Supreme Court of South Australia

Eliza Jane Investments Pty Ltd v City of Playford [2009] SASC 260

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On 1 September 2009 the Full Court of the Supreme Court ("Court") dismissed an appeal by Eliza Jane Investments Pty Ltd ("Eliza Jane") against a decision of the Environment Resources & Development Court ("ERD Court"). Earlier Eliza Jane had appealed to the ERD Court against the City of Playford's ("Council's") refusal to grant development plan consent to vary an existing development approval for a retail plant nursery to incorporate a fruit and vegetables sales area ("the Proposal"). The Council and the ERD Court agreed that the Proposal was a non-complying form of development.

The Court considered whether the Proposal was a change in the use of the land and, if so, whether it was a non-complying form of development.

The land contained a nursery and retail component for plants (some of which were grown on site), garden supplies and accessories. There had been other appeals in the ERD Court in 2006 for a cafeteria/coffee shop operating within the existing retail area. The ERD Court found that cafeteria/coffee shop was not a non-complying form of development. It granted consent to that use on the basis that it was an ancillary use.

The Proposal involved four separate checkouts to be used only for the sale of those goods, in an area portioned off solely for that use.

The land was situated within the Horticulture Zone ("Zone") of the relevant Development Plan. Principle of Development Control 48 of the Zone described a "shop, other than a shop involving the retail sale of products grown on the same site as the shop" as non-complying.

The Appellant argued that the proposal was a variation under Section 39(6)-(7) of the Development Act 1993 ("the Act"). The Court found that if the Proposal entailed "development", namely a change in the use of the subject land, then the Proposal could not escape an assessment against Section 33 of the Act.

The Court stated that the cafeteria/coffee shop was justified on the basis that it was ancillary to the retail plant nursery. It described the existing approved use on the land as a "shop (retail plant nursery) including certain incidental and ancillary uses". The greenhouse activities, packing shed, storage of plants and cafeteria/coffee shop were all incidental and ancillary uses. In order for the Proposal not to be a change in the use of the land it needed to fall within that existing use. The Court found that it did not.

The existing approved shop was required to be of such a genus in order to be approved in that Zone. There was no evidence that the fruit and vegetables to be sold would be grown on the land. The sale of those items was not incidental to the activities of a shop which was a retail plant nursery. If the proposal were implemented the completed development would be a "shop (retail plant nursery) and retail fruit and vegetable shop, including certain incidental or ancillary uses". That would be a change in use of the land regardless of whether the sale of fruit and vegetables was subordinate to the sale of plants and incidental or ancillary activities. It did not then follow that the proposal would be subservient or incidental to the sale of plants.

The Court found that it did not matter how the sale of fruit or vegetables was managed or whether it was a separate profit centre. It was the discrete activity on or use of the land which would change. It was that change which was required to be assessed against the Development Plan.

As the Proposal was for a change in the use of land the Court found that it was then for a non-complying form of development. It held that if the Proposal was implemented the land would still be used as a shop, but no longer as a shop "involving the retail sale of products grown on the same site as the shop". Instead it would include use of the land for a shop for the sale of fruit and vegetables, which was a non-complying form of development in that Zone.