

2011: A YEAR IN REVIEW¹

By Stuart Morris QC and Emma Peppler

“Every year, PIA invites a senior member of the legal fraternity to discuss changes to planning controls, as well as significant decisions of VCAT and the Supreme Court over the previous 12 months and their implications on planning practice.”

Introduction

- 1 In the planning law and policy realm, 2011 provided a level of action which kept us all ‘alert but not alarmed’.
- 2 This paper contains a succinct and hopefully edifying overview of the essential planning scheme reforms and case law developments.

The planning system

Reviews, reviews, reviews

- 3 On 14 June 2011 the Victorian Government appointed a Ministerial Advisory Committee to undertake a review of the Victorian Planning System. The committee was asked to focus on the operation of the provisions of the Victorian Planning Provisions (VPPs); and to seek to improve the provisions by seeking to ensure that they are properly aligned to policy objectives, and do not impose unnecessary costs and delays.
- 4 The committee has submitted an initial report. The Victorian Government says it will respond to the committee’s findings early in 2012.
- 5 Only time will tell whether this initiative produces lasting and worthwhile change. But we think it can be said that the *focus* of this inquiry was spot-on. Most of the shortcomings in Victoria’s planning system are not the product of legislation, but of misdirected controls – through the VPPs – which have vastly increased the number of discretionary decisions that responsible authorities must make.
- 6 In 2011 yet another car parking advisory committee was appointed to consider proposed changes to the car parking provisions in the VPPs and planning schemes. Submissions closed 7 October 2011. It is remarkable how long outdated parking provisions have persisted in planning schemes: such as a rate of 8 spaces per 100 square metres for retail uses, and 2 spaces per apartment for a development of 4 storeys or more. Surely the time has come to implement changes.
- 7 In September 2011 the Environment and Natural Resources Committee of Parliament produced a report reviewing the Environment Effects Statement process. The report was printed on 100% recycled paper. Fortunately the

¹ A paper delivered at the Planning Institute of Australia Victorian Professional Development Seminar on 22 February 2012 in Melbourne, Australia.

content of the report has not been recycled. Some of the recommendations are radical: such as the notion that any person may apply to have a project made subject to an EES; and if a decision is made to refuse the application the matter can be subject of an appeal to VCAT.

- 8 In March 2011 the Potentially Contaminated Land Advisory Committee was appointed to review existing planning controls and processes around contaminated land. Submissions were invited by 1 November 2011 in response to an Issues and Options Paper.
- 9 In May 2011 a Stakeholder Reference Group was established by Minister for Planning to provide advice on reforming the development contributions system across Victoria.² For some years there has been concern that the current system seeks to achieve perfection at the expense of complexity; and it will be interesting to see if a range of standard levies can be developed.
- 10 In February 2011 the Environment Protection Authority (EPA) released a report into its compliance and enforcement policy.
- 11 In 2011 the Department of Planning and Community Development (DPCD)³ also announced it was reviewing planning requirements for helicopter use.
- 12 To round out the field, reviews have been or are about to be undertaken by:
 - the Department of Sustainability and Environment (DSE) and the EPA, in relation to State Environment Protection Policies and Waste Management Plans;
 - the DSE in relation to the *Flora and Fauna Guarantee Act 1988*; and
 - the State Government, in respect of the *Climate Change Act 2010* (announced on 21 October 2011).
- 13 It also appears that the review of the *Planning and Environment Act 1987* (PE Act), commenced under the former State Government, is still on foot.

Wind farms

- 14 In August 2011 significant amendments were made to the Victorian Planning Policies controlling wind energy facilities, or wind farms.⁴ Earlier in the year the VPPs had been amended to remove the Minister's decision making powers regarding wind energy facilities of 30MW or greater. Rather, councils became the responsible authority for all planning permit applications in respect of the use and development of a wind energy facility. But the changes in August were much more radical, and have effectively stymied the further development of the wind energy industry in Victoria.

² <http://www.dpcd.vic.gov.au/planning/news-and-events/news/reforming-the-development-contribution-scheme-across-victoria>

³ <http://www.dpcd.vic.gov.au/planning/theplanningsystem/improving-the-system/planningreviews/helicopterlandingsites>

⁴ <http://www.dpcd.vic.gov.au/planning/planning-applications/More-information-on-permits/windenergy>

Backflips

- 15 In September the media had a field day with the Minister for Planning's backflip over the zoning of land on Phillip Island in the local government area of Bass Coast Shire. Having announced that the site in question would be rezoned for development, at the eleventh hour before gazettal the Minister changed his mind. Leaving aside the legality of such a reversal, cynics were left asking whether the change of heart was due to the media-catching opposition of Miley Cyrus on twitter (daughter of Billy-Ray, infamous in her own right for a younger generation as Hannah Montana, and dating a former Home and Away star). For those in planning, the incident was a timely reminder of the broad exemption power contained in section 20(4) of the *Planning and Environment Act* 1987.

Urban Growth

- 16 The State Government is currently conducting an audit of green wedge land planning controls, which looks set to loosen existing restrictions on use and development in green wedges, though the jury is out regarding how extensive the changes will be.⁵
- 17 The Logical Inclusions Advisory Committee heard submissions from August to October in respect of whether certain land within Wyndham, Melton, Hume, Whittlesea, Mitchell, Casey and Cardinia growth area councils should be included within the Urban Growth Boundary.
- 18 The Growth Areas Authority released four draft Growth Corridor Plans and invited public comment until 20 December 2011.
- 19 The Minister for Planning also made moves in respect of urban renewal, announcing the Urban Renewal Authority Victoria to replace VicUrban in October; subsequently named 'Places Victoria' in November (leaving us to question whether a rose by any other name would smell as sweet?).

Protective

- 20 In November VC83 implemented new bushfire planning provisions to strengthen consideration of bushfire at different stages of the planning process and ensure new development is more fire resilient.
- 21 In April Practice Note 61 was introduced in respect of licensed premises, to guide the assessment of cumulative impact in licensed premises applications.

Significant VCAT decisions

VCAT Red Dot decisions

- 22 *LPD Property Pty Ltd v Moreland CC* (Red Dot)[2011] VCAT 65 is a decision of Deputy President Dwyer that a section 82B application could not be brought by an objector after a permit had been granted. Originally the objector had brought a s 82 merits review, but believed that "a deal" had been done to reduce the height of the proposed building and withdrew their

⁵ <http://www.abc.net.au/news/2011-06-24/govt-flags-more-development-in-green-wedges/2769920>

appeal. After this, the permit applicant lodged an application for conditions review putting the height of the building back on the agenda. In this context, the Tribunal commented (at [6]) that:

The Tribunal is aware, from the comments made by parties in a range of proceedings, of an increasing trend for permit applicants and permit holders to use the differential prescribed periods for Tribunal applications (ie as between s 82 and 80), or to make a subsequent s 87 or 87A application, to simply re-agitate matters that councils or objectors may have thought had been negotiated or ‘resolved’ within the initial permit process or through permit conditions. Permit applicants and permit holders are clearly entitled to use legitimate measures under the Act or the Regulations to their benefit, as has occurred here. However, if these measures are being used on occasion to undermine the spirit of the legislative regime, in a manner that alienates the legitimate expectations of responsible authorities and objectors, then this would be a matter worthy of review by the Minister for Planning and his Department. All parties are entitled to a ‘fair’ planning review process that deals with the substantive merits in dispute, freed to the extent possible from the tactical exploitation of process by other parties. As I have said, I have insufficient evidence to determine whether this case falls clearly into that category.

- 23 *Athina Windsor Nominees Pty Ltd v Stonnington CC* (Red Dot)[2011] VCAT 121 is a decision of Senior Member Komesaroff and Member Davies in which a permit was granted for a new tavern on Chapel Street. The tension between increasing residential densities in activity centres and late night uses was examined. This case highlights that higher densities cannot be confined to activity centres; as many residents simply do not want to be cheek by jowl with late night uses.
- 24 *McLaughlin and ors v Macedon Ranges SC* (Red Dot)[2011] VCAT 292 is a decision of Member Code on a question of law in which he determined that the proposed use and development in that case was properly characterised as use for wind measurement by an anemometer and development of an anemometer, and as the anemometer was proposed to be used for more than 3 years, it was prohibited. The decision identifies a potential anomaly in the Farming Zone and other zones in which unspecified uses are prohibited. The anomaly is that a temporary anemometer of more than three years is prohibited but a wind energy facility that includes an anemometer as part of the infrastructure associated with electricity generation is not prohibited.
- 25 *The University of Melbourne v Minister for Planning* (Red Dot)[2011] VCAT 469 is a decision of Deputy President Gibson and Member Read in which a permit was granted to establish a research and development centre, but at the expense of the demolition of a heritage building. The decision examines the concepts of integrated decision-making, net community benefit, sustainable development and acceptable outcomes (rather than ideal outcomes: following a comment of Justice Osborn in *Rozen v Macedon Ranges SC* [2010] VSC 583 that the Tribunal is often quoting in recent cases).

26 We think this case is the most important decision that was made in 2011, as it provides considerable leadership in how to apply the Victorian Planning Provisions. In this case the tribunal quoted from clause 10.04 of the VPPs:

Society has various needs and expectations such as land for settlement, protection of the environment, economic well-being, various social needs, proper management of resources and infrastructure. Planning aims to meet these by addressing aspects of economic, environmental and social well-being affected by land use and development.

Planning authorities and responsible authorities should endeavour to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations.

Relying on this policy provision, the tribunal rejected a submission that in deciding whether to permit the demolition of a heritage building, the tribunal should only look at policy objectives relevant to heritage.

27 *Tan v Kingston CC* (Red Dot)[2011] VCAT 470 is a decision of Deputy President Gibson which considered a planning permit was required under clause 52.27 to use the front footpath to sell or consume liquor, and that the general exemption in clause 62.01 due to a local law controlling footpath trading did not apply. The Tribunal commented that given the recent strengthening of the provisions of clause 52.27 (including cumulative impact), a local law would need to be very explicit in dealing with the identical use for which a permit is required under the planning scheme to achieve exemption under clause 62.01.

28 *The King David School v Stonnington CC & Ors* (Red Dot)[2011] VCAT 520 is a high profile decision of Deputy President Dwyer and Member Naylor, which examines the s 87A amendment process where a permit applicant seeks to amend original permit conditions. The Tribunal was wary of such applications being used as ‘repeat appeals’. The decision establishes factors of importance to the Tribunal in similar cases, such as:

- whether the amendments sought are ones that clarify, or seek more substantive changes;
- the timeframe that has passed between the permit being granted and the s 87A application being made;
- whether the permit applicant seeks a more favourable outcome than that clearly contemplated in the decision that led to the grant of the permit (that is, whether the changes sought go to the heart of controversial issues in the first case and seek to ‘win back’ development aspirations);
- the need for finality to litigation and certainty in the outcome;
- whether there has been a change of circumstance or some other good reason that makes the changes appropriate.

- 29 *Stupak v Hobsons Bay CC* (Red Dot)[2011] VCAT 618 is a decision of Deputy President Gibson which examines section 18 of the *Subdivision Act* 1988 and the difference between the need for more public open space, and the percentage of contribution required. The decision notes the lack of guidance provided in the *Subdivision Act* for the exercise of discretion on the latter question. Importantly, the Tribunal did not accept that small subdivisions that only result in a modest increase in population should pay less than large subdivision in terms of percentage – because in fact they pay less simply due to site value. The Tribunal therefore refused to reduce the public open space contribution from 5% to 2%. This decision highlights the continuing uncertainty about open space contributions; an uncertainty that is rooted in the statutory provisions that govern this obligation. Perhaps this needs a review!
- 30 *Sgarlata v Mornington Peninsula SC* (Red Dot)[2011] VCAT 786 is a decision of Deputy President Gibson which revisits the principles set down in *Kantor v Murrundindi SC* 18 AATR 285 in respect of when a permit will be extended. In *Sgarlata*, a new Wildfire Management Overlay had been applied to the land. The Tribunal stated that it is only if it would be appropriate to extend the permit in its current form that the opportunity to then amend the permit may arise; the decision to extend the permit should not be predicated upon the need to then amend it. One has to question whether this decision elevates form over substance. If integrated decisions are encouraged, why should this not also apply to matters of procedure. Surely it would be more logical to consider whether a permit extension ought be granted in the context of what would be the actual effect of an extension; that is, taking account of any amendments that might be made at the same time.
- 31 *Bowden v Mornington Peninsula SC* (Red Dot)[2011] VCAT 917 is a decision of Deputy President Dwyer in which the Tribunal determined that a proposed subdivision was prohibited under the applicable Design and Development Overlay (DDO). The permit applicant had proposed using a section 173 agreement to achieve the outcome that the land was ‘not capable of further subdivision’ and essentially avoid the effect of minimum lot sizes in a low density subdivision area. The Tribunal found that the proposed s 173 agreement did not in fact prevent further subdivision of the ‘super lot’ in this case, and further, that the particular DDO in this case provided a mandatory requirement which could not be varied. The Tribunal noted that in other subdivision controls, it might be provided for and hence permissible that a s 173 agreement could be used to prevent further subdivision.
- 32 *Hill v Campaspe SC* (Red Dot)[2011] VCAT 949 is a decision of Deputy President Gibson which considers s 60(5) of the *PE Act* and clause 52.02 in refusing to grant a permit to vary a restrictive covenant. This decision is the most recent in a series of decisions in respect of the subject land. Of note, the Tribunal found that parties to a clause 52.02 application could include objectors who were not beneficiaries of the covenant, and that there was a general discretion to refuse the permit even if the Tribunal were satisfied

that the matters in s 60(5) were met. This outcome seems remarkable, given that the need for a permit is only created by the existence of a private instrument; a restrictive covenant. The decision highlights the mess that Parliament has created by effectively making the planning system responsible for restrictive covenants. Recently the Victorian Law Reform Commission has published a report on Easements and Covenants, which we would hope provides a way out of this mess.

33 *The Sisters Wind Farm Pty Ltd v Moyne SC* (Red Dot)[2011] VCAT 1133 is a decision of Deputy President Gibson in respect of a permit for a wind farm. It involves the application of *Ungar v City of Malvern* and *Esber v The Commonwealth* to a matter remitted back to the Tribunal from the Supreme Court. The Court held that the original Tribunal determined the matter on the incorrect noise standard, which was newer, but not implemented in the planning scheme. The Court remitted the matter back to the Tribunal only on the question of noise. Before the matter could be heard, the newer noise standard was introduced into the planning scheme. The permit applicant argued there was an accrued right to have the matter heard on the old standard. Deputy President Gibson held that no right had accrued and the Tribunal must determine the case based on the planning scheme as it stands at the date it makes its final decision.

34 *Westfield Limited v Manningham CC* (Red Dot)[2011] VCAT 1341 is a decision of Member Rundell in relation to digital advertising signage near a major intersection being a traffic hazard and safety risk (clause 52.05). The summary suggests:

Driving is a complex task involving ongoing subtasks and monitoring and corrections. Expert evidence from a cognitive expert suggests drivers involuntarily glance to digital signs. There appears to be a correlation between glances longer than 1.5 seconds and propensity to have an accident, although research has not identified a clear link between distraction and traffic accidents. Recent research indicates the lack of clear evidence to date does not mean that no link exists. Decision makers should be cautious and apply the precautionary principle so the major advances in road safety are not diminished.

One can question the significance of signs compared with mobile phones inside motor vehicles; and there are always going to be external attractions for a driver.

35 *Sheradar Pty Ltd v Casey CC* (Red Dot)[2011] VCAT 1414 is a decision of Deputy President Gibson in respect of the operation of s 184(4)(b) *PE Act* in removing land from a s 173 agreement: that is, that the Tribunal may amend a s 173 agreement if having regard to any relevant permit it considers it inappropriate that the agreement should continue to apply to the land and the owner. This is an important case as it has confirmed that there is a remedy to remove outdated agreements without the consent of the responsible authority. The Tribunal noted there is no definitive test in determining whether to approve an amendment, but that regard should be had to the following factors:

- when the permit was granted;
- what consideration the responsible authority and the Tribunal gave to the agreement when deciding whether to grant the relevant permit;
- how the permit affects obligations under the agreement and vice versa;
- the age of the agreement and the context and circumstances surrounding the entry of the agreement;
- the original intent and obligations of the agreement;
- whether circumstances have changed since the agreement was entered;
- whether the land and the owner have had benefit from the agreement or continue to enjoy benefit from the agreement;
- the relationship between the benefits to the land and the owner and any ongoing responsibilities or obligations under the agreement;
- the benefit in maintaining the agreement;
- whether the land and/or the owner should continue to accept the obligations under the agreement.

- 36 *Lynbrook Village Developments Pty Ltd v Casey CC & Ors* (Red Dot)[2011] VCAT 1380 is a decision of Senior Member Rickards in respect of the receipt of Cultural Heritage Management Plans. The Tribunal found that it did not have jurisdiction to consider any failure to determine an application to amend a permit as time had not yet begun to run under the *PE Act* due to the operation of s 52(4) of the *Aboriginal Heritage Act* 2006. The Tribunal also held that clause 62 Schedule 1 of the *VCAT Act* was overridden by the express and later in time words of s 52(6) of the *Aboriginal Heritage Act*. By contrast, in *Community Villages Australia Pty Ltd v Mornington Peninsula SC* (Red Dot)[2011] VCAT 1667, a decision of Member Code, it was held that the Tribunal had jurisdiction to consider the matter. We think the latter decision offers an outcome more attuned to “the vibe” of planning law in Victoria.
- 37 *Batman Pty Ltd v Melbourne CC* (Red Dot)[2011] VCAT 1477 is a decision of Deputy President Gibson and Members Naylor and Chase in respect of a s 87A application for 135 residential apartments. The Tribunal highlighted the importance of justifying a proposal to reduce the planning scheme’s car parking requirements.
- 38 *Marone Pty Ltd Joint Venture v Glen Eira CC & Ors* (Red Dot)[2011] VCAT 1650 is a decision of Senior Member Baird in which s 87A makes yet another appearance. This matter builds upon the *King David School* matter. The application here was made following a mediation, and the Tribunal made a number of statements in respect of the importance of protecting the integrity of the original Tribunal decision including if mediated. The Tribunal stated that in the absence of a good and sound reason, key components of mediated settlements should generally not be undone via a s 87A application.

- 39 *BMF Pty Ltd v Greater Geelong CC* (Red Dot)[2011] VCAT 1666 is a decision on questions of law by Member Code, in respect of whether the schedule of the Rural Living zone could validly require that each lot in a subdivision must be capable of containing a rectangle of a specified minimum area or dimensions. The Tribunal held it could not as that would go beyond what was provided for in the zone. The Tribunal also considered that the decision potentially has wider implications for the validity of schedules to a number of zones, overlays and other provisions in planning schemes and invited the DPCD to carry out an audit.
- 40 *Jones v Macedon Ranges SC* (Red Dot)[2011] VCAT 1893 is a decision of Member Rae in relation to calculating native vegetation offsets. The Tribunal held that vegetation that could be removed without a permit due to bushfire protection controls (eg clause 52.43 and 52.17-6) should not be vegetation that should be counted as ‘lost’ for the purposes of calculating an offset.
- 41 *Richmond Icon Pty Ltd v Yarra CC* (Red Dot)[2011] VCAT 2175 is a decision of Members Naylor and Read approving a 10 storey residential tower above the iconic ‘Dimmey’s’ store in Swan Street, Richmond, despite council and residential objection. As somewhat of a digression, it should be borne in mind, in this case and in others where existing uses are treasured by parts of the community, that the decision to grant a permit, or not, is not the sole determinant of the fate of an existing use. Ultimately, planning scheme regulation alone does not dictate the shape of our city, and nor should it. Factors such as market influence and community values will also act to mould particular uses on particular sites.
- 42 *Watson v Monash CC* (Red Dot)[2011] VCAT 2176 is a legal opinion of Member Martin that the placing of a shipping container on land constituted ‘works’ such that a planning permit was required.
- 43 *Wellington & Ors v Surf Coast SC* (Red Dot)[2011] VCAT 2317 is a decision of Deputy President Dwyer within the troublesome legal territory where an existing use has intensified or expanded over decades, to a degree that the neighbours seek to challenge its lawfulness: here, a motocross track holding national and international events. The decision undertakes a thorough journey through the relevant case law and clause 63. Also of note is that the Tribunal held that a s 149B application is available to an objector seeking a declaration in respect of existing use rights.
- 44 *7-Eleven Stores Pty Ltd v Nillumbik SC & Ors* (Red Dot)[2011] VCAT 2418 is a decision of Member Taranto to strike out an application to amend a permit, on the basis that s 87A of the PE Act was not available to the applicant in this case, their permit having been granted in 1990.

Significant Supreme Court decisions

- 45 This year has seen the elevation of Justice Robert Osborn to the Court of Appeal. Justice Osborn has been the author a large number of planning decisions and his experience and wisdom will be missed. However Justice

Karin Emerton, who is now in charge of the Valuation, Compensation and Planning List, has already shown that she has a solid grasp of public law.

- 46 Perhaps the most interesting case Justice Emerton has decided is *Magee v Boroondara City Council* [2011] VSC 78. In this case Justice Emerton refused leave to appeal from a Tribunal decision in which an objecting resident had applied for declarations that the issuing of a Notice of Decision in favour of a nine dwelling development was issued in breach of the rules of natural justice, and that the council had failed to properly consider the objections it received. Essentially, the applicant alleged that the council officers had collaborated with the developer in the preparation of the application, and this led to a reasonable apprehension of bias. Two main factors relied upon were pre-application meetings and the preparation of the planning officer's report in favour of the development. The Tribunal refused to make the declarations, finding that the allegations of apprehended bias had not been made out. The Court essentially agreed. The decision contains important commentary regarding what may be considered legitimate in terms of the planning permit application process, and how the apprehension of bias principle applies in respect of councils. For example, the Court stated:
- at [53] that one of the important functions of a council is to facilitate the appropriate development of land in accordance with law and policy, and that it is not foreign to council's role to assist developers to make applications that comply with the requirements of the relevant planning scheme and the raft of policies contained or referred to in it;
 - at [70] that councillors should be cautious about meeting privately with persons involved in a permit application immediately prior to a meeting convened for the purpose of voting on an application, but that the councillors' attendance at a presentation given by the developer would not give rise in the mind of a fair minded lay observer to an apprehension that the council might not consider the permit application in an impartial and unprejudiced way.
- 47 In *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 (18 May 2011) Justice Bell held that the Tribunal had erred in law and remitted the matter. The Director of Liquor Licensing had sought an amendment of the license of the Exford Hotel to sell liquor 24 hours in the CBD (the only one of its kind), to end late night trading, on the basis of harm minimisation concerns. On appeal the Tribunal refused to amend the licence. The Director appealed to the Court. The Court held that the Tribunal had failed to properly consider general evidence about violence and anti-social street behaviour in the community and in the CBD, had taken too narrow an approach in considering specific evidence of violence and anti-social behaviour in close proximity to the subject land, had failed to properly consider the report of the Liquor Licensing Panel, and had made findings regarding the economic impact of ending late night trading on the licence holder without evidence. However, we understand that Justice Bell's decision is now subject to a further appeal.

- 48 In *Planet Platinum Ltd v Hodgkin* [2011] VSC 330 (21 July 2011), Justice Kyrou considered a Tribunal decision that cancelled the liquor licence of the appellant, disqualified the appellant from holding a liquor licence for 18 months, and disqualified two directors of the appellant from being involved in the management of licenced premises for 18 months (the relevant premises being Bar 20 on King Street). The detrimental effect on the amenity of the area was considered. The Court held that the Tribunal erred in finding that the expression ‘the amenity of the area in which the licensed premises are situated’ includes the area inside the premises, and set the VCAT order aside. We note that this decision was quickly reversed by Parliament.
- 49 In *Crick & Ors v Bunnings Group Limited & Ors* [2011] VSC 398 (23 August 2011), Justice Osborn refused leave to appeal from a decision of the Tribunal which granted a permit to Bunnings to use and develop land for ‘trade supplies/restricted retail premises’. The proper interpretation of the definition of ‘trade supplies’ was considered at length.
- 50 *Candidon Pty Ltd v Minister for Planning* [2011] VSC 415 (29 August 2011) was an interesting case about the conduct of former planning minister McClellan. The Plaintiff claimed damages in deceit, negligence, and unconscionable conduct and pursuant to the *Land Acquisition and Compensation Act 1986*, in respect of the 1998 sale of its land just south of Pakenham to the Minister. Justice Emerton found that none of the claims were made out and the proceeding was dismissed.
- 51 In *Hoe v Manningham City Council* [2011] VSC 543 Justice Osborn considered an appeal from a VCAT declaration that the keeping of hobby cars on a residential lot was not ancillary to the use of a dwelling, but was an additional and separate use as a ‘store’. The Court was not convinced that the use was not a ‘car park’; an issue that had not been raised or considered by the Tribunal, and hence amended the declaration made by the Tribunal. The decision contains a useful discussion of the difference between an error of law and an error of fact, and ancillary uses.
- 52 Justice Kyrou made a decision of importance for the imposition of special charge schemes by councils, finding that the Tribunal erred in determining to set aside a special charge scheme on the basis that there was no special benefit for an unidentified number of individuals subject to the scheme (*Surf Coast Shire Council v Cameron* [2011] VSC 604).
- 53 In *McKinnon Hotels Pty Ltd v Glen Eira City Council* [2011] VSC 627 Justice Osborn considered an appeal from the Tribunal in respect of the operation of the clause 52.28 permit requirement to both install and use gaming machines, where a hotel has existing use rights. It is established that the existing use rights mean that a permit cannot be required for the use element; but could there be a permit required for installation, it being akin to development? The Tribunal had found that there could as to install is something other than use. The Court held that whilst the concept of installation certainly could relate to development, in the present case the installation proposed was simply an aspect of use and did not involve

development: simply plugging in and switching on a gaming machine is similar to plugging in and switching on any other moveable electric appliance. The decision contains a useful analysis of the ever-important concepts of development and use.

- 54 The decision of *Laukart v Knox City Council* [2011] VSC 630 by Justice Osborn looked at the matters that the Tribunal can take into account in considering an application for a caretaker's house.
- 55 The decision of Justice Osborn in *DC Consolidated Investments Pty Ltd v Maroondah City Council* [2011] VSC 634 is an important one for prosecuting councils. The Court upheld a conviction and sentence against the owner of \$40,000 imposed by the Magistrates' Court for the poisoning of 33 native trees on the land – a section 126 *PE Act* offence in breach of clause 52.17 and 42.02 (Vegetation Protection Overlay). There was no proof that it was the owner who in fact poisoned the trees, but no evidence to suggest the opposite. The Plaintiffs argued that section 126 of the *PE Act* requires proof that the owner *caused* the poisoning or at the very least, had knowledge of the breaching behaviour. The Court (agreeing with the Magistrates' Court) held that it does not, and hence *mens rea* is not a necessary element of the offence.
- 56 Two planning related cases made their way to the Victorian Supreme Court of Appeal in 2011: *Harvey v Mutsaers* [2011] VSCA 101 (8 April 2011, an appeal from *Harvey v Mutsaers* [2011] VSC 23 by Justice Emerton, itself an appeal from VCAT) and *George Adams Pty Ltd v Whittlesea City Council* [2011] VSCA 194 (30 June 2011, an appeal from *Whittlesea CC v George Adams Pty Ltd* [2011] VCAT 534 in which the Tribunal was constituted by Vice President Hampel and Senior Member Liston and hence the matter was appealed straight to the Court of Appeal).
- 57 In the first decision, the Court of Appeal (constituted by Tate JA and Ross AJA) granted leave to appeal a decision of the Tribunal concerning the powers of schedule 1 clause 62 of the *Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act)*. Emerton J had refused leave to appeal. In the original decision the Tribunal extended the time by which development was to be completed in a planning permit in respect of which the applicants had failed to apply for an extension of a planning permit either before expiry or within three months afterwards. The Tribunal relied upon schedule 1 clause 62 to do so. Clause 62 provides:

The Tribunal has jurisdiction to determine a proceeding under a planning enactment despite any failure to comply with the planning enactment or any other enactment and, in doing so, may determine to disregard that failure if the Tribunal considered it in the interests of justice to do so.
- 58 This is a clause often relied upon by the Tribunal to facilitate a decision where there has been a technical failure to comply with an enactment (see for example *Rumpf v Mornington Peninsula Shire Council* (2000) 2 VR 69, *Warraglen Developments Pty Ltd v Maroondah City Council* [2008] VCAT 1608, or *Schneider v Boroondara City Council* [2004] VCAT 642).

- 59 The Court of Appeal considered this to be a question of general and public importance, stating (at [14]):

It is clear that the scope and operation of cl 62 is of considerable importance to the workings of the Tribunal, and the members of the public whose disputes are heard and determined there, given the potential of cl 62 to cure non-compliance with a range of statutory requirements, including, but not limited to, the particular time limits of this individual case. Just how far cl 62 does extend to empower the Tribunal to disregard non-compliance lies at the heart of this application.

- 60 In the second decision, the Court of Appeal (constituted by Harper JA and Macaulay AJA) considered the installation of electronic gaming machines in a proposed tavern in Laurimar. There were two applications on foot: one in respect of planning permission, and one in respect of gaming permission. On review from the planning decision of the council, and the gaming decision of the Victorian Commission for Gambling Regulation (VCGR) the Tribunal had decided not to grant planning permission and to set aside the VCGR's decision to approve gaming. The Court of Appeal granted leave to appeal from the planning decision, but not from the gaming decision. The Court considered that the proper interpretation of 'strip shopping centre' within the meaning of clause 52.28 was a relevant question of law. The Court did not consider that the particular construction of clause 52.28 had carried through to the gaming decision, and considered that the decisions were separate such that leave to appeal could be granted in respect of one decision and not the other.

In other news...

- 61 In VCAT news:
- The Major Cases List was suspended (18 March 2011), and recommenced (on 3 January 2012).
 - Russell Byard became a Sessional Member and we will miss his musings.
 - A new Practice Note - PNPE9 (Amendment of Plans and Applications) was introduced in July in relation to the service of amended plans, requiring 30 business days for the circulation of amended plans instead of 20.
- 62 On 13 May 2011 the Victorian Planning and Environment Law Association announced a change of President, from Kathy Mitchell to Tamara Brezzi.
- 63 In February 2011 the Victorian Ombudsman released a report into the Windsor Hotel affair in which it was revealed that a Minister of Planning staffer had suggested running a 'sham' public consultation.
- 64 Whilst Victoria has not been a hive of activity in relation to nationally publicised coal seam gas activities (otherwise known as 'fracking'), we have had interesting developments in relation to the future of our energy provision, especially in terms of climate change implications. In 2011 the

EPA approved a new power station to be predominantly powered by brown coal, albeit brown coal to be gasified before being burnt to produce electricity. Appeals against this decision were brought before VCAT and the tribunal has recently retired to consider its decision.

- 65 For the technophiles amongst us, the year brought exciting technology updates for iphone users in the ‘austlii app’, the ‘planning Victoria planning property report app’, the ‘Victorian heritage app’. Planning scheme histories are also now better able to be accessed online at <http://www.dpcd.vic.gov.au/planning/planningschemes/get-information/planning-scheme-histories>.
- 66 And in possibly the most titillating news of 2011, the Subdivision (Procedures) Regulations 2000 under the *Subdivision Act* 1988 sunsetted on 9 October 2011, and new regulations made by the Governor in Council came into operation on 8 October 2011.