VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NO. P3324/2004

CATCHWORDS

Fee for consideration of planning application – fee for determining whether neighbourhood and site description is to satisfaction of responsible authority – administration fee in addition to prescribed fee – power under *Local Government Act* 1989 for council to impose fees in respect of planning applications – power limited by *Planning and Environment Act* 1987, which is intended to cover the field – jurisdiction of the tribunal under s 149B of *Planning and Environment Act* enlivened.

APPLICANT FOR REVIEW	Bensen Development Pty Ltd
RESPONDENT	Monash City Council
SUBJECT LAND	1331-1335 Centre Road CLAYTON
WHERE HELD	Melbourne
BEFORE	Justice Stuart Morris, President
HEARING TYPE	Hearing
DATE OF HEARING	31 January 2005
DATE OF ORDER	15 February 2005
CITATION	[2005] VCAT 194

ORDER

I declare that the City of Monash does not have power, whether under the *Local Government Act* 1989 or the Planning and Environment (Fees) Regulations 2000, to impose a fee of $135.25, described as an administration fee, upon Bensen Development Pty Ltd in respect of a permit application to develop land at 1331-1335 Centre Road, Clayton for ten dwellings and by subdividing the land.

Stuart Morris
President

APPEARANCES:

For Applicant for Review	Mr Simon Merrigan, town planner
For Respondent/ Responsible Authority	Mr John Rantino, solicitor

JOINT REASONS
(Appeals Nos P3269/2004 and P3324/2004)

1 These two cases raise important issues concerning the power of municipal councils to charge fees concerning applications for planning permits. Although the issues in the cases overlap, there are differences. Thus it is desirable to separately set out relevant findings of fact in relation to each case.

The Monash case

2 Bensen Development Pty Ltd ("Bensen") applied to the City of Monash ("Monash") for a permit pursuant to the Monash Planning Scheme to develop land in Clayton by constructing ten residential units and by subdividing the land. The value of the development was stated to be $1,700,000.

3 The application for the permit was made to Monash because it was specified in the scheme as the responsible authority for considering permit applications pursuant to the scheme.

4 The permit application was accompanied by the fee prescribed by regulations made under section 203 of the *Planning and Environment Act* 1987: namely the Planning and Environment (Fees) Regulations 2000 ("the regulations"). Clause 7 of the regulations specifies that the fee for an application for a permit to develop land, where the estimated cost of development is more than $1,000,000 and not more than $7,000,000, is $1,010. This clause also specifies that the fee for an application to subdivide land is $685. Clause 8 of the regulations provides that where an application is for a combination of development and subdivision the total sum arrived at is the highest of the fees which would have applied if separate applications had been made, plus 50% of each other fee which would have applied if separate applications had been made. Thus in the present instance the combined prescribed fee was $1,352.50 (that is, $1,010 plus half of $685).

5 Monash has a practice of charging an administrative fee, in addition to the prescribed fee, in relation to permit applications. This fee ("the administrative fee") is set at 10% of the prescribed fee. Thus, in the present case, the council required an additional fee of $135.25 to be paid to it. This is the fee that is subject to challenge in the Monash case.

6 Bensen did not include the administrative fee with its application. As a consequence Monash wrote to Bensen explaining that the council had introduced a 10% administrative fee for all applications under the *Planning and Environment Act* and the *Subdivision Act*. Monash contended in the letter that it was not prepared to continue to subsidise the administrative assessment of applications for planning permits and certification of plans of subdivision by more than current levels. Thus Monash stated in its letter:

> Accordingly, please forward an additional $135.25, being the administrative fee, so that the processing of your application can be expedited.

7 Mr Rantino, who appeared for Monash, informed the tribunal that if a permit applicant failed to pay the administrative fee this did not mean that the application would not be considered. He said that Monash could not refuse to deal with an application because the administrative fee had not been paid, although it could sue for the fee as a debt. However, in practice, I find that a permit applicant would really have no choice but to pay the administrative fee if it wished its permit application to be considered; or, at least, considered without undue delay. This follows from the circumstances in which the payment is demanded, including the statement in this case that the payment of the fee should be made so that the processing of the application "can be expedited". Presumably if the fee was not paid, at the very least, Bensen could not have expected the application to be considered without unjustified delay.

The Knox case

8 Stephen Forsyth applied to the City of Knox ("Knox") for a permit pursuant to the Knox Planning Scheme to construct three double storey dwellings, to the rear of an existing dwelling, and to remove vegetation in respect of land in Bayswater. The application for the permit was made to Knox because it was specified in the scheme as the responsible authority for considering permit applications pursuant to the scheme.

9 The Knox Planning Scheme required the development to meet the requirements of clause 55 of the scheme. In turn, clause 55 provided that an application for a permit must be accompanied by a neighbourhood and site description and a design response. Further, this clause provided that the responsible authority must inform the applicant in writing, before an application is advertised, whether the neighbourhood and site description meets the requirements of the scheme and is satisfactory.

10 The permit application was accompanied by a fee of $620, this being the fee applicable to an application for development estimated to cost $400,000. However the council insisted upon an additional fee of $90 ("the satisfaction fee") because it said that, in addition to considering the permit application, it was required to consider whether it was satisfied with the neighbourhood and site description. The council wrote to the permit applicant stating:

> … the administration of a $90 "neighbourhood and site description" analysis fee remains the discretion of the responsible authority.
>
> Council is satisfied with the quality of information submitted, however the application will not proceed to the advertising process until a $90 fee is received.

The contentions

11 A firm of planning consultants, Millar & Merrigan Pty Ltd, represented the permit applicant in both the Monash case and the Knox case. Mr Simon Merrigan, a town planner, submitted that Monash could not lawfully charge the administration fee. He also submitted that, in the circumstances of the particular case, Knox could not charge the satisfaction fee. In essence his case was that the only fees that could be charged were those prescribed by the Planning and Environment (Fees) Regulations 2000 and any additional fees was inconsistent with the regulations and the *Planning and Environment Act* 1987.

12 Both the Monash council and the Knox council were represented by Mr John Rantino, solicitor. Mr Rantino's primary argument was that the administration fee and the satisfaction fee were validly imposed pursuant to each council's general powers under the *Local Government Act* 1989. Further, he submitted that the very question of whether or not these powers had been exceeded was not a matter which the tribunal could address in an application pursuant to section 149B of the *Planning and Environment Act*. He also maintained that, in any event, the satisfaction fee was validly imposed in the Knox case pursuant to the Planning and Environment (Fees) Regulations 2000.

Jurisdiction

13 Section 149B(1) of the *Planning and Environment Act* provides:

> (1) A person may apply to the Tribunal for a declaration concerning –
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> (a) any matter which may be the subject of an application to the Tribunal under this Act; or
>
> (b) anything done by a responsible authority under this Act.

14 I confirm what I said in *Sweetvale Pty Ltd v Minister for Planning* [2004] VCAT 38:

> 16 Section 149B of the *Planning and Environment Act* enables a person to apply to the tribunal for a declaration concerning any matter which may be the subject of an application to the tribunal under the Act or anything done by a responsible authority under the Act. Clearly the grant of a permit, or the making of a decision to grant a permit, is something done by a responsible authority under the Act. Hence a person may apply to the tribunal for a declaration that the decision of a responsible authority to grant a permit is invalid.
>
> 17 Section 149B of the Act finds its genesis in Section 14 of the *Planning Appeals Board Act* 1980. The intention of the parliament was to promote a *one stop shop* in relation to planning matters and to invest in the tribunal a similar power to that possessed by the Supreme Court to *judicially review* matters arising under the *Planning and Environment Act*. Hence the nature of the powers possessed by the tribunal in determining an

> application under Section 149B are substantially similar to those of the Supreme Court. The same principles which operate in relation to judicial review of administrative action by a superior court should also operate when the tribunal is exercising this power.

15 I think it can also be said that receiving, processing and considering an application for a planning permit are things done by a responsible authority under the *Planning and Environment Act*; and certainly are matters that "concern" things done by a responsible authority under the Act. More specifically, the charging of a fee in relation to a permit application, whether that fee is authorised under the *Planning and Environment Act* or some other legislation, "concerns" things done by a responsible authority under the *Planning and Environment Act*. This is because the imposition of such a fee, whether justified or not, is integrally connected with the receipt, processing and consideration of the permit application, all of which are acts of a responsible authority under the *Planning and Environment Act*.

16 It may also be that the administration fee and the satisfaction fee may "concern" a matter which may be subject of an application to the tribunal under the *Planning and Environment Act*: compare *Ramholdt v Planning Panels Victoria* [2004] VCAT 2432. But it is unnecessary to explore this further.

17 Mr Rantino acknowledged that if his jurisdictional objection was successful it would only prevent *the tribunal* from making the declarations sought. A similar application could be made to the Supreme Court of Victoria which would be required to consider the same substantial issues of lawfulness. It is important, as the High Court has recently observed (*Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59) that powers given to specialist courts and tribunals be interpreted amply to give effect to the legislative policy that the specialist court or tribunal address legitimate issues of concern. There are strong policy reasons why the power given to the tribunal pursuant to section 149B should be interpreted broadly. The legislative response to the decision in *Thorne v Doug Wade Consultants Pty Ltd* [1985] VR 433 was clearly designed to ensure that the State's planning tribunal was available to provide a "one stop shop" in relation to planning matters; and, in particular, to provide accessible, timely and inexpensive recourse in relation to the procedures being followed by responsible authorities under the *Planning and Environment Act*.

Local Government Act

18 Monash and Knox comprise the local government for their respective areas. Under the *Constitution Act* 1975 local government is a distinct and essential tier of government having functions and powers of a very broad character.

19 In section 1A of the *Local Government Act* 1989 the Parliament has expressed its intention that the provisions of the Act be interpreted so as to give effect to both the preamble (contained in section 1 of the Act) and the

local government charter (to be found in sections 3A to 3F of the Act). It is also provided, in section 1A(3):

> In the interpretation of the preamble and the local government charter, a construction that promotes consistency between the provisions of this Act and any other Act is to be adopted.

20 The objectives of a council are set out in section 3C of the Act. The primary objective is to endeavour to achieve the best outcomes for the local community having regard to the long term and cumulative effects of decisions. Section 3D sets out the role of a council, which includes ensuring that resources are managed in a responsible and accountable manner. The functions of a council are set out in section 3E. These include undertaking strategic and land use planning for the municipal district and raising revenue to enable the council to perform its functions.

21 Section 3F sets forth the powers of councils as follows:

> (1) Subject to any limitations or restrictions imposed by or under this Act or any other Act, a Council has the power to do all things necessary or convenient to be done in connection with the achievement of its objectives and the performance of its functions.
>
> (2) The generality of this section is not limited by the conferring of specific powers by or under this or any other Act.

22 Putting to one side, for the moment, the provisions of the *Planning and Environment Act* 1987, it seems plain that the provisions of the *Local Government Act* are wide enough to empower the charging of both the administration fee and the satisfaction fee.

23 But what of the provisions in the *Planning and Environment Act*?

Planning and Environment Act

24 The purpose of the *Planning and Environment Act* is expressed to be to establish a framework for planning the use, development and protection of land in Victoria in the present and long term interests of all Victorians (see section 1). It is clear enough that the Act is not intended to be the sole method by which planning might occur in relation to the use, development or protection of land. But where the Act establishes a particular framework, for example in relation to the application for a permit pursuant to a planning scheme, could it be said that the Act intends to cover the field in relation to this aspect?

25 Section 47 of the Act provides that if a planning scheme requires a permit to be obtained for a use or development of land the application for the permit must be made to the responsible authority in accordance with the regulations and be accompanied by the prescribed fee. (There are various other requirements set out in section 47 which are not presently relevant.) The *Planning and Environment Act* sets out a detailed procedure in relation to the processing and consideration of applications for planning permit.

Importantly section 58 of the Act provides that "the responsible authority must consider every application for a permit". Mr Rantino submitted, I think correctly, that if an application was not accompanied by the prescribed fee then it was not an application that the responsible authority must consider. (It would of course be appropriate for the responsible authority to inform the applicant of the failure to accompany the application with the prescribed fee.)

26 Section 203 of the *Planning and Environment Act* provides, inter alia:

> (1) The Governor in Council may make regulations prescribing fees for –
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> (b) considering applications for permits;
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> …
>
> (e) determining whether anything has been done to the satisfaction of a responsible authority, Minister, public authority, municipal council or a referral authority;
>
> …
>
> (g) any other thing for which fees are authorised or required to be prescribed under this Act.

Since the enactment of the *Planning and Environment Act* in 1987 there has always been regulations in relation to fees. As I have observed, the current regulations are the Planning and Environment (Fees) Regulations 2000. The objectives of these regulations are set forth in clause 1 and include "to prescribe fees for considering applications for permits". Clause 7 of the regulations provides:

> The fee for an application for a permit under section 47, other than an application under section 96(1), is the fee set out for an application of that particular class as follows.

The table which follows sets forth different fees for different types of applications. For example class 6, for which the fee is $620, essentially relates to applications to develop land where the estimated cost of development is between $250,000 and $500,000 (not being a single dwelling on a lot).

27 Clause 8 of the regulations deals with combined permit applications. It provides:

> The fee for an application for any combination of use, development other than subdivision, subdivision and any matter referred to in Classes 16, 17 or 18 is the sum arrived at by adding the highest of the fees which would have applied if separate applications had been made plus 50% of each of the other fees which would have applied if separate applications had been made.

28 Clause 12 of the regulations deals with determining whether certain matters have been done to the satisfaction of a responsible authority or other body. This provides:

If a planning scheme specifies that a matter must be done to the satisfaction of the responsible authority or a referral authority, the fee for determining that matter is $90.

29 The making of the regulations was proceeded by a regulatory impact statement. On 9 May 2000 notice was given in the *Victoria Government Gazette* that such a statement had been prepared.. This notice summarised the regulatory impact statement as follows:

> Planning functions are provided for under the **Planning and Environment Act 1987**. The purpose of the Act is to establish a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians. The Act requires planning and responsible authorities to provide a range of planning functions, including planning permit applications, planning scheme amendments and the issue of planning certificates. The **Planning and Environment Act 1987** allows for fees to be prescribed for many of these functions, and in such instances this Act requires applications for such functions to be accompanied by the prescribed fee.
>
> The proposed Regulations have been formulated based on the following criteria.
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> - consistency across the State through the prescription of state-wide fees;
> - reflectivity of the cost of undertaking planning functions;
> - recognition of the public good element of planning;
> - full cost recovery;
> - recognition and facilitation of innovation and efficiency in undertaking planning functions; and
> - facilitation of the appropriate allocation of resources by planning and responsible authorities.
>
> Alternative options to the proposed regulations canvassed in the RIS include:
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> - existing regulations adjusted (CPI adjustments to existing fees);
> - deregulation with central guidelines;
> - regulated base fees with add-on fees;
> - regulated fees for routine and complex processes;
> - regulated fees based on least cost.
>
> The costs and benefits of these alternatives have been assessed in comparison to the proposed regulations. The key advantages of these alternatives are degrees of inconsistency of fees schedules across the State; potential for distortions in cost reflectivity, with the risk of under and over recovery of costs; and potential to discourage efficiency improvements. On the basis of the cost benefit analysis, the

> RIS concludes that the objectives of the proposed fees can be best achieved by making the Regulations.

Inconsistency with *Planning and Environment Act*

30 In my opinion, neither the administration fee nor the satisfaction fee can be validly imposed pursuant to the *Local Government Act,* because this is inconsistent with the provisions of the *Planning and Environment Act*.

31 It is true that section 3F of the *Local Government Act* gives councils the power to do all things necessary or convenient to be done in the performance of its functions (which include land use planning). It is also true that the generality of that power is not limited by the fact that specific powers are conferred upon councils by Acts such as the *Planning and Environment Act*. But the power conferred by section 3F is subject to any limitations or restrictions imposed by another Act, such as the *Planning and Environment Act*; and this includes both express limitations or restrictions and limitations or restrictions which are to be implied.

32 Further, the *Local Government Act* requires that section 3F be interpreted so as to promote consistency between provisions of the *Local Government Act* and other legislation. Where particular legislation is intended to cover the field in relation to a particular matter, the interpretation of a general power so as to embrace the field so covered would not promote consistency. Rather consistency is promoted by having regard to implied limitations or restrictions imposed by the specific legislation; and regarding these as a constraint upon the scope of the general power.

33 The present situation has some parallels with section 109 of the Constitution of the Commonwealth of Australia. This provides:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

In this context it has been established that inconsistency can arise where a Commonwealth law is intended to cover a particular field. The most commonly quoted formulation of the principle is that of Dixon J in *Ex Parta McLean* (1930) 43 CLR 472, at 483:

> [Inconsistency] depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its intention is directed. When a Federal law discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.

The scope of local government powers does not turn upon an inconsistency with other laws. Rather an interpretation is to be favoured which promotes consistency with other laws; and any constraint on the power depends upon limits or restrictions imposed by, or under, other Acts. But, in my opinion, one can draw upon the principle formulated in *McLean* to ascertain whether

the Parliament has intended, in passing another Act, to limit or restrict the general power of local government in relation to certain matters dealt with by the specific Act. In other words, the existence of an implied limitation or restriction by, or under, another Act may depend upon an intention of the legislature to express by a specific Act, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which that Act is directed.

34 If it were permissible to have regard to the Planning and Environment (Fees) Regulations 2000, or the regulatory impact statement which preceded it, in interpreting the *Local Government Act*, it would be plain that the executive branch of government intended that the regulations would cover the field and be the only mechanism for the imposition of fees in relation to planning applications and the like. But I have concluded that neither the regulations nor the regulatory impact statement can be relied upon in this regard. Regulations made under a specific Act cannot be used to constrain words used by the Parliament in another, more general, Act. This seems to be the position as a matter of general principle; and, in any event, is mandated by the language used in section 3F(1) of the *Local Government Act*.

35 Thus the key provisions that require further consideration are provisions in the *Planning and Environment Act* that require an application for permit to be accompanied by the prescribed fee (section 47), the requirement that the responsible authority must consider every application for a permit (section 58) and the provision that the Governor in Council may make regulations prescribing fees for considering applications for permits and for determining whether anything has been done to the satisfaction of a responsible authority (section 203). Certain things stand out. The application for permit *must* be accompanied by a fee; and the fee in question is not any fee, but *the prescribed fee*. Next the method of prescribing fees is set: it is by regulation. Further, the body empowered to make such regulations is set: it is the Governor in Council. Finally, responsible authorities are not given a discretion as to whether or not to consider an application for permit; rather they are required to do so. In my opinion, it is plain from these provisions that the Parliament intended that there be one regime of fees for considering applications for planning permits (and determining whether anything has been done to the satisfaction of a responsible authority) and that this regime be fixed by the State. If it had been intended that different fee regimes operate within different municipalities the power to impose fees would not have been by way of regulations and would have been given to councils, not the Governor in Council. One can also readily understand the policy basis for the Parliament's intention. There is a public interest in permit applicants operating within a consistent regulatory environment. Those who regularly make permit applications, such as architects and planning consultants,

routinely work in more than one municipal district. Multiple fee regimes may be confusing; and, possibly, discriminatory.

36 It should also be observed that if the fee provisions in the *Planning and Environment Act* are not intended to cover the field, or, more accurately for present purposes, to impose an implied limitation upon the general powers of local government, it would open up all sorts of possibilities for councils to modify the detailed planning procedures contained in the *Planning and Environment Act*. It is quite improbable that the Parliament intended this to occur. Rather I conclude that the Parliament intended that the detailed provisions in the *Planning and Environment Act* regulate the planning procedures that would apply to the making and amendment of planning schemes and the making of statutory decisions pursuant to planning schemes.

The satisfaction fee

37 There remains the question of whether Knox was nonetheless entitled to charge the satisfaction fee in addition to the permit application fee when it received the application for a permit for three dwellings. This turns upon an interpretation of the Planning and Environment (Fees) Regulations 2000.

38 It is common for a planning scheme to specify that a matter must be done to the satisfaction of a responsible authority. Usually this occurs when no permit is required. For example, clause 52.06-2 of the Knox Planning Scheme provides that before any use commences a plan must be prepared to the satisfaction of the responsible authority showing all required car spaces. It is clear enough that in this type of circumstance a responsible authority is entitled to impose a fee of $90 for determining whether or not the thing has been done to its satisfaction.

39 The present situation is different in that the relevant provision requires *the permit application* to be accompanied by certain documents, including a neighbourhood and site description. This is a document designed to provide a proper foundation for the consideration of the application. It has no other significance.

40 The planning scheme describes the types of matters which should be addressed in a neighbourhood and site description, but, acknowledging the considerable variety in the applications that might be subject of the requirement, allows the responsible authority to waive or reduce any of these requirements. The planning scheme requires the responsible authority to inform a permit applicant whether the neighbourhood and site description meets the requirements of the planning scheme and is satisfactory. It also provides that the responsible authority must not advertise or decide an application until it is satisfied with the neighbourhood and site description. However it may refuse the application without being so satisfied.

41 In my opinion, the requirement in clause 55.01-1 of the scheme that the responsible authority be satisfied with a neighbourhood and site description

is a step, and only a step, in the responsible authority performing its role of considering the permit application to which clause 55 applies. It is conceptually different to a planning scheme provision, requiring a matter to be done to the satisfaction of a responsible authority, which is independent of the consideration of a permit application.

42 Further, in my opinion, clause 12 of the Planning and Environment (Fees) Regulations is only intended to embrace a provision in a planning scheme, specifying that a matter be done to the satisfaction of a responsible authority, where this is independent of, and not part and parcel of, the consideration of a permit application. If clause 12 of the regulations was intended to embrace a decision that was part of the permit consideration process, such as satisfaction with a neighbourhood and site description, one would have expected a provision, similar to clause 8 or clause 9 of the regulations, that dealt with the combination of the two matters. The absence of any such provision points to clause 12 not being intended to cover a requirement that a responsible authority be satisfied about a particular matter when this is part of the consideration of a permit application. Rather the intention of the regulations seems to be that a fee prescribed for considering a particular permit application is intended to embrace all aspects of such consideration, including whether certain preliminary matters, forming part of the application, are satisfactory.

Conclusion

43 Neither the administration fee nor the satisfaction fee have been validly imposed. There should be a declaration that the imposition of the fees was invalid.

Stuart Morris
President