

**OFFICE OF CORRECTIONS
CITY OF HEIDELBERG
MEDICAL CONVENTION SERVICES & ORS**

**APPELLANT/APPLICANT
RESPONSIBLE AUTHORITY
RESPONDENT/OBJECTORS**

Appeal No. : P87/2028

Date of Determination : March 31, 1988

Tribunal Members : S.R. Molesworth (Presiding Senior Member), P.J. Mulcahy

PERMIT SOUGHT FOR OFFICE TO BE USED AS A COMMUNITY BASED CORRECTIONS CENTRE IN BUILDING ZONED RESTRICTED BUSINESS (M.M.P.S.) - WHETHER DETRIMENTAL TO RESIDENTIAL AMENITY OR LIKELY TO CREATE UNDUE FEAR IN ELDERLY RESIDENTS - WHETHER UNACCEPTABLE DETRIMENT TO AMENITY THROUGH MENTAL AVERSION - TRIBUNAL'S DISCRETION TO CONSIDER APPEAL UNDER PLANNING AND ENVIRONMENT ACT 1987 PURSUANT TO s.210(1) THEREOF - WHETHER USE WOULD HAVE SIGNIFICANT ECONOMIC EFFECTS - INTERPRETATION AND APPLICATION AND PLANNING AND ENVIRONMENT ACT s.60(6)(i) IN LIGHT OF PLANNING AND ENVIRONMENT ACT s.4 - SIGNIFICANT ECONOMIC EFFECTS OF PROPOSED USE ON OTHER BUSINESSES IN SAME BUILDING - PROPER LOCATION OF SUCH CENTRES - WHETHER PROPOSED USE AN "OFFICE" BIAS - WHETHER PRESIDING SENIOR MEMBER SHOULD DISQUALIFY HIMSELF HAVING APPEARED AS COUNSEL FOR APPLICANT IN PREVIOUS APPEAL - PROPER TEST OF SUCH BIAS - RELEVANCE OF DELAY AND INCONVENIENCE IF DISQUALIFICATION OCCURRED.

The Applicant supervised over 200 offenders residing in the north-eastern suburbs of Melbourne who were required pursuant to court orders to attend on it for various purposes. It sought a permit to use the rear of the ground floor of a two-storey office building zoned Restricted Business (M.M.P.S.) as an "office", to be used as a community based corrections centre with 10 full time staff. It was intended that an average of 15 offenders per day would report to the centre mostly in normal business hours. Two floors of the building already comprised offices of private and public sector tenants. The centre was to be accessed from the main entrance of the building.

A number of elderly persons lived in the area.

The Responsible Authority refused the application and the Applicant appealed to the Tribunal pursuant to the provisions of the Town and Country Planning Act 1961.

The Planning and Environment Act 1987:

set out the objectives of planning in Victoria and of the planning framework established by the Act (s.4);

provided that before deciding on an application, the Responsible Authority "if the circumstances appear to so require, may consider any significant ... economic effects of the use or development for which the application is made" (s.60(b)(i);

and by s.210 gave the Tribunal a discretion to deal with an appeal lodged and heard under the Town and Country Planning Act 1961 in the context of either the considerations set out in that Act or of those set out in the Planning and Environment Act 1987.

At the hearing:

- (a) The Tribunal heard the appeal under the Town and Country Planning Act 1961;*
- (b) One argument put by the objectors was that the use would create fears of safety in elderly residents in the area;*
- (c) Late on the second day counsel for certain objectors formally objected to the Presiding Senior Member continuing to sit on the ground of perceived bias. It appeared that 2½ years earlier the Presiding Senior Member had appeared as counsel for the present applicant in a successful appeal to the Planning Appeals Board concerning an Attendance Centre (the forerunner of a community based corrections centre) in Caulfield. The Division of the Planning Appeals Board hearing that matter included the person who was counsel for the applicant in this appeal and who in his submission stressed the importance of the earlier decision.*

Held, disallowing the appeal

1. *A judicial or quasi-judicial officer was only disqualified on the ground of appearance or reasonable suspicion of bias if such appearance or reasonable suspicion existed from the objective perspective of the reasonable person who generally understood the processes of the law involved.*
Franklin v Minister of Town and Country Planning [1948] AC 87 at 103; R v Australian Stevedoring Industry Board (1953) 88 CLR 100 at 116; Metropolitan Properties Co. (FGC) Ltd. v Lannon [1969] 1 QB 577 at 598-9; R v Lilydale Magistrates' Court [1973] VR 122; Ewert v Lonie [1972] VR 308 at 313; Livesey v NSW Bar Association (1983) 151 CLR 288 at 294, applied.
Shire of Hastings v Reilly (Administrative Appeals Tribunal, November 4, 1987, unreported), followed.
2. *Such a person generally understanding the role and duties of the Tribunal and the role and the professional ethics of counsel would not conclude that an appearance or reasonable suspicion of bias existed here. However a shorter lapse between appearance as counsel and sitting as a Tribunal Member may in some cases induce disqualification.*
3. *In deciding whether to disqualify himself the Presiding Senior Member took account of the delay and inconvenience which the other parties would suffer if the hearing was aborted at an advanced stage by his disqualification.*
Livesey v NSW Bar Association (1983) 151 CLR 288, followed.
4. *Due to lack of physical proximity the proposed use would not be detrimental to neighbourhood residential amenity or create undue fear of safety in elderly residents. Further the lack of real incompatibility between the use and the neighbourhood meant that the issue of unacceptable detriment to amenity through mental aversion did not arise.*
Michelle Brook v City of Brighton (1985) 4 PABR 50 at 58; Tobin Brothers v City of Ringwood (1985) 16 APA 423, referred to.
The distinction between psychological considerations based on mental aversion to a use and psychological considerations based on a use creating fear of safety, commented on.
5. *The Tribunal would pursuant to s.210(1) of the Planning and Environment Act 1987 consider the appeal under that Act not under the Town and Country Planning Act 1961.*
6. *In assessing the significance of economic effects for the purpose of s.60(b)(i) it was necessary:*
 - (a) *to first determine the context or relevant 'community' in which those effects were to be considered;*
 - (b) *to consider such factors objectively from the perspective of that community or in the context of their impact on that community. Thus adverse impact of a proposed use on a prospective business competitor was irrelevant unless there was also adverse impact on the broader community.*
Stanway v City of Ringwood and Christian Brethren Family Care and Others (Administrative Appeals Tribunal, March 31, 1988, unreported), followed.
Planning and Environment Act 1987 s.4, referred to.
7. *In this case the existing offices in the subject building were the relevant community. The proposed use would be likely to have a significant and serious economic effect on them by impairing their ability to present themselves attractively and so would cause unacceptable detriment to them.*
Planning and Environment Act 1987 s.60(b)(i); MMPS Cls. 5A(c), 5A(e), 7(2)(c), 7(2)(e), referred to.
8. *Community based correction centres should be separately accessed from the street and have little or no interaction with other businesses or uses. Multi-tenanted buildings were an unsuitable location for them.*

9. *The proposed use was not an "office" as defined in the MMPS.*

The meaning of the word "consulting", discussed.

Appeal Site: Suites 1-3, 104-120 Mount Street, Eaglemont.

Mr. S. Morris of Counsel, instructed by the Victorian Government Solicitor, appeared for the Appellant/Applicant.

Mr. P. Barnes, Planning Consultant, represented the Responsible Authority.

Mr. G. Watkins of Counsel, instructed by Wisewould Schilling, Solicitors, appeared for six Objectors being the existing commercial tenants of the subject building.

Mrs. D. Matthews, Mr. C. Calder, Mr. A. Fitzpatrick, Mr. A. Miller, Mrs. Perry, Mr. P. Collins, Cr. G. Nikkio and Mr. A. Collier, all Objectors, appeared in person.

Determination and Reasons for Determination

The Proposal and the Subject Site

On 3 June, 1987 the application was lodged with the Responsible Authority by the Department of Property and Services on behalf of the Office of Corrections. The proposal was basically to make use of 278 square metres of ground level floor space within the two-storey office building at 104-120 Mount Street, Heidelberg. The application had little detail regarding the proposed use of available floor space.

The North-Eastern Suburbs Region of the Office of Corrections currently has 114 offenders under its supervision who are resident in Heidelberg. These people will find it considerably more convenient to report to an office in their municipality. Additionally, the office has fifty offenders under its supervision who reside in the Shire of Diamond Valley and fifty-eight in the Shire of Eltham. It is envisaged that an average of fifteen people would attend the Heidelberg Centre on each day of its operation.

The office is scheduled to operate Monday to Friday during normal business hours. The office will also be open one or two nights each week for appointments with offenders in full-time work or for the provision of personal development/education programs and staff training. Periodic attendance will also occur on Saturday for the purpose of co-ordinating community work.

Offenders attend the office to assist in ensuring that they maintain the conditions of their orders and to obtain assistance with their personal problems. Community Corrections Officers are trained to assess the risk that clients have of re-offending. This assessment is then directed towards the development of individualised supervision strategies and programs designed to minimise this risk. The tasks undertaken by Community Corrections Officers include one-to-one counselling, regular visits to offenders' homes, direct assistance with day-to-day living issues and referral to local agencies for specialised services.

The Heidelberg office will have ten full-time staff. Six of these are Community Corrections Officers trained in the social sciences and in the provision of professional assistance to offenders. Additionally, the Heidelberg office will be assisted by Community Corrections volunteers. These volunteers, who live or work in the Heidelberg, Diamond Valley and Eltham areas, are provided with training and support by the region to assist them in the supervision and management of clients.

The subject site is located on the eastern side of Mount Street, Heidelberg between Burgundy and Yarra Streets. The building on the property has two floors of office accommodation and a basement car parking area, accessed from the rear of the building. The building was constructed in 1981 for use as offices and presently there are various private and public office tenants.

The floor space which the Applicant proposes to occupy is at the rear of the ground floor level. This area is accessed from the Mount Street main entrance.

The site has thirty-seven covered car parking spaces at the basement level. In addition, there are twenty-eight uncovered spaces on the property. The building has a total of 1683 square metres of floor space, thus the ratio of car spaces to floor spaces is approximately 3.8 spaces/100 square metres of floor space.

Grounds of Refusal

1. The proposed use and development will have a detrimental effect on the amenity of the neighbourhood.

2. The proposed use and development is not in an appropriate location given the proximity to the public pathway regularly used by school children.
3. The proposed use and development will prejudice the proper future planning of the area.
4. The proposed use would have a detrimental effect on adjacent office uses.

Grounds of Appeal

1. The proposed use and development of a regional office will not have a detrimental effect on the amenity of the neighbourhood.
2. The proposed use is in an appropriate location given its proximity to public transport and other Government services.
3. The proposed use and development will not prejudice the proper future planning of the area.
4. The proposed use will not have a detrimental effect on adjacent office uses.

Parties, Submissions and Evidence

The appearances before the Tribunal are listed at the foot of this determination. Written submissions were read to the Tribunal by Mr. Barnes, Mr. Morris and Mr. Fitzpatrick. Each submission was liberally supported by relevant plans, maps, photographs or background documentation.

Mr. Watkins made oral submissions to the Tribunal speaking to a number of statements of grounds lodged by his clients. Further, Mr. Barry Miller, a Director of Australian Medical Industry Services and Medical Convention Services, gave evidence in support of Mr. Watkins' case.

Mr. Fitzpatrick, an Objector, appeared for R. Cameron, M. Jackson, L. Whiley, E. Whiting, J. Forman and M. Bosser. He presented a very forceful and impressive submission which involved reference to learned texts dealing with the problems of the elderly - in particular, *'Abuse of the Elderly, A Guide to Resources and Services'*, 1984, by Joseph Costa.

Mr. Morris called two witnesses: Mr. Cameron Barnes, Direct of Finer Fork Services of Herbert Street, Northcote; and Mr. Tim Wilmot, the Regional Manager of the Office of Corrections. In brief, Mr. Barnes explained that his business had never been affected by living close to another Corrections Centre. Mr. Wilmot gave an exhaustive description of the proposed operation, the need for it and the experience of his Office at other sites.

All submissions have been duly considered and all material physically capable of being retained has been placed upon the Tribunal's file as a permanent record of these proceedings. Further, the Tribunal carried out an extensive inspection of both the appeal site and its surrounding locality.

Challenge to the Tribunal Chairman Hearing the Appeal

Late in the afternoon on the second hearing day Mr. Watkins advised the Tribunal that he had just been instructed to formally object to the Presiding Chairman of the Tribunal continuing to hear and determine the appeal. Mr. Watkins submitted that there was a possible question of perceived bias on the part of the Chairman which required the Chairman to immediately step down from further involvement.

The Tribunal indicated that if Mr. Watkins' challenge was properly founded and the Chairman decided to step down, it would be impossible to have the Tribunal reconstituted at such a late stage in the proceedings. The fact that Mr. Mulcahy was not a Member possessing legal qualifications would be fatal to any prospect of the Tribunal continuing in a reconstituted form given that a number of matters of law were raised during the hearing. Consequently, if the challenge was successful, the hearing would have to be abandoned and a new Division of the Tribunal would have to be appointed to sit some time in the distant future.

The basis of Mr. Watkins' challenge was as follows. In August 1985 a Division of the former Planning Appeals Board constituted by Mr. Morris (now the Counsel for the Applicant before the Tribunal in this case), Mr. Kinder and Mr. Alder determined an appeal, *Ross v City of Caulfield* (1985) 21 APA 202, dealing with an Attendance Centre. In that case Mr. Molesworth, now the Presiding Chairman in this case, appeared as Counsel

for the Applicant instructed by the Crown Solicitor. The Board in the *Ross* case upheld Mr. Molesworth's client's appeal and directed that a permit issue for the Attendance Centre. Attendance Centres in 1985 were the forerunners of Community-based Correction Centres as defined in 1988.

Mr. Watkins argued that, although two-and-a-half years had passed, the involvement of Mr. Molesworth in the *Ross* case would be seen to be too close a connection to the Applicant in this case and so there would be doubt as to whether the parties would receive a fair and unbiased hearing. Mr. Watkins said this was particularly so given the emphasis placed upon the importance of the decision in the *Ross* case by Mr. Morris in his submission to the Tribunal.

After adjourning the hearing to consider Mr. Watkins' submission, the Tribunal Chairman, after giving oral reasons, disallowed the challenge and proceeded to complete the hearing. In order to understand the Tribunal Chairman's ruling it is necessary to be aware of the learned pronouncements of various courts over the years dealing with the question of bias. Firstly, in *Franklin v Minister of Town and Country Planning*, [1948] AC 87 at 103 the following passage is useful:

*"My Lords, I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or the other in the dispute. As Lord Cranworth, LC says in *Ranger v Great Western Ry Co (1854)*, 5 HL Cas 72, at p 89; [1843-60] All ER Rep 321, 'A judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other. In ordinary cases it is a just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent.'"*

Secondly, in *R v Australian Stevedoring Industry Board*, [1953] 88 CLR 100 at 116, it was said of bias that:

"... before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be 'real'. The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that 'pre-conceived opinions though it is unfortunate that a judge should have any do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded.'"

Thirdly, in *Metropolitan Properties Co. (FGC) Ltd v Lannon*, [1969] 1 QB 577 at 598-9, Lord Denning MR said:

*"So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr. Lannon, and no want of good faith. But it was said that there was, albeit unconscious, a real likelihood of bias. This is a matter on which the law is not altogether clear; but I start with the oft-repeated saying of Lord Hewart, CJ, in *R v Sussex Justices; Ex parte McCarthy*, [1924] 1 KB 256, at p 259; [1923] All ER Rep 233, at p 234: 'It is not merely of some importance, but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'"*

*In *R v Barnsley Licensing Justices; Ex parte Barnsley and District Licensed Victuallers' Association*, [1960] 2 QB 167, at p 187; [1960] 2 All ER 703, at pp 7 4-5, Devlin, LJ, appears to have limited that principle considerably but I would stand by it. It brings home this point; in considering whether there was a real likelihood of bias,*

the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand ... Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see R v Camborne Justices; Ex parte Pearce, [1955] 1 QB 41, at pp 48-51; [1954] 2 All ER 850, at p 853; R v Nailsworth Licensing Justices; Ex parte Bird, [1953] 2 All ER 652. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'

This passage has been followed in the High Court and was specifically approved by the Supreme Court in *R v Lilydale Magistrates' Court*, [1973] VR 122.

In *Ewert v Lonie*, [1972] VR 308 at 313, a case dealing with the former Town Planning Appeals Tribunal, Mr. Justice Lush of the Supreme Court approved as his preferred test the words in *Lannon's case* at pp 604, 605, 'the appearance or reasonable suspicion approach'. His Honour went on to say that:

"I think it appropriate to add that an assessment of the existence of reasonable grounds for suspicion must take into account, besides the nature of the Tribunal, the nature of its work and the persons, by type or interest, who come before it. Some tribunals may operate in a more sensitive atmosphere than others. I see no reason for thinking that the Appeals Tribunal operates in an especially sensitive atmosphere."

Finally, in *Livesey v NSW Bar Association*, (1983) 151 CLR 288, the following helpful passage at page 294 is found:

"In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters 'of degree and particular circumstances may strike different minds in different ways' (per Aickin J in Shaw (24)). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court."

The latter three authorities were recently discussed and followed in the Tribunal case of *Shire of Hastings v Reilly*, (1987) 5 PABR 357. Extrapolating principles from these authorities, it is first necessary to apply the test, whether there is an appearance or reasonable suspicion of bias, from the objective perspective of the reasonable person who generally understands the processes of the law involved. The Tribunal believes that the test must be applied on the basis that the parties understand the role and duties of the Tribunal. Further, it should be assumed that the parties have a general understanding of the role of a barrister before such a Tribunal.

In short, the Tribunal is of the opinion that there is an insufficient nexus between a person acting as a barrister for a Government Department and that same person acting as a chairman two-and-a-half years later dealing with an appeal connected with that same Government Department. The barrister is bound by a code of ethics which demands an objective and independent application of advocacy skills to the job in hand. The barrister's words do not involve a personal commitment to the cause in hand, rather the barrister is using professional skills to express the views of others in a hopefully persuasive fashion. So on one day the barrister may be seen acting for one party and on the next day in a different case the barrister may be acting for a different party '*on the other side of the fence*'. The barrister must usually remain indifferent, in a subjective sense, to the opinions which are expressed.

Clearly, such broad principles must be subject to a discretion. For appearances sake, a separation of only days, weeks or even a few months between acting as a barrister for a party and subsequently acting as a chairman of an appeal dealing with that same party would be unwise as the closeness in time might awaken concerns with an otherwise innocent situation. On the other hand, with an expert Tribunal which draws its chairmen from the small pool of people who have relevant expertise and who are likely to have regularly appeared before the Tribunal, it must be expected that it is only a personal relationship which creates the unacceptable nexus and not the professional relationship.

In conclusion, given the advanced state of the appeal hearing at the time of Mr. Watkins' challenge, clearly the disadvantage to the other parties of any major delay was a consideration to take into account, as was indicated in *Livesey's case*. In the interests of justice, after deciding that any '*suspicion*' of bias would be likely to be limited to very few persons who do not understand the appeal system and the professional ethics of barristers, the Tribunal Chairman decided that it would be both unnecessary and quite improper to step down.

Determination

The Tribunal has decided to disallow the Appellant/Applicant's appeal. It is directed that a permit not issue.

Reasons for the Determination

1. Many issues arose in this appeal which if fully addressed would result in a very extensive determination. The Tribunal has decided that there is just one issue which needs to be addressed in detail, whether the proposed use would have a detrimental effect on adjacent office uses, as it is on that issue that the appeal can be determined.
2. Dealing shortly with the other issues, despite the force of Mr. Fitzpatrick's submissions we do not believe the proposal would have had a detrimental effect upon the residential amenity of the neighbourhood and, in particular, the elderly who reside in the area. The locational factors are such that we do not believe there would have been any interaction between the offenders attending the Corrections Office and persons living in the surrounding streets. The likely access route to and from the Corrections Office would almost certainly be directly to the railway station. Further, if there are offenders in the Office's client group who are going to re-offend, it would seem illogical to presume they would re-offend in close proximity to their supervisors. In other words, the few offenders who do re-offend are most likely to do so in other districts.
3. With respect to the psychological impact on the elderly upon which Mr. Fitzpatrick placed great reliance, there are differing views as to the extent to which planning law allows psychological factors to be taken into account in determining the impact of a proposal on the amenity of an area. The issue has mainly been discussed in the context of brothels and funeral parlours. A full examination of the competing views can be found in *Michelle Brook v City of Brighton*, (1985) 4 PABR 50 at 58. In summary, the then Board in that case determined that the '*mental aversion*' psychological impact only becomes relevant in limited circumstances, such as where there is a real incompatibility of the use of nearby premises. The best example is *Tobin Brothers v City of Ringwood*, (1985) 16 APA 423, where a funeral parlour was refused a permit due to the likely psychological impact on the elderly persons

occupying an adjoining elderly persons' home next door.

4. We are of the opinion that a distinction can be drawn between psychological considerations based on '*mental aversion*' to a proposal and psychological considerations based on fear or a concern for safety which directly arises out of a proposal. The material submitted by Mr. Fitzpatrick was convincing enough to show that insecurity is one of the greatest psychological traumas of the elderly in our society. In such circumstances, such concerns are a relevant consideration. However, the question of proximity is still a determining factor. One must not cast the net too far, the concerned elderly must be sufficiently proximate to give substance to their concerns. That does not mean it must be shown that unsafe conditions have been created, rather it must be shown that, in the context of the fact of life that the elderly have very real concerns for their safety, will the placement of the proposal in the vicinity of the concerned elderly place undue or unreasonable stress upon them. On the facts in this case, we do not believe the appeal site is sufficiently proximate to the homes of the elderly in the area to give their concerns about safety sufficient weight to be persuasive.
5. As indicated above, the crucial issue in this case is whether the proposed use would have a detrimental effect on the occupants of the adjacent offices in the subject building. We have decided that the impact will be likely to be so detrimental that the Appellant/Applicant's appeal must be refused. Although the refusal on this ground can be classed as an objection to the proposal on '*amenity*' grounds (Clause 5A(e) and Clause 7(2)(e) of the MMPS Ordinance) and as an objection to the proposal on '*orderly and proper planning*' grounds (Clause 5A(c) and Clause 7(2)(c)), it is easiest to explain the refusal by reference to undesirable economic effects.
6. Although this appeal was lodged and heard under the *Town and Country Planning Act 1961*, pursuant to Section 210(1) of the *Planning and Environment Act 1987*, the Tribunal has the discretion to deal with the appeal in the context of the considerations set out in that Act. Apart from the effect of Section 4 of this Act, Section 60 provides that the Responsible Authority, and so this Tribunal on appeal, may, inter alia, consider any significant economic effects on the use or development for which the application is made. In determining the significance of and economic effects it will always be necessary to at first determine the context within which the effects are to be considered. Like the need to determine the relevant '*neighbourhood*' with respect to impacts upon amenity, with respect to economic effects it will be necessary to determine the relevant '*community*'. (In trade practice law the equivalent to '*relevant community*' would be the relevant '*market place*' within which competition etc. is to be considered).
7. In order to determine the '*relevant community*' so as to be able to assess the significance of economic effects, one must look at the facts of each case. One aspect which is very clear is that in the context of what are essentially '*community*' objectives set out in Section 4, the microcosm of competition between individual traders will usually be irrelevant. To date, there have been few decisions of the Tribunal analysing these provisions. In *Stanway v City of Ringwood and Christian Brethren Family Care and Others*, Appeal No. P87/1919, an unreported determination of today's date, the following passage appeared:

"In passing we should state that it is our belief that the consideration of economic factors must be addressed objectively from a community perspective. Clearly Section 60 should be read in the context of Section 4, which sets out the objectives of planning in Victoria and the objectives of the planning framework, and which leaves little doubt that it is the community perspective or the community impact that is relevant. The direct competition between individual operators is not something with which the Tribunal should concern itself unless there are ramifications for the community at large. Similar views were expressed by the Tribunal in Vernia Pty. Ltd. and Others v City of South Melbourne, Appeal P87/2452, unreported determination dated 29.2.88, wherein it was said at page 4:

‘Having regard to the objectives of planning in Victoria set out in Section 4 of the Act, I have reached the conclusion that the intention of the Act is not to stifle competition. In other words it is not meant to operate in such a way as to prevent a business commencing in an area even if the effect of that commencement was to make another business of a similar nature unviable. I consider that I would have to find that the proposed use would have some effect on the broader community rather than on a mere competitor. In this appeal I was not able to conclude that the proposed use would have the effect of forcing the cessation of any of the other similar businesses. Even if I had been able to reach such a conclusion I do not believe there would have been any adverse effect on the broader community and that the only effect would have been on the competitor whose business ceased to operate.’”

- 8 Applying these principles to the subject case, we are of the opinion that the subject building being a multi-tenanted building containing various individual offices, is a ‘*relevant community*’ for the purposes of determining the significance of any economic effects. If the building was single-tenanted in a strip shopping centre then the strip shopping centre would most probably be the ‘*relevant community*’. In these circumstances, we have considered the likely community perception of the proposal. Whether the Office of Corrections likes it or not, it is our opinion that Mr. Waktins’ description of the business communities likely response to shared occupancy of the building with the Office of Corrections and its ‘*clients*’, the offenders, is correct.
9. Although the subject site is at the end of the ground floor hallway in clear view of the front door; that hallway, the front door, the front foyer, the entrance ramps, and the toilets will all be shared. There is a compatibility between an accountant’s office to the former bank to a travel agent to a convention services office. There is little similarity to the prime or principal purpose of the proposed Office of Corrections office. It may be that the offenders are on their best behaviour while within the subject premises but that is not the point. When assessing the economics of a business much depends upon confidence factors. The clients must feel comfortable with their professional consultant, they look to smart presentation as an indication of success and so competence. If the existing businesses have to ‘*sell*’ themselves to their clients to be economically viable, they do so partly by presentation at the front door, in the front hallway, at the front counter. There is little doubt that an offender attending the Office of Corrections will look different to the medical practitioner attending the premises to arrange his international convention travel. We may be dealing with perceptions, with the superficial side of business, with factors which some may describe as elitist, but the fact is such matters cannot be dismissed lightly – they go to the very heart of successful business practice, whether we like it or not.
10. It is not hard to imagine an offender having arrived early at the premises and, feeling nervous about seeing his supervisor, lighting up a cigarette to wait on the front ramps or in the hallway before going in to keep his appointment. We can then see a medical specialist arriving to make his arrangements for his New York conference or the local up-and-coming businessman arriving to discuss tax with his accountant and seeing the offender seemingly loitering, looking suspicious or ill at ease. Such first impressions could be fatal to the existing business occupants of the premises. We believe that the likely impact of the proposal on this ‘*relevant community*’ of businesses can only be considered to be significant and serious economically. Accordingly, we are satisfied that the Responsible Authority has made out its fourth ground of refusal.
11. As a word of advice to the Office of Corrections, this Tribunal is of the opinion that an essential criterion for the location of an office to be used as a Community-based Corrections Centre is that it must be separately accessed from the street front. There must be little or no interaction with other businesses or uses. Multi-tenanted buildings would seem to us to be totally unsuitable. In these days when the social and economic effects of a proposal can be considered, it is essential that the Office

of Corrections accepts that it will be a long time before the community at large shares the confidence the Office of Corrections staff have in their '*clients*'. The community's perceptions may be misguided but they nevertheless exist and cannot be lightly dismissed. No one disputes the public need for such Correction Centres, but they must be located so that they integrate rather than clash with the community at large.

12. In dealing with this appeal in this fashion, it follows that we have not accepted Mr. Morris' argument that the proposal is in fact merely an office for the Office of Corrections which is permissible in the subject zone. Although we understand the strength of Mr. Morris' description of the proposed services to be provided as being properly characterised as consulting, the seeking of advice, etc and that there would seem to be strong similarities to, say, persons (possible offenders) obtaining advice from their solicitors in a solicitor's office, we do not accept the argument. Properly characterised, the '*consulting*' is not without compulsion, the advice given relates back to Court orders, and the whole operation is prescribed by legislation. Although there are similarities, essentially this proposal cannot be characterised as an office per se. A permit was, and is, required.
13. Finally, we must state, on the basis of the ruling in *City of Springvale v Heda Nominees Pty. Ltd.* (1982) 1 PABR 287 at 290, we did not have regard to either of the further written submissions which were lodged with the Tribunal after the hearing.