

ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT OF SOUTH AUSTRALIA

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ABC DEVELOPMENTAL LEARNING CENTRES PTY LTD v CITY OF TEA TREE GULLY & ORS

Judgment of Her Honour Judge Cole

21 December 2004

LOCAL GOVERNMENT - TOWN PLANNING

Application for an appeal to be dismissed on the basis that it has been instituted for an improper purpose
- whether appeal based on proper planning argument - finding that appeal has been instituted for an improper purpose - appeal dismissed.

Environment, Resources and Development Court Act 1993 s.17(4)(a); Development Act 1993 s.88B & 88C, referred to.

Penley & South Australian Planning Commission v Glendambo Hotel Motel Pty Ltd [1994] EDLR 109; Williams and Ors v Spautz (1992) 174 CLR 509; Kentucky Fried Chicken Pty Ltd v Gantidis and Anor (1979) 140 CLR 675; Harrow Trust v Adelaide Hebrew Congregation Inc & City of Burnside (No 2) [2003] SASC 30, considered.

Appellant: ABC DEVELOPMENTAL LEARNING CENTRES PTY LTD **Counsel:** MR D COLE -
Solicitor: CONNOLLY & CO

First Respondent: CITY OF TEA TREE GULLY **Counsel:** MS M SAVVA - **Solicitor:** NORMAN
WATERHOUSE

Second Respondents: NICOLE MANNING AND TARA ROBERTS **Counsel:** MR J HILDITCH -
Solicitor: GRIFFIN HILDITCH

Hearing Date/s: 30/11/2004

File No/s: ERD-04-373

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[2004] SAERDC 111

**ABC DEVELOPMENTAL LEARNING CENTRES PTY LTD v CITY OF
TEA TREE GULLY & ORS
[2004] SAERDC 111**

THE COURT DELIVERED THE FOLLOWING JUDGMENT:

1 This decision relates to an application pursuant to s.17(4)(a) of the *Environment, Resources and Development Court Act 1993* by Ms Manning and Ms Roberts (collectively, "the second respondents") for the Court to dismiss proceedings instituted by ABC Developmental Learning Centres Pty Ltd ("the appellant").

2 The second respondents applied on 12 July 2004 to the City of Tea Tree Gully ("the Council") for provisional development plan consent to establish a child care centre at 1238 – 1240 Grand Junction Road, Hope Valley ("the land") within an existing building which was most recently used as medical consulting rooms. The land is within the Local Commercial Zone. The Council designated the application as being for a category 3 kind of development and processed it accordingly. The appellant made a representation in respect of the application. On 21 September 2004, provisional development plan consent was granted to the application, subject to thirteen conditions ("the consent"). On 12 October 2004, the appellant appealed to this Court against that decision.

3 The *Environment, Resources and Development Court Act 1993* provides, in s.17(4)(a):-

"17(4) *Subject to rules of the Court, the Court may, if of the opinion that it is appropriate to do so, on its own initiative or on the application of a party to the relevant proceedings –*

(a) *dismiss or determine any proceedings that appear –*

(i) *to be frivolous or vexatious; or*

(ii) *to have been instituted or prosecuted for the purpose of delay or obstruction, or for some other improper purpose;"*

4 The second respondents argue that the appeal against the provisional development plan consent has been instituted for an improper purpose, in that the motivation for the appeal is the desire to prevent the establishment of a child care centre which would compete for business with the child care centre presently conducted by the appellant. They further argue that the appellant has not put forward any ground of appeal relevant to the objects of the *Development Act 1993* or the provisions of the applicable Development Plan. It is clear from the decision of Bleby J in *Harrow Trust v Adelaide Hebrew Congregation Inc & City of Burnside (No 2)* [2003] SASC 30 that, in order to succeed in the present case,

the second respondents must show that the improper purpose was the appellant's sole or predominant purpose in instituting the appeal. This is a heavy onus.

5 The *Development Act 1993* provides, in s.88B:-

"88B. (1) If

(a) a person

(i) commences any relevant proceedings; or

(ii) becomes a party to any relevant proceedings; and

(b) the person has a commercial competitive interest in the proceedings,

then the person must disclose the commercial competitive interest.

(2) If—

(a) a person—

(i) commences any relevant proceedings; or

(ii) becomes a party to any relevant proceedings; and

(b) the person receives, in connection with those proceedings, direct or indirect financial assistance from a person who has a commercial competitive interest in the proceedings,

then both the person referred to in paragraph (a) and the person who provided the financial assistance referred to in paragraph (b) must disclose the commercial competitive interest.

(3) A disclosure must be made to the Registrar of the relevant court and to the other parties to the relevant proceedings in accordance with any requirements prescribed by the regulations.

(4) A person who fails to make a disclosure in accordance with the requirements of this section is guilty of an offence.

Penalty: Division 3 fine."

6 The *Development Act 1993*, in s.88C, goes on to provide that the proponent of a development may recover its loss from a commercial competitor who is a party to proceedings in relation to that development:-

"... if the Court is satisfied that the defendant's sole or predominant purpose in pursuing the proceedings ... was to delay or prevent the

development in order to obtain commercial benefit for the defendant or an associate of the defendant."

7 The *Development Act* further provides, in s.88C(3):-

"(3) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of subsection (1), a person may be taken to have pursued proceedings, or to have provided financial assistance to a party to proceedings (as the case may be) for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or of any other person or from other relevant circumstances."

8 It is clear from ss.88A, 88B and 88C of the *Development Act* that the legislature wished to discourage and prevent the use of the planning appeal system set up by the *Development Act* by the commercial competitors of the proponent of a development for commercial advantage. In other words, the appeal system is not to be used to delay or prevent the establishment of a competing business. Sections 88A, 88B and 88C were inserted into the *Development Act* by an amending Act which came into force on 2 April 2001. Prior to that amendment, the question of whether resistance to commercial competition could be a proper ground of appeal in a planning appeal was considered in a number of cases, many of which are cited in *Penley and South Australian Planning Commission v Glendambo Hotel Motel Pty Ltd* (1994) EDLR 109.

9 The appellant operates an existing child care centre at 1178 - 1180 Grand Junction Road, Hope Valley, within the Residential (Tea Tree Gully) Zone. The appellant's child care centre is roughly 200 metres west of the land. The land is on the southern side of Grand Junction Road, and the appellant's child care centre is on the northern side.

10 The appellant's representation dated 2 September 2004 to the Council in respect of the application ("the representation") was as follows:-

"We act on behalf of ABC Developmental Learning Centres Pty Ltd who have requested we lodge a submission with the City of Tea Tree Gully objecting to the development application seeking to establish a Child Care Centre at 1238 Grand Junction Road, Hope Valley.

Our client has an interest in the development proposal, as they operate an existing child care centre near the subject site at 1178-1180 Grand Junction Road, Hope Valley.

We make representations on the basis of Objectives 1 and 2 of the Tea Tree Gully (City) Development Plan, which require 'orderly and economic

development' in the City, taking into account the 'changing population structure of the area', and the 'decline in population which has been evident in many parts of the metropolitan area'. Development of the proposed child care centre has potential to affect the viability of our client's existing child care centre at 1178-1180 Grand Junction Road. On this basis our client objects to the proposal, and asserts that it should not be approved without some demonstration of need for the proposed child care centre being provided by the application. We suggest such demonstration of need should be based on an assessment by suitably qualified persons of likely catchment areas for the centre, of the area's demographic profile, and the need for additional child care places, in order to ensure the viability of our client's centre and other child care centres in the area would not be affected by the proposed centre.

As our client is Queensland based, we are unable to be heard on this matter, however should you require any further details or clarification, please do not hesitate to contact the writer by telephone."

- 11 The appellant's notice of appeal to this Court has been amended since its lodgement, and now sets out the following grounds of appeal ("the grounds of appeal"):-

"The Appellant is aggrieved by the decision of the Authority to grant Provisional Development Plan Consent for a proposed development at 1238 & 1240 Grant Junction Road, Hope Valley, SA, 5090 being a proposal to Convert an Existing Building to a Child Care Centre, ('the proposed development'). The Appellant objects for the following reasons:

- 1. The Appellant operates an established Child Care Centre at 1178/1180 Grand Junction Road, Hope Valley, SA, 5090 ('the existing centre')*
- 2. The existing centre has the current capacity to cater for 50 children.*
- 3. In response to waiting lists and to the demographic, social, environmental and economic needs of the immediate vicinity, the Appellant applied to the Authority by development application number 070/83744/2003, to alter and extend the existing centre. ('the proposed extensions to the existing centre')*
- 4. Provisional Development Plan Consent was granted by the Authority to the Appellant with respect to the development application number 070/83744/2003 on 27 July 2004, and permits the Applicant to cater for up to 105 children.*
- 5. Work is now advanced on the proposed extensions of the existing centre.*

6. *Within the relevant Development Plan boundary area, there are already 11 Child Care Centres.*
 7. *Objectives 1 & 2 of the City of Tea Tree Gully Development Plan requires 'orderly and economic development' which takes into account the 'changing population structure in the area' ... and 'decline in population which has been evident in many parts of the metropolitan area.*
 8. *The proposed development does not take into account the changing population structure of the area or the decline in population which has been evident in many parts of the metropolitan area and is not consistent with orderly and economic development in the City of Tea Tree Gully and should therefore not proceed."*
- 12 The representation refers to Objectives 1 and 2 of the relevant Development Plan. The grounds of appeal refer to the same provisions. Objectives 1 and 2 are:-

"Objective 1: Orderly and economic development.

Objective 2: A proper distribution and segregation of living, working and recreational activities by the allocation of suitable areas of land for those purposes.

The direction of the future expansion of the metropolitan area is influenced by the Mount Lofty Ranges and the sea, which restrict development to the east and west, and by the cost of providing water supply and sewerage services to hilly land and to low-lying coastal areas.

The future form and nature of the existing metropolitan area will be influenced by meeting housing choice in the metropolitan area. Current and anticipated demographic trends in the metropolitan area indicate population growth but a changing population structure, with falling dwelling occupancy rates and declining population in many areas, particularly in the inner and middle suburbs, will necessitate increasing dwelling density to maintain population levels.

While taking these trends into account, there are social, environmental and economic benefits to be gained from higher essential densities within the metropolitan area.

It is an essential element in the future development of Adelaide, to address concerns about increased housing demand, efficient use of urban infrastructure and population change. This can be achieved by increasing the number of dwellings that can be accommodated within the existing boundary of the metropolitan area, and arresting and perhaps reversing the

decline in population which has been evident in many parts of the metropolitan area."

- 13 Mr Cole did not disagree with the proposition that an appeal instituted for the sole or predominant purpose of delaying or preventing commercial competition would be an appeal instituted for an improper purpose. He said, however, that the appellant had a proper planning argument to put on appeal based on Objectives 1 and 2. He said that two expert witnesses, who he described as "social planners", and whose curricula vitae he tendered, were being consulted by the appellant. They had not yet produced a report or finally formulated their views. Mr Cole tendered a document prepared by one of those experts, Ms Moore. In summary, the argument which Mr Cole seeks the opportunity to put at a hearing on the merits of the development application is this:-

- The provision of pre-school facilities in a rational and orderly way is a planning matter which it is proper for a planning authority to take into account when determining a development application for a child care centre.
- It is projected that the population of 0 to 4 year olds within the City of Tea Tree Gully will decline in the next 7 years. The figures provided by Ms Moore in Exhibit A4 are:

2001	6,357 pre-schoolers
2006	5,866
2011	5,594.

- There are presently more than 11 child care centres within the catchment of the proposed development.
- If the proposed development proceeds, the supply of child care services may outstrip demand, which could lead to "social disamenity", in the form of a reduction in the quality of the services offered.
- The proposed development is, therefore, not orderly and economic within the meaning of Objective 1, as it may not be needed, or it may somehow be premature.

- 14 Mr Cole's argument fundamentally misunderstands the meaning of the phrase "orderly and economic development" in the Development Plan. It is clear from the text to Objective 2 and Objective 5 that the desire to achieve orderly and economic development is the desire that development occur in such a way that public infrastructure is used to optimal efficiency. It does not direct an assessment of the likely profitability of each proposed commercial development and its effect on competing businesses. Ms Moore's research on predicted

demographics might be of value to the formulator of a Plan Amendment Report, were such a person to be interested in inserting into the Development Plan specific provisions relating to the desirable spacing between child care centres, for example (see the text to Objective 20 in respect of primary schools). In other words, it is relevant to the formulation of the policy which underpins the provisions of a Development Plan. However, there is no warrant in the Development Plan applicable to this development application to go down the track of assessing the economic viability of the proposed development or its likely competitors. Ms Moore's research does not assist in the planning assessment of the proposed development. There is nothing in the Development Plan to which Mr Cole's argument can attach itself.

- 15 I have considered the objects of the *Development Act*, set out in s.3. They include, relevantly:-

"s.3 The object of this Act is to provide for proper, orderly and efficient planning and development in the State and, for that purpose –

....

(c) to provide for the creation of Development Plans-

....

(iii) to advance the social and economic interests and goals of the community; ..."

- 16 It was envisaged, then, that such economic interests as were to be taken into account in the planning assessment process would be incorporated into the Development Plan. I have also considered s.33, which sets out the matters that a relevant authority must take into account before granting development approval. In relation to the provisional development plan step of the process, s.33 merely directs the relevant authority to have regard to the provisions of the appropriate Development Plan. Neither s.3 nor s.33 provide a basis upon which the factors for which Mr Cole argues should be taken into account in assessing a development application.

- 17 Mr Cole's argument really amounts to the dressing up of a concern about commercial competition in planning language. It is not a true planning argument in relation to development assessment.

- 18 The stated purpose of Mr Cole's argument is to protect the community from "social disamenity". In considering the question of the extent to which economic factors properly play a part in a planning assessment, Stephen J, in *Kentucky Fried Chicken Pty Ltd v Gantidis and Anor* (1979) 140 CLR 675 said this:-

"If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical or financial causes, and if the resultant community detriment will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However the mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration." [my emphasis].

19 Mr Cole cited *Penley & South Australian Planning Commission v Glendambo Hotel Motel Pty Ltd* in support of his argument. That case dealt with a proposed motel in Glendambo. The relevant Development Plan dealt in some detail with the question of what level of service provision was appropriate in Glendambo, given the particular circumstances of that fairly remote area. No analogous provisions exist in the Development Plan under consideration in this matter.

20 The "social disamenity" feared is the competition with the appellant's child care centre. Even if it could be shown that the establishment of the proposed development would bring about its closure, that would not be a proper planning ground, especially given the relatively small scale of the child care centres. I note also that the child care centre applied for involves the adaptation of a building formerly used as a medical centre. This is not an application for a purpose designed facility which will inevitably fall into disuse if the business fails.

21 As the document tendered by Mr Cole says, child care centres are licensed. The industry is regulated. An argument that increased competition might bring about a reduction in the standard of services cannot be made convincingly in a regulated industry. In any event, it is arguable that competition will provide an incentive to improve the quality of services.

22 It is odd that an appellant who is presently engaged in more than doubling the capacity of its own child care centre would argue that matters are so finely balanced that 50 more child care places pose a threat to the standards of child care facilities in the area. It is also odd that such an appellant would tender a document such as Exhibit A4 in which one of the experts upon which it intends to rely makes these statements:-

- *"All facilities had waiting lists in place for next year and gave an indication that the "early [sic] people put their name down" the*

better the chances are for getting access to child care on the day/time of choice."

- *"Gaining access to full time/long day care i.e. 5 days per week between 7am and 6pm is very difficult to get in the catchment area, according to all of the agencies contacted. They suggested that this was not incongruent with the rest of the City of Tea Tree Gully area or with other regions for Adelaide."*
- *"The number of places allocated for different age groupings and the type of care eg occasional, long day, family day care, and out of hours and vacation school care by the government was seen to be inadequate by those contacted."*
- *"Occasional child care was also difficult to access. Only one facility was registered to provide occasional child care (Highbury Children's Centre) in the catchment area. Waiting lists applied for some age groupings on most days. Limited vacancies for some age groups for one of the 3 days available for morning sessions, while afternoon sessions had been mostly fully booked this year."*

23 On the basis of the appellant's representation, its notice of appeal, the documents tendered on its behalf and Mr Cole's argument, I am satisfied that this appeal has been instituted solely for an improper purpose, namely the delay or prevention of the establishment of a child care centre which will compete for business with the appellant's existing, and expanding, child care centre. Mr Cole pressed for an opportunity to seek out and obtain evidence to adduce at a full hearing on the merits. It seems to me that to afford him that opportunity would put the parties to considerable wasted expense. It would also partially achieve the appellant's purpose in delaying the proposed development. No proper planning basis for an appeal is apparent on the material before me. Mr Cole has not been able to show that the appellant is motivated by any proper purpose in the institution of this appeal. In all of the circumstances, I am satisfied that it is appropriate to exercise the power conferred by s.17(4)(a)(ii). Pursuant to s.17(4)(a)(ii) the appeal will be dismissed. I will hear the parties as to costs, and I draw their attention to s.17(4a) and (4b).