

that taint deprives the Tribunal of jurisdiction to entertain a purported appeal arising out of the application or determination. If there is not a valid appeal on foot the Tribunal has no jurisdiction to exercise curative power (*Dunkley v Shire of Charlton*, supra). It is suggested, with respect, that this argument is not soundly based, and that the preferable analysis treats the Tribunal as having jurisdiction in any case where there has been a "decision", as the word is understood in common parlance, regardless of the validity of the decision (*Twist v Randwick Municipal Council* (1976) 12 ALR 379; *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*, (supra)).

**GEELONG REGIONAL COMMISSION  
CITY OF GEELONG  
YUNCKEN INDUSTRIES LIMITED**

**APPELLANT/OBJECTOR  
RESPONSIBLE AUTHORITY  
RESPONDENT/APPLICANT**

*Appeal Nos.* : P88/2191 and P88/2350  
*Date of Determination* : June 27, 1989  
*Tribunal Member* : R D Barton (Deputy President)

APPLICATION - AVAILABILITY OF APPLICATION - INSPECTION OF APPLICATION - VALIDITY OF APPLICATION - COMPLETENESS OF APPLICATION - REFERRAL OF APPLICATION TO MINISTER - IDENTITY OF OWNER OF LAND - DEFECTIVE APPLICATION - UNCERTAIN CONDITION - APPEAL AGAINST FAILURE - INCIDENTAL USE - PLANNING AND ENVIRONMENT ACT 1987 ss.48, 51, 79 AND 96 - ADMINISTRATIVE APPEALS TRIBUNAL ACT 1987 s.47 - PLANNING APPEALS ACT 1980 s.54

*This was an appeal by an objector against the grant of a permit and an appeal by an applicant against failure to grant a permit.*

**Held:**

1. *An application for a permit must not be piece-meal and must include all relevant material including that relating to uses which are incidental to the primary use proposed. Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council & Ors (1980) 145 CLR 485; 44 LGRA 346, followed.*
2. *Section 52 of the Planning and Environment Act 1987 requires that all documents which form part of an application must be available for inspection at all times.*
3. *Compliance with Section 51 of the Planning and Environment Act 1987 is mandatory. Scurr v Brisbane City Council (1973) 133 CLR 242, followed; Montreal Street Railway Company v Normandin [1917] AC 170, considered.*
4. *Where documents which form part of an application are not available for inspection at all times, any subsequent determination to grant a permit is invalid. Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council & Ors, supra, followed.*
5. *A condition of a planning permit must be certain and specific. Television Corporation Limited v The Commonwealth [1963] 109 CLR 59; City of Unley v Claude Neon Ltd 49 LGRA 65; Imecal (Vic) Pty Ltd v City of Heidelberg 2 PABR 247, followed.*
6. *A condition of a planning permit which is invalid is not severable from other conditions if it is a substantial and integral condition. Olsen v City of Camberwell (1926) VR 58, followed.*

**Obiter:**

- A. *Where certain documents which do not form part of an application but which have a capacity to mislead are made available for inspection, any subsequent determination to grant a permit is invalid.*
- B. *Non-compliance with Section 48(1) of the Planning and Environment Act 1987 may be cured by use of the powers under Section 54 of the Planning Appeals Act 1980.*

*Dunkley v Shire of Charlton 1 AATR 181, followed.*

*C. An appeal against failure does not lie where the relevant application is invalid.*

Appeal Site: 140-158 Malop Street, Geelong

Mr H McM Wright QC with Mrs J Bruce of Counsel, instructed by Ralph Lloyd and Co, Solicitors, appeared on behalf of the Geelong Regional Commission.

Mr J Winneke QC with Mr R Osborn of Counsel, instructed by Best Hooper, Solicitors, appeared on behalf of Yuncken Industries Limited.

Mr W Nelson, Solicitor of the firm of Harwood and Pincott, Geelong, appeared for the Responsible Authority.

### **Determination and Reasons for Determination**

This was the hearing of questions of law arising in these appeals referred to His Honour Judge Jones by Mr I Marsden pursuant to Section 47 of the *Administrative Appeals Tribunal Act*. On 21 March, 1989 His Honour directed that such questions should be considered by me.

The relevant portion of the reference is as follows:

#### **"1. Introduction**

*Pursuant to the provisions of Section 47 of the Administrative Appeals Tribunal Act I have to advise that, during the hearing of the above appeal, the parties raised a number of points of law which I am obliged to refer to you. A number of these arise from the introduction of the new Planning and Environment Act 1987 and little direct authority exists from the courts which might assist in their resolution.*

*The following memorandum summarises the factual situation, the legal submissions and questions of law which have been identified. The parties will, in all probability, wish to be heard by the Member appointed to decide the legal issues. I have given an undertaking that this memorandum will be forwarded to the parties forthwith. It should be noted that the hearing to date, which occupied two full days, was not tape recorded. All the written submissions and other documentation tabled by the parties during the course of the hearing has been placed on file.*

*There are two appeals before the Tribunal. Appeal No P88/2191 is by the Geelong Regional Commission against a notice of decision by the Responsible Authority to grant a permit. Appeal No P88/2350 is lodged by Yuncken Industries Ltd against failure to determine.*

#### **2. Appearances**

*Mr W Nelson, Solicitor of Harwood and Pincott, represented the Responsible Authority. Mr H McM Wright QC with Mrs J Bruce of Counsel represented the Geelong Regional Commission.*

*Mr J Winneke QC with Mr R Osborn of Counsel represented the Applicant company.*

#### **3. The Application, Site and History**

*The application concerns a proposal for the 'construction of the buildings and works depicted on the accompanying plans for use for the purpose of keeping, exposing and offering of goods for sale by retailing including a 'market format'.*

*The site identified by the title particulars which accompanied the 'Application for Planning Permit' (exhibit No GRC2) is situated in Malop Street, Geelong and is occupied by a disused supermarket and associated car parking. To the south is a parcel of land situated in Little Malop Street. The land is owned by the Geelong Council. On 30 March, 1981, the Geelong Regional Commission and the City of Geelong entered into an agreement, the general purport of which is that the Little Malop Street land will be developed by the City of Geelong for the purposes of a multi-storey car park.*

*I turn first to the evidence which assists in identifying the precise nature of the land which the Applicant company proposes to develop.*

*Evidence was given by Mr Rodney Dawson, an Architect in the employ of Norman Day Pty Ltd, that the application form (exhibit No GRC2) was signed by Mr Paul Yuncken, the Managing Director of Yuncken Industries Ltd, on 12 August, 1988 and lodged by Mr Dawson personally at the offices of the City of Geelong on either*

18 or 19 August. According to Mr Dawson's evidence the documentation comprised:

- (a) the application for planning permit;
- (b) three copies of a report prepared by various consultants (the consultant's report) (exhibit No GRC1);
- (c) three copies of a series of drawings numbered 532/1, 532/2, 532/3 and 532/4 (exhibit No CG2(a) to (d));
- (d) Face sheet of copies of Certificates of Title:
  - Volume 4871 Folio 182
  - Volume 5092 Folio 838
  - Volume 5717 Folio 378
  - Volume 1905 Folio 847
  - Volume 9415 Folio 802

A copy of this material is to be found in Appendix 2 of the supporting documentation supplied by the Responsible Authority.

Mr Dawson further stated that the proposal had been the subject of ongoing discussions with Council officers for several months. Drawing No 532 (exhibit No GC1) had been lodged with the Council in 'early August' and did not form part of the plans accompanying the application. Drawing 532 shows the land in Little Malop Street to be used as a car park and a 'pedestrian covered link' connecting the car park to the proposed shopping complex.

I interpolate that the consultant's report makes a number of references to the provision of car parking (see for example pp 4, 5, 20, 21 and 22) and to a covered walkway to link that car park with the proposed development (pp 12 and 15). Read in isolation, or in association with drawing No 532, it is open to the interpretation that the Little Malop Street land comprised part of the appeal site.

Mr R J Davis, a Town Planner in the employee of the City of Geelong, gave evidence. He stated that while 'he had no personal recollection of the application being lodged' the normal course would be that the application would be passed on to him via a receptionist. The customary procedure was to record the application in the Council Register and place the documentation on file. It was also customary to place a date stamp on the application form. This had not been done in the present case, apparently 'an oversight'.

Mr D P Matthews, Director of Special Projects, Geelong Regional Commission gave evidence and tabled a 'File Record' of a visit he made to the Geelong Council offices on 26 August, 1988 with the purpose of seeking information regarding the application. He was told by the receptionist that it was not normal to make the file available and he was handed:

- Drawing No 532
- Drawing No 532/1 (or something akin to it without the diagonals)
- Drawing No 532/2
- Drawing No 532/3
- Drawing No 532/4

Mr Matthews stated that he was not shown the application form nor the consultant's report.

In cross-examination, Mr Matthews denied that he had asked 'just for the plans'. He was unable to recall the precise wording of his request. His visit was made at about 1.30 pm just after lunch. The receptionist was courteous but appeared to be a bit 'disorganised'. He left intending to return at a later date.

Ms Sue Weatherley, Town Planner, employed by the Geelong Regional Commission, gave evidence and tabled 'File Notes' of two visits which she made to the Geelong Council offices.

On 22 September, 1988 she asked to see the permit application and was given:

- the permit application;
- drawing Nos 532 (1) to (4);
- the consultant's report.

Drawing No 532 was not among the documents handed to Ms Weatherley.

On 28 September, 1988 Ms Weatherley again visited the Council offices and requested to see the permit application. She was handed 'a pile of plans and letters'. In addition to the material handed to her on the earlier visit, the documentation contained:

- objections from the Geelong Regional Commission and Scott Barry Pty Ltd;
- a letter to the City Engineer dated 5 August, 1988 from Norman Day Pty Ltd proposing three options for car parking, namely:
  - (i) basement park with entry/exit from Malop Street;
  - (ii) roof top parking;
  - (iii) location of the car parking on the Little Malop Street land (the preferred option);
- draft Council statement of 26 July, 1988;
- drawing Nos 532/12 and 532/13;
- letter from Norman Day Pty Ltd dated 18 July, 1988 proposing a roof top car park.

The consultant's report did not form part of the documentation handed to Ms Weatherley on this particular occasion.

In cross-examination both Mr Williams and Mr Matthews conceded that at no stage had they sought to speak to Mr Davis or his deputy to clarify precisely what documents comprised the application.

I should say at this point that I accept without reservation the evidence above described, all of which is readily reconcilable. I am satisfied that the Applicant company regarded the documentation which accompanied the application as being that delivered by Mr Dawson on 18 or 19 August. I am also satisfied that, when various persons visited the Council offices seeking information regarding the application, they were handed various file material lodged either prior to or after the application. I am satisfied that, on each of the visits by Ms Weatherley, she was not given all the documentation lodged by Mr Dawson. She was also given background material which did not comprise part of the actual application. None of these matters, it should be said, are the fault of the Applicant company.

It is also apparent that other persons interested in the application were, on attendance at the Council offices, given material which did not form part of the actual application. This finding is supported by the fact that two other Objectors unconnected with the Geelong Regional Commission lodged objections based on the premise that the land in Little Malop Street formed part of the appeal site. It is reasonable to deduce from this that drawing No 532 formed part of the material which the Council staff made available to persons who asked to see the application and accompanying material.

However, it is to be noted that, in cross-examination, Mr Matthews was asked:

- (a) does he suggest all information was not made available to the Geelong Regional Commission?
- (b) does he suggest the Geelong Regional Commission was prejudiced (by the nature of the documentation shown to its representatives) in contesting this appeal?

Mr Matthews answered 'no' to both questions.

Mr Wright contended that Section 51 of the Planning and Environment Act imposed an obligation on the Responsible Authority to make the application and associated material available to the public 'every second of every minute during working hours'. Mr Winneke contended that it was 'drawing a long bow' to contend that Section 51 cast a burden on the Responsible Authority to make every application document available at all times and that failure to comply with Section 51 does not go to jurisdiction of the appeal process. A failure to comply with Section 51 would not render either the application or the subsequent notice of decision a nullity. In any event Section 51 must be construed reasonably. Provided that a person has made available to him/her the relevant documents at some time during the relevant period, compliance with Section 51 is achieved.

I turn now to the identity of the appeal site. In the words of Mr Wright:

- “2.1 The analysis of the application for permit depends upon whether, properly construed, it includes the land to be used for car parking i.e. the Council owned land to the south of Little Malop Street opposite the proposed market, and the proposed pedestrian bridge over Little Malop Street, which is unalienated crown land, or whether it excludes these elements.
- 2.2 The former construction follows from the text of the accompanying Submission, which makes it clear that the car parking to service the development will be provided on the Council owned land (pp. 4, 5, 20, 21 and 22), with a pedestrian bridge over Little Malop Street to the market (pp. 12 and 15).
- 2.3 However, only the latter construction is consistent with the description of the land in the Application Form, and the accompanying plans as contained in the Submission (Plans Nos 532/1, 532/2, 532/3 and 532/4). There is no mention in these documents of the land to the south of Little Malop Street, or to be occupied by the aerial bridge.”

Mr Wright first contended that, if the application on its proper construction includes the Little Malop Street land and the pedestrian link over it, then it is clearly prohibited by the operation of Clause 25 of the Geelong Regional Planning Scheme. In this regard, Mr Wright relied on the decision of the Supreme Court in *Walker v Shire of Flinders* (1984) VR 409. However, in the light of Mr Nelson's later submission that Clause 30 of the Planning Scheme operated to provide a discretion for the payment of a cash-in-lieu contribution, Mr Wright did not proceed with that submission.

Mr Wright further argued that, on the same construction of the application, it is invalid because it should have been made to the Minister pursuant to the provisions of Section 96(2) of the Planning and Environment Act, the Little Malop Street land being in the ownership of the Council and the airspace over Little Malop Street being under the control of the Department of Conservation, Forests and Lands.

In the alternative, Mr Wright submitted that, if the proper construction of the application served to exclude those two components, then it is invalid because it excludes land upon which an ancillary, but nonetheless essential part of the proposed use and development would be carried on. Mr Wright referred me to a decision of the High Court of Australia in *Pioneer Concrete Pty Ltd v Brisbane City Council* (1980) 44 LGRA 346 and he stated:

“The ratio of the decision is that an application for land use permission must include all land sought to be used for the particular purpose, including both land to be used for the dominant purpose and land to be used for ancillary purposes. The application must be made in respect of the ‘entirety’ of the use. Permission cannot be sought piece meal by means of a series of applications.”

In particular, Mr Wright relied on the majority judgment delivered by Stephen J which commences at page 357.

Mr Winneke submitted that the application documentation had at all times comprised:

- (a) the application form;
- (b) drawing Nos 532/1 to 532/4;
- (c) the consultant's report;
- (d) face sheets of the copy Certificates of Title.

The fact that Mr Matthews (and others) were shown drawing No 532 did not, in Mr Winneke's submission, alter the nature of the application. It was simply an unfortunate error on the Council's part. The information on the application form and the copy Certificates of Title made it plain that the land the subject of the application did not include the Little Malop Street site. Drawing No 532 and the references in the consultant's report were no more than suggestions by the Applicant for the purpose of fulfilling car parking requirements or, in the alternative, that a cash-in-lieu payment can be provided. It would have been remiss of the Applicant not to deal with this question.

Mr Winneke argued that the Pioneer Concrete case was clearly distinguishable on its facts. For one thing, ‘use’ in the relevant planning scheme was defined (see p

358) in a particular way. For another, the quarry owner had to carry his goods over private land in order to market them. The quarry use could not be perfected without its construction of a road. This should be contrasted with the present circumstances where a shopkeeper did not need a permit to use public car parks or public roads. The Little Malop Street car park will not be the exclusive domain of the developers and it will be a public car park serving the general public interest.

To sum up the material to date, I suggest that the following questions of law can be identified:

- 1 Does the application on its proper construction include the Little Malop Street land and the pedestrian link?
- 2 If the answer to (1) is No – should the application have included the Little Malop Street site in accordance with the findings of the majority in the Pioneer Concrete case?
- 3 Does the failure to include the Little Malop Street site invalidate the application?
- 4 Should the application thus have been made to the Minister pursuant to the provisions of Section 95 of the Planning and Environment Act?
  - (a) Does Section 51 of the Planning and Environment Act require the Council to make available to the public for inspection only those documents which form part of the application and no other?
  - (b) Is the application invalidated because certain documents which comprised part of the application were not available to the public at all times during the period of notice?
  - (c) Does the fact that certain documents which did not form part of the application were made available to the public and the inclusion of these had the capacity to mislead the public as to the nature of the application invalidate the application?

#### 4. The Identity Of The Applicant

Section 48(1) of the Planning and Environment Act provides:

‘48(1) If the applicant is not the owner of the land for which the permit is needed, an application must –

- (a) be signed by the owner of the land; or
- (b) include a declaration by the applicant that the applicant has notified the owner about the application.’

The application form discloses the name of the Applicant as Yuncken Industries Ltd and the signature of the Managing Director of that company, Mr Paul Yuncken, certifies that company as the owner of the land.

Mr Wright submitted that searches at the Titles Office disclosed that the registered proprietor or legal owner of the land was a company known as Deci Pty Ltd. Copies of the relevant Certificates of Title were submitted by Mr Wright (exhibit No GRC7). The application did not include a declaration that Deci Pty Ltd had been notified of the application. That requirement, Mr Wright submitted, was mandatory. A Division of the Tribunal had so held in a recent appeal, P88/2571. I understand that no written determination has issued in respect of that appeal.

Mr Yuncken gave evidence. This evidence was complex and Mr Yuncken’s recall of the chronology of the events which took place was somewhat hazy. Attached are two contracts of sale between Extan Pty Ltd as vendor and Yuncken Industries Ltd as purchaser (exhibit Nos A1 and A2). Extan was, at that time, a joint venturer with Yuncken Ltd in respect of the subject land. The first contract was not executed. The second was apparently signed by the parties on 21 July, 1988. Deci Pty Ltd is a company formed to run a joint venture in respect of the proposed development. Yuncken Industries had paid a deposit at the time the application was lodged. A contract of sale between Extan and Deci was settled in mid-November. A verbal agreement existed allowing Yuncken Industries to do what they wished on the site. Yuncken Industries had replaced broken windows after the contract was signed, and commenced planning the subject development. The principals of Extan and Deci

had at all times knowledge of the application and had participated in a number of discussions concerning the site.

Mr E C Sent gave evidence. He is a member of the Board of Management of Deci Pty Ltd. There is a joint venture arrangement between the two companies which came into being on 29 August, 1989. Deci is funding the present appeal proceedings. Deci was at all times aware of the application and the appeal.

In respect of these matters, Mr Wright submitted that the Applicant was not the owner of the land at the time the application was lodged. Section 48(1) imposed a mandatory requirement that had not been met. The application was therefore invalid. Mr Winneke submitted it was clear that Yuncken Industries was the person operating the site when the application was made, that it had an obligation to carry out repairs and that it qualified as the person able to receive the rent. In any event, it was clear beyond doubt that, at the time the application was lodged, Deci knew and approved of it.

Mr Winneke drew the Tribunal's attention to *Dunkley v Shire of Charlton* (1988) 1 AATR 180 at 188 in which Phillips J held in respect of Section 18B of the Town and Country Planning Act that Section 54 of the Planning Appeals Act was available to amend the form and content of an application so as not to deprive the Tribunal of jurisdiction, and he relied on that decision.

I should state that I am satisfied that nobody has been misled in this matter by the appearance of Yuncken Industries as 'owner' in the relevant documentation. If a discretion under Section 54 is available to me in this matter I would exercise it in favour of the Applicant company.

The question of law is therefore:

- What is the legal effect of the inclusion of the company Yuncken Industries Ltd as the owner of the land in the circumstances above described? Is the application a nullity or are the powers under Section 54 of the Planning Appeals Act available to remedy this defect?
5. **Is The Determination Invalid?**

Condition 9 of the notice of decision reads as follows:

9. Car parking requirements for the development shall, in accordance with Clause 30(2) of the Planning Scheme Ordinance, be met by way of a payment in lieu of the provision of spaces. The permit hereby authorised shall have no force or effect until an agreement is entered into between the applicant and the Responsible Authority, pursuant to Section 173 of the Planning and Environment Act 1987 providing for payment not later than the commencement of the development to the Responsible Authority of the sum as required by the City of Geelong in lieu of the provision of car parking spaces.'

Mr Wright submitted that the determination to grant a permit is invalid because it fails to specify the permit holder's obligations in respect to the provision of car parking with any particularity or, indeed at all. Specifically, Condition 9 does not specify how car parking is to be provided, no plan exists which specifies where or how many spaces are to be provided, or any form of layout or means of access or egress. Mr Wright further submitted that Condition 9 was an integral part of the decision and was not severable. The authorities which Mr Wright relied upon to support this proposal are to be found at para 7.3 of his written submission. Mr Wright further relied on an unreported decision of the Supreme Court of Victoria in *Ezywalkin v City of Camberwell* (Fullager J, 15 December, 1977, copy attached) which concerned an appeal regarding Section 798D of the Local Government Act and a payment-in-lieu condition. In consequence of these decisions, Mr Wright submitted that the Tribunal had no jurisdiction to entertain the present proceedings.

Mr Nelson conceded that the condition might have been drafted with greater precision. However, Section 184 of the Planning and Environment Act enables an owner of land to apply to this Tribunal for an amendment to a proposed agreement under Section 173 and, in any event, as a hearing before the Tribunal is a hearing de

novo, the Tribunal was entitled to impose a more precisely drafted condition or an alternative condition as the Tribunal considers appropriate.

Mr Winneke adopted Mr Nelson's submissions and further contended that Clause 30 of the Planning Scheme and Section 62(2)(f) of the Planning and Environment Act both provided a specific power for the Responsible Authority to do what it indeed had done. Sections 173 and 174 of the Planning and Environment Act are cast in wide terms. In *Weigall Constructions v MMBW* (1972) VR 781, Pape J had warned of the dangers of imposing overly inflexible conditions. The cases cited by Mr Wright did not support the proposition for which he contended and failed to distinguish between 'the validity of a permit' and 'the validity of a determination'. Such a distinction is obvious and can be seen by reference to *Arleon Holdings v MMBW* (noted at 4 PABR 6). In any event, any authority which precedes the introduction of Section 62 of the Planning and Environment Act would have to be carefully examined. Section 85(1)(b) of the Planning and Environment Act makes it clear that the Tribunal can consider the efficacy of permit conditions.

As to the *Ezywalkin* case, Mr Winneke submitted that it was clearly distinguishable on its facts and was a civil action brought to establish whether the appellant was or was not bound by a payment-in-lieu condition. It was not authority for the proposition contended for by Mr Wright that a determination made in the circumstances of this appeal was a nullity. Clause 30 of the Geelong Regional Planning Scheme operates in a different way from Section 798D of the Local Government Act.

The question of law is therefore:

- Is the determination invalid by reason of the inclusion of an uncertain condition (namely Condition 9) or does the Tribunal have power in a hearing on the merits to replace or amend the condition?

#### **6. The Effect Of The Appeal Against Failure (Appeal No P88/2350)**

Mr Wright contended that an appeal against failure cannot lie in the present circumstances but only in cases where the responsible authority simply does nothing in the prescribed period. It does not lie in cases where a responsible authority purports to do something which is later found to be invalid. In this case, the Responsible Authority had made a purported decision from which consequences flow.

Mr Nelson contended that Section 79 must be construed within the light of its context within Section 77-81 and, if the Responsible Authority failed to grant a valid permit within the prescribed time, Section 79 was available. Its clear intention was for an applicant to have his application dealt with by the Tribunal.

Mr Winneke contended that there is no justification for interpreting Section 79 so that it does not extend to a failure following a 'purported determination' as distinct from a 'failure to do anything'. Failure is equally detrimental to an applicant whether it be through acts of commission or omission. A responsible authority, by deliberately taking actions which would invalidate the grant of a permit, could prevent that applicant from appealing.

The question of law is:

- Does an appeal against 'failure' lie in the circumstances described in this memorandum?

#### **7. Conclusions**

It is to be noted that Mr Wright tabled a further submission, a copy of which is annexed, inviting me to make findings of fact in respect of 18 specified propositions. I have, on balance, decided against that approach. Some of the propositions, it seems to me, contain questions of mixed fact and law. In any event, I have set down the relevant factual situation as it appears to me on the evidence presented.

I recommend that this memorandum be forwarded to the parties and the matter be set down for further hearing according to law."

On the hearing before me appearances were as they had been on the hearing before Mr Marsden.

I turn to the various questions:



**1. Does the application on its proper construction include the Little Malop Street land and the pedestrian link?**

This is a question of fact. It was agreed at the hearing that the application on its proper construction does not include the Little Malop Street land and the pedestrian link.

**2. If the answer to (1) is no – should the application have included the Little Malop Street site in accordance with the findings of the majority in the Pioneer Concrete case?**

The decision of the High Court in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council and Others* (1980) 145 CLR 485 and 44 LGRA 346, is summed up in the head note in 44 LGRA:

*“The appellant company applied to the respondent planning authority for its consent to the use of part of a piece of land as a quarry. The appellant company proposed to construct an access road on part of an adjoining piece of land, but did not include that in its application or in the advertising of the application. Neither the application nor the advertising of the application gave any indication of a buffer area between the quarry and the boundaries of the land included in the application.*

**Held: (Gibbs and Aickin JJ dissenting)**

- (1) *When the use is a single use no piecemeal series of applications is permissible.*
- (2) *The use must be stated in appropriate detail in one application, and all the land involved must be the subject of that application.*
- (3) *The appellant company ought to have applied, in the one application, for consent not only to extract and process quarry products but also to construct and use the access road along which those products were to be carried from the processing site to a public highway.*
- (4) *Accordingly, the area of land the subject of the application should have included the route of that access road.*
- (5) *In any such scheme for the control of land use the two critical integers, land and use, each involves a question of definition, namely which land and which use?*
- (6) *It will be the integer of use that will dictate the precise identity and extent of the other integer, the land the subject of the application.*
- (7) *Land devoted only to incidental and necessarily associated uses will be as much land to which the application relates or applies as will be the land which is to be devoted to the principal use.*
- (8) *Use of land in any active sense requires that there be access to the land.*
- (9) *The failure of the applicant to specify the whole of the land to which the application related deprived the Local Government Court of jurisdiction.*
- (10) *The fact that the context of an application is that of town planning will enter into the consideration of the appropriateness of any description of the proposed use.*
- (11) *Uses which are likely to affect local amenity because, for example, of special characteristics involving noise, smell, the attraction of crowds or of heavy traffic, must be so described as to reveal those qualities.*
- (13) *Application may quite properly be made in respect of part of an allotment so long as the intended use is truly to be restricted to that part.”*

In the judgment of Stephen J the following passages appear:

(- at page 357 in 44 LGRA)

*“Underlying the rival contentions argued on this appeal is a question of quite general importance in the field of town planning: it is whether an applicant for consent to use land for a particular purpose may make application piecemeal, or must he, on the contrary, apply at the outset for the entirety of the use in question and, consequently, in respect of the whole of the land devoted to that use.*

*The terms in which I have posed this question, my reference to ‘the entirety of the use’ and to ‘the land devoted to that use’, necessarily lack precision. It will be from*

the resolution of some at least of that imprecision that an answer to the question will emerge. I may, at this stage, foreshadow the answer to which I have come: it is that where, as here, the use proposed is a single use, no piecemeal series of applications is permissible, at least under the City of Brisbane's town planning measures; instead, that use must be stated in appropriate detail in one application and all the land involved in the use must be the subject of the application. When applied to the facts of the present appeal this means that the applicant ought to have applied, in the one application, for consent not only to extract and process quarry products but also to construct and use the access road along which those products were to be carried from the processing site to a public highway. It follows that the area of land the subject of the application should have included the route of that access road."

(- at pages 357-358)

"In any such scheme for the control of land use the two critical integers, land and use, each involves a question of definition, what land and what use? The intending user of land will, in his application for consent, have to specify these two integers but it will be one of them, the integer of use, that will dictate the precise identity and extent of the other integer, the land the subject of the application. This is a necessary consequence of the fact that the consent being sought is consent to use for a particular purpose. The land is merely the passive object which is being used; the active integer, use, will determine its extent."

(- at pages 358-359)

"But where, as here, the proposed access is not to be by means of the subject land's own road frontage, but is to be gained by a quite different route, to be constructed over land adjoining the applicant's land, there immediately arises the question of the true extent of the subject land which is to be devoted to the proposed use, what the present legislation calls 'the land to which the application relates or applies.' Of some significance in this whole question is the particular meaning to be given to the integer, 'use'. In Brisbane's system of town planning its meaning is elucidated by definition. Section 3 of the City of Brisbane Town Planning Act 1964-1976 defines 'use' as follows:

*Use-*

*In relation to land, includes the carrying out of excavation work on or under land and the placing on land of any material or thing which is not a building or other structure.*

*The term includes any use which is incidental to and necessarily associated with the lawful use of the land in question;.*

The town plan for the City of Brisbane contains an identical definition and the ordinances also incorporate this definition.

As will appear below, I do not regard this definition as in any way requiring that an applicant for consent should include in his application a description of all incidental and associated uses involved in devoting the land to the proposed use. What it does do, however, is to make it clear that, just as permission granted for a particular use will extend to permit of all incidental and necessarily associated uses, so too land devoted only to the latter will be as much land to which the application relates or applies as will be the land which is to be devoted to the principal use. Even without the aid of this definition I should have thought that the applicant's proposed use must have been regarded as necessarily extending to more than the extraction and processing of quarry products; it included the construction and use of an access road. The land the subject of the use accordingly included the route of that access road. Were there any room for doubt as to this, the extended meaning of 'use' given by the later portion of the definition removes it. The intimate connexion between the use of land and access to it requires little elaboration. Use of land in any active sense, as distinct from such passive use as was considered in *Newcastle City Council v Royal Newcastle Hospital (1957) 4 LGRA 69* requires that there be access to

the land. Especially is this so in the case of a commercial or industrial use, where access for the free flow of raw materials, of finished goods and, perhaps, of customers will be essential. Since in this case access to and from the public highway is only to be gained by the traversing of other land in private ownership lying between the site and the public highway, this use of that other land appears to me to be an integral part of the use to which the site itself is to be put."

(- at page 360)

"Such piecemeal applications are likely to place planning authorities or review tribunals in somewhat of a dilemma. The first application may well require assessment of the entire proposal if it is properly to be disposed of; yet the second application will still remain to be dealt with on its merits as an independent matter. When it comes to be heard there will be strongly felt pressures to avoid what might seem to be conflicting outcomes if, the first application having been granted, the second were to be refused. Any detailed examination in the first application, whether by the tribunal or by objectors, of matters which will have to be dealt with in the second is likely to be met with the objection that they are more proper for consideration when the second application is heard; but when that second application is heard it is likely to be much dominated by the outcome of the first."

(- and at page 362)

"If the definition of 'use' plays no part in prescribing how an intended use is to be described, words of Kitto J, albeit in a somewhat different planning context, do, I think, assist in arriving at the correct view of the requirement that the proposed use of land be described in an application for consent. In *Shire of Perth v O'Keefe* (1964) 10 LGRA 147, his Honour, speaking of the lawful continuation of nonconforming prior uses, denied that there was involved any 'meticulous examination of the details' of activities or any precise cataloguing of them but, rather, an inquiry as to what 'according to ordinary terminology, is the appropriate designation of the purpose, being served by the use of the premises at the material date'. His Honour called in aid the criterion of that which would appeal 'to practical minds as appropriate in the application of town-planning legislation'. A like approach should be adopted in the case of applications for consent; if this be done it becomes clear that not every subsidiary use need be described, although it will still be necessary to ensure that all land to which the application 'relates or applies', whether devoted to the main use or only to a subsidiary use, is included in the application."

This is not an easy decision to apply. Its own facts were stark. At first I was impressed by the argument of Mr Winneke QC that it is not necessary under Section 30 of the Geelong Regional Planning Scheme to supply car parking rather than cash-in-lieu. He distinguished the facts in the *Pioneer* case on the basis that in that case the road link was necessary whereas in the present case it is not. Customers may come on foot, but public transport or motor vehicle which they may choose to park in the street or elsewhere rather than in the Council car park, which will in any event be open to the public at large and not only customers of the development. However, subsequent reflection has convinced me that I am in error in this. At page 15 of the consultant's report the following passage appears:

"The proposal also incorporates a partially glazed pedestrian link across Little Malop Street connecting the pedestrian exit from the carpark to the proposed entrance of the complex. This will assist in improving the local micro-climate and linking covered accessways on both sides of Little Malop Street. It is proposed to be located about 6m above street level to enable passage of articulated vehicles making deliveries. In addition, a pedestrian priority area in the form of pavement widening, lighting and landscaping is proposed for this section of Little Malop Street."

There is no suggestion of this on the plans lodged as part of the application. A person inspecting the file would have been left to guess the point at which it was proposed to place the pedestrian bridge. In my opinion, land devoted to the incidental use of providing access to the site is as much land to which the application relates or applies as is the

land which will be devoted to retailing. It is not to the point that the pedestrian bridge is only one of a number of ways in which access may be gained to the retailing area. Nor, in my opinion, does the fact that the definition of 'use' contained in Section 3 of the *Planning and Environment Act 1987* is in different terms to that contained in Section 3 of the *City of Brisbane Town Planning Act 1964-76* have any effect on the reasoning to be applied to the matter.

**3. Does the failure to include the Little Malop Street site invalidate the application?**

In my opinion it does. I think Mr Winneke's argument is valid in relation to the public car park but not in relation to the pedestrian bridge.

**4. Should the application thus have been made to the Minister pursuant to the provisions of Section 96 of the Planning and Environment Act?**

No. The application as constituted should not have been referred to the Minister. The application, as it should have been constituted, would have required referral under Section 96(2) which provides:

*"(2) A person other than the responsible authority must obtain the consent of the responsible authority and a permit from the Minister before carrying out any use or development on any land owned or controlled by the responsible authority for which a permit is required under the planning scheme for which it is the responsible authority."*

As the pedestrian bridge was to connect the public car park with the development, it required a consent of the Responsible Authority and a permit from the Minister for Planning and Environment.

**5 (a) Does Section 51 of the Planning and Environment Act require the Council to make available to the public for inspection only those documents which form part of the application and no other?**

Section 51 provides:

*"51. The responsible authority must make a copy of every application and the prescribed information supplied in respect of it available at its office for any person to inspect during office hours free of charge until the end of the period during which an appeal may be lodged against a decision on the application."*

There is no doubt that Section 51 was not complied with in the present case. It is not to the point, as Mr Winneke QC argued, that the Geelong Regional Commission well knew the nature of the application which comprised the application form, four plans and the consultant's report. Others may not have done so. That they did not do so seems to be amply borne out in the cases of *Scott Barry Pty Ltd* and, particularly, in the case of *Capital Building Society*. Their objections bear all the marks of a study of Plan 532 which includes car parking on the other site, not part of the application. Mr Winneke QC argued that on the evidence, all potential Objectors had been shown the correct material, although sometimes more material than was comprised in the application. This does not seem to be so in the case of Ms Weatherley who on her visit on 28 September, 1988 was not shown the consultant's report, or in the case of Mr Matthews who on his visit on 26 August, 1988 was also not shown that report. He was, however, shown Drawing No 532.

Assuming that potential Objectors were shown more material than was required by the section, the test I regard as appropriate is that proposed by Mr Wright QC, namely:

*"Did the produced material in response to a request to inspect accurately describe the application or did the material produced have a real tendency to mislead as to what was being applied for?"*

In my opinion, the production of Plan 532 inevitably had a tendency to mislead when produced with the mass of other material.

I do not think that there is any ambiguity about the meaning of Section 51. What is to be made available is 'a copy of the application and the prescribed information'. If nothing or less is made available, the section is not complied with. Nor is it complied with if the person making the request to inspect is shown part of the information on one occasion and a different part on another occasion, both making up the whole of the information. And the person making the application is entitled to make it 'during

office hours' at any time between the lodging of the application and the expiration of the time for appeal. It is not to the point that a harassed receptionist has other duties which cause her not to comply with Section 51. It is the duty of the Responsible Authority to comply. In order to do this, it may have to make other arrangements from those which seem to have prevailed in the present case.

I have given thought to the matter whether Section 51 is mandatory in the light of the following passage from *Montreal Street Railway Company v Normandin* [1917] AC 170 at page 175. The Privy Council there dealt with the matter in the following words:

*"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the aim and object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."*

The main object of the Legislature is to be gained from a study of the provision in question. In the present case the section is one of a number of sections dealing with applications culminating in Section 61 which deals with 'decision on application'. In *Scurr v Brisbane City Council* (1973) 133 CLR 242, Stephen J said of Section 22 of the *City of Brisbane Town Planning Act 1964-1969* (Q), at pages 251-52:

*"This section secures the attainment of two important goals. It provides the Council with the views of those who oppose an application; written grounds of objection will be before it, supported by relevant facts and circumstances, and it will thus be relieved of the special burdens associated with decision-making when only one side of the argument is known. It also provides objectors with an opportunity both to make their views known and, if their objections are unavailing, then to appeal to the Local Government Court against the proposed decision of the Council."*

In the light of its place in the Act and the comments of Stephen J, I regard Section 51 as of great importance in the decision-making process of the Responsible Authority. In my opinion, the Legislature intended compliance with it to be mandatory. From the statement of facts, I regard it as beyond doubt that it was not complied with in the present case. There was nothing sinister in this. However, in my view, the effect of it was to produce the likelihood that the Responsible Authority, in considering the present application, excluded a source of input to its deliberations, which input the Legislature intended it to have. Accordingly, in my opinion, the determination to grant is a nullity.

5. (b) *Is the application invalidated because certain documents which comprised part of the application were not available to the public at all times during the period of notice?*

In my opinion, the application is not invalidated but the subsequent determination to grant will be.

5. (c) *Does the fact that certain documents which did not form part of the application were made available to the public and the inclusion of these had the capacity to mislead the public as to the nature of the application invalidate the application?*

In my opinion, it does not invalidate the application although it will invalidate a subsequent determination to grant.

#### ***The Identity of the Applicant***

The provisions of Section 48(1) of the *Planning and Environment Act* have already been set out. The section is, on its face, a mandatory requirement. The word 'owner' in ordinary use may include owner at law or owner in equity. However, under the *Planning and Environment Act* there is no room for doubt. Section 3 provides:

*"'Owner' in relation to land, means the person for the time being entitled to receive the rent of the land in connection with which the word is used or who would be entitled to receive the rent, if the land were let at a rent."*

In the light of this definition, there is no doubt that the Applicant Yuncken Industries

Limited was not the owner of the land comprised in the application at the date of the application. Nor did it furnish a declaration as required by Section 58(1)(b). It was thus in breach of a mandatory section. The reasons for making the section mandatory are not difficult to ascertain. The whole planning process goes awry if one man can apply in respect of another man's land without notifying the other man. However, in making the section mandatory, the draftsman seems to have overlooked obvious cases. Take for example a proposal to build a pedestrian access over a right of way laid out on a plan of subdivision in the 1860s. The owner will have been dead for a great number of years. He may have left no estate, or if he left an estate, the executors may be untraceable.

In the light of the mandatory nature of Section 48(1) the application is invalid. The real question is whether such invalidity can be cured by resort to Section 54 of the *Planning Appeals Act*. That section provides:

*54(1) Where in any proceedings before the Tribunal it is submitted that there has been a failure to comply with this Act or the Regulations or with any other Act or any Regulations made under any other Act in relation to -*

- (a) the form or content of an application for a permit or licence;*
- (b) a permit or licence;*
- (c) a notice given under section 18B or section 18BA of the Town and Country Planning Act 1961;*
- (d) a statement of objections to the grant of a permit or licence;*
- (e) a statement of the grounds of an appeal; or*
- (f) any other document -*  
*the Tribunal hearing the appeal may, if it appears to it just to do so, and with the approval of the President, determine to disregard that failure (if any) and any such failure so disregarded shall not render the application, permit, licence, notice, statement or document void but the application, permit, licence, notice, statement or document may be amended or otherwise dealt with in such manner and upon such terms as to costs or otherwise as the division, with the approval of the President, thinks just in the circumstances."*

Mr Wright QC contended that Section 54 was not available to cure invalidity. He stressed that an invalid application should not be processed by the Responsible Authority or by the Tribunal. It should accordingly not ever reach the stage of a Section 54 application. Unconstrained by higher authority, I would agree with this. However, in *Dunkley v Shire of Charlton* 1 AATR 181, His Honour Mr Justice Phillips clearly took the view at page 188 that Section 54 was available in the case of invalidity. The matter is summed up in the head note at page 182 as follows:

*If the Hill application and appeal were technically defective because the applicant and appellant was not a legal person the Tribunal did not thereby lose jurisdiction and the Planning Appeals Act, Sections 51, 53 and 54 empowered any necessary amendment.*

This should be contrasted with the *Donchi* appeal where, in relation to an objector's appeal against a determination to grant, His Honour held that a failure by the responsible authority to comply with Section 18B of the *Town and Country Planning Act 1961* in relation to advertising resulted in the invalidity of the determination to grant and deprived the Tribunal of jurisdiction to resort to Section 53.

I accordingly answer this question that the application is at present a nullity by reason of its failure to comply with Section 48(1) of the *Planning and Environment Act*, but that such defect may be cured by the use of the powers under section 54 of the *Planning Appeals Act*.

*Is The Determination Invalid By Reason Of The Inclusion Of Condition 9?*

Condition 9 which deals with car parking has already been set out. As Mr Marsden pointed out, it fails to specify the permit holder's obligations in respect to the provisions of car parking with any particularity or, indeed, at all. It merely provides that car parking requirements for the development shall be met by way of a payment-in-lieu of the provision

of spaces. How many spaces this applies to is not stated.

In *Television Corporation Limited v The Commonwealth* 109 CLR 59 at page 70, His Honour Mr Justice Kitto said in relation to the *Broadcasting and Television Act 1942-1960*:

*"In this context it seems to me a necessary conclusion that what the Act means by a 'condition' is a specification of acts to be done or abstained from the licensee company - a specification telling the company what it is to do or refrain from doing, and thus on the one hand enabling it in regulating its conduct to know whether it is imperilling the licence or not, and on the other hand making clear to the Minister for the time being what test he is to apply in order that any judgment he may form as to compliance or non-compliance may not be vitiated by error of law. A specification cannot, I think, fulfil this dual function if it is so vaguely expressed that either its meaning or its application is a matter of real uncertainty; and for that reason it seems to me that on the proper construction of the Act the Minister's power to impose conditions is to be understood as limited to the imposition of conditions that are reasonably certain - that is to say (as has been said in a long line of cases with respect to conditions of forfeiture created by the dealings of private persons with other forms of property) conditions such that from the moment of their creation the Court can say with reasonable certainty in what events forfeiture will be incurred: cf. In re Sandbrook; Noel v Sandbrook (1912) 2 Ch 471 at p 477. Such certainty includes both certainty of expression and certainty in operation: In re Exmouth; Exmouth v Praed (1883) 23 ChD 458 at p 464; Sifton v Sifton (1938) AC 656 at pp 670, 671; Clayton v Ramsden (1943) AC 320 at pp 326, 329, 332."*

The necessity for certainty in relation to conditions has also been stressed by the Supreme Court of South Australia in *City of Unley v Claude Neon Ltd* 49 LGRA 65, and *Imecal (Vic) Pty Ltd v City of Heidelberg* 2 PABR 247.

Accordingly, in my opinion, Condition 9 is void. The real question is whether it is severable from the remainder of the permit.

In *Olsen v City of Camberwell* (1926) VLR 58, the Full Supreme Court was concerned with the issue as to whether or not some invalid by-laws could be severed from the balance of the by-laws which were a comprehensive code of building by-laws made under the provisions of the *Local Government Act* by the respondent. At page 68, Cussen J said as follows:

*"If the enactment, with the invalid portion omitted, is so radically or substantially different a law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it as to warrant a belief that the legislative body intended it as a whole only, or, in other words, to warrant a belief that if all could not be carried into effect the legislative body would not have enacted the remainder independently, then the whole must fail. We quite agree with the contention of counsel for the applicant that the conclusion at which the Court is to arrive must in such a case as the present be drawn from a notional comparison of two documents, one containing and the other omitting the invalid portions, and cannot depend upon what may be called outside speculations as to what the members of the legislative body would or would not be likely to do. But it would seem, from the cases we have mentioned, that the expressed intentions of the legislative body should be preserved as far as possible, and that before giving effect to the applicant's contention the Court should be satisfied that the parts are so interwoven that the rest should fall with the admittedly invalid part: see Whybrow's Case (1910) 11 CLR at p 27 per Griffith C J."*

Having regard to the importance of car parking in relation to a development such as the present, I do not think that the Responsible Authority would have granted a permit containing the various other conditions but without Condition 9. Accordingly, in my view, the whole permit must fall. The determination to grant was not invalid. However, it resulted in nothing.

*The Effect Of The Appeal Against Failure*

No argument was addressed to me on this matter. I think that an appeal against failure is obviously not only available where the responsible authority simply does nothing within the prescribed period. The circumstances in the present case are that a valid determination has not been arrived at by the Responsible Authority within the period. Accordingly, *prima facie*, an appeal against failure to grant lies. However, in the present case, the application was invalid in that it failed to include the land the subject of the walkway. In the case of an appeal against a determination to grant, this matter could be remedied by resort to Section 53 of the *Planning Appeals Act*. That section specifically refers to the making of an amendment to an application '*as to the land to the use or development of which the application relates*'. However, that section is restricted to '*an appeal ... in relation to a determination of the responsible authority*'. It is not available in a failure appeal. I accordingly conclude that in the circumstances of the present case it is not possible to remedy the invalidity of the application and that an appeal against failure will not lie.

The results of my consideration of the matter are:

1. That the application was invalid in that it did not include details of the pedestrian walkway.
2. That the decision to grant was invalid for failure to comply with Section 51 of the *Planning and Environment Act*
3. That the provisions of Section 48(1) of the *Planning and Environment Act* 1987 dealing with the specification of '*owner*' in an application are mandatory. However, non-compliance may be cured by resort to Section 54 of the *Planning Appeals Act* 1980.
4. That the permit was nugatory by reason of the inclusion of Condition 9 which is inseverable from the remainder of the permit.
5. That in the circumstances of the present case, an appeal against failure does not lie.

In the result, I think that Appeal No P88/2191 should be allowed and Appeal No P88/2350 should be dismissed.

MLW