class 10a outbuilding. For example, private bushfire shelters cannot be granted a building consent under the Act unless the Commission concurs. This concurrence is considered necessary given there is no nationally accredited bushfire shelters and because of the significant life safety concerns associated with a bushfire shelter. In addition there are likely to be ongoing maintenance requirements for bushfire shelters to ensure that they continue to operate as designed and approved.^[111]

80. A statement of compliance is required under the Act in relation to completed building work so as to ensure that a licensed builder or registered building work supervisor together with the owner of the relevant land can verify that the relevant building work has been undertaken in accordance with all necessary requirements.^[112] An outbuilding, being a class 10a building, can be constructed without a statement of compliance being provided under the Act whereas it is a mandatory requirement that a statement of compliance is provided to the relevant authority following the construction or installation of a private bushfire shelter, a class 10c building.^[113]

81. The legislative scheme draws a clear distinction between an outbuilding and a private bushfire shelter, not merely as a matter of definition, but by evincing an intention that the installation of private bushfire shelters be subject to greater regulatory oversight. Specific performance requirements have been introduced for private bushfire shelters under the NCC. Certain criteria must be met in order for a shelter to meet these specific performance requirements.

82. As stated by the Full Court in *Stewart*, while form may be very influential, in the end it is the proposed use of a building which will provide the answer in *many* cases. I consider that while that may be so in many cases, it is not necessarily so in all cases. Importantly, in *Stewart*, there were existing restrictions on the use of the building as a result of the Council having imposed conditions on the original approval to reinforce the ancillary nature of the building. I don't consider that *Stewart* is authority for the proposition that the intentions of an

applicant are determinative. The case does not stand for the proposition that form *cannot* be decisive. It is authority for the proposition that form is not *necessarily* decisive.

83. The circumstances before this Court in *Pohl*, a case also relied upon by the appellants, were similar in some respects to those which arose in *Stewart* (although in *Pohl* there were no previous conditions of an earlier approval in place which restricted the use of the building in question). In *Pohl*, the applicant for consent sought approval for a development which included the *construction of a detached dwelling (including tourist accommodation – bed & breakfast for a maximum of six (6 persons))*. The built form of the proposal included a single storey detached building comprising 3 bedrooms, 2 bathrooms, kitchen, dining and living areas with provision for laundry facilities. The applicant indicated that the development was for a dwelling *in the future* but that it was *presently intended* to be used for the *next few years* as a self-contained bed and breakfast facility accommodating up to a maximum of six guests.

84. In the relevant zone, a motel was a non-complying kind of development. The Council had not assessed the application on the basis that it was a motel. The proposed building contained the necessary features to enable it to be described as a motel, namely, a building providing temporary accommodation for more than five travellers but not including a hotel or residential flat building. Notwithstanding, the building also contained all of the necessary features of a dwelling, as defined. The adjoining neighbours, the Pohls, commenced review proceedings in relation to the Council's characterisation of the application pursuant to [s 86\(1\)\(f\)](#) of the *Development Act 1993* (SA) (now repealed).

85. Referring to *Stewart*, the Court held that although the ancillary building was capable of being used as a dwelling, that fact was not determinative of the character of the proposed development. It was in *that* context that the Court went on to find in *Pohl* that ultimately it is the intention of the developer as to the use of the building that is determinative of the nature of the development for which approval is sought. As was the case in *Stewart*, in *Pohl*, a distinction was required to be drawn between different types of structures within the same category. That category involved a building that could be used for accommodation and which, according to the plans, appeared to involve an application for a dwelling, although it was not proposed to be *used* in that way by the applicant in *either* case. In both cases, the form of the building was deceptive and there was a need for a distinction to be drawn between different structures that fell within the same category. That is not this case.

86. In this case, the structure has been specifically designed, manufactured and marketed for the purpose of providing shelter in the event of a bushfire. That Wildfire SB has described the structure as a 'storage unit' on the specification sheet^[114] does not change the fact that it is a structure which is still capable of providing human shelter in the event of a bushfire. The 'storage unit' and the 'prefabricated fire bunker' are indistinguishable in physical form and practical effect. The structure is sited in the ground. It contains concrete walls and a roof. It has a fire retardant access hatch and an access ladder. It has a ventilation system and the capacity to accommodate human occupants. These essential characteristics remain in place even with the modifications now proposed as depicted on the plans. Unlike the situation in *Stewart* and *Pohl*, there is nothing deceptive about the form of the structure.

87. In *Chappel Investment Company Pty Ltd and Smallacombe Investment Company Pty Ltd v City of Mitcham (Chappel)*,^[115] the Full Court of the Supreme Court considered whether the appellants contention that the proposed use of the buildings which were the subject of a development application were determinative. In that case, the developer sought provisional development plan consent for a proposal described as a retirement village, which was refused by the relevant authority, the Council. The developer appealed to this Court against the refusal. As a preliminary point, the Council argued that the appeal was incompetent because the proposal included residential flat buildings and was therefore non-complying. Under the relevant legislation at the time, no appeal lay from a refusal of consent for a non-complying development.

88. A judge of this Court considered that the majority of the buildings which comprised the proposed development technically fell within the definition of “residential flat building” however ultimately found that as a matter of practical reality, the nature of the development was not a series of residential flat buildings but instead was a retirement village. On appeal, Bleby J determined that the Court had fallen into error in its reasoning. He described that error in the following way:

In this case it was beyond argument that the buildings the subject of the development application, other than the single dwelling, each fell within the definition of residential flat building contained in the Regulations. Each was therefore, in the Zone in question, a non-complying development, notwithstanding that together they also comprised a retirement village as defined in the Retirement Villages Act.

In my opinion the Environment Court fell into error when, for the purpose of determining whether this was a non-complying development, it attempted to classify the development as a retirement village. The only relevant question was whether the development was or included a series of residential flat buildings. (emphasis added)^[116]

89. On further appeal to the Full Court, Kourakis J, as he then was, stated that as a matter of semantics it will almost always be possible to describe a development in a number of different ways.^[117] He said that it is the substance of a development for which approval is sought that is important and not the mere form of the application or applications.^[118] While *Chappel* was a case which concerned the manner in which a non-complying list of particular kinds of development in a Development Plan ought to be interpreted and applied, the findings of the Full Court with respect to the correct approach to determining the nature of a development have equal application to this case. Insofar as there is any inconsistency between this Court’s findings in *Pohl* and those of the Full Court in *Chappel*, with respect to the intentions of a developer being determinative in the assessment of the nature of a development, this Court is bound by the latter.

90. I consider that the relevant question for the Court here is whether the structure can be described as a private bushfire shelter, as defined. The fact that it may be described in some other way by the applicant is not determinative for the reasons expressed by the Full Court in *Chappel*.

91. The relevant elements in the definition of a private bushfire shelter are that:

1. the shelter is a building;
2. it is associated with a Class 1a building under the Building Code; and
3. it may as a last resort provide shelter for occupants from the immediate life threatening effects of a bushfire event.

92. There is no argument that the shelter is a building and that it is associated with a Class 1a building under the *Building Code* (i.e., the existing dwelling located on the Land). Whether a building or structure *may* as a last resort provide shelter for occupants from the immediate life threatening effects of a bushfire event, is a question of fact. Whether the structure may also be used in some other way, as intended by the appellants, is not the relevant question to be asked in determining the nature of this development. As was the case in *Chappel*, however else the proposal may be described, or proposed to be used, the structure contains all of the necessary characteristics and physical properties to provide shelter for occupants from the immediate life threatening effects of a bushfire. It is a structure that could provide that shelter as a last resort.

93. While I accept the appellants current intention is to use the structure as an outbuilding, given the purpose built nature of the structure which comprises all of the essential characteristics of a fire bunker, it follows that the structure can be characterised as a private bushfire shelter, as defined. When the appellants purchased the structure it was described on the invoice as a “six person bunker”.^[119] As a matter of fact, the structure was a fire bunker when it was brought to the Land and installed on the Land, and that is what it continues to be. The modifications proposed on the plans will not change that fact.

94. I reject the argument that any number of structures could provide a level of shelter from the immediate life-threatening effects of a bushfire. It is a matter of common sense that a person seeking shelter from a bushfire could not reasonably expect the necessary level of protection from a building or structure that was not specifically designed for that very purpose. Even with the proposed modifications in place (which I note could easily be reversed at any time without any regulatory oversight of the Council), the structure is a private bushfire shelter, as defined. I agree with the respondent that in this case the form of the structure is very influential if not decisive.

Notice to future owners or occupiers

95. Notwithstanding the appellants current intentions, in any event, I consider that in this particular case the Court must also take into account the future owners and occupiers of the Land, the intentions of whom are not known and may not be shared or align with those of the appellants.^[120]

96. If the appellants were correct and the structure was an outbuilding and not a private bushfire shelter, then, based on its dimensions and location on the Land, no development authorisation would be required for its construction on the Land.^[121] That being so, in relation to any future sale of the Land, no relevant prescribed information would be provided

to a prospective purchaser under the LB(SC) Act. It would not be made clear that the structure may only be used as an outbuilding and not as a private bushfire shelter.

97. The appellants submitted that they would be content to obtain a development authorisation for the structure so that any conditions of a development authorisation granted could then be disclosed to a prospective purchaser upon the sale of the Land under the LB(SC) Act.

98. A relevant authority ought not undertake the task of assessing an application submitted for assessment under the Act if it comprises a development which does not, in fact, require the grant of a planning consent and/or a building consent and a development approval under the Act. As submitted by the respondent, the relevant authority would have no statutory authority to undertake such an assessment or make decisions in relation to such applications.^[122]

99. In the alternative, the appellants contend that they could submit a variation application to their existing development authorisation granted in relation to the dwelling on the Land, to incorporate the existence of the structure on the Land. If the structure is not development under the Act, I do not consider that a variation application would be required under the Act in the circumstances of this particular case.

100. I therefore reject the submission that prospective purchasers would be on notice of any limitation restricting the use of the structure to that of an outbuilding upon the sale of the Land through the provision of prescribed particulars under the LB(SC) Act.

101. I also do not consider that a sign prohibiting the use of the structure for shelter on the Land would necessarily be effective, particularly in a life or death situation where a person(s) has unfortunately found themselves trapped at the Land during a bushfire, and is faced with one of two options, namely to either take shelter in the structure or perish. Even if the viewing hole on the structure is covered, it is simply a matter of common sense to assume that if a person is faced with those two limited options, that the person would elect to take shelter in the structure regardless of whether or not they could see through the viewing hole. The dire scenario that I have described would no doubt be similar to that which would have arisen during the Ash Wednesday fires in South Australia in 1983, the Black Saturday fires in Victoria in 2009 or similar events in more recent times. It is for this reason that the Court should not assume, in this particular case, that people will simply follow the law and that it should accept that the structure will only ever be used for the storage of goods. I agree with the respondent's submissions in this regard.

102. Mr Palumbo produced a copy of an amendment dated 27 June 2025 to the certificate of accreditation that has been granted by the Victorian Building Regulations Advisory Committee to Wildfire SB for its 6-person private bushfire shelter. One of the conditions of the accreditation provides that the bunker cannot be used to store goods, as this will reduce the available passive air supply within the bunker for occupants.^[123] This qualification on the conditions of the accreditation further highlights the additional risks that could be posed by the structure being used as an outbuilding and then as a private bushfire shelter in an emergency.

103. The Country Fire Service has identified that shelters can be dangerous if they are not properly designed, assessed and approved. The building advisory notice produced by Plan

SA in December 2022 indicates that if buildings that resemble bushfire shelters are installed without being appropriately assessed under the Act, that there is a grave risk that the shelter may not meet the performance requirements of the NCC. The shelter may not function in the manner anticipated thereby posing further life safety risks to the occupants. The Commission has refused to issue concurrence with respect to the grant of a building consent for the construction or installation of a private bushfire shelter on the Land. The structure has not been granted a building consent under the Act.

104. It is critical that such structures are appropriately designed and assessed and that they be subject to the more rigorous regulatory oversight that is contemplated by the legislation.

Conclusion

105. An applicant cannot seek to evade the requirements and intentions of the relevant planning framework by describing a proposal in a different way. I do not consider that the appellants are attempting to do this. I accept that they now wish to put the structure to some use given it has already been installed on the Land. Notwithstanding the stated intentions of the appellants to only use the structure for storage purposes and not for shelter, in this particular case, I consider that the intentions of the appellants cannot override the fact that the structure has been purpose built as a fire bunker, that it contains all of the physical properties and attributes of a fire bunker, and that it is capable of being used and, for the purposes of the definition, *may* be used, for shelter, in the event of a bushfire, as a matter of fact.

106. It is the role of the relevant authority to determine the true nature of a development and in doing so, it must objectively examine the documents and information that is before it, and to determine as a matter of practical reality what the nature of a development is. I consider that the relevant authority correctly determined that the nature of the development was a private bushfire shelter because when considering all of the physical properties and characteristics of the structure, it falls squarely within the ambit of the definition of a private bushfire shelter, as defined, in the Regulations. On appeal to this Court, even with the proposed modifications as depicted on the plans, for the reasons stated herein, the structure remains a private bushfire shelter and is not an outbuilding.

The appeal must therefore be dismissed.

[1] Exhibit A3, 51.

[2] *McBride & Morison v Adelaide Hills Council* ERD-22-000093.

[3] Exhibit R2, [19].

[4] *Planning, Development and Infrastructure (General) Regulations 2017* (SA), sch 4, cl (4) (1)(a).

[5] Exhibit A3.

[6] Exhibit R2.

[7] Ibid, [2]-[3].

[8] Exhibit A3, [13].

[9] Ibid, [6].

[10] Ibid, [7].

[11] Ibid, [8].

[12] Ibid, 11-35.

[13] Ibid, [10].

[14] Ibid, [11].

[15] Ibid, [12].

[16] Ibid, 36-37.

[17] Ibid, 49-50.

[18] Ibid, 51.

[19] Ibid, [18].

[20] Exhibit R2, [20.4].

[21] Exhibit A3, 53.

[22] Under s 103 of the Act, development is divided into three categories for the purposes of assessment in relation to planning consent, namely *accepted development*, *code assessed development* and *impact assessed development*. If a development falls within the category of *accepted development* by either the Code or the relevant regulations, it does not require a planning consent. That is not to say that the development does not require a building consent and a development approval.

[23] Exhibit A3, [23].

[24] Ibid, [22].

[25] Ibid, 57.

[26] Ibid, [24].

[27] Exhibit R2, [20.6].

[28] Exhibit A3, 45-48.

[29] Ibid, 67-70.

[30] Ibid, 69.

[31] Ibid, [33].

[32] Ibid, 8-9.

[33] The Building Regulations Advisory Committee (not *Commission* as described by Mr McBride) is an independent statutory body established under s 209 of the *Building Act 1993* (Vic). The Committee reviews and considers applications for building product accreditations and provides feedback to the Victorian Minister for Housing and Building on policy development, draft regulations and matters relating to the building industry; Victorian Building Authority (Web Page) <<http://www.vba.vic.gov.au/about/building-regulations-advisory-committee>> .

[34] Exhibit R2, [21].

[35] Exhibit A3, 17.

[36] Exhibit R2, [22]; Exhibit A3, 11-35.

[37] Exhibit R2, [23].

[38] Ibid, [24].

[39] *Planning, Development and Infrastructure (General) Regulations 2017* (SA), r 45(6).

[40] Exhibit R2, [25].

[41] Ibid, [26].

[42] Ibid, [27].

[43] Exhibit R1, 9.

[44] Exhibit R3, [28].

[45] Exhibit A1.

[46] Appellants, Summary of Argument of Appellants, undated, FDN10, [7].

[47] Exhibit A1, 2.

[48] Ibid, 4.

[49] Ibid, 5.

[50] Appellants, Summary of Argument of Appellants, undated, FDN10, [7].

[51] Exhibit A2.

[52] Appellants, Summary of Argument of Appellants, undated, FDN10, [6].

[53] Transcript of Proceedings, 25 lines 11-18.

[54] Transcript of Proceedings, 26 lines 37-38, 27, lines 1-13.

[55] Transcript of Proceedings, 44, lines 3-6; 45, lines 24-38.

[56] Exhibit R3.

[57] Transcript of proceedings, 46, lines 23-24.

[58] Country Fire Association Victoria (Web Page), <<https://www.cfa.vic.gov.au/about-us/history-major-fires/major-fires/black-saturday-2009>>.

[59] Exhibit R2, [9].

[60] Ibid, [12].

[61] Ibid.

[62] Ibid.

[63] Ibid, [13.3].

[64] A development plan consent under the *Development Act 1993* (SA) (now repealed) is the equivalent of a planning consent under the Act.

[65] Exhibit R2, [13.2].

[66] Ibid, 12-14.

[67] Ibid, 15-19.

[68] Ibid, 21-23.

[69] Ibid, 21-22.

[70] Ibid, 24.

[71] *Rossi v City of Holdfast Bay Assessment Manager & Anor* [2022] SAERDC 18, [47].

[72] *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd* (2001) 80 SASR 435, [10].

[73] Ibid.

[74] *Chappel Investment Company Pty Ltd and Smallacombe Investments Pty Ltd v City of Mitcham* [2009] SASC 23; (2009) 103 SASR 184, [27].

[75] *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd (2001) 80 SASR 435*, [35].

[76] *Chappel Investment Company Pty Ltd and Smallacombe Investments Pty Ltd v City of Mitcham [2009] SASC 23; (2009) 103 SASR 184*, [27].

[77] *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd (2001) 80 SASR 435*.

[78] *Planning and Design Code*, Part 7.

[79] Respondent, Respondent's Outline of Argument, 7 October 2025, FDN 9, [10].

[80] Appellants, Summary of Argument of Appellants, undated, FDN10, [28]-[29].

[81] Appellants, Summary of Argument of Appellants, undated, FDN10, [8].

[82] Transcript of Proceedings, 26, lines 24-28.

[83] Transcript of Proceedings, 44, lines 1-6.

[84] Transcript of Proceedings, 45, lines 30-35.

[85] Transcript of Proceedings, 45, lines 36-38; Transcript of Proceedings, 46-47.

[86] Appellants, Summary of Argument of Appellants, undated, FDN10, [25].

[87] [2009] SAERDC 44.

[88] [2009] SAERDC 44, [29].

[89] Appellants, Summary of Argument of Appellants, undated, FDN10, [22] – [24].

[90] *Ibid*, [25].

[91] Transcript of proceedings, T11, lines 27-29.

[92] Transcript of proceedings, T12, lines 19-20.

[93] Appellants, Summary of Argument of Appellants, undated, FDN10, [31].

[94] *Wong v Metcash Pty Ltd [2003] SASC 314*.

[95] [2019] VCAT 810.

[96] [2019] VCAT 810, [11].

[97] Appellants, Summary of Argument of Appellants, undated, FDN10, [30].

[98] *Land and Business (Sale and Conveyancing) Act 1994*, s 7(1).

[99] This is because the outbuilding meets all of the requirements in Schedule 4, cl (4)(1)(a) of the Regulations and would therefore not be considered to be "development" for the

purposes of the Act.

[100] Section 127(2)(b) of the *Planning, Development and Infrastructure Act 2016* (SA) provides that any condition imposed in relation to a development is binding on and enforceable against the person who undertakes the development, any person who acquires the benefit of the development and the owners and occupiers of the land on which the development is undertaken.

[101] Transcript of Proceedings, 49, lines 24-33.

[102] (1997) 94 LGERA 127.

[103] (1997) 94 LGERA 127, 135.

[104] Respondent, Respondent's outline of argument, dated 7 October 2025, FDN9, [17].

[105] *Legislation Interpretation Act 2021* (SA), s 10(2).

[106] Transcript of Proceedings, 26, lines 24-28.

[107] Transcript of proceedings, T40, lines 12-17.

[108] Appellants, Summary of Argument of Appellants, undated, FDN10 [5].

[109] *Ibid.*

[110] Exhibit A3, [7].

[111] Exhibit R2, 22

[112] *Planning, Development and Infrastructure (General) Regulations 2017* (SA), r 104.

[113] *Planning, Development and Infrastructure (General) Regulations 2017* (SA), r 104(2).

[114] Exhibit A2.

[115] [2009] SASC 23; (2009) 103 SASR 184.

[116] [2009] SASC 23; (2009) 103 SASR 184, [11].

[117] [2009] SASC 23; (2009) 103 SASR 184, [18].

[118] [2009] SASC 23; (2009) 103 SASR 184, [27].

[119] Exhibit A3, 36-37.

[120] *Levin v Yarra Ranges SC* [2019] VCAT 123; *O'Toole v Yarra Ranges SC* [2019] VCAT 810.

[121] Transcript of Proceedings, 20, lines 23-26.

[122] Transcript of Proceedings, 59, lines 30-34.

[123] Ibid, 26.