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TICK ACTION REQUIRED:
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SUPREME COURT OF VICTORIA

CAUSES JURISDICTION

No. 5630 of 1995

FITZWOOD PTY LTD A.C.N. 005 180 183 & ORS

Plaintiffs

v.

THE MAYOR, COUNCILLORS AND CITIZENS OF THE WHITTLESEA CITY COUNCIL

Defendant

JUDGE: ASHLEY, J.

WHERE HELD: MELBOURNE

DATES OF HEARING: 25-28 August 1997; 1-5, 8, 9, 11, 12, 16, 22, 25, 26, 30 September 1997; 1 October 1997

DATE OF JUDGMENT: 17 March 1998

CATCHWORDS: Local government - Role of municipality as planning authority - Development of planning policy - Preparation of planning scheme amendments - Content of amendments - No reservation of land for a public purpose - Whether required in the circumstances.
Local government - Role of municipality as responsible authority - Applications for planning permits - Whether applications required to be refused on the ground(s) stated in s.98(2) of the Planning and Environment Act 1987.

Planning and Environment Act 1987, ss.98, 99, 111.

APPEARANCES:	Counsel	Solicitors
For the plaintiffs	MR S.R. MORRIS, Q.C. with MR C.W. PORTER	GSM Lawyers
For the defendant	MR W.F. LALLY, Q.C. with MR M.A. DREYFUS	Coltmans Price Brent

SC:EB

Counsel for the plaintiffs submitted that the issue of part funding of the road by VicRoads was a "furphy", because the LSP as adopted on 13 April 1992 did not contemplate VicRoads funding the land component of the road. Counsel submitted, in effect, that VicRoads' intransigence was simply used as an excuse to delay preparation of a proper amendment and for failure to refuse permit applications on a s.98(2) ground. That is, I consider, too narrow a view. The question of the road involved much more than who was to pay for acquisition of the land. Moreover, the defendant always proposed that the cost of land acquisition be paid for by some party other than itself. The cost of acquisition thus connected with the vexed issue of development contributions, even if it was not the source of the particular controversy with VicRoads.

In case there be any doubt as to the material to which I have had regard in expressing my conclusions as to the nature of the defendant's belief in the period now under consideration, I should make it clear that I have not ignored documents generated by the defendant in connection with the permit applications. The various documents contain language which, viewed in isolation, might be thought to support a conclusion that the defendant held an unqualified belief that the road extension would be needed. But those same documents also reveal, in my opinion, the features of qualification to which I have earlier adverted.

On a series of occasions the defendant's officers reported to the council that the Act enabled a claim for compensation from a planning authority for financial loss suffered as a result of land being required for a public purpose; going on to say that the compensation provisions of the Act required an application to be refused. This was in some respects not an accurate statement of the operation of ss.98 and 99 of the Act. Given that fact, it may nonetheless be said that the defendant's officers were to an extent aware of the consequences of refusal of a permit on the grounds that land would be required (read "needed") for a public purpose. I do not consider, however, that this awareness indicates that in fact the defendant formed and held a belief of the kind relevant for the purposes of s.98(2) of

the Act. It was also reported to the council on such occasions that other factors justified refusal of the permit application before the council.

Counsel for the plaintiffs submitted that the grounds of refusal in fact relied upon from time to time were a re-working of grounds previously relied upon and rejected by the Tribunal; and that in one instance a condition recognised to be of doubtful validity was attached to a permit. Each of those submissions may be accepted. But it does not follow that the defendant held the belief upon which the plaintiffs rely, or that the grounds of refusal were not relied upon bone fide, or that the condition which was imposed was not considered to be arguably valid. On the evidence, I draw no such inferences. I do not conclude that the defendant's resolutions in connection with the permit applications were taken as part of a course of action whose intent was that the land be not developed in a manner inconsistent with its future use as a road, in the face of a belief that it would be so needed. Those conclusions make it unnecessary for me to consider whether, if such a belief had been held, the defendant must have refused a permit application on grounds involving that ground. Counsel for the plaintiffs submitted that such was the case, referring to aspects of the legislative history of the Act, its framework, provisions of the Land Acquisition and Compensation Act 1987, texts in relation to planning provisions generally, and Equity Trustees Executors and Agency Co Ltd & Ors. v. Melbourne and Metropolitan Board of Works [1994] 1 V.R. 534 at 544-545. There was force to those submissions but I would wish to reserve my opinion upon them. It may be that a responsible authority is not bound to state as a reason for refusing a permit application a ground which would give rise to a right to compensation, if another ground for refusal which would not attract a compensation claim bona fide exists: see, for example, Nunawading at 223, and Wade, Administrative Law, 7th Ed. pp.430-431.

Counsel for the plaintiffs directed attention to the council's resolution of 13 April 1992. The LSP was adopted, and the council resolved that "the Planning Scheme amendments detailed in section 16 of the plan" be commenced. Section 16