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Kaplantzis v Whitehorse CC & Anor [2010] VCAT 1502 (10 September 2010)

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Kaplantzis v Whitehorse CC & Anor [2010] VCAT 1502 (10 September 2010)

Last Updated: 20 September 2010

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

**PLANNING AND
ENVIRONMENT LIST**

VCAT REFERENCE NO.
P2474/2010
PERMIT NO. WH/2006/304

CATCHWORDS

Application under [s 120](#) of the [Planning and Environment Act 1987](#) for an interim enforcement order; Whitehorse Planning Scheme; Adjournment granted.

APPLICANT	Nicholas Kaplantzis
RESPONSIBLE AUTHORITY	Whitehorse City Council
RESPONDENTS	Construction Engineering (Aust) Pty Ltd Heathbridge Pty Ltd
SUBJECT LAND	172-210 Burwood Highway, Burwood East
WHERE HELD	Melbourne
BEFORE	Russell Byard, Senior Member
HEARING TYPE	Preliminary Hearing
DATE OF HEARING	9 September 2010
DATE OF ORDER	10 September 2010
CITATION	Kaplantzis v Whitehorse CC & Anor [2010] VCAT 1502

ORDERS

1. The hearing of the enforcement order application is adjourned to commence at 10.30 am on Thursday 14 October 2010 when two days have been allocated for the hearing.
2. The tribunal file in relation to planning review P3013/2007 is to be located and attached to this file for this current proceeding.
3. The Responsible Authority is directed to make available to any of the other parties the contents of any of its files relevant to this proceeding including any file relating to or resulting in the issue of planning permit no. WH/2006/304 and to allow any other party to make copies of any such documents or to provide copies thereof to such other parties upon such other party paying the reasonable cost thereof save that the Responsible Authority may withhold access to or the giving or allowing of the taking of copies of any document for which it claims legal professional privilege provided that such claim of privilege is made in writing in a document delivered to the party seeking access to that or other documents on such files which writing is to identify and specify clearly the document or documents in relation to which such privilege is claimed.
4. Costs of or in relation to the hearing on 9 September 2010 are reserved.

Russell Byard
Senior Member

APPEARANCES

For the Applicant

Mr G Peake, barrister, appeared on the instructions of Harwood Andrews solicitors for the applicant Nicholas Kaplantzis.

For the Responsible Authority

Mr W Zaske, planning enforcement officer of the City of Whitehorse appeared for the Responsible Authority.

For the Respondents

Mr T Pikusa, barrister, appeared on the instructions of Gadens solicitors for the respondent Construction Engineering (Aust) Pty Ltd.

Mr P Chiappi, barrister, appeared on the instructions of Arnold Bloch Leibler solicitors for the respondent Heathbridge Pty Ltd.

INFORMATION

Nature of Proceeding

Application under [s 120](#) of the *[Planning and Environment Act 1987](#)* for an interim enforcement order.

REMARKS

1. The hearing on 9 September 2010 was in relation to an application for an interim enforcement order pursuant to [s 120](#) of the *[Planning and Environment Act 1987](#)* (PE Act). The applicant has made an application for an enforcement order pursuant to [s 114](#) of that Act.
2. He is an elderly gentleman living on land that abuts the site at 172-210 Burwood Highway, East Burwood. There is a planning permit WH/2006/304 in existence in relation to that land. That permit was issued on 24 April 2008 at the direction of this tribunal in its determination of planning application for review P3013/2007.
3. The first condition of that permit requires the approval and

endorsement of plans for the development allowed by the permit. Such plans are to be submitted to and approved by the responsible authority. They are to accord with the existing plans subject to a number of specified modifications. These specifications are contained in sub-conditions (a) to (y) of condition 1. The last of these provides:

(y) The wall of the ground level must be at least 10 metres from the rear boundary of 49 Witchwood Crescent.

1. 49 Witchwood Crescent is the home of the applicant, Mr Kaplantzis.
2. The building work allowed by the permit is under way. Building work near the applicant's home is partly constructed. Some of this work is alleged to be constructed within the prohibited 10 metres.
3. Apparently plans were approved by the responsible authority which allow construction of works within the 10 metre limitation. On the face of it, it would appear that these plans, approved and endorsed by the responsible authority, contravene the requirements of condition 1(y) of the permit. The applicant contends that plans contravening a specific requirement of condition 1 are beyond the power of the responsible authority to approve and cannot be lawfully approved or endorsed. His view is that, although the works might comply with the plans purportedly approved and endorsed, such approval is beyond power and invalid and such works contravene the planning laws.
4. Mr Chiappi appeared for Heathbridge Pty Ltd. That company is the developer. Mr Pikusa appeared for Construction Engineering (Aust) Pty Ltd. That company is carrying out the actual construction works. Mr Zaske, planning enforcement officer of the City of Whitehorse, appeared for the responsible authority. Each of these three gentlemen contend that the works that have been partly constructed are lawful and do not contravene the planning laws. At least, they claim, there is a strong arguable case that this is true.
5. Each of these parties requires an adjournment to consider the enforcement order application and, indeed, the application for an interim enforcement order. These proceedings have only very recently come to their attention. Furthermore, they need an opportunity to prepare materials to rely upon at a hearing in relation to an interim enforcement order and, ultimately, a hearing in relation

to an enforcement order.

6. Mr Peake, appearing for the applicant, did not oppose such an adjournment. Initially an adjournment of approximately one week was contemplated. Such an adjournment would have been of the application for an interim enforcement order. Estimates were that the hearing of that application could be expected to take between half a day and one day.
7. It was subsequently suggested that there should be an adjournment to a hearing of the actual enforcement order application under [s 114](#) PE Act. That would give a quicker resolution of the whole proceeding and obviate the need for an interim hearing in relation to an interim order.
8. Holding costs in relation to this quite substantial project are considerable. Ultimately I was able to obtain a hearing date for the full hearing of the application under s 114. The estimated time for that hearing is one day to two days. Two days have been set aside namely, Thursday 14 October and Friday 15 October 2010. The hearing on the Thursday is to commence at 10.30 am, not 10.00 am.
9. There is a difficulty about that starting time. Mr Peake has an engagement to appear before Mr Philip Martin, member, at 10.30 am on that day in relation to an application for costs. The case concerned is *Love v Whittlesea Shire Council*. The morning has been set aside for the hearing although it may be that only one or one and a half hours will be required. There are only two parties concerned in that matter. The other party is represented by Mr John Cicero of the firm Best Hooper solicitors.
10. This costs application concerns a case heard some time ago. There is no great urgency in relation to it. Mr Peake has undertaken to contact Mr Cicero and, if possible, make arrangements with the tribunal for that matter to be adjourned to a later date. I consider that the balance of convenience is heavily in favour of an adjournment of that matter so that this current one can commence at 10.30 am on that day.
11. Although this matter is to be listed at 10.30 am, if it proves impossible to adjourn the *Love v Whittlesea Shire Council* case, the understanding reached at the hearing before me is that the *Love* case will be disposed of first and this matter will then proceed as soon as Mr Peake is freed from his obligation to the *Love* matter. If the *Love* matter is not adjourned from 14 October it may well be that Mr

Martin will be allocated to hearing this matter.

12. A question was raised as to what was to be the situation in the meantime and whether the clients of Mr Chiappi and Mr Pikusa would give an undertaking not to continue with further work in relation to the land within 10 metres of the boundary of the applicant. Neither have instructions to give such an undertaking and no such undertaking has been given. However, it was specifically noted that both these parties, at least through their barristers, are well aware of the current proceedings and the contention that the 10 metre strip cannot be built upon. This is specifically noted on the basis that their clients will be at risk if they proceed with further work pending the hearing to commence on 14 October 2010.
13. The tribunal has power to require demolition of such works if an enforcement order is made and that is deemed to be appropriate. I will not be able to hear this case on 14 October 2010. I did comment that achieving a *fait accompli* would not dissuade me from making such an order where I considered it to be warranted and that I would take into consideration the circumstance that those parties had proceeded with further work knowing that it was at their own risk.
14. There was further reference to the case P3013/2007 which gave rise to the direction by the tribunal for the issue of the permit. That file, Mr Peake assures me, is in the possession of the tribunal at 55 King Street. It should be attached to this current file. I will give an administrative direction to that effect.
15. Mr Peake has had access to the file but wishes to obtain copies of a set of plans on it that had been circulated to parties under cover of a letter of SJB Planning dated 13 March 2008. The hearing of that case was on 18 and 19 March 2008 before Mr Peter O'Leary, then a member of the tribunal. Mr Peake wishes to obtain copies of those plans. In fact other parties also need copies. I agree that such copies are needed, but I am not sure whether the tribunal has facilities to reproduce copies of such large documents. However, it appears that Mr Chiappi's client and the responsible authority have or may have copies of those documents. This matter was left on the basis that copies could be made available to other parties requiring them at the cost of such other parties.
16. A further matter was raised in relation to access to documents. There are a number of documents on the file of the responsible authority in

relation to which Mr Peake and his instructors seek access. It turns out that other parties also need access to such documents.

17. When access was sought by the instructors of Mr Peake they were required to complete a document headed “Planning information request for copy of planning permit and endorsed plans”. A copy of this document is Exhibit SK-8 to an affidavit of Sophia Kaplantzis filed in relation to the interim enforcement order application. This document sets out the documents of which copies are sought. The instructing solicitors were apparently allowed to see the documents and to have copies of some of them but not others. Those in relation to which copying was denied apparently refer to persons other than parties to the current proceedings. The responsible authority has indicated that it would only provide copies pursuant to a Freedom of Information request. That would take an amount of time which would be excessive in the circumstances, unreasonable and obstructive of the parties obtaining justice before the tribunal. I also consider this requirement to be unjustified. I propose to make an order that the responsible authority provide access to the documents on such of its files as are relevant to these proceedings, including the proceeding whereby the permit was granted and that parties to these current proceedings be able to obtain copies of such documents at the expense of the parties seeking such copies subject only to any claim of legal professional privilege, such claim to be made in writing presented to the party to whom access and copying is denied, with such writing to specify and identify the document or documents in relation to which such privilege is claimed.

Russell Byard
Senior Member