

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
VALUATION COMPENSATION AND PLANNING LIST

Not Restricted

S CI 2013 5353

YVONNE VON HARTEL & ORS

Applicants

v

MACEDON RANGES SHIRE COUNCIL &
ORS

Respondents

JUDGE: EMERTON J
WHERE HELD: Melbourne
DATE OF HEARING: 7 February 2014
DATE OF JUDGMENT: 14 May 2014
CASE MAY BE CITED AS: Von Hartel & Ors v Macedon Ranges Shire Council & Ors
MEDIUM NEUTRAL CITATION: [2014] VSC 215

PLANNING AND ENVIRONMENT - Planning scheme amended to restrict third party rights after application for review was commenced by applicants in the Victorian Civil and Administrative Tribunal – Tribunal summarily dismissed the proceeding brought by the applicants as misconceived – Whether the Tribunal misconstrued the words ‘education centre’ in the Planning Scheme – Whether the Tribunal denied the applicants natural justice – Vitiating error – Appeal allowed – Proceeding remitted to the Tribunal for determination according to law – s 82(1) *Planning and Environment Act 1997* - s 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* - s 28(2) *Interpretation of Legislation Act 1984* - *S v Crimes Compensation Tribunal* [1998] 1 VR 83 - *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 - *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicants	Mr Paul Connor	Equipe Lawyers
For the Second Respondent	Mr Andrew Walker	Best Hooper

Introduction

- 1 The applicants seek leave to appeal against the order of the Victorian Civil and Administrative Tribunal made on 17 September 2013 by which the Tribunal summarily dismissed the proceeding brought by the applicants as misconceived pursuant to s 75(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 (the 'VCAT Act').
- 2 The proceeding in question was an application for review of the decision of the Macedon Ranges Shire Council to grant a permit for the development of a supermarket in the township of Riddells Creek, including permission to reduce car parking spaces and permission for signage. The applicants objected to the grant of the permit and brought the proceeding under s 82(1) of the *Planning and Environment Act* 1997 (the 'PE Act').
- 3 The Tribunal's order was made following a practice day hearing convened to consider whether amendments to the Macedon Ranges Planning Scheme since the commencement of the proceeding had resulted in the removal of all of the applicants' rights of notice and review under the PE Act.
- 4 In dismissing the proceeding summarily, the Tribunal ruled that the subject land was exempt from the notice and review provisions of the PE Act by reason of cl 34.01-7, cl 44.04-4 and cl 52.06-4 of the Planning Scheme and that the Riddells Creek Neighbourhood House was not an 'education centre' within the meaning of the Planning Scheme.
- 5 For the reasons that follow, leave to appeal will be granted and the appeal will be allowed.

Relevant background

- 6 On 29 October 2010, planning permission was sought to develop a supermarket on the subject land. Notice of the application was given to the applicants pursuant to s 52(1) of the PE Act. The applicants duly objected to the grant of a permit pursuant

to s 57(1) of the PE Act.

- 7 On 27 February 2013, the Council, as responsible authority, issued a notice of decision to grant a permit.
- 8 On 21 March 2013, the applicants applied to the Tribunal to review the Council's decision pursuant to s 82(1) of the PE Act. In their Statement of Grounds the applicants contended that the proposal did not meet relevant planning policies, including but not limited to clauses 11, 12, 15, 17, 21, 22, 34, 52.06 and 52.07 of the Planning Scheme.
- 9 Clause 34.01-4 of the Planning Scheme requires permission to construct a building or carry out works in a Commercial Zone. However, pursuant to cl 34.01-7, an application to construct a building is exempt from the notice requirements of s 52(1)(a), (b) and (d), the decision requirements in s 64(1), (2) and (3) and the review rights of s 82(1) of the PE Act (which I shall refer to collectively as 'third party rights') if the subject land is more than 30 metres from, amongst other things, land used for the purpose of an education centre.
- 10 The subject land is also partly located within a Land Subject to Inundation Overlay. Pursuant to cl 44.04-1, a permit is required for buildings and works, but pursuant to cl 44.04-4, an application made pursuant to this Overlay is exempt from third party rights.
- 11 Pursuant to cl 52.06 of the Planning Scheme, planning permission is required to reduce the number of car spaces required by cl 52.06-5. Prior to 19 April 2013, a permit application to reduce the number of car spaces was subject to third party rights. However, following gazettal of Amendment VC95 to the Planning Scheme on 19 April 2013, third party rights were restricted. After that time, there was an exemption from third party rights if, in respect of all other permissions required for the development, there was also an exemption from third party rights.

- 12 On 3 September 2013, the solicitors for the second respondent (the permit applicant)

wrote to the Senior Registrar of the Tribunal enclosing an urgent practice day request seeking an order that the proceeding be struck out. The letter explained that, as a consequence of Amendment VC95, the planning permit application in its entirety had become exempt from third party rights, and the applicants no longer had any legitimate right of review. This was because all permissions required for the supermarket development, save for the car spaces waiver, were exempt from third party rights and, following the amendment to cl 52.06-4, the application for the car spaces waiver had therefore also become exempt.

The Tribunal hearing and decision

- 13 The practice day hearing was brought on at short notice. The applicants resisted the summary dismissal application on the basis that third party rights existed under the zone provisions in the Planning Scheme because the subject land was within 30 metres of an education centre. They submitted that the building shown on the site plan immediately to the west of the subject land as a community centre and neighbourhood house should be characterised as an 'education centre' for the purposes of cl 34.01-7 of the Planning Scheme. As a result, so they contended, third party rights were not excluded by cl 34.01-7 (and therefore not pursuant to cl 52.06-4 either).
- 14 As a result, the focus of the Tribunal's attention at the practice day hearing was whether the Riddells Creek Neighbourhood House (the 'Neighbourhood House') was an 'education centre' for the purposes of cl 34.01-7 of the Planning Scheme.
- 15 Clause 74 of the Planning Scheme contains land use terms. 'Education centre' is defined as 'land used for education'. The third column of the table of definitions in cl 74 contains a list of inclusions for an 'education centre' as follows: business college, employment training centre, primary school, secondary school and tertiary institution.
- 16 The applicants put before the Tribunal written material illustrating the activities undertaken and the range of classes offered at the Neighbourhood House. They

submitted that the Neighbourhood House was 'land used for education', despite not being specifically listed in the inclusions in the definition table because neighbourhood houses are centres for local learning and represent a new form of what had previously been the mechanics institutes. The applicants informed the Tribunal that the 'Learn Local' logo on the front of the Macedon Ranges Neighbourhood Houses Term 3 Program for 2013 (the 'Term 3 Program') indicated that programs received financial support through the Victorian Education Department for adult community education and training programs.

17 The Tribunal accepted that the concept of education could embrace the acquisition of knowledge in a broad range of fields. However, this did not mean that every centre that offered a class in something would fall within the definition of 'education centre'. According to the Tribunal, the examples of uses that were included in the definition of 'education centre' (business college, employment training centre, primary school, secondary school and tertiary institution) all 'denoted a degree of formality associated with the delivery of education resulting in some form of recognised standard or accreditation at the successful conclusion of the training or course of instruction'.¹ Centres offering education of this kind could be distinguished from those offering classes for recreational, cultural, social or self-fulfilment purposes.

18 The Tribunal accepted that the Neighbourhood House offered community facilities and also some learning opportunities. However, it held that when characterising the real and substantial purpose of the way in which the subject land was used, it was necessary to ask what, according to ordinary terminology, was the appropriate designation of the purpose being served by the use of the premises at the material date. The Tribunal said:

In the present case, I am not prepared to find that the primary purpose or real and substantial purpose of the Riddells Creek Neighbourhood House is that of an education centre. I would characterise it rather as a community centre. Some of its activities may be educational in terms of imparting

¹ *Poulton v Macedon Ranges SC* [2013] VCAT 1639 ('Reasons') [10].

learning, but they are not of a sufficiently formalised nature, leading to some form of recognised standard or accreditation, such that the primary purpose of the land could be said to be used for education.²

- 19 Having found that the Neighbourhood House was not an education centre, the Tribunal held that the exemption from third party rights under cl 34.01-7 applied and that this, in turn, meant that the exemption from third party rights in cl 52.06-4 (as amended) also applied. The Tribunal concluded:

In these circumstances, the objectors have no rights of review in respect of any aspects of the development or reduction in car parking for which a permit is required in this particular case. I therefore rule that the application for review must be struck out as misconceived because the Tribunal has no jurisdiction to determine the merits of the case.³

Proposed grounds of appeal

The applicants have four proposed grounds of appeal:

1. In circumstances where the applicants had already lawfully exercised their right to commence an application for review, the Tribunal erred in law by finding that the application for review was misconceived as a consequence of a change to the Planning Scheme which occurred after the application for review was commenced;
2. The Tribunal misdirected itself and misunderstood its task pursuant to s 75(1) of the VCAT Act because it should not have exercised its powers pursuant to that section unless it was clear that there was no real question to be tried;
3. The Tribunal misconstrued the words 'education centre' in the Planning Scheme, in that there was no requirement that the education offered had to give rise to a recognised standard or accreditation;
4. The Tribunal denied the applicants natural justice by finding that:
 - (i) the delivery of education which results in some form of recognised standard or accreditation is a relevant factor in determining whether a

² Reasons [13].

³ Ibid [15].

use can be properly characterised as an 'education centre' without giving the applicants an opportunity to address it on that issue;

- (ii) the educational activities occurring at the Neighbourhood House are not formal and do not lead to a recognised standard or accreditation without giving the applicants an opportunity to address it on that issue or adduce evidence on the subject.

20 The first ground concerns the continued existence of third party rights in relation to the car spaces waiver, given that such rights existed at the time the application for review was commenced. The third ground is concerned with the existence of third party rights in relation to the zone control under cl 34.01-4. If the proposed supermarket is within 30 metres of land used for an education centre, then the exemption from third party rights in cl 34.01-7 is inapplicable. This would mean that the amendment to cl 52.06-4 would not deprive the applicants of third party rights in respect of the car spaces waiver. In other words, if the Neighbourhood House is an 'education centre', the applicants have rights of review under both the zone control and in respect of the car spaces waiver. However, if the Neighbourhood House is not an 'education centre', the applicants have no third party rights under the zone control and they then have to establish that their rights in respect of the car spaces waiver was not affected by the amendment to cl 52.06-4 of the Planning Scheme that occurred after the proceeding had been commenced.

21 It is therefore convenient to commence with those grounds alleging error in the Tribunal's determination that the Neighbourhood House was not an 'education centre' for the purpose of cl 34.01-7 of the Planning Scheme and alleging a denial of procedural fairness in the way that the Tribunal dealt with this question.

Grounds 3 and 4: third party rights under cl 34.01-7

22 The Tribunal ruled that the Neighbourhood House was not an education centre for the purposes of cl 34.01-7. It considered whether the Neighbourhood House was 'land used for education' having regard to the need to ascertain the purpose of the

use. It concluded that while some of the activities of the Neighbourhood House might be educational in terms of imparting learning, the activities were 'not of a sufficiently formalised nature, leading to some form of recognised standard or accreditation, such that the primary purpose of the land could be said to be used for education'.⁴ As discussed, the Tribunal expressed the view that centres offering education 'resulting in some form of recognised standard or accreditation at the successful conclusion of the training or course of instruction'⁵ could be distinguished from centres where classes were offered merely for recreation, cultural, social or self-fulfilment purposes.

- 23 The Tribunal therefore understood the Planning Scheme to impose a requirement that the education provided by an 'education centre' be of a formal nature involving the conferral of a recognised standard or accreditation marking the 'successful conclusion' of the course or training. The applicants submit that the Tribunal has thereby impermissibly read words into the definition of 'education centre'. While the statutory definition of 'education centre' is 'land used for education', the Tribunal has re-written the definition as follows:

Land used for education which gives rise to a recognised standard or accreditation at the successful conclusion of the training or course of instruction.

- 24 According to the applicants, there is no warrant for reading words into the definition in question. Moreover, the words that the Tribunal has read into the definition are contrary to the purposes of the PE Act specified in ss 4(1), 4(2)(i) and 4(2)(j) of the PE Act.
- 25 For their part, the respondents submit that the words 'land used for education' have their ordinary English meaning, and that meaning is a question of fact. As a result, the only basis upon which an appeal could be sustained on the ground that the Tribunal misconstrued the term 'education centre' is that the Tribunal arrived at a

⁴ Ibid [13].

⁵ Ibid [10].

meaning that no tribunal acquitted with determining the ordinary use of the term could reasonably reach. The respondents submit that the Court should be slow to conclude that on no reasonable view could the Tribunal have interpreted the ordinary meaning of the words 'land used for education' in the way that it did.

26 In *S v Crimes Compensation Tribunal*,⁶ Phillips JA considered, by reference to a number of propositions, the distinction between a question of law and a question of fact in appeals from decisions about whether something falls within a statutory description. His Honour's first proposition was that, as a matter of construction, the proper meaning of the statutory description that is relevant to the claimant's success or failure is a question of law.⁷ The first question of construction is whether the words are used with their ordinary and natural meaning. If so, no further question of construction arises. However, if the words are used in some special or unusual sense or, although used in their natural and ordinary sense, give rise to uncertainty because of the grammar or the context, the resolution of that problem of construction is a question of law, not fact.⁸ In this context, his Honour observed that the task of construing the relevant statutory description is no more than settling the legal criteria for the claimant's success or failure and that is a question of law. It is only where no construction is involved, that is, where the words are used in their natural and ordinary sense, that what they mean is a question of fact.⁹

27 On any view, the Tribunal has here embarked on an exercise of construction. It accepted that the concept of education could embrace the acquisition knowledge in a broad range of fields, but said that that did not mean that every centre that offered a class in something would 'fall within the ambit of the definition of education centre in the Planning Scheme'.¹⁰ It distinguished centres offering classes for recreation, cultural, social and self-fulfilment purposes by reference to the fact that the examples

⁶ [1998] 1 VR 83.

⁷ Ibid 88.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid [10].

of uses included in the definition denoted a degree of formality in the delivery of the education.¹¹

28 Thus, in answering the question whether the real and substantial purpose of the use of the land brought the Neighbourhood Centre within the definition of an 'education centre', the Tribunal found some of the activities of the Neighbourhood Centre to be 'educational' in terms of imparting learning, but not sufficiently formalised to meet the definition of 'education centre' 'such that the primary purpose of the land could be said to be used for education'.¹²

29 Whether or not the words 'land used for education' were intended to have their ordinary and natural meaning, the Tribunal did not give them such a meaning. The Tribunal discerned the meaning of 'education' (in 'land used for education') by reference to the context provided by the Planning Scheme itself, and gave it a specific meaning arising from this context. It is a question of law whether it erred in doing so. Alternatively, if the words 'land used for education' are used in a particular sense in the Planning Scheme or, although used in their natural and ordinary sense, give rise to uncertainty because of their context, the proper construction of those words is a question of law.

30 In either event, the Court has before it a question of law. It therefore remains to consider whether the Tribunal erred in law in giving 'education centre' the specific meaning that it did.

31 'Education centre' is a defined term. However, the definition 'land used for education' is singularly unhelpful. It gives no insight into what is meant by 'education'.

32 The Macquarie Dictionary defines 'education' to be 'the act or process of educating; systematic instruction or training'. In the light of the dictionary definition, I agree with the applicants that the Tribunal has chosen to read the phrase 'land used for

¹¹ Ibid.

¹² Reasons [13].

education' narrowly by requiring an imparting of learning of a formalised nature 'leading to some form of recognised standard or accreditation' at the 'successful conclusion' of the process. The Tribunal's gloss on the definition of 'education centre' means that the persons to whom learning is imparted in an education centre must be formally recognized as having achieved a particular standard or accreditation as a result of their exposure to 'education'. This, in my view, goes beyond receiving 'systematic instruction or training'.

- 33 The only signpost in the Planning Scheme supporting such a restricted meaning of education is, as the Tribunal pointed out, the nature of the inclusions in the third column of the definitions table: business college, employment training centre, primary school, secondary school and tertiary institution.¹³ These education centres are all arguably institutional in character and curriculum and/or accreditation driven.
- 34 Against this, however, is the fact that the phrase 'land used for education' is to be construed in the context of cl 34.01-7, which removes third party rights in relation to proposed buildings and works in a Commercial Zone. As the applicants submitted, the objects of planning and the planning framework in the PE Act envisage active participation by the public in land-use decisions. Persons affected by proposals for the use, development or protection of land are to receive appropriate notice¹⁴ and there is to be an accessible process for the just and timely review of decisions¹⁵. Participation in planning processes, including permit applications, is generally encouraged and facilitated by the PE Act: Part 3 contains mechanisms for public participation in planning scheme amendments; Part 4 contains a regime for participation in the grant of planning permits and for the review of permit decisions by the tribunal.
- 35 Consistently with the objectives of the PE Act, a provision in a planning scheme that

¹³ Clause 74.

¹⁴ Section 4(2)(i) of the PE Act.

¹⁵ Section 4(2)(j) of the PE Act.

limits participation in land-use decisions should be narrowly construed. In this case, this means not adopting an overly restrictive interpretation of 'land used for education'. Such a restricted meaning would need to be clearly indicated by the statutory context. In my view, it is not.

- 36 The exemption from third party rights in cl 34.01-7 does not apply to a proposed development on commercially zoned land close to a residential zone, a hospital or an 'education centre'.¹⁶ It is not easy to identify any single organising principle or purpose behind this limited maintenance of third party rights, except that residents and users of hospitals and education centres might be considered to be peculiarly susceptible to disturbance as a result of particular forms of development. I see no reason why users of a centre in which they receive 'systematic instruction or training' in a particular subject or skill but do not achieve a recognised standard or receive accreditation at the successful conclusion of the training or course of instruction should be considered to be any the less vulnerable to disturbance than students of a business college, employment training centre or, indeed, a school.
- 37 I therefore accept the applicants' submission that the Tribunal has impermissibly read words into the definition of 'education centre'. The error is a vitiating error in that, had the Tribunal not construed the definition of 'education centre' so narrowly, it could have reached a different decision on the question before it.
- 38 Ground 3 is made out.
- 39 As a result, the proceeding must be remitted to the Tribunal to be heard and determined afresh. In the normal course, this means that the applicants will have a new opportunity to put before the Tribunal all the material that they consider relevant to establishing that the Neighbourhood House is an centre delivering systematic instruction or training. It is therefore unnecessary to consider the ground based on an alleged want of procedural fairness.

¹⁶ Or land reserved for the purpose of a hospital or education centre.

40 However, were it necessary to decide, I would hold that Ground 4 was made out for the following reasons.

41 In its Reasons, the Tribunal observed that the Term 3 Program set out programs for neighbourhood houses in Woodend, Riddells Creek, Kyneton, Lancefield and Romsey and that some of the classes offered had a 'Learn Local' or a 'Nationally Recognised Training' or an 'Adult, Community and Further Education' logo beside them, which indicated an accredited training course. It also observed that '[n]one of the classes or activities offered at the Riddells Creek Neighbourhood House have such a logo'.¹⁷ This led the Tribunal to say that it was not to be prepared to find that the real and substantial purpose of the Neighbourhood House was that of an education centre.¹⁸

42 The applicants say that had they known of the importance that the Tribunal accorded to accreditation or standards, and the presence or absence of the logo, they could have highlighted evidence that was tendered on the subject and tendered further evidence. In her affidavit filed in the proceeding, the town planner who represented the applicants at the practice day hearing, Debbie Joy Dunn, deposes that the question of whether the Neighbourhood House delivered education 'resulting in some form of recognised standard or accreditation at the successful conclusion of the training or course of instruction' was not discussed at the hearing. The Tribunal did not inform the parties that the provision of such courses may be material to its consideration of the matter.¹⁹ Ms Dunn further deposes that had she been informed by the Tribunal that this was a material consideration, she could have directed the Tribunal's attention to evidence she had gathered on the subject. According to Ms Dunn, the Neighbourhood House conducts numerous accredited training courses such as first aid, CPR, Anaphylaxis, Responsible Serving of Alcohol,

¹⁷ Reasons [9].

¹⁸ Reasons [13].

¹⁹ Affidavit of Debbie Joy Dunn sworn of 21 October 2013, [15].

Food Handling, skills for obtaining employment and a variety of computer courses.²⁰

43 In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*,²¹ the High Court cited with approval the following passage from the judgment of the Full Court of the Federal Court of Australia in *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd*²²:

It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material.²³

44 Furthermore, this right extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made:

The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material.²⁴

45 However, procedural fairness does not require the tribunal to give an applicant a running commentary upon what it thinks about the evidence. In *SZBEL*, the High Court referred with approval to the following statement of Lord Diplock in *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry*²⁵:

The rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision.²⁶

46 The existence or otherwise of a logo indicating accreditation was critical to the Tribunal's decision. In my view, the approach taken by the Tribunal to determining what was an 'education centre' was a one which was not obvious. The requirement

²⁰ Ibid [16].

²¹ (2006) 228 CLR 152 ('SZBEL').

²² (1994) 49 FCR 576 ('Alphaone').

²³ Ibid 590-591.

²⁴ Ibid.

²⁵ [1975] AC 295.

²⁶ Ibid 369.

to demonstrate accreditation was not apparent from the terms of Planning Scheme. Given that the absence of the logo or other evidence of accreditation was treated as adverse to them, the applicants ought to have been given the opportunity to make submissions about the matter and, if necessary, to draw the Tribunal's attention to material displaying the logo or otherwise relevant to the question of accreditation.

47 I am conscious that the practice day hearing occurred at short notice and canvassed issues that had not previously been raised. The Tribunal did its best to ensure that the parties received a proper hearing. Nonetheless, in reaching its decision, the Tribunal fixed upon a specific matter, the importance of which was not apparent from the terms of the Planning Scheme or from the way in which matters unfolded in argument in the practice day hearing. Given the significance attributed by the Tribunal to the issue of standards and accreditation and, in this context, to the absence of a logo beside the courses offered by the Neighbourhood Centre, this ought to have been identified as an issue and the applicants given an opportunity to lead evidence and make submissions about it.

Ground 1: the planning scheme amendment

48 The applicants submit that in circumstances where they had already lawfully exercised their right to bring an application for review, the Tribunal erred in law by concluding that the application for review was misconceived as a consequence of a change to the Planning Scheme which occurred after the application for review was commenced.²⁷ This, so the applicants say, would be inconsistent with s 28(2) of the *Interpretation of Legislation Act 1984* (Vic) and the common law presumption against the retrospective operation of legislation.

²⁷ The applicants refer to a number of decisions in the Tribunal to the effect that the exemption from notice and rights of review can only operate to exclude third party objectors if the restriction applied at the relevant time: *West Valentine Pty Ltd v Stonnington City Council* [2005] VCAT 224; *Bunnings Pty Ltd v Surf Coast CC* [2011] VCAT 690. The applicants point out that:

- (a) they were given notice of the permit application pursuant to s 52(1) of the PE Act;
- (b) they made an objection pursuant to s 57(1);
- (c) their objection was required to be considered by the Council pursuant to s 60(1);
- (d) the Council gave them notice of its intention to grant a permit pursuant to s 64(1);
- (e) they duly commenced a proceeding in the Tribunal in the form of an application for review under s 82(1);
- (f) the permit applicant filed and served its statement of grounds.

49 Section 28(2) of the Interpretation of Legislation Act provides that the repeal or amendment of a subordinate instrument or a provision thereof shall not affect any right accrued under the instrument or provision, unless the contrary intention expressly appears. The common law presumption has been expressed as follows:

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.²⁸

50 It is necessary to consider the interpretation provision and the common law presumption by reference to the statutory scheme here in issue.²⁹ The Tribunal proceeding brought by the applicants is governed by the VCAT Act and the relevant provisions of the PE Act. The VCAT Act provides that the Tribunal has an original jurisdiction and a review jurisdiction.³⁰ In its review jurisdiction, the Tribunal has such jurisdiction as is conferred upon it by the enabling enactment to review a decision made by a decision-maker.³¹ In this case, the enabling enactment is the PE Act and the reviewable decision is the decision made by Council under s 61(1) to grant a permit. In exercising its review jurisdiction, the Tribunal does not review the propriety or legality of the decision made by the initial decision-maker.³² Its task is to 'stand in the shoes' of the original decision-maker and make the correct or preferable decision, having regard to the material before it.³³ The review is therefore carried out on the basis of the facts and the law at the time the review decision is made.

²⁸ *Maxwell v Murphy* (1957) 96 CLR 261, 267.

²⁹ In *Attorney-General (Qld) v Australian Industrial Relations Commission* (2002) 213 CLR 485 Kirby J emphasised that the starting point for such an analysis must be the language of the applicable statute. His Honour held that the court below 'erred in proceeding directly to the suggested application of the Interpretation Act: the question raised by that Act was, and could only ever be, a subsidiary one.' (529 [129]) The starting point for the legal task is the construction of the text applicable to the case (524-525 [114]).

³⁰ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 40.

³¹ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 42; *R v Perkins* [2002] VSCA 132, [16]; *Herald and Weekly Times Pty Ltd v Victorian Civil and Administrative Tribunal* [2006] VSCA 7, [27].

³² *Victorian WorkCover Authority v AB Oxford Cold Storage Co Pty Ltd* (Unreported, Victorian Court of Appeal, Nettle and Ashley JJA, 1 September 2006, [29]).

³³ *Drake v Minister for Immigration* (1979) 24 ALR 577.

51 Consideration of the relevant planning scheme policies is central to the Tribunal's exercise of its review jurisdiction under the PE Act.³⁴ Importantly, s 5 of the PE Act states that:

This Act applies to any planning scheme approved under this Act as in force from time to time under this Act.

52 Section 5 of the PE Act therefore requires the provisions of the PE Act be read so as to automatically pick up amendments to planning schemes. Section 6(3) is a complementary provision that protects existing uses and provides that nothing in a planning scheme or planning scheme amendment requires the removal or alteration of any lawfully constructed building or works.

53 Thus, where there has been an amendment to the planning scheme between the commencement of a Tribunal proceeding and the date of the hearing, when performing its task of carrying out a review under the PE Act, the Tribunal must have regard to the planning scheme not as it was when the proceeding was commenced but as it is at the time of the hearing.³⁵

54 In this case, the amended cl 52.06-4 provides that an application under cl 52.06-3 to reduce the number of car parking spaces is exempt, relevantly, from 'the review rights of Section 82(1)' in specified circumstances. If the specified circumstances

³⁴ Section 84B of the PE Act sets out the matters which the Tribunal must or may have regard to in determining an application for review under the PE Act. Section 84B(1) provides that the Tribunal must have regard to any matter which the responsible authority properly took had regard to, or was required to have regard to in making its decision. Pursuant to s 60(1), the responsible authority must consider the relevant planning scheme. Section 84B(2) provides that, in addition to the matters referred to in sub-s (1), the Tribunal must also take into account a variety of things, including 'any relevant planning scheme'.

³⁵ In *Ungar v City of Malvern* [1979] VR 259, the Full Court of the Supreme Court rejected the argument that instituting an appeal to the Town Planning Appeals Tribunal created a right to have an application for a planning permit decided on the basis of the law as it existed at the time the appeal was instituted. The Court held that the Planning Appeals Tribunal was obliged to give effect to the amendments to the planning scheme. The institution of the appeal gave the owner no more than a hope or expectation that his appeal would succeed and that he would be granted a permit. As the grant of a permit was discretionary, the question was open and unresolved, and no right or privilege had accrued to the owner (265). Similarly, in *Robertson v City of Nunawading* [1973] VR 819, the Full Court held that the lodging of a plan of subdivision with the council gave the subdivider no right to the continuance of his proceeding unaffected by an amendment to the statute requiring the payment of security to the council before a plan of subdivision was sealed. The council was entitled to require the payment of security by the subdivider.

exist, the application before the Tribunal is exempt from such rights. The question then is whether 'the review rights of Section 82(1)' is simply the right to bring an application for review or whether it encompasses the rights to have the application that has been brought heard and determined.

55 Clause 52.06-4 is expressed to apply to 'an application under Clause 52.06-3'(which involves the hearing and determination of whether the permission sought should be granted) and to provide an exemption from 'the review rights of Section 82(1)'. In my view, 'the review rights of Section 82(1)' is a collective term for the rights that are triggered by lodging an application in the Tribunal for review of the decision to grant a permit. Section 82(1) of the PE Act entitles a person to invoke the review jurisdiction of the Tribunal under s 48 of the VCAT Act. That in turn gives the Tribunal the powers in s 51 of the VCAT Act, including the power to set aside the decision under review and make another decision in substitution for it. The 'review rights of Section 82(1)' is therefore a bundle of rights arising by virtue of the operation of s 82(1) not limited to the right to lodge an application in the Tribunal. It includes the right to have the application that has been lodged heard and determined in a particular way.

56 Although it is unnecessary for the Court to determine whether Ground 1 is made out, were it necessary to decide I would hold that cl 52.06-4 applied in its amended form and that, in the absence of third party rights under other clauses, it removed rights flowing from s 82(1) of the PE Act, including the right to have the application for review heard and determined. Ground 1 would not succeed.

Conclusion

57 Ground 3 is made out. Leave to appeal is granted, the appeal is deemed to have been instituted and heard *instanter* and is allowed.

58 The matter will be remitted to the Tribunal to be determined according to law. I will hear from the parties as to whether the matter should be re-heard by the same division of the Tribunal.

CERTIFICATE

I certify that this and the 17 preceding pages are a true copy of the reasons for Judgment of the Honourable Justice Emerton of the Supreme Court of Victoria delivered on 14 May 2014.

DATED this fourteenth day of May 2014.


Associate

