

**ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT**

**JUDGMENT NAME:** ADELAIDE CITY INVESTMENTS PTY LTD v ADELAIDE CITY COUNCIL

**CITATION:** [2004] SAERDC 3

**PARTIES:** **Applicant**  
ADELAIDE CITY INVESTMENTS PTY LTD

**Respondent(s)**  
ADELAIDE CITY COUNCIL

**FILE NUMBER(S):** 21 OF 2003

**HEARD BY:** HER HONOUR JUDGE COLE

**SUMMARY:** Applicant applied for development approval to use portion of land for an off-street private and public carpark - refused by Council - decision appealed - whether the use is “development” within meaning of Act and if so whether that development is a change of use of the land to open lot parking - finding that the existing use of the carpark area was not open lot parking but was ancillary parking - the development application is for a non-complying kind of development

**CASES CITED:** *Prestige Car Sales Pty Ltd v Corporation of the Town of Walkerville and Shuttleworth* (1979) 20 SASR 514  
*Leeming v Corporation of the City of Port Adelaide* (1987) 45 SASR 506

**LEGISLATION CITED:** *Development Act 1993, Planning and Development Act 1966*

**HEARING DATE(S):** 5 to 6 November 2003

**JUDGMENT DATE:** 16 January 2004

**REPRESENTATIVES:** **Applicant(s)**  
MR B HAYES QC

**Solicitors**  
A BURTT

**Respondent(s)**  
MR M RODER

**Solicitors**  
NORMAN WATERHOUSE

**ADELAIDE CITY INVESTMENTS PTY LTD**  
**V**  
**ADELAIDE CITY COUNCIL**  
**(ERDC No. 21 of 2003)**

**[2004] SAERDC 3**

**THE COURT DELIVERED THE FOLLOWING JUDGMENT:**

1 By development application dated 27 May 2002 (“the development application”), Adelaide City Investments Pty Ltd (“the applicant”) applied to the Adelaide City Council (“the Council”) for development approval to use a portion of the land at 288 North Terrace, Adelaide for an “*Off-street public and private carpark*”. 288 North Terrace, Adelaide, is Ayers House and its curtilage (“the property”). A carpark presently exists on the property to the east of the Ayers House building (“the carpark site”). That carpark is already being operated in the manner applied for.

2 The Council issued a decision notification form dated 21 November 2002 stating that it had refused provisional development plan consent and development approval to the development application on 18 November 2002. On that form, the proposed development was described thus - “*To use portion of site as an off-street private and public open lot car parking area.*” (sic). This statement appeared on the form:-

*“REASONS OF PROVISIONAL DEVELOPMENT PLAN REFUSAL ARE AS FOLLOWS:-*

*Pursuant to Section 39(4)(d) and Regulation 17(3) of the Development Act, 1993, Council has determined not to proceed with an assessment of the application.”*

The *Development Act* in s.39(4)(d) provides:-

“(4) A relevant authority may –

...

(d) *refuse an application that relates to a development of a kind that is described as a non-complying development under the relevant Development Plan without proceeding to make an assessment of the application.”*

The *Development Act* in reg. 17(3) provides:-

“(3) A relevant authority may, after receipt of an application which relates to a kind of development that is described as a non-complying development under the relevant Development Plan -

(a) *refuse the application pursuant to section 39(4)(d) of the Act, and notify the applicant accordingly, or*

(b) *resolve to proceed with an assessment of the application.”*

3 The Council has determined that the proposed development is a non-complying development and has refused it without undertaking a planning assessment. The applicant has appealed against that decision.

**The Development Plan**

4 The land is within the East End Precinct designated by the Adelaide (City) Development Plan consolidated on 13 December 2001, which is the Development Plan applicable to the development

application. Pursuant to Principle 29 of the East End Precinct (“the CA16 Precinct”) a change of use to “Open lot parking” (among other things) is a kind of development which is non-complying in the CA16 Precinct. The term is not defined in the applicable Development Plan or the legislation.

### **The Arguments**

5 At the hearing before this Court on 5 December 2003, two arguments were advanced on behalf of the applicant. Firstly, it was argued that the use to which the applicant has applied to put the land is a continuation of the lawfully existing use of the land. No “development” within the meaning of the Act is proposed. The activities to be pursued by the applicant do not require approval. Secondly, it was argued that if the proposed activities of the applicant on the land do constitute development, that development is not a change of use of the land to “Open lot parking”. The use proposed is not non-complying, and the Council cannot therefore refuse it without undertaking an assessment of it.

### **The History of the Land**

6 The history of the land is relevant to the determination of the applicant’s first argument, and a considerable amount of evidence was given in relation to it.

7 Ms Robyn Taylor, an architectural historian, gave evidence in the respondent’s case. She is the author of a report entitled “*A History of Ayers House - Its users and uses*” which she prepared in 1997. She drew upon the research conducted for the purpose of that report in her evidence. Ms Taylor’s evidence was that rate assessment records say that in 1852, Town Acre 30 contained a house, domestic offices, stables and a coach-house together with gardens and paddocks. The land was enclosed, presumably by a fence. The present-day site of Ayers House is part of Town Acre 30, and there is no doubt that the rate assessment records refer to the building which is now part of Ayers House.

8 Ms Taylor concluded from various documents of the time that the carpark site was part of a garden from before 1852 until 1914. In 1860, Henry Ayers entered into a written lease of Town Acre 30 from its owner, William Paxton. Since 1855, Henry Ayers had occupied the property under an informal arrangement. Henry Ayers died in 1897, and the house was maintained by a housekeeper until 1914, when it was sold to Austral Gardens Ltd. From 1914 until 1932 an open air café and outdoor theatre were conducted on the land, and the stage for the theatre was on the carpark site. From 1918 to 1922 the House was the headquarters of the Returned Soldiers and Sailors Imperial League. In 1926, the House and its curtilage was sold to the Commissioner for Public Works, for use by the Royal Adelaide Hospital for nurses’ accommodation. Ms Taylor’s research showed that, by 1949, three dormitories had been constructed on the carpark site. Each could accommodate 16 trainee nurses. Mr Danvers, a heritage architect who gave evidence for the respondent, produced a plan which indicates that the dormitories were built in 1944. Ayers House was then called Austral House. In 1960, Mrs Ryder, who gave evidence in the appellant’s case, was a trainee nurse. She resided at Austral House for six weeks, and subsequently in one of the dormitories on the carpark site for a further six weeks. Mrs Ryder recalled that the dormitories were set back from the northern boundary of the land, and that there was a carpark between that northern boundary and the dormitories. Contemporary photographs and plans confirm her recollection. Mrs Ryder said that visitors to the Austral House site used the carpark, as did some doctors who worked at the Royal Adelaide Hospital.

9 Mr Abbott QC, who gave evidence in the applicant’s case, recalled being a visitor to the site in the 1960s, and parking in the northern portion of the carpark site. There was apparently no restriction as to who could park there, and members of the public almost certainly did so when visiting other places in the area, particularly the Royal Adelaide Hospital. There was no charge to park in the carpark.

10 In 1969, the use of the House and the dormitories for trainee nurses ceased. The dormitories had been removed from the carparking area by 1973. In May of 1972, the National Trust began its use of part of the House for offices, a museum and a caretaker’s residence. This use continues. In

1973, after extensive renovations were undertaken, a restaurant and function facility opened in the House.

11 Mr Cramey was the manager of the restaurant and functions facilities at Ayers House from 1973 to 1980 and he was a consultant manager from 1989 to 1990. Mr Cramey gave evidence in the respondent's case. It was clear from his evidence and from the evidence of Mr Abbott QC and Mr Danvers, that, from a point in time shortly after the restaurant opened in 1973, the whole of the carparking site had become a carpark. From 1974, the northern part of that carpark was allocated for the use of staff and volunteers of the National Trust. The balance was available to the restaurant, for its patrons and staff. It was Mr Cramey's evidence that decisions about the use of the carparking area were made by a management committee which included a representative of the State Government, the National Trust and the restaurant.

12 The use of the carpark was important to the conduct of the restaurant. It was Mr Cramey's evidence that the restaurant and functions facilities were very successful during his time as manager, to the point that the site sometimes accommodated 500 patrons. It was critical to Mr Cramey that the carpark be available for use by his patrons at lunch and dinnertime from Monday to Saturday. In 1974, he engaged a carpark attendant, or valet, to park and retrieve patrons' cars. This enabled the cars to be stacked, significantly increasing the capacity of the carpark. The valet would generally work from 11.00 am to 3.00 pm and from 6.00 pm to 10.00 pm, Monday to Saturday and on Sunday as required. Restaurant patrons were not charged a fee for parking. The caretaker employed by the National Trust also had a role in managing the carpark, and, on Mr Cramey's evidence, would challenge people who attempted to park their cars in the carpark when they were neither restaurant patrons nor visitors to or staff of the National Trust. In off-peak times, at his discretion, the caretaker might permit a person having no business at the site to park there, provided that they assured him that their car would be removed prior to the beginning of the next peak period. The impression from Mr Cramey's evidence was that this would be an occasional occurrence. Mr Abbott QC parked on the site when he chose to, but this is explicable by it being known to the caretaker that he was Mr Cramey's lawyer.

13 It was Mr Cramey's evidence that valet parking continued until at least 1990. During Mr Cramey's time, the gates to North Terrace would invariably be open from early in the morning until late at night. Several witnesses recalled a chain impeding access to the carpark during the Grand Prix.

14 The documents tendered include a lease of portion of the buildings on the property, from the Minister of Works to North Terrace Restaurants Pty Ltd, dated 1978. Clause B3 of that document provided:-

*"B. AND THE LESSOR HEREBY COVENANTS WITH THE LESSEE as follows:-*

*1. ...*

*2. ...*

*3. That the Lessor will permit, at the Lessor's risk, and subject to the Lessor's reasonable directions the Lessee his servants and agents and his customers the right to park vehicles in those areas on the Lessor's land set aside by the Lessor for that purpose."*

15 Another similar agreement, the term of which commenced in 1996, made similar provision in relation to carparking.

16 Mr Greenshields, an architect who worked at the National Trust on the site from 1987 to 1989, gave evidence that, from about 1989, and throughout the 1990s, there were signs painted on the bitumen of the carpark saying "Restaurant Parking Only" and similar words in relation to the National Trust parking area. There was also an upright sign at the entrance to the carpark from the circular

driveway which said, among other things, "Private Parking Area". Photographs taken in 1993 show some of those signs. Mr Greenshields recalled a caretaker, Mr Eric Benke, who used to prevent parking by those not having business on the site.

17 Mr Jozeps, a Director of the National Trust since 1999, gave evidence for the applicant. He said that the "Ayers House Function Centre" is now open to the public and available for bookings for functions. It was his understanding that, prior to his direct involvement, there had been some parking on the site by people who were visiting other destinations in the area, such as the Botanic Hotel and the Royal Adelaide Hospital. He was aware that the National Trust and the management of the restaurant had, on a few occasions, reserved spaces in the carpark by placing a box with a sign on it in the spaces.

18 On 15 December 2000, Park Fast (Aust) Pty Ltd ("Park Fast") a company related to the applicant, entered into an agreement with the Minister for Government Enterprises which gave Park Fast an exclusive licence to operate and manage the carpark. For the purposes of this appeal and the development application, the applicant would appear to be acting as agent for Park Fast. The agreement provided for Park Fast to install ticket vending machines, and that occurred early in the term of the agreement. There are presently 42 spaces in the carpark, including one reserved for disabled drivers. In the agreement the Minister reserves the right to use 16 parking bays for the National Trust and the restaurant. The agreement provides, in clause 15:-

"STATUTORY COMPLIANCE

*The Manager shall at all times during the Term comply with:*

15.1 *the requirements of all statutes, regulations, by-laws, ordinances, rules or other forms of statutory instruments or delegated legislation applicable to the Parking Facilities or to the use of the Parking Facilities by the Manager; and*

15.2 *the requirements of all notices, orders or requirements lawfully given or made by any authority in respect of the Parking Facilities."*

19 The use by Park Fast of the carpark probably began in December 2000. It continues. For the purposes of determining the questions presently before me, I have not taken into account the fact of the commencement and continuing use of the carpark.

20 Statutory planning controls began in relation to the property on 15 June 1972. The use of the land for a licensed restaurant was approved under s.41 of the *Planning and Development Act 1966* in 1973.

21 Mr Cramey and Mr Abbott QC gave evidence that Licensing Court approval was also given for the restaurant, and that the availability of on-site carparking was a critical prerequisite for the obtaining of that approval.

**Is Park Fast's Use of the Land a Change of Use?**

22 To determine this question, it is first necessary to decide what the use of the carparking area was immediately prior to December 2000.

23 Guidance in determining whether a change of use of land has occurred was given by Wells J in *Prestige Car Sales Pty Ltd v Corporation of the Town of Walkerville and Shuttleworth* (1979) 20 SASR 514 at 522:

*"The principles for determining what is an existing use and whether there has been a change of existing use should be flexible. They are not convertible into hard and fast rules. Rather should they be treated as directing a comprehensive survey of the circumstances that obtained before the planning regulations in question came into force, and of the circumstances that*

*would obtain if the proposed extensions or reconstructions were to be made or carried out. The object of the survey should be to decide whether, having regard to the purpose of the former use of the subject building, and to the purpose of the use that would be made of it after execution of the proposals, there would, as a matter of fact and degree, be a change in the essential nature of the existing use if consent were granted. It should be borne in mind that labels are not principles. No one factor is necessarily decisive. There should be no resort to convenient, but indiscriminating and oversimplified, formulae."*

24 Mr Hayes QC argued that the Crown, as the owner of the land, had, through its various Ministers, from at least 1944, designated varying portions of the carpark site as being available for carparking. He argued that the introduction of planning controls in 1972 could not affect that use of the carpark site. In response to the question of whether, as a matter of fact, the carpark had, by December 2000, become a carpark ancillary to the use of the property for a restaurant and for the offices and museum of the National Trust, Mr Hayes said that the specific use of the carpark and the balance of the property at that point in time could not confine the broader characterisation of the carpark area as, simply, a carpark. Mr Hayes argued, in effect, that the Minister's ability to allow carparking on the carpark area for any purpose was unconstrained in 1972 and therefore continued to be unconstrained in the absence of the imposition of specific legislative constraints.

25 The question of the use to which land is being put is a question of fact. I find, on the evidence before me, that, in May of 1972, the use of the property for National Trust Offices and museum and a caretaker's residence was established. At that time, the dormitories for the trainee nurses had been demolished, but there is no evidence that a carpark had been established in their place. Portion only of the carpark site was established as a carpark by that time. The evidence in relation to that portion indicates that it was used primarily by visitors to the building on the property. The fact that people who were not visitors to the nurses' home sometimes parked in the carpark site does not make it a public carpark.

26 Evidence as to when the southern portion of the carpark site was established as part of the carpark is not altogether clear. I infer that it was established as part of the preparation of the property for the restaurants and functions facility in 1973. Although not specifically mentioned in the documents provided in relation to the approval of the restaurant use, it is reasonable to infer that the Licensing Court, and the Council, took it into account when considering the application for the restaurant.

27 I find that, by 1973, the use of the carpark site was for a carpark ancillary to the use of the buildings on the property, which then, as now, was for a restaurant, function facility, offices, museum and caretaker's residence.

28 I reject Mr Hayes' submission that a right to use land in a certain way is, in effect, frozen at the time of the introduction of statutory planning controls. The question of what a parcel of land is being used for is a question of fact. If the full ambit of a lawful use is not exercised for a sufficiently long period of time, then the use may change. King CJ, who gave the lead judgment in the Full Court matter of *Leeming v Corporation of the City of Port Adelaide* (1987) 45 SASR 506 at 515 said:

*"A use may be discontinued by means of cessation of activity pursuant to that use accompanied by words or conduct on the part of the owner or occupier indicating unequivocally an intention to abandon or terminate the use. It may also be discontinued by cessation of activity pursuant to the use in such circumstances, or for such duration, or both, as to indicate from a practical point of view that such cessation is no mere interruption of activity pursuant to the use, but amounts to abandonment or termination of the use, irrespective of the subjective intentions of the owner or occupier as to the future."*

29 The *Development Act 1993*, in s.6, recognises that an existing use is a fluid concept and that an existing use may change over time as a matter of fact.

30 In any event, it is likely that on 15 June 1972, when statutory planning controls took effect, only the northern portion of the carpark site enjoyed existing use rights as a carpark.

31 The existing use of the carpark site was the same until December 2000 as it had been in 1973. Occasional parking which was not ancillary to the use of Ayers House, but which was not invited or encouraged, could not and did not change it. The purpose of the existing use was to provide a facility for users of the buildings on the land. The purpose of the proposed use is to provide parking to members of the public in exchange for a fee. Taking into account the right of the Minister to reserve 16 of the spaces for the restaurant and the National Trust simply means that a new use is to be added to the existing use. The purpose of the use has changed. A change of use of the land is proposed, and approval under the *Development Act 1993* is required.

### **Is the Change of Use Non-complying?**

32 The presence, in lists of non-complying development in the Development Plans, of terms which were once defined in the legislative scheme, but are no longer defined, causes considerable confusion.

33 Until July 2000, the Adelaide (City) Development Plan contained these definitions:-

*“(bu) open lot parking:*

*the use of land for the parking of vehicles in the open air, but does not include ancillary parking or a public parking station.*

*(cc) public parking station:*

*the use of a building for the parking of vehicles, such parking being available to the public on payment of a fee or charge.*

*(l) ancillary parking:*

*the use of land for parking of motor vehicles ancillary to another activity carried out on that or other land, such parking being available to the public or to the occupants of the land where such other activity is carried out for no fee or charge. It does not include a public parking station, a freight terminal, a passenger terminal, a minor transport depot or the use of land for the loading and unloading of service, delivery or emergency vehicles ancillary to another activity carried out on that land.”*

34 Principle 29 for the CA16 Precinct says that a change in use to “open lot parking” is non-complying. The proposed development would have come within the pre-July 2001 definition of that term. In determining this question, it is not appropriate to apply the definitions which have been removed. The ordinary meaning of “open lot parking” must be applied. The carpark site the subject of the development application is open. It is difficult to imagine an interpretation of “open lot parking” which would not embrace the proposed development. The term implies a land use which can stand alone, separate from other land uses. The designation of an open, public carpark as non-complying is consistent with the tenor of the other provisions relevant to the CA16 Precinct. The proposed development is open lot parking within the meaning of Principle 29 for the CA16 Precinct. The use of the carpark site prior to December 2000 was not for open lot parking, but was for ancillary parking.

35 The development application is for open lot parking, which is a non-complying kind of development.

### **The Site**

36 The above analysis has considered the carpark site as the site of the proposed development. There is an alternative approach. The property can be viewed as the site. It is a property which

accommodates mixed land uses. The proposed development then adds a new use to the mix. It is still a change of use pursuant to the *Development Act 1993* s.6(1)(c), and a non-complying use.

### **Summary and Conclusion**

37 The whole carpark site was not used as a carpark prior to 15 June 1972. Only the northern portion of the carpark site had existing use rights as a carpark on that date.

38 The approvals in relation to the restaurant in 1973 established a right to use the carpark site as a carpark ancillary to the use of the buildings. The extent of the use of the carpark site as a carpark by people who were not visiting the property for any purpose other than carparking, and the circumstances of that use prior to December 2000, are not such as to lead to the characterisation of the carpark as a public carpark. The land use the subject of the development application by the applicant would constitute the commencement of a new use of the carpark site which would be additional to the previously established use of the carpark site for ancillary parking in relation to the uses of the buildings on the property. The proposed land use is “open lot parking” within the meaning of Principle 29 of the CA16 Precinct. The proposed land use is non-complying. The Council was entitled, pursuant to s.29(4)(d) of the *Development Act 1993* to refuse the application without assessing it. The appeal is dismissed.