

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

S CI 2017 02222

PHILLIP MANNERHEIM HOLDINGS PTY LTD

Appellant

v

NILLUMBIK SHIRE COUNCIL

Respondent

JUDGE: Bell J
WHERE HELD: Melbourne
DATE OF HEARING: 12 September 2017
DATE OF JUDGMENT: 2 November 2017
CASE MAY BE CITED AS: Phillip Mannerheim Holdings v Nillumbik Shire Council
MEDIUM NEUTRAL CITATION: [2017] VSC 670

PLANNING AND ENVIRONMENT - appeal on question of law from Victorian Civil and Administrative Tribunal - objection to grant of planning permit - whether must contain positive statement of opposition to grant of permit - whether that opposition can be inferred without that statement - importance of encouraging equal public participation in planning decision-making processes and also ensuring compliance with minimum formality requirements for making objections - statutory interpretation - relevance of previous judicial decision when interpreting new provisions enacted with knowledge of that decision - statutory distinction between an 'objection' and 'submission' - whether document in question was one or the other - whether VCAT erred in law in determining that it was a valid objection - *Planning and Environment Act 1987* (Vic) ss 57(1)-(2), *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 148(1)

APPEARANCES:

For the applicant

Counsel

Mr J Pizer QC with
Mr M Townsend

Solicitors

Equipe Lawyers

For the first
respondent

Mr R Appudurai

Russell Kennedy

For the second, seventh,
eighth, ninth, tenth and
thirteenth respondents.

Ms S Porritt with
Ms F Hudgson

Environmental
Justice Australia

HIS HONOUR:

- 1 The critical issue in this application for leave to appeal and, if leave is granted, this appeal, under s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) is whether, under the proper interpretation of ss 57(1)–(2) of the *Planning and Environment Act 1987* (Vic), an objection to the grant of a planning permit is valid only if it contains a statement of opposition to the grant of the permit. Resolution of this issue necessarily engages consideration of both encouraging equal public participation in planning decision-making processes and ensuring compliance with the minimum formality requirements for making an objection.
- 2 When a person is permitted to use and develop land, this can have significant consequences for others, especially those living nearby. The *Planning and Environment Act 1987* (Vic) therefore encourages public participation in planning decision-making processes in various ways. This is reflected in an objective of the framework established by the Act, which is ‘to ensure that those affected by proposals for the use, development or protection of land or changes in planning policy or requirements receive appropriate notice’ (s 4(2)(i)). Giving such notice is foundational of the right of all persons who may be affected to object to the grant of planning permits (s 57(1)) and participate in the decision-making process, whatever be their background and capabilities. Under that process, objectors (and sometimes others) also have certain review rights (see below). This is the source of the first principle that is engaged in this case: encouraging equal public participation in the planning system.
- 3 The minimum formality requirements for making an objection are (s 57(2)):
 - (2) An objection must be made to the responsible authority in writing stating the reasons for the objection and stating how the objector would be affected by the grant of the permit.

These requirements serve important purposes in the administration of planning decision-making processes, both at the primary and the review stages. They ensure that objections are properly made to the responsible authority by identified persons who are affected and that the articulated reasons for objection are related to how the

objector would be affected by the grant of the permit in respect of the subject land. This enables objections to be properly assessed and considered in the various ways encompassed by planning decision-making processes (see below). This is the source of the second principle: ensuring compliance with the minimum formality requirements for making an objection to the grant of a permit.

- 4 The critical issue about the interpretation of ss 57(1)-(2) of the *Planning and Environment Act* arises in relation to the 'objection' made by Kim Cope to the grant of a permit by Nillumbik Shire Council ('Nillumbik') as the responsible authority to Phillip Mannerheim Holdings Pty Ltd ('Phillip Mannerheim') to use and develop its land in North Warrandyte for the construction of a dwelling and to remove indigenous vegetation. As the owner of an adjoining property, Mr Cope wrote the following polite email message on behalf of himself and his wife to Nillumbik's senior statutory planner:

Dear Katrina

Thank you for time and assistance on the 16/11/16 for the viewing of the proposed Planning Proposal of the residence next door to us at 2 Pigeon Bank Road.

As the proposed property is planned on the hill ridge line adjacent to our existing property residence at 340 Menzies Rd, we are interested in minimising the visual impact to our outlook.

My wife - Robyn has asked would you please review the requirement to minimise clearance the screening vegetation between the properties and recommend the relocation of the proposed property as far west as possible so as to maintain privacy between the residences.

Additionally are we able to request the planting of screening vegetation asap along the boundary as we do not want to hamper the new property owner.

May I please apologise for our late submission as we have had some trying medical issues of late within our family.

Thank you and regards,

Kim

In Phillip Mannerheim's submission, this message was not a valid objection under s 57(2) of the Act because it did not contain the mandatory statement of opposition.

5 This issue matters because (for example) it may affect who is eligible to apply as of right to the Victorian Civil and Administrative Tribunal for review of a decision of the responsible authority to grant a permit. In that connection, s 82B(1) of the Act provides:

- (1) Any person who is affected may apply to the Tribunal for leave to apply for review of a decision of the responsible authority to grant the permit in any case in which a written objection to the grant of the permit was received by the responsible authority.

As can be seen, where the responsible authority has received written objection from at least one person, any other person who has not objected but who is affected may apply for leave to review the decision of the responsible authority to grant the permit. This occurred in the present case. Other persons who had not objected to the grant of the permit by Nillumbik to Phillip Mannerheim piggy-backed upon Mr Cope's objection to apply for leave from VCAT to review the decision. Against Phillip Mannerheim's submission and in a carefully considered and well-reasoned decision, VCAT decided that Mr Cope's objection was valid and that the other persons should be granted leave because they were affected (s 82B(1)) and it was just and fair in the circumstances to do so (s 82B(4)).¹

6 In doing so, VCAT interpreted the provisions of s 57(2) of the Act in a manner that properly stressed the importance of encouraging equal public participation in planning decision-making processes:

As a matter of public policy, I think it is dangerous to set the bar too high for a letter to the responsible authority in response to notification to be regarded as an objection, so long as it meets the basic legislative requirements.²

I respectfully agree with this approach, which accords with the statement of Emerton J in *Boerkamp v The Hon Matthew Guy* that '[p]articipation in planning processes, including permit applications, is generally encouraged and facilitated by the ... Act'.³ Permission to use and develop land can have significant consequences for all persons affected, and the participation that is so encouraged and facilitated is equal

¹ *Cope v Nillumbik Shire Council* [2017] VCAT 684 (12 May 2017) (Member Cook) ('Cope').

² *Ibid* [14].

³ [2014] VSC 167 (14 April 2014) [49].

participation by all persons affected, whatever be their background and capabilities.

7 Phillip Mannerheim's submission to the Tribunal, which was repeated in the proceeding in this Court, was that, since the judgment of Stephen J in *Spurling v Development Underwriting (Vic) Pty Ltd*, objections must contain, among other things, 'an expression of opposition' to the grant of permit.⁴ As Mr Cope's email message did not contain that expression of opposition, it was invalid.

8 VCAT considered that Phillip Mannerheim was trying to read something into s 57(2) of the Act that was not there, namely a mandatory requirement for opposition to be expressed as such in the objection. Rejecting this approach, it emphasised the requirements actually specified in s 57(2):

I appreciate the notion of opposition generally being integral to the concept of an objection. At the same time, this is not a mandatory requirement for a valid objection under the [*Planning and Environment Act*]. The mandatory requirements are that the person may be affected, the objection must be in writing and it must state the reasons for the objection and how the person would be affected.⁵

I agree with this also, and do not accept that it is inconsistent with the judgment of Stephen J in *Spurling*.

9 Although *Spurling* was decided in 1972, it has contemporary significance because the Act was enacted in 1987 in relevantly similar terms in the knowledge of what Stephen J had held. Consistently with the applicable principle of interpretation,⁶ I therefore accept Phillip Mannerheim's submission that the requirements of s 57(2) should be identified in a way that has regard to his Honour's judgment, as Morris J held in *Cun Sheng Liu v Melbourne City Council*.⁷

10 When *Spurling* was decided, the governing legislation was the *Town and Country Planning Act 1961* (Vic). In relation to public participation in planning processes, ss 18B(1)-(2) stipulated that notice of an application for a planning permit had to be

⁴ [1973] VR 1, 14 ('*Spurling*').

⁵ *Cope* [2017] VCAT 684 (12 May 2017) [9] (Member Cook).

⁶ *Ex parte Campbell; In re Cathcart* (1870) 5 Ch App 703, 706 (Sir WM James LJ).

⁷ [2003] VCAT 1521 (24 October 2003) [11].

given in terms that stated that objections could be made by 'statements in writing' sent to the responsible authority by persons who may be affected. Under s 18C, objections had to be considered by the responsible authority, who had to send notice of determination to applicants and objectors. Under the then legislation, but not under the present legislation, objections had to be made in the 'prescribed form' (s 18B(2)(d)), which required the person affected to specify the 'Details of Objection'.⁸ Thus the prescribed form automatically performed the function of expressing opposition to the grant of the permit.

11 The relevant facts of *Spurling* were that the City of Sunshine granted Development Underwriting a planning permit to use and develop certain land as a drive-in regional shopping centre. Beforehand, the Sunshine Trader's Association (which was not a legal entity) sent a letter with a large number of signatures opposing the granting of a permit but upon general grounds rather than by reference to the way in which individual landowners might be affected. The validity of the subsequent appeal to the Town Planning Appeals Tribunal was affected by whether this was a proper objection under ss 18B–18C of the *Town and Country Planning Act*. The responsible authority had given notice of decision only to the officers of the Association and not to the large number of signatories to the letter. Stephen J held that it was not a proper objection.

12 In so holding, Stephen J had regard to the inadequacy of the so-called letter of objection in relation to its terms and its content. In relation to its content, his Honour stated:

the form of letter not only does not identify the applicant or the subject land but reads more in the nature of a petition expressing a general opposition to the erection of a regional shopping centre anywhere within the municipal district of the City of Sunshine than an objection to the grant of a particular permit.⁹

⁸ *Town and Country Planning Regulations 1961* (Vic), as amended by *Town and Country Planning (Amendment) Regulations 1962* (Vic) sch 8 reg 4.

⁹ *Spurling* [1973] VR 1, 15.

As can be seen, his Honour drew a distinction between expressing general opposition to a proposed development wherever in the relevant region it was to be located and expressing opposition to the grant of a particular permit in relation to the subject land.

- 13 In relation to the terms of the letter, his Honour drew attention to the minimum requirements of s 18C:

However, I think it is correct to say that to constitute an 'objection in writing' for the purposes of s 18C there are certain minimum requirements which must be satisfied. These can perhaps best be gauged by an understanding of the purpose served by an objection. Its primary purpose is, no doubt, to inform the responsible authority of the views of the particular objector who opposes the grant of a permit; a subsidiary effect of lodging an objection is that the objector thereupon becomes entitled to notice of the responsible authority's ultimate conclusion on the permit application and is thus warned of any grant of permit so that he may appeal against it if he sees fit. The foregoing throws, I think, some light upon what are the minimum requirements of an 'objection in writing'. Clearly enough it must emanate from a legal entity and it must be in writing; these requirements flow directly from the terms of, inter alia, s 18C(b). Again the document to be an objection must be capable of consideration by the responsible authority; this involves at least that it should contain an expression of opposition coupled with some sufficient identification of the application for a permit which is the subject of the opposition. Thirdly, I conclude that, at least for the purposes of s 18C(b), which is the relevant provision said to have been breached in the present case, an objection must contain sufficient information about the objector to permit the responsible authority to give the objector notice in writing of its determination of the application for a permit.¹⁰

As can be seen, his Honour held that, to be valid, the objection must emanate from a legal entity; be in writing; be capable of consideration by the responsible authority, which involves at least an expression of opposition to a sufficiently identified application for a permit; and contain sufficient information to enable the responsible authority to give objectors notice of the determination in writing. Each of these requirements was responsive to the facts and circumstances of the case: the so-called letter of objection did not emanate from a legal entity; it did not relate to a particular application for grant of a permit; and it did not sufficiently identify who (as objectors) should be given notice of determination.

¹⁰ Ibid 14-15.

14 It thus appears that Stephen J had particular reasons relating to the facts of the case for discussing the need for an objection to contain an 'expression of objection' to the grant of a permit. However, Phillip Mannerheim submits that his Honour's judgment establishes that an implicit requirement of (now) s 57(2) of the Act is that an objection must contain an 'expression of opposition' to the grant of the permit, as some decisions by VCAT have apparently held.¹¹ I reject these submissions for the following reasons.

15 In my view, Stephen J did not decide in *Spurling* that the proper interpretation of the objection provision always required a positive statement of opposition to the grant of the permit to be made in the written objection. Certainly his Honour drew attention to the element of opposition that is a necessary part of making an objection. But where there is no express statement to that effect, that opposition can be inferred from the whole of what is written. So held Menhennitt J of the same provision in *Commonwealth of Australia v O'Donohue and Melbourne and Metropolitan Board of Works*:

In my view for a person to object in writing that person need not use the word 'object'. It is sufficient if what is written conveys that what is sought to be done pursuant to the permit is objected to.¹²

In support of this conclusion, his Honour referred¹³ to the judgment of Stephen J in *Spurling*. Correctly, with respect, his Honour did not understand that judgment to require an 'expression of opposition' to the permit.

16 It is not consistent with encouraging public participation, and certainly not with encouraging *equal* public participation, in planning decision-making processes to read a requirement for an 'expression of opposition' to the grant of the permit into s 57(2) of the Act. A great many planning decisions are made by responsible authorities every year, affecting a great number of people in the community, many of whom will not have access to expert advice and representation. As the legislature

¹¹ *Leonora Group (Wonthaggi) Pty Ltd v Bass Coast Shire Council* [2003] VCAT 233 (21 March 2003) [23]–[24] (Senior Member Byard); *Hamelin Pipe Pty Ltd v Melbourne City Council* [2015] VCAT 339 (19 March 2015) [29] (Deputy President Gibson); cf *Vicroads v Boroondara City Council* [2013] VCAT 385 (18 March 2013) [23]–[24] (Member Code).

¹² [1979] VR 441, 454.

¹³ *Ibid.*

would have been aware when enacting ss 57(1)–(2), persons affected by the grant of permits will come from different backgrounds and have varying capabilities to express their objection. When complying with the formality requirements of those provisions, they should be able to use their ordinary and natural language, having regard to their individual circumstances. For various understandable reasons, they may choose to express their objection politely, while still making their message clear, as in the present case. Whether the objection is a valid objection is determined by reference to the terms of the provisions, not whether the objection contains a statement of opposition.

17 Phillip Mannerheim relied upon certain provisions of the Act that draw a distinction between an ‘objection’ and a ‘submission’. It submitted that the existence of a statement of opposition is what distinguishes one from the other. Mr Cope’s email message did not contain that statement and therefore falls to be characterised as a submission not an objection. In consequence, it did not give rise to the derivative appeal procedure in s 82B(1).

18 I accept that the scheme of the Act encompasses objections and submissions (neither of which terms are defined) in various contexts according to the specifically applicable provision and decisional setting.¹⁴ For example, before determining an application for a planning permit, the responsible authority must consider (among other things) ‘all objections and other submissions which it has received and which have not been withdrawn’ (s 60(1)(c);¹⁵ see also s 60(3)). Therefore Mr Cope’s email message had to be considered whether it was an objection *or* a submission. Parliament thus intends certain planning decisions under the Act to be made after consideration of both objections *and* submissions. Perhaps reflecting the distinction drawn by Stephen J in *Spurling* (see above), this kind of case will involve consideration not only of objections by persons affected to the grant of a particular permit but also of submissions of a more general but relevant kind. In other kinds of cases, however, it will be relevant to identify whether an objection properly so

¹⁴ See, eg, ss 60(1)(c), (3), 97E(1), (2), (5), 97G(4), 97K(1)(c).

¹⁵ Interestingly, this provision treats an objection as a species of submission (see the word ‘other’).

called, rather than a submission, has validly been made.

19 The present case is such a one. Only objectors as such are entitled to receive notice of a decision to grant a permit (s 64(1)) and to apply as of right for review of such a decision. If they otherwise discover that a permit has been granted, persons affected can apply for leave to make application for review, but only where a valid objection has been made (s 82B(1)). The distinction between an objection and a submission may thus be relevant to determining whether a person affected who has not objected is entitled to apply for this leave. But this distinction does not assist Phillip Mannerheim in the present case. On no view was Mr Cope's email message a submission. It was an objection by a person affected to the grant of a permit in respect of the use and development of particular land.

20 An 'expression of opposition' is an ex post facto way of describing an objection, not an a priori statutory eligibility requirement to be satisfied before it can be characterised as valid. An objection may represent an expression of opposition without it being so expressed in those terms. That is what VCAT meant in stating that 'the notion of opposition generally [is] integral to the concept of an objection' but not a 'mandatory requirement'.¹⁶ It is distracting and confusing, and ultimately circular, to elevate a way of describing an objection to the position of a mandatory eligibility requirement, and not warranted by the proper interpretation of ss 57(1)-(2) of the Act.

21 From the language of ss 57(1)-(2), an objection will be valid if it is an objection; if it is made by a person affected; if it is made in respect of the grant of a permit; if it is made to the responsible authority; if it is in writing; if it states in writing the reasons for the objection; and if it also states in writing how the objector would be affected by the grant of the permit. I have already stressed the importance of these minimum formality requirements, as well as encouraging equal public participation in planning decision-making processes. In my view, VCAT correctly understood, described and applied them in the present case. It correctly decided that, to be valid,

¹⁶ See the passage set out above.

an objection did not have to contain a statement of opposition as such to the grant of the permit. This is not one of the statutory requirements. It is not necessary for ensuring compliance with the minimum requirements that are specified to read such a requirement into the provisions. It would not be consistent with encouraging equal public participation in planning decision-making processes to do so.

22 In the ordinary planning context, an application for a permit might attract from persons affected outright support, outright opposition, conditional support, conditional opposition or neutrality across a spectrum of possible reactions that might change or interact in response to circumstances as they evolve. The operation of planning decision-making processes, including the processes of negotiation, alternative dispute resolution and adjudication at the primary and review levels, typically encompasses all of these legitimate positions and due consideration of the interests that they represent, which may result in modification of the application. An objection which is expressed in terms of conditional support or conditional opposition forms part of these processes and is capable of being inferentially characterised as an objection under ss 57(1)–(2) without an expression of opposition as such. Conditional support is that kind of objection which inferentially expresses opposition if the conditions that will give rise to support are not satisfied; conditional opposition is that kind of objection which inferentially expresses opposition unless the conditions that give rise to the opposition are not addressed. The boundary between these two forms of objection is circumstantial, unstable and some positions might equally be described in either way. In a case like the present of conditional support or opposition, it is distracting and confusing, and in the end circular, to assess the validity of an objection by reference to whether the objection contains an ‘expression of opposition’ because an objection containing conditional support or opposition is inferentially capable of answering this description.

23 Mr Cope’s email message to the responsible authority falls into this category. On the found facts, Kim and Robyn Cope wanted to be good neighbours and clearly did not oppose a dwelling being built on the property next door even though it necessarily

involved some visual intrusion and removal of some indigenous vegetation. But Mr Cope stated in his polite email message that he and his wife wanted the visual impact of the building to be minimised (it was to be built on the ridge line) and the removal of vegetation to be minimised (and made good with new plantings). This is conditional support or conditional opposition, depending on how their position is framed. However politely expressed, Mr Cope's email message clearly communicated objection, even if the word 'object' was not used, because the view he impliedly expressed was that the permit should not be granted unless these concerns were addressed.

24 Mr Cope's email message was an objection (conditional support or conditional opposition); was made by a person affected; was made to the responsible authority; was made in respect of the grant of a planning permit; was made in writing; stated in writing the reasons for the objection; and stated in writing how the Copes would be affected by the grant of the permit (visual impact and vegetation removal). Therefore it was a valid objection under ss 57(1)-(2) of the Act. So understood, the message also represented an 'expression of opposition' to the grant of the permit, but this is a term of description ex post facto not a condition of eligibility a priori.

25 It follows that the tribunal did not err in law when interpreting ss 57(1)-(2) of the Act and in treating Mr Cope's email message as 'a written objection to the grant of the permit' for the purposes of s 82B(1). In view of the importance of the case for planning processes and practice and the apparent conflict of the authority within VCAT on this legal issue, I would grant leave to appeal. But the appeal must be dismissed.