VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING & ENVIRONMENT LIST NO. P160/2003

CATCHWORDS

Section 39 Planning and Environment Act 1987 - Failure of Planning Authority to comply with Section 96C Planning and Environment Act 1987 - notification after commencement of Panel hearing - Panel directions to enable late submitter to be heard - Failure to accord natural justice - no ability for submitter to have knowledge of oral submissions already presented - no failure to give opportunity to be heard

APPLICANT	Craig Thomson
RESPONDENTS	Stonnington City Council,Minister for Planning, Daniel Leslie Minogue and Others, JT Snipe Investments Pty Ltd, Westley Pty Ltd
SUBJECT LAND	Amendment C 23 Stonnington Planning Scheme 293 Tooronga Road Glen Iris
WHERE HEARD	Melbourne
BEFORE	Judge M Higgins - Vice President Jeanette G Rickards - Member
DATE OF HEARING	17 & 18 March 2003
DATE OF ORDER	30 June 2003
MEDIUM NEUTRAL CITATION:	[2003] VCAT 813

ORDER

1. The application for declaration pursuant to Section 39(4) *Planning and Environment Act* 1987 is refused.

2. The Tribunal orders that the question of costs thrown away (if any) by reason of this application is reserved.

JUDGE HIGGINS
VICE PRESIDENT
PLANNING & ENVIRONMENT LIST

JEANETTE G RICKARDS
MEMBER
PLANNING & ENVIRONMENT LIST

APPEARANCES

For the Applicant:	Mr S Wilmoth and Mr A Marshall of Counsel instructed by Borchard & Moore
For the Responsible Authority:	Mr S Morris QC of Counsel instructed by Maddocks
For the Respondent/Objectors:	Mr G Peake of Counsel instructed by Rennick & Gaynor on behalf of Daniel Leslie Minogue and Others Mr C Wren of Counsel instructed by Kellehers on behalf of JT Snipe Investments Pty Ltd, Westley Pty Ltd

REASONS

1. This is an application brought by Craig Thomson, owner of 371 Tooronga Road, Glen Iris seeking a declaration pursuant to Section 39(4) *Planning and Environment Act* 1987(PE Act) that he has been denied natural justice by the findings and directions made on 17 December 2002 by a Panel appointed to hear submissions in relation to Amendment C23 to the Stonington Planning Scheme.

2. Mr Thomson seeks an interim order that the Panel hearing of submissions in relation to Amendment C23 be stayed or adjourned pending the hearing and determination of this application or until further order of the Tribunal. The Panel indicated in directions that it would recommence hearing submissions on 11 March 2003. It is understood the Panel has not to date resumed the hearing and does not intend to do so until such time as the Tribunal has made its determination.

3. Mr Thomson seeks an order that the Planning Authority must not adopt and the Minister for Planning must not approve Amendment C23 to the Stonnington Planning Scheme, or alternatively, must not do so unless the Panel Hearing is abandoned, a new Panel differently constituted is appointed and a new hearing is conducted by the reconstituted Panel, or alternatively, all evidence called on behalf of the Planning Authority is reheard and any other party is afforded the opportunity to cross-examine all such witnesses and reply to all such submissions.

4. Section 39 PE Act enables a person who is materially affected by a failure of a panel to comply with Part 8 of the PE Act to refer the matter to the Tribunal.

> ***39 (1)*** *A person who is substantially or materially affected by a failure of the Minister, a planning authority or a panel to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved may, not later than one month after becoming aware of the failure refer the matter to the Tribunal for its determination.*

5. The background facts of this matter that have given rise to this application are generally not disputed by the parties.

6. Stonnington City Council sought to amend its planning scheme by way of Amendment C23. The Council was both the proponent of the amendment and as it related to land within the area for which it is the responsible planning authority, the Planning Authority in relation to the amendment.

7. Amendment C23 proposes to:

- *Remove the restrictive covenant applying to parts of the existing Council Tooronga Road Depot and abutting areas of parkland and Road Zone 1.*
- *Rezone residual road reserve on the western side of Tooronga Road, Glen Iris, south of the Monash Freeway, from Road Zone 1 to Public Use Zone 6.*
- *Rezone part of Tooronga park to the north of the existing Council Tooronga Road Depot from Public Park and Recreation Zone to Public Use Zone 6.*
- *Rezone part of the existing Monash Freeway reserve to the immediate north of the existing Council Tooronga Road Depot from Road Zone 1 to Public Park and Recreation Zone.*

8. If the Planning Authority resolves to exhibit an amendment, which the Council so resolved in this instant, then it is required pursuant to the provisions of Sections 17-19 PE Act to follow the procedures set out for the exhibition of an amendment to a planning scheme and the giving of notice of an amendment.

9. Amendment C23 also includes consideration as to whether a permit should be granted "*to construct buildings and to construct and carry out works associated with the development of the Council Tooronga Road Depot. The application also seeks a permit to use part of the land for the purposes of the SES and the ST Johns Ambulance Service*". This type of matter is governed by Division 5 of Part 4 PE Act. By reason of Section 96B PE Act the provisions generally applicable to only an amendment are also applicable and in this respect Section 96C stands in place of Section 19 in relation to notification requirements.

10. Section 96C (1) PE Act provides:

A planning authority must give notice of its preparation of an amendment to a planning scheme and notice of an application being considered concurrently with the amendment under this Division -

(g) to the owners (except persons entitled to be registered under the Transfer of Land Act 1958 as proprietors of an estate in fee simple) and occupiers of land benefited by a registered restrictive covenant, if -

(i) the amendment or the permit would allow the removal or variation of the covenant ; or

(ii) anything authorised by the permit that would result in a breach of the covenant.

11. The Council placed the amendment on exhibition and gave notice to surrounding land owners and to owners and occupiers of land benefited by the registered restrictive covenant.

12. Notice was given and a large number of persons made submissions in relation to the amendment, Including a number of objecting submissions. As a result, the Planning Authority resolved on 8 April 2002 that as the matters in dispute could not be resolved through modifications to the amendment, planning application and proposed permit that it request the Minister for Planning to appoint an Independent Panel to "*hear the submissions and report on Amendment C23, Planning Application No 1290/01 and Proposed Permit No. 1290/01*". The Planning Authority referred submissions it had received to the appointed Panel.

13. The material before the Tribunal indicates that by letter dated 21 June 2002 the Council notified submitters that the Panel had been appointed and that a public hearing would commence on 4 September 2002. At that time advice had been given to the Responsible Authority by Maddocks Lawyers as to whom notice was required to be sent as owners and occupiers of the land which benefit from the covenant. As a result of that advice letters were despatched on 23 November 2001 to those parties who were regarded as being affected.

14. On Wednesday 4 September 2002 it would appear that Mr Morris QC, instructed by Mr John Rantino of Maddocks, appeared for the Council. Mr Peake appeared for a

number of submitters instructed by Kellehers Solicitors. He also appeared on behalf of other objectors instructed by Rennick & Gaynor. Mr Dreyfus QC was briefed by Kellehers to make legal submissions. The material before the Tribunal does not indicate the precise dates that Mr Dreyfus actually attended. It would appear, however, that his first attendance was on 10 September 2002. It would also appear that the City of Boroondara was also represented.

15. The problem with the failure of the Responsible Authority to serve interested parties was raised on the first day of the Panel hearing. The material demonstrates that Mr Peake advised the Panel that the Planning Authority may not have notified all persons owning land having the benefit of the Covenant in accordance with s.96C(1)(g) PE Act. In an affidavit sworn by Leonie Kelleher on 19 February 2003 in paragraph 3 she deposes as follows:

> "*It was made clear that our clients were not in a position to know whether Council had complied with its Statutory duty to give such notice. Neither the Panel nor the City of Stonnington through its barristers would countenance an adjournment of the hearing pending resolution of this issue. The Chair of the Panel, Mr Banon, directed that all parties discuss the issue and report back to the Panel in due course.*"

16. Pausing there, it is apparent that up until that point in time the Panel clearly had no knowledge of this possible defect. Clearly the responsibility for ensuring that all interested parties were either advised publicly of the hearing or in the case of a person such as Mr Thompson were actually served with notice of the hearing rests with the City of Stonnington.

17. However, the "warning bells" were now there and had the Panel taken the view which the Tribunal believes it should have, then subsequent events bordering on the "farcical" would not have taken place.

18. It must have been apparent to the Panel that this planning amendment was going to be the subject of a reasonably substantial contest. The history of the matter is set out in the affidavit of Rachel Ducker, an officer of the City of Stonnington. The affidavit was

affirmed on 19 February 2003 and it demonstrates that from an early point in time this amendment would be opposed. In her affidavit at paragraph 26, the following appears:

> *"A total of 55 submissions, including a multi-signature submission containing 53 signatures was received as a result of this exhibition process over a two month period. A summary of the issues raised in the submissions was listed in the Council Meeting Notice Paper dated 8 April 2002. Council noted on page 8 of the Notice Paper that a number of submissions raised issues that are similar to those raised in response to the previous application for a planning permit. Council resolved to request that the Minister for Planning appoint an independent Panel to hear submissions and record on Amendment C23 and the current planning application."*

19. Following the appointment of the Panel, a directions hearing took place on 3 July 2002 at which the Council and the three groups of submitters were all represented. The Panel gave written directions as to the future conduct of the matters including the exchange of Expert Witness Statements. In the Tribunal's view it must have been clear to the Panel that the matter would be strongly contested.

20. Despite this circumstance the Panel on 4 September, when advised of the possible failure to serve interested parties, decided to proceed with the hearing. Indeed, on that day, Mr Morris QC called Mr Warren Roberts, the General Manager Infrastructure and Environment of the City of Stonnington, who gave evidence and conducted a PowerPoint presentation. On Day 2 of the Panel hearing he was cross-examined by Mr Peake.

21. It is the opinion of the Tribunal that given the nature of the application and the manner in which it was to proceed, that having been forewarned of the possible failure to properly serve interested parties, common sense would have dictated that the matter not proceed and that all enquiries be made urgently to clarify whether what was alleged was correct and if so as to how the defect could be cured. It was apparent from the affidavits of Daniel Minogue of Rennick & Gaynor (sworn 32 January 2003) and that of Leonie Kelleher to which we have previously referred that adjournment of the matter was at least contemplated or raised. However, whether there was any formal

application for an adjournment is unclear. However, Mr Minogue in paragraph 4 of his affidavit deposes to attempting to discuss the matter with Mr Rantino during the luncheon adjournment on the first day. But according to his affidavit, Mr Rantino was not in a position to discuss this matter until the end of the second day.

22. In any event the Panel hearing proceeded on 4 and 5 September when further witnesses were called and cross-examination took place.

23. It ought to be observed that the Panel was complying with the rules of natural justice in respect of those who appeared before them. They clearly took the view (and in the Tribunal's view correctly so) that this was a matter where interested parties should be heard and witnesses subjected to cross-examination. The Panel had the power to prevent or restrict cross-examination but did not do so. The inference to be drawn from that course is that the Panel felt it was necessary in order to carry out its statutory duty to allow cross-examination. Unfortunately the proceedings were not recorded in any way.

24. Mr Minogue in paragraph 4 of his affidavit states that at the end of the second day of the hearing he was able to speak to Mr Rantino and he took him to title searches and pointed out inaccuracies and that the "list of persons given notice of Amendment C23 did not include all of the owners of the land". Rachel Ducker of the City of Stonnington confirms that statement at paragraph 36 of her affidavit where she stated that "Mr Rantino advised me that he and Mr Morris would look into this issue."

25. On 6 September 2002 Mr Morris advised the Panel that an error had occurred in the identification of the land benefiting the Covenant. He informed the Panel that:

> *"The error had been made by Maddocks Lawyers in that it was incorrectly thought the land which was excised from the parent title before the recreation of the Covenant had in fact not been excised until after the creation of the Covenant."*

(See paragraph 18 of the affidavit of Rachel Ducker) Paragraph 5 of the affidavit of Daniel Minogue confirms this and further states that the Panel was told that some four

persons owning land with the benefit of the Covenant may not have been notified and that Mr Morris would make a formal submission on this on Tuesday 10 September. The Panel acceded to this request. Again, whether there was an application for an adjournment of the matter is not clear. Leonie Kelleher at paragraph 5 of her affidavit said that Mr Morris told the Panel that the failure to notify the four did not matter because a sign had been placed on the land and that was sufficient.

26. On Monday 9 September Mr Morris called four more expert witnesses. Kelleher, at page 6 of her affidavit, further deposes that during the morning of 9 September Mr Morris informed the Panel that what he said on Friday with regard to notification was not correct and that by law notification to each person was necessary. On that day Kelleher deposes that her articled clerk sought to have the proceedings cease because of the defect with regard to service. (See the Exhibit LMK1 to her affidavit). The clerk indicated to the Panel that to use his words "this hearing should stop now" and that senior counsel had been briefed by his firm and wishes to address the Panel at 2.15 the following day. His application was rejected by the Panel and the evidence continued.

27. On 10 September 2002 Mr Dreyfus QC representing the clients of Kellehers and "other submitters" appeared and argued that the Panel should adjourn. Paragraph 8 of the Kelleher affidavit states that Mr Dreyfus in support of this argument told the Panel that:

> *"This was particularly relevant due to the potential for duplication of costs especially as a transcript of proceedings prior to these submissions was not available. Mr Morris submitted that the hearing should continue and advised the Panel that his client had now identified six persons as affected by the absence of notice."*

28. The Panel refused to adjourn the matter and gave verbal directions which were converted to written directions the following day, that is 11 September 2002.

Those directions were that:

(i) Notice be given to the persons concerned;

(ii) Notification was to include a document in the form of Document s30 being a draft letter tendered by Mr Morris;

(iii) Copies of all materials made available to the Panel prior to and during the course of the hearing, including witness statements, are available for inspection.

The Panel may recall particular witnesses, in the event that the persons request the Panel to do so, the parties were to be advised that the Council should have given you notice as owner or occupier of the land benefited by the Covenant but did not do so.

Written copies of all submissions made to the Panel are to be provided to the Panel and all other parties on or before 28 September 2002.

29. At this point it should be noted that the Panel had by a gradual process been advised of the failure by the City of Stonnington to comply with the *Planning and Environment Act*. They were certainly aware of this defect either by 5th, 6th or 9th September yet despite that fact persisted in the hearing of the matter. As previously indicated they were obviously aware of the need to afford procedural fairness to those before them but persisted in a determination to proceed. This is not a case where the issues are whether the Panel is bound by the rules of natural justice. We were referred to numerous decisions on this aspect and we do not regard them as relevant because, as indicated, the Panel was aware that it was so bound. Nor is it a case whereby the actual content of the rules are in issue. This is so because the Panel has treated the matter as being conducted in what was virtually an adversarial setting. That view is one which we accept as being appropriate. The failure of the Panel has been to apply the rules of natural justice to a group of objectors but ignore until late in the hearing the existence of another party who was entitled to the same rights as those parties who were presently before it.

30. In the Tribunal's opinion, when viewed objectively, the directions given on 11 September 2002 and reduced in writing on 12 September 2002, constituted an appreciation of the difficulties which they had encountered by pursuing the course which had been urged upon them by the Council and those acting for them. However, such determination was merely causing further difficulties, all of which could and

should have been avoided by the matter having been adjourned at the outset and time given to investigate the irregularities and to correct them.

31. On 13 September 2002 Mr Dreyfus QC appeared before this Tribunal. According to the record he appeared on behalf of Mr Thompson and three other applicants, although his position with regard to the latter was not clear. At any event the Tribunal mainly dealt with the position of Mr Thompson. The application before the Tribunal sought an order preventing the continuation of the Panel hearing (see page 20 of the Reasons for Decision of the Tribunal). Insofar as Mr Thompson is concerned the Tribunal ruled that the application be dismissed largely on the basis that as Mr Thompson had not yet been served or made a submission, as a consequence the Panel was not aware of Mr Thompson's existence and the ceasing of hearings did not give the Panel the opportunity to hear from Mr Thompson and to address any concerns he may express. The Tribunal regarded the application as premature and noted that should circumstances change he would have an entitlement to make a fresh application to the Tribunal.

32. The reference in s.166 PE Act which deals with "technical defects" does not have any relevance to a failure by the Panel to accord natural justice to a person whose interest has been affected. The provisions of s.166(1) and (2) refer to defects failure or irregularity in the preparation of a planning scheme. In this situation the view of the Tribunal is that the preparation of the planning scheme or amendment ceases by the stage that the documents are to be served in accordance with ss.17, 18 and 19. There is in the Tribunal's view a difference between the preparation of the planning scheme amendment and the procedural steps whereby the implementation process commences.

33. It is the Tribunal's view that this section deals with that which is contained in the heading namely "Technical Defects" and that furthermore it relates to the preparation of the Planning Scheme. A failure to comply with s.19(1)(c)(a) of the Act is not a technical defect. It is a failure to advise a party whose identity can and was established (compare s.19(1A)) of an amendment to a planning scheme that has been prepared. Once prepared, notice is required and it is the Tribunal's view that should a technical defect be later found to exist it can be dealt with, but cannot deny the right of a party, in the applicant's position, to a hearing.

34. The material before the Tribunal indicates that on 12 and 13 September the Panel did not sit. It resumed on 16 September 2002 and documents were tendered by Mr Morris on behalf of his client. Mr Peake then opened his client's case and called two expert witnesses and on 17 September he called a further two witnesses. On 18 September 2002 closing submissions took place. Following that, written submission were provided to the Panel.

35. Closing submissions having been made on 18 September 2002 the written notices which were required by the Act to be served on parties prior to the Panel's hearings were forwarded on 20 September 2002. The affidavit of Rachel Ducker in paragraph 20 is silent as to the number of such notices. However, the affidavit of Daniel Minogue in paragraph 7 asserts 139 owners or occupiers were given notice of hearing. During the hearing before this Tribunal no reference or attack was made upon the failure of Ducker to indicate the number of further notices. Nor was there any assertion by Mr Morris that Minogue's affidavit was defective or misleading. In those circumstances it is open to the Tribunal to conclude that in fact 139 notices were served. In any event, whatever their number, the fact was that the applicant in this case was then served. As a result of these letters being forwarded to other parties a small number of submissions were received.

36. The final steps in this drawn out process are as follows:

(i) On 18 November 2002, that is two months to the day that formal hearings ceased, the Panel wrote to the solicitors for the Council and to additional submitters and listed a directions hearing for 17 December 2002.

(ii) Between those dates Rachel Ducker deposes to the fact that she prepared eight complete sets of all documents. At paragraph 55 of her affidavit she deposes that "the complete set of documents was voluminous filling two archive boxes. I filed all the documents in A4 lever-arch folders". She then went about serving these documents and Mr Thompson was served with his copies on 4 December 2002.

(iii) On 17 December 2002 the directions hearing of which the Panel gave notice on 18 November 2002 took place. That hearing was not a mere procedural process designed to ensure that documents had been filed or will be filed within a particular date. Counsel attended and arguments were put concerning procedural fairness by each representative. I will not repeat the arguments as they were later put to the Tribunal at this hearing. In any event the Panel after an adjournment indicated it proposed to continue the hearing.

(iv) The further directions of the Panel set out a timetable as to the filing of additional submissions; the reconvening of the Panel and a direction that Mr Wilmoth must file and serve by 12 February 2003 a list of expert witnesses he wishes to cross-examine; the list to be accompanied by a short statement relating to each witness he wishes to cross-examine setting out the aspect of the evidence of that witness that he wishes to test or clarify.

(v) On 16 January 2003 the applicant made this application. Although a number of grounds are set out, essentially what is sought is an order that the Panel be disbanded, a new Panel differently constituted is appointed and a new hearing take place. Alternatively, that all of the evidence called on behalf of the Council and all submissions made be reheard and any other party be afforded the opportunity to cross-examine all witnesses and reply to all submissions.

37. The above history represents a lamentable failure by both the Council, its legal representatives and the Panel to properly deal with a problem which could have been avoided.

38. Before dealing with the legal issues involved there is one particular matter that needs to be addressed. That is that this proceeding, albeit not specifically spelt out, is a device to further delay the progress of a final outcome. Whether that is correct or not, I am unable to say. However, the argument put by Mr Morris that it is incredulous that Mr Thompson had he been served would merely have "signed up" and been represented by either Mr Peake or Mr Dreyfus, or both, and so there is no real prejudice, is one which I do not accept. There is no evidence of such a probable course of action. The

proposition advanced is mere speculation and it is the Tribunal's view that it must treat this problem on the basis that given there was a right to be notified of the hearing and be heard, it would have been open to the applicant to brief counsel in his own right and be accorded the right to cross-examine witnesses and call evidence if he so decided and in the manner in which it was thought appropriate.

39. The Panel, as indicated in paragraph 18 of this ruling, has taken the view that the rules of natural justice would be applied in respect of all those who attended. The Tribunal infers that had the applicant been properly served and attended on the first day he would have been accorded the same rights as other objectors. This is not a hearing where the Panel has elected (as it was entitled to do) to exclude cross-examination despite being bound to observe the rules of natural justice - see Supreme Court of Victoria v King & Ors, ex parte Westfield Corporations (Victoria) Limited, a decision of Southwell J on 29 May 1981.

40. It is noted that the Panel intends to extend the right to the applicant to cross-examine witnesses who have previously been called. The Tribunal interprets the Panel's directions as conferring that "right", although the words used are slightly vague because the directions refer to a list of expert witnesses he (the applicant) "wishes" to cross-examine.

41. If the Panel were to deny the applicant the right to cross-examine certain witnesses in circumstances where that right was extended to other parties involved in the hearing, it would, in our view, amount to a denial of natural justice. However, we do not interpret the Panel's offer as anything other than an unfettered right to cross-examine witnesses.

42. Given that the Panel has -

    (a) provided the applicant with all of the written material;

    (b) extended an offer to the applicant to cross-examine witnesses,

    what is it that the applicant has lost as a result of the circumstances which we have outlined.

43. Three possibilities seem to emerge;

Firstly, any elaboration by the witnesses in evidence-in-chief of the reports or statements which form part of the written material before the Panel and which have now been provided to the applicant. There is evidence of such elaboration which is referred to in the affidavit of Mr Minogue. Secondly, the benefit of having answers given by those witnesses when cross-examined by other parties at the hearing. Thirdly, there is a possible avenue of prejudice, namely the right of the applicant to indicate to the Panel and rely upon any prior inconsistent statement. However, were the Tribunal to accede to the application made and a fresh hearing took place then the applicant would still be in the position of not knowing what was said in cross-examination by a witness in the earlier hearing because no record exists. In that situation, in the Tribunal's view, there has been no prejudice to the applicant in respect of this third ground.

44. Having regard to the above, the real question for this Tribunal is whether the steps taken by the Panel will effectively overcome the matters to which we have referred.

45. In the opinion of the Tribunal, provided that a further requirement is met, the duty of the Panel to afford natural justice to the applicant, including of course the right to be heard, will be met. That requirement is as follows. In the absence of a tape-recording of the Panel's hearing or a transcript of what was said, in determining the nature of the recommendation to be made to the Minister, no fact opinion or submission should be relied upon or used adverse to the applicant unless he has had such material drawn to his attention and he be allowed to express a view or make a submission on that material. Having regard to the history of this matter it is essential that the Panel pay due regard to and strictly observe this requirement. Whether such material be contained within the notes of the Panel or the recollection of individual members is not to the point, the applicant must be given an opportunity to meet any adverse material which the Panel proposes to rely upon when reaching its recommendation.

46. Such a requirement may in fact impose a greater obligation on the Panel than is actually required at law. It may be that the obligation is merely upon the Panel to disclose to the applicant the content of submissions received and, in particular, to broadly indicate any allegations of fact which are adverse to the applicant - see Perron v Central Land Council (1985) 6 FCR 226 at 253 per Toohey and Wilson JJ. However, there must be

some doubt about that view, having regard to the peculiar nature of the events which have occurred in this dispute.

47. It should be noted that there is no allegation of bias alleged against the Panel either inferentially or directly. The relief sought does refer to the Panel being reconstituted if there was a finding of a denial of natural justice. But that is quite different from any allegation or perception of bias being directly alleged.

48. Having regard to the above circumstances the Tribunal does not propose to make the order sought by the applicant and the matter is referred back to the Panel for further hearing taking into account what we have said in the course of this ruling.

49. The Tribunal however wishes to make the point that s.39 of the Act in effect gives a type of supervisory role over the Panel's conduct of the hearings. The failure of this application does not preclude a further application which could be made should circumstances arise which adversely affect the applicant or indeed any other party to the proceedings.

50. Having regard to the decision contained herein the question of costs thrown away (if any) by reason of these events is one which we reserve for further argument.

JUDGE HIGGINS
VICE PRESIDENT

JEANETTE G RICKARDS
MEMBER