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**JURISDICTION** : TOWN PLANNING APPEAL TRIBUNAL

**STREAM** : DEVELOPMENT & RESOURCES

**ACT** : TOWN PLANNING AND DEVELOPMENT ACT  
1928 (WA)

**CITATION** : ABC LEARNING CENTRES and CITY OF  
GOSNELLS [2003] WATPAT 13

**CORAM** : MR P MCGOWAN  
MR D BROWN  
MR E A MCKINNON

**HEARD** : 19 MAY 2003

**DELIVERED** : 19 MAY 2003

**FILE NO/S** : APP 133 of 2002

**BETWEEN** : ABC LEARNING CENTRES  
Appellant

AND

CITY OF GOSNELLS  
Respondent

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*Catchwords:*

Planning approval - Child care centre - Traffic concerns - Costs - Whether Respondent behaved unreasonably in relation to the appeal

*Legislation:*

Nil

*Result:*

Appeal allowed and declined Appellant's application for an order as to costs.

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr A Derrick and Ms R Malcolm
Respondent	:	Mr T Price

*Solicitors:*

Appellant	:	Phillips Fox
Respondent	:	As Agent

**Case(s) referred to in decision(s):**

Nil

Nil

**MR P MCGOWAN, MR D BROWN, MR E A MCKINNON:**

- 1     This application involved property on the western corner of the intersection of Bronzewing and Harpenden Streets, Huntingdale. The subject site is part of Canning Location 16 and is Lot 1357 on Plan 3314 being the whole of the land contained in Certificate of Title Volume 1315 Folio 150.
- 2     Lot 357 was the subject of a subdivision application with the intent that eleven lots would be created. One of those lots would be the Subject Site.
- 3     The Subject Site was to be 2967m<sup>2</sup>.
- 4     On 23 July 2002, the Appellant made application to the Respondent for planning approval for the development of a child care centre on the Subject Site. The Appellant is itself a publicly listed company which supplies child care services throughout Australia. It is the owner operator of a number of child care centre facilities.
- 5     On 10 September 2002, the Respondent refused the Appellant's application "due to traffic concerns on a current dangerous corner".
- 6     It seems that the Appellant arranged for a Traffic Impact Statement in November 2002, prepared by Mr Behnam Bordbar of Transcore Pty Ltd, to be provided to the Respondent.
- 7     The purpose of such provision was to both address the concern raised by Council in September 2002 and endeavour to provide a satisfactory answer to the concerns then held.
- 8     The matter was further considered by Council at a meeting on 17 December 2002. The resolution of 10 September remained and the application continued to be refused.
- 9     The appeal in this matter has been brought from Council's determination of 10 September 2002.
- 10    The only reason for refusal provided at that stage was, as indicated above, "due to traffic concerns on a current dangerous corner".
- 11    In the Statement by the Respondent, the Respondent effectively accepts that the present application complies with the Respondent's Child Care Centres Policies in all respects, save as to traffic safety concerns.

12 In so saying, however, the Statement by the Respondent also provided:

“It is agreed, based on the City’s traffic engineer’s assessment, that both Bronzewing Street and Harpenden Street would have the capacity to accommodate the traffic that the proposed child care centre would generate.”

13 Further:

“It is agreed that in the report to Council regarding this matter, the City’s traffic engineer is quoted as having assessed the proposal, including the proposed access and egress points, and determined that the proposed layout complies with all relevant criteria.”

14 When the matter came on for Hearing, it was apparent by reference to the Notice of Appeal, the Statement by the Respondent and the statements filed on behalf of the parties, that the only issue live in the appeal was the issue of traffic safety concerns.

15 In so saying, we hasten to emphasize that the nature of an appeal to this Tribunal is, as has been pointed out on many occasions, in the nature of an appeal *de novo*.

16 As such, therefore, it still remained a matter for this Tribunal to determine the appeal having regard to relevant legal and planning principles.

17 It was, however, conceded that there was no difficulty with the Respondent’s Town Planning Scheme and that in relation to the Respondent’s Child Care Centres Policy, the present application met all relevant criteria.

18 Evidence was given on behalf of the Appellant by Mr Donald Jones. Mr Jones is the Development Manager of the Appellant, based in Brisbane. His statement made reference to the considerable experience of the Appellant in child minding centres throughout the country and the role he plays in identifying appropriate sites. He also addressed questions in relation to pick up and drop off times, having regard to the fact that the child care facility would be open from 6.30 am to 6.30 pm, Monday to Friday. There was no cross-examination.

19 The Appellant also called Mr Duane Cole. Mr Cole is a Town Planner of considerable experience. He gave evidence in relation to the

circumstances of the application to the Respondent in September and December 2002.

20 Finally the Appellant called Mr Behnam Bordbar. Mr Bordbar is a traffic engineer. He was the author of the Traffic Impact Study which was provided to the Respondent in November 2002.

21 Of particular significance was the analysis that was undertaken in relation to traffic movements. The report also directed to three accidents which appeared to have occurred before the end of 1998 when a roundabout was introduced. There have been no accidents reported at that intersection in the three year period 1 January 1999 to 31 December 2001.

22 Significantly, there was no cross examination of Mr Bordbar.

23 The only evidence lead on behalf of the Respondent was from Mr Price. Mr Price is the Manager of City Planning for the Respondent and has been since March 2002.

24 During the course of cross-examination, he accepted that although he had not prepared the Planning Officer's report to Council in September 2002, he had vetted it and agreed with its contents and the recommendation. The recommendation was to approve the Appellant's development.

25 The only argument advanced on behalf of the Respondent was that there was a perception held by residents and presumably, as a consequence of the Respondent's decision, by Council, that there were traffic safety concerns in relation to approval being granted to the Appellant's application.

26 Significantly, as we have indicated above, Council's own engineers agreed with the methodology and recommendations of Mr Bordbar. Expert evidence before us in that regard is, in our view, irresistible. There was no challenge to it nor does there appear in the report provided to be any reason why we would not accept that recommendation as being soundly based in fact and properly substantiated as an opinion held by an expert in the area.

27 The fact that there may be perceptions (which Mr Price effectively agreed would not necessarily be based in fact) is not of itself a basis in our view to depart from the conclusions expressed by Mr Bordbar.

28 We have no hesitation in accepting the report and its recommendations, as demonstrating that there is no factual basis for traffic safety concerns and

that as a result, we are satisfied there is no basis to refuse the Appellant's application.

29 For those reasons the appeal will be allowed.

30 As is the practice in the Tribunal, the parties have fourteen days within which to agree the conditions by which effect will be given to this decision. The appellant is granted liberty to apply in the event that agreement is not or cannot be reached within that period.

### **Costs**

31 At the conclusion of the matter when we gave our decision with reasons to be published later, Counsel for the Appellant, Mr Derrick, moved for an order that the Respondent pay the costs of the appeal.

32 He sought legal costs together with costs of the relevant experts, namely Mr Cole and Mr Bordbar, in relation to the preparation for and conduct of this appeal.

33 This is effectively a no cost jurisdiction. The presumption in those terms appears in Section 65(1) *Town Planning and Development Act 1928*. There are, however, limited circumstances in which an order for costs may be made. Those are limited to:

“Where in the opinion of the Tribunal a party to an appeal has behaved unreasonably, vexatiously or frivolously in relation to the appeal, the Tribunal may order that their party pay such costs as the Tribunal thinks fit to any other party who has not so behaved.” Section 65(2).

34 The essence of the Appellant's contention was that there never was a basis upon which realistically this appeal should have been opposed and that as a result it was contended the Respondent had behaved unreasonably.

35 The Respondent's position was that it maintained its view that there was a perception that there were traffic safety concerns notwithstanding recommendations of a technical nature from its engineer and notwithstanding the report provided by the Appellant in that regard.

36 It was certainly clear that as a consequence of, in effect, the Respondent leading no evidence in support of its contention that there was a perception of traffic safety concerns, that the appeal itself took a lot less time than would otherwise have been the case.

- 37 This is not a case for example where the conduct of one party has enlarged or exacerbated the costs otherwise incurred in relation to the conduct of an appeal. Rather in the way in which the matter has unfolded, this appeal, which was set down for two days hearing, was resolved early on the first day. In a simplistic sense the conduct of the Respondent has not exacerbated the costs of the appeal.
- 38 The other matter which must be borne steadily in mind is that once the Respondent has refused the Appellant's initial application and once the appeal had been instituted, it was essentially a matter for this Tribunal. That is not to say that the parties could not have agreed to resolve the matter but such agreement would ultimately have to have been effected by an order of this Tribunal on the basis that, from the institution of the appeal, the Respondent was effectively *functus officio*.
- 39 Necessarily, as the Appellant well understands, the processes before the Respondent for its determination and the processes before this Tribunal for our determination are different.
- 40 The fact that they unfold in different ways necessarily means that the consequences may well be different.
- 41 It is undoubtedly the case that although each matter before the Respondent is to be determined on its merits, the Respondent is entitled to have regard to views expressed by its ratepayers and, in fact, the policy in question which was at the heart of this application itself includes five matters to be taken into account including "resident comments". The fact that in the end those resident comments may well be based upon perception is not for the purpose of the determination made by the Respondent a matter necessarily to be rejected.
- 42 Before this Tribunal no evidence was lead to provide a basis for the perception that was said to be held. There was, on the contrary, positive expert evidence lead to demonstrate that there was no basis for concern as to traffic safety.
- 43 One can readily appreciate that it was the Appellant's expectation that upon provision of the Traffic Impact Study in November 2002, the Respondent would have immediately accepted that there was no basis for its perception.
- 44 In essence the fact that it did not do so is the complaint now raised. That, in our view, is not acting unreasonably in relation to the appeal.

- 45      That it is not to say that we are endorsing the conduct of the Respondent. In fact there seem to be good reasons why, when the Traffic Impact Study and advice was provided to the Respondent by its City engineer, it ought to have acted upon that advice.
- 46      Nevertheless, it did not do so but in this instance we are not satisfied that the conduct is unreasonable for the purposes of Section 65(2).
- 47      We therefore decline the Appellant's application for an order for costs.