

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL****ADMINISTRATIVE DIVISION****PLANNING AND ENVIRONMENT LIST**VCAT REFERENCE NO. P2676/2015  
PERMIT APPLICATION NO. 0324/15

**APPLICANT** Little Projects Pty Ltd

**RESPONSIBLE AUTHORITY** Stonnington City Council

**REFERRAL AUTHORITY** Public Transport Victoria (PTV)

**RESPONDENTS** John Atchison & Ors

**SUBJECT LAND** 60, 60A & 60B Belgrave Road,  
MALVERN EAST

**WHERE HELD** Melbourne

**BEFORE** Mark Dwyer, Deputy President

**HEARING TYPE** Hearing (Reconstitution)

**DATE OF HEARING** 2 May 2016

**DATE OF ORDER** 2 May 2016

**CITATION** Little Projects Pty Ltd v Stonnington CC  
[2016] VCAT 698

**ORDER****Compulsory Conference**

- 1 The following dates are the dates referred to in these orders.

Item	Action	Date	Time	Duration	Number of members
A	Compulsory Conference	4 May 2016	10 AM	1 day	1

- 2 This application is referred to a further compulsory conference on the date and for the time set out in **item A of order 1**. The compulsory conference will be conducted at 55 King Street, Melbourne.
- 3 Given that the further compulsory conference has been listed at very short notice at the request of the represented parties, in lieu of a scheduled hearing day, all parties should endeavour to attend the compulsory conference. An objector unable to attend the compulsory conference should endeavour to authorise another objector to represent his or her interests at the compulsory conference.

- 4 Amongst other things, the purpose of the compulsory conference will be:
- to promote a settlement of the proceeding, including a consideration of possible amendments or alternatives to the proposal;
  - to identify and clarify the nature of the issues remaining in dispute in the proceeding and/or those capable of resolution;
  - if the matter is unlikely to settle, to allow directions to be given concerning the future conduct of the proceeding having regard to the reconstitution of the Tribunal. This may involve the referral of the matter to a further practice day hearing.
- 5 Please read the information included in Appendix A and observe any directions included in the Appendix.

### **Reconstitution of Tribunal**

- 6 Pursuant to s 108(2)(a) of the *Victorian Civil and Administrative Tribunal Act 1998*, the Tribunal hearing the proceeding to date (i.e. Senior Member Baird and Member Chase) should be reconstituted by members other than those members.
- 7 The hearing of the proceeding to date is discontinued. Unless the proceeding is settled at or as a result of the compulsory conference, the President (or his delegate) will reconstitute the Tribunal for a future hearing, and the hearing will start again.
- 8 Pursuant to s 10(1) of the *Appeal Costs Act 1998*, and on the basis that the Tribunal is satisfied that:
- the hearing of the proceeding is discontinued;
  - the reason for the discontinuance is not attributable in any way to the act, neglect or default of any of the parties to the proceeding or their legal practitioners; and
  - a new hearing has been ordered -
- the Tribunal (to the extent possible) grants an indemnity certificate in respect of each party's own costs of the discontinued proceeding.
- 9 In the absence of relief under the *Appeal Costs Act 1998*, costs are reserved generally as between the parties.

Mark Dwyer  
**Deputy President**

## APPEARANCES

For Permit Applicant

Chris Townshend SC of counsel, instructed by Best Hooper

For Stonnington City Council

Chris Wren SC of counsel

For Respondents (Objectors)

Peter Tesdorpf, town planner, represented some objectors.

Several objectors were present, in person, but did not address the Tribunal on the issue of reconstitution.

## REASONS

- 1 Shortly after the commencement of the scheduled fifth day of hearing on 2 May 2016, before Senior Member Baird and Member Chase, the permit applicant sought of a reconstitution of the Tribunal under s 108(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 2 An application for reconstitution must be decided by a presidential member. At 2:15pm on that same day, I heard the application. Pursuant to s 108(2)(a), after allowing the parties to make submissions, I decided that the Tribunal should be reconstituted.
- 3 This is an unusual matter. The essence of the application for reconstitution was that Member Chase, a sessional architect member, had in the previous week to the hearing of this proceeding been an objector in a private capacity in another proceeding in the Planning and Environment List at the Tribunal. The central issue in that other proceeding concerned the application of planning policy relating to 'substantial change' to a proposed development immediately adjacent to an area covered by a Heritage Overlay. Mr Chase's presentation to the hearing in that other proceeding expressed a detailed personal and professional opinion on that issue.
- 4 That same issue is also the central issue in this proceeding, albeit that the other proceeding concerned a development in a neighbouring municipality (Yarra), and this proceeding concerns a development in Stonnington. On the same day as the hearing of this proceeding commenced (on 26 April 2016), Mr Chase withdrew his objection in the other proceeding. His letter of withdrawal was signed 'Gregary Chase, sessional member', even though his involvement in that other proceeding was in a private capacity. He did not disclose his involvement in that other proceeding at the commencement of the hearing of this proceeding, nor the nature of his personal views on the policy in question.
- 5 Mr Townshend, on behalf of the permit applicant, indicated that he had only found out about Mr Chase's involvement in the other proceeding last Friday, and made its application for reconstitution immediately after perusing the Tribunal file on the following Monday morning. The applicant does not allege any actual bias on the part of Member Chase, but relied on there being a reasonable apprehension of bias. I was taken to the decision in *Jinshan Investment Group Pty Ltd v Melbourne CC* [2015] VCAT 635 where the VCAT President set out some of the principles to be considered in determining whether a proper basis for apprehension of bias is established, drawing on the decision of the Court of Appeal in *AJH Lawyers Pty Ltd v Careri* (2011) 34 VR 236, 241-3 [18]-[25]. In *Jinshan*, at [30]-[31], the President also made mention of the critical decision-making role that VCAT has in relation to planning matters at Victoria, where it is imperative that the impartiality and independence of the Tribunal be, and be

seen to be, above reproach. He stated that it would be of no benefit to anyone if there was ongoing concern as to the impartiality of the Tribunal, or the legality of the ultimate decision. In the matter before him, although different in its facts and circumstances, the President decided it was better to make a fresh start with a differently constituted Tribunal even though the hearing in that matter had already finished.

- 6 Mr Wren, on behalf of the responsible authority, did not oppose the application and indicated that his client would abide the Tribunal's decision. However, Mr Wren provided assistance to the Tribunal in taking me through the eight factors set out in the *AJH Lawyers* decision referred to above, which were drawn in part from the decision of the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. In particular, apprehension refers to an apprehension of the member not deciding a case impartially, as opposed to an apprehension that the case will be decided adversely to one party. The satisfaction of the test for apprehended bias requires two distinct steps – the first is the identification of what might lead a member to decide a case other than on its legal and factual merits, and the second is an articulation of the logical connection between the matter and the feared deviation. In this regard, the perception of a lay observer will not be as informed as the perception of a lawyer.
- 7 Mr Tesdorpf, on behalf of some of the objectors, also did not oppose the application. Although invited to make submissions, none of the unrepresented objectors sought to be heard on the matter.
- 8 As I have said, this is an unusual matter and my decision is made 'on balance'. I do not find any actual bias on the part of Member Chase. Moreover, a member of the Tribunal is not precluded from exercising his or her rights as a private citizen, including the right to participate as an objector in a proceeding at the Tribunal under the *Planning and Environment Act 1987*. VCAT has protocols in place to deal with this scenario. Equally, it must be recognised that non-lawyer expert members of the Tribunal are appointed for their professional experience and expertise that they necessarily bring to bear in their decision-making role. Sometimes, those members may take a robust role, and even express tentative views, on a point of importance in a proceeding. They will also express opinions on matters of principle in their decision, which may have implications in other proceedings. Sessional members utilised only from time to time by the Tribunal may also engage in other professional work away from the Tribunal. None of these matters of themselves satisfy the test for apprehended bias, subject to compliance with internal protocols to avoid any conflict of interest, and subject (where appropriate) to considerations of disclosure and procedural fairness. The test is really whether a fair-minded observer would apprehend that the member was incapable of bringing an impartial mind to bear in determining an issue of substance in a proceeding.

- 9 As I indicated at the hearing, having regard to each of the issues raised by Mr Townshend *in isolation*, I would likely not have reconstituted the Tribunal. A reconstitution, particularly late in the hearing, should be avoided where possible given the costs and delay to the parties, and to avoid ‘forum shopping’ where a party might seek a reconstitution of the Tribunal as a tactical manoeuvre where it thinks that the decision is likely to be adverse to it. A reconstitution should arise only in rare and exceptional circumstances. I would not have decided to reconstitute only on the basis that Member Chase had been an objector in another proceeding of a similar type, or with the same central issue having regard to his special expertise as an architect. I would not have reconstituted only on the basis that the two proceedings occurred within a week of each other. I would not have reconstituted only on the basis that Member Chase seemingly misunderstood the distinction in his roles, in withdrawing his objection in the other proceeding by signing the letter as a ‘sessional member’, and doing so on the same day as this hearing commenced. I would not have reconstituted only on the basis that Member Chase had not disclosed his involvement in the other proceeding at the commencement of the hearing in this matter, as any tentative views that he held may have been capable of being raised and tested during the hearing.
- 10 I agree however with Mr Townshend that there is an ‘extraordinary coincidence’ in the combination of factors at play here, including the coincidence of timing. It is the unique and coincidental combination of all of these factors, rather than any matter in isolation, that leads me to the view on balance that the Tribunal should be reconstituted for this proceeding. In my view, this combination of factors would fail what is now colloquially known as the ‘pub test’, and an ordinary fair-minded person would reasonably have some apprehension about Member Chase’s involvement in deciding the case. There is a logical connection between Member Chase’s involvement in the other proceeding and the feared deviation in this proceeding.
- 11 The parties were agreed that, if Member Chase were removed from the proceeding, the Tribunal should be completely reconstituted, and the hearing would need to start again. Although there was absolutely no issue raised in relation to the role of Senior Member Baird in the proceeding, she had through four days of hearing consulted closely with Member Chase, and may have therefore become imbued with his views. It is therefore appropriate that she not participate further in the proceeding.
- 12 The current hearing is therefore discontinued.
- 13 Assuming the matter is not capable of settlement, the President or his delegate will reconstitute the Tribunal pursuant to s 108(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*, and a new hearing before a newly constituted Tribunal will be listed in due course. It may be necessary to convene a practice day hearing to make arrangements about

the future conduct of the hearing. If so, this will also be listed in due course.

- 14 The represented parties noted that there was a scheduled hearing day on Wednesday of this week, and sought to have that hearing day converted to a compulsory conference before a mediator/member to discuss whether there is any potential to resolve some or all of the issues in dispute in the proceeding. Although there may be logistical difficulties, particularly for unrepresented objectors who may not have been present at the hearing before me, I have listed the matter on that basis.

Mark Dwyer  
**Deputy President**