Supreme Court decisions

Appeals from VCAT under s 148

Inside Planning & Environment Law
Seminar Series 2026

13 August 2026

Presented by Peter O'Farrell KC
& Michael Beaconsfield

FOLEY'S | LIST



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Supreme Court Decisions – Appeals from VCAT under s 148
Peter O'Farrell KC, Michael Beaconsfield

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Part 5 of the Planning and Environment Act: Changes to the Compensation Regime
Jennifer Trewhella, Kate Lyle

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Serena Armstrong

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Water Planning and Management
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Planning Permit Applications and Restrictive Covenants
Peter O'Farrell KC, Emma Peppler, Rachel Matulis

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Getting Compensation Right: Strategic Considerations for Claimants and Acquiring Authorities in Compulsory Land Acquisition Matters
Marissa Chorn

Supreme Court decisions

The year in review

July 2025 – June 2026

- Applications for leave to appeal from a decision of VCAT pursuant to s 148 of the VCAT Act
- Four appeals to the Supreme Court under s 148:
  - *Intrapac Ellarook Pty Ltd v Wyndham City Council* [2025] VSC 549
  - *Denali Nominees Pty Ltd v Banyule City Council* (2025) 78 VR 470; [2025] VSC 579
  - *McNee v Ball* [2025] VSC 808
  - *Maple Media Pty Ltd v Monash City Council* [2026] VSC 330
- Two decisions of the Court of Appeal:
  - *Kingston City Council v Mobius Materials Recovery Pty Ltd* [2025] VSCA 322
  - *IGA Retail Services Pty Ltd v Minister for Planning* [2025] VSCA 180; (2025) 264 LGERA 154
- Practical tips

Appeals under s 148 of the VCAT Act

The framework

- Identify question(s) of law
- Not a re-hearing of the planning merits
- Requires leave of the Court – a real prospect of success
- Materiality – a realistic possibility of a different decision
- Trial Division appeals are heard in the Valuation, Compensation and Planning (VCP) List
- About five appeals determined each year

Part 5—Appeals from the Tribunal

148 Appeals from the Tribunal

(1) A party to a proceeding may appeal on a question of law from an order of the Tribunal in the proceeding—

The jurisdiction in practice

Timing of an application

(2) An application for leave to appeal to the Trial Division of the Supreme Court must be made—

(a) within 28 days after the day of the order of the Tribunal, unless the rules of the Supreme Court otherwise provide; and

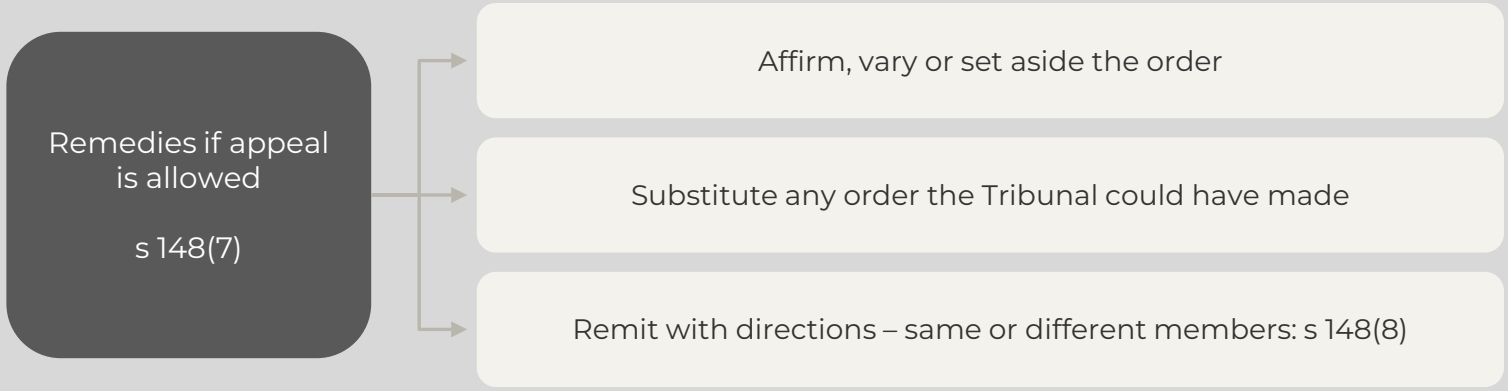
(b) in accordance with the rules of the Supreme Court.

(2A) The Trial Division of the Supreme Court may grant an application for leave to appeal under this section only if it is satisfied that the appeal has a real prospect of success.

The jurisdiction in practice

Parties, costs and remedies

- Costs ordinarily 'follow the event', (unlike a VCAT merits review)
  - A party who does not participate will very rarely face an adverse costs order
  - An active contradictor assumes the ordinary risk of a costs order in civil litigation
- Parties receiving a summons may elect to not participate in the appeal proceeding
- Available remedies:



Intrapac Ellarook Pty Ltd v Wyndham City Council

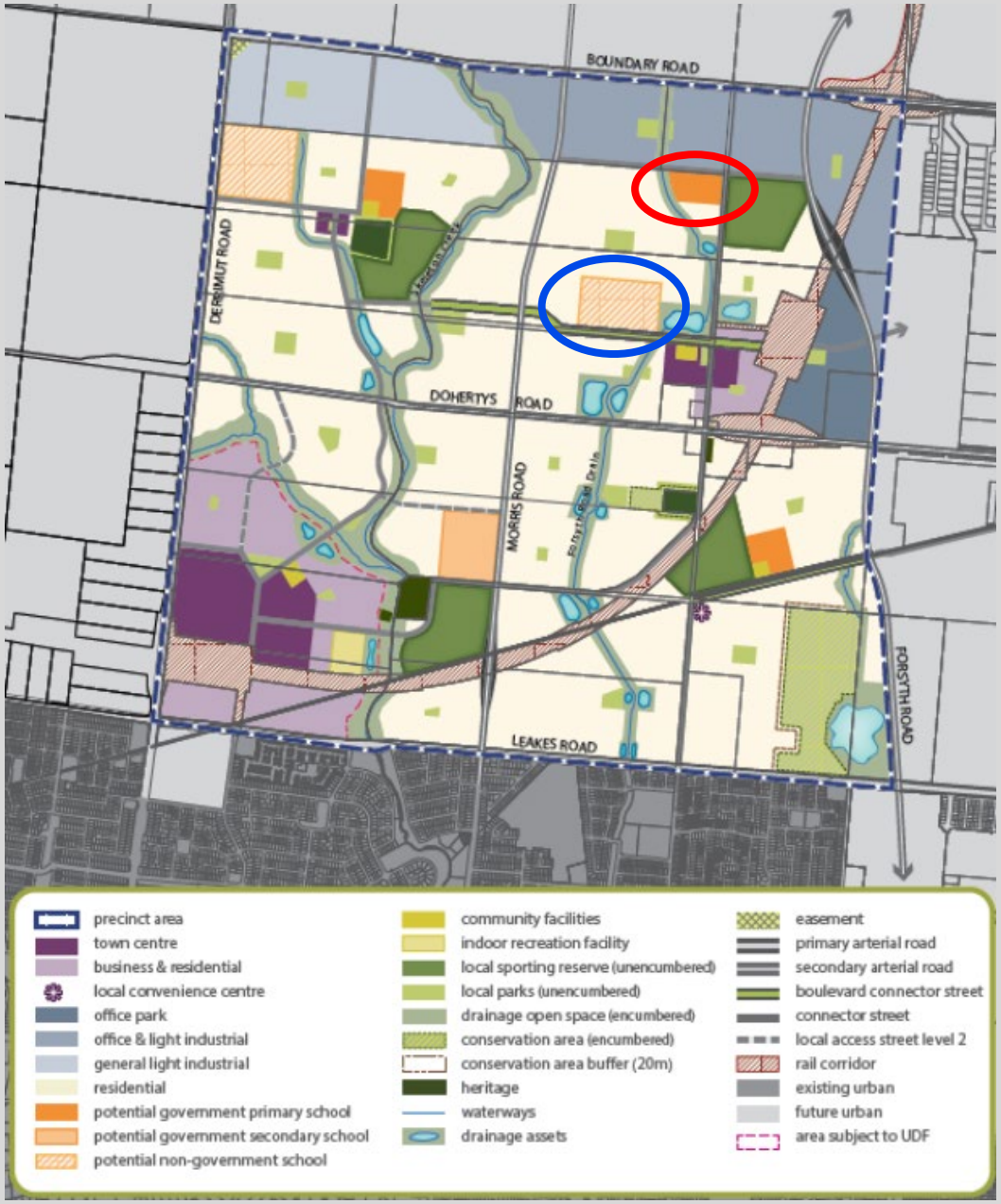
[2025] VSC 549



Intrapac

- 43 ha site within the Truganina PSP
- Plan 2 designates the north-east corner ‘potential government primary school’

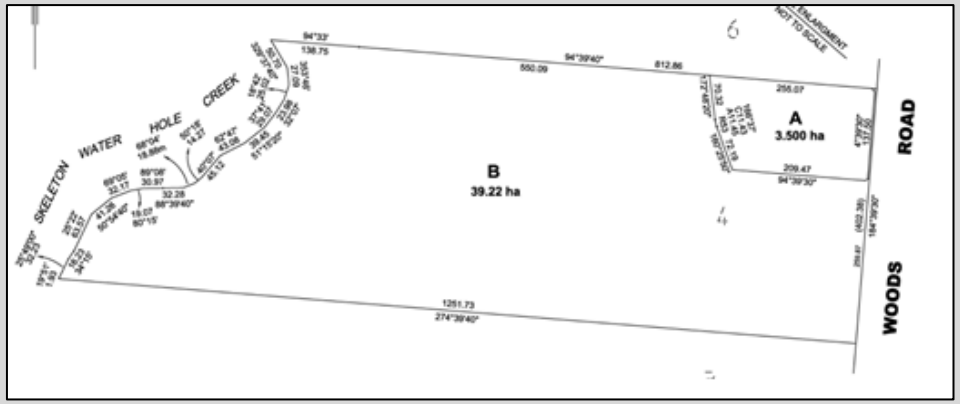
Intrapac


BOUNDARY ROAD
DERRIMUT ROAD
DOHERTYS ROAD
MORRIS ROAD
LEAKES ROAD
FORSYTH ROAD
precinct area
town centre
business & residential
local convenience centre
office park
office & light industrial
general light industrial
residential
potential government primary school
potential government secondary school
potential non-government school
community facilities
indoor recreation facility
local sporting reserve (unencumbered)
local parks (unencumbered)
drainage open space (encumbered)
conservation area (encumbered)
conservation area buffer (20m)
heritage
waterways
drainage assets
easement
primary arterial road
secondary arterial road
boulevard connector street
connector street
local access street level 2
rail corridor
existing urban
future urban
area subject to UDF

Intrapac

- Intrapac subdivided its land. The land earmarked for the school became ‘Lot A’ and the balance of the land available for development became ‘Lot B’ and was developed
- The Department of Education formally advised that the site is no longer required (the school was built elsewhere - the ‘potential non-government school’ site)
- Intrapac sought to develop Lot A for residential housing
- Intrapac lodged a s 72 application to amend the permit and subdivide for housing
- Council refused, saying among other things that it has ‘no power’
- VCAT held, on a preliminary question: residential subdivision cannot be ‘generally in accordance’ with the PSP (cl 37.07-10) because the land has been identified as a potential government school site (not residential)

Intrapac


SKELETON WATER HOLE CREEK
A
3.500 ha
B
39.22 ha
ROAD
WOODS
812.86
550.09
1251.73


254.43m
154.18m
208.94m

Intrapac

Reading the PSP

Part 1.1: 'How to read this document'… requirements must be met; guidelines may be departed from; the PSP does not address everything

R33 is a requirement that applied only to non-government school site. Not a source of power. No negative implication for government school site

G26: the 'indicative layout' may be altered where approved by the responsible authority

'POTENTIAL'
(20+ uses in the PSP)

✗ 'Committed unless formally released' (VCAT)

✓ 'Possible, as opposed to actual' – same meaning throughout

Intrapac

Reading the PSP

1.1 HOW TO READ THIS DOCUMENT

This structure plan guides land use and development where a planning permit is required under the Urban Growth Zone or another provision in the Wyndham Planning Scheme that references this structure plan.

A planning application and a planning permit must implement the outcomes of the precinct structure plan. The outcomes are expressed as the vision and objectives.

Each element of the precinct structure plan contains requirements, guidelines and conditions as relevant.

Requirements must be adhered to in developing the land. Where they are not demonstrated in a permit application, requirements will usually be included as a condition on a planning permit whether or not they take the same wording as in this structure plan. A requirement may reference a plan, table or figure in the structure plan.

Guidelines express how discretion will be exercised by the responsible authority in certain matters that require a planning permit. If the responsible authority is satisfied that an application for an alternative to a guideline implements the outcomes, the responsible authority may consider the alternative. A guideline may include or reference a plan, table or figure in the structure plan.

Conditions in this PSP must be included in a permit as relevant.

Development that meets these requirements, guidelines and conditions will be considered to implement the outcomes of the precinct structure plan.

Development must also comply with other Acts and approvals where relevant e.g. the Environment Protection and Biodiversity Conservation Act 1999 in the case of biodiversity or the Aboriginal Heritage Act 2006 in the case of cultural heritage amongst others.

Not every aspect of the use, development or subdivision of land is addressed in this structure plan. A responsible authority may manage development and issue permits as relevant under its general discretion.

Intrapac

Reading the PSP

3.3.2 Community Facilities & Education

	REQUIREMENTS
R33	Where the Responsible Authority is satisfied that land shown as a non-government school site is unlikely to be used for a non-government school, that land may be used for an alternative purpose which is generally consistent with the surrounding land uses and the provisions of the applied zone
R34	Schools and community centres must be designed to front and be directly accessed from a public street with car parks located away from the main entry.
	GUIDELINES
G21	School sites should be provided with three street frontages where practicable.
G22	Any educational or community infrastructure not shown on Plan 2 should be located within or proximate to a major town centre, local town centre or an existing community hub, as appropriate.
G23	Any private childcare, medical or similar facility should be located proximate to the Major Town Centre, any Local Town Centre, Local Convenience Centres or nominated community hub, as appropriate.
G24	Community facilities which are located in a town centre should be designed to maximise efficiency of land use through the sharing and overall reduction of car parking spaces.
G25	Community facilities, schools, and sporting reserves which are co located should be designed to maximise efficiencies through the sharing of car parking spaces and other complementary infrastructure.
G26	The indicative layout of community facilities, schools, and open space as illustrated in Plan 2 may be altered where approved by the responsible authority.

'There can be no universal rule that departures from a PSP must be minor. … The degree of flexibility contemplated by any PSP must be derived from the drawings, images, structure and language of the PSP taken as a whole.'

[2025] VSC 549, [123]

Intrapac

Leave granted; appeal allowed; remitted for the merits

- The PSP does not prohibit consideration of alternative uses on the 'potential government primary school' land
- Construction first; 'generally in accordance' remains a question of fact and degree
- The Court declined to decide the merits itself: the developer has the right to a hearing, not granted a permit
- Development contributions consequences go to the merits, not to power

Intrapac

Takeaways

- A PSP is part of the scheme: construe it by its text, structure and machinery, starting in this case with Part 1.1
- Growth areas are full of ‘potential’ designations, sometimes overtaken by real world events
- For drafters: consider what degree of flexibility and adaptability is intended – express principles in clear language
- For proponents: obtain formal renunciation from the agency, then apply – ‘generally in accordance’ remains a merits question

QUIZ

Round 1



Denali Nominees Pty Ltd v Banyule City Council

(2025) 78 VR 470; [2025] VSC 579



Denali



- Established veterinary clinic sought to relocate across the laneway into the NRZ3
- Second, reduced application after a 2022 refusal
- Same VCAT member; repeat appeal principles applied
- VCAT held:
  - Built form ‘not unlike what might be expected in any future residential development’
  - Refused on grounds of intensity of use and level of activity

Denali

The wrong test

Zone purpose: 'To allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations.'

Neighborhood Residential Zone, cl 32.09 – read permissively

VCAT: intensity of activity 'well beyond what could be reasonably expected in a residential development approved in accordance with the NRZ3 provisions'.

This benchmark or comparison is not required by the Planning Scheme

Denali

Leave granted; appeal allowed

> *'In short, the test of compatibility as described in the planning policy is not a test of sameness or equivalence. Rather it is a test of acceptability.'*
>
> Justice Finanzio

- A decision maker errs by asking a wrong question or applying a wrong test (*Kirk*)
- The critical question: would this use, in this location, have an unreasonable impact on the amenity of the surrounding area
- The notionally compliant residential development: undefined, unsourced, and inconsistent with the planning framework
- Error was material: the intensity finding was central to the refusal
- Remitted to VCAT, to be heard by a different member
- The objector association ordered to pay the applicant's costs

Denali

Takeaways

- Tests must come from the scheme
- Residential ‘intensity’ is not a comparator for non-residential level of activity
- Policy guides development to appropriate locations: main roads and land abutting a commercial zone treated differently
- For objector groups: the Tribunal’s ‘no costs’ rules do not apply in the Supreme Court
- Contentious non-residential use applications in residential zones are likely to rely on this case

QUIZ

Round 2



McNee v Ball

[2025] VSC 808



McNee



- Extension to a dwelling, Murphy Street, South Yarra
- Two walls on the common boundary (GRZ schedule 9; cl 54 ResCode)
- Objector review under s 82 of the P&E Act
- VCAT affirmed the grant of a planning permit
- The parties posed an agreed question of law on Standard A10 to VCAT
- VCAT declined to answer it, assumed non-compliance, and found the cl 54.04-1 objective met

McNee

Standards and objectives

Clause 54

'A development: Must meet all of the applicable objectives of this clause. Should meet all of the applicable standards of this clause'

'If a development meets standard … A10, A11 … it is deemed to meet the objective for that standard'

Stonnington Planning Scheme, cl 54 (Operation and Requirements)

- The deeming provision works one way only
- The question: where a standard is not met, must the decision maker (in this case, VCAT) construe it and measure the degree of non-conformance?

'... it is the impact on amenity rather than the standard (and its non-compliance) that is a mandatory consideration for satisfaction as to the objective.'

[2025] VSC 808, [53]

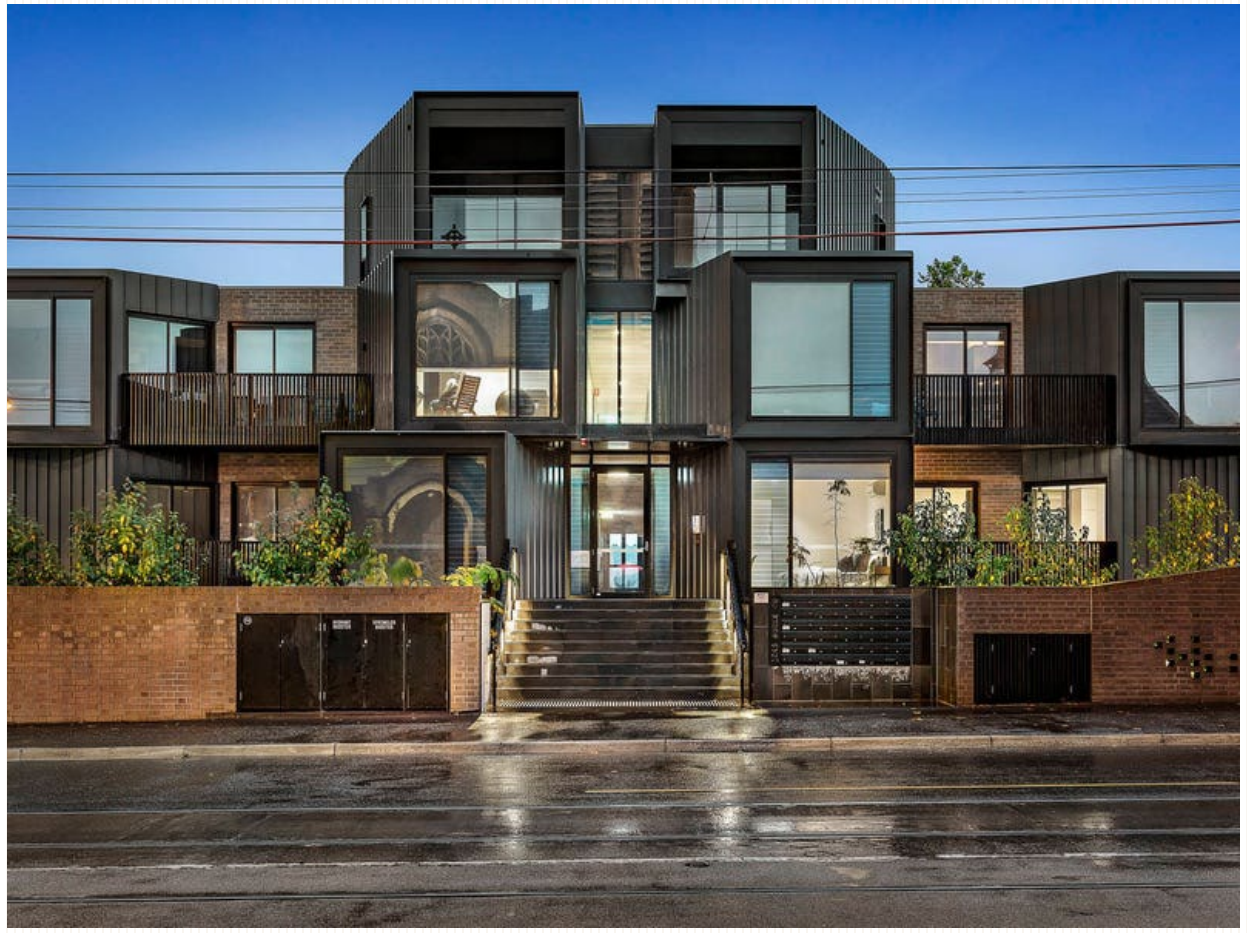
McNee

Leave granted; appeal dismissed

- VCAT may assume the standard unmet and decide if the objective is met or not
- No mandatory finding as to the nature and degree of non-compliance
- Obiter: the text of Standard A10 prevails over the diagram; setbacks run from ground level
- An amenity case must address the objective and not solely focus on a standard

QUIZ

Round 3



Maple Media Pty Ltd v Monash City Council

[2026] VSC 330



Maple Media

- Permit issued February 2019 at the direction of VCAT
  - 'installation and display of two major promotion signs' – a permit for development only
  - Condition 8: 'This permit will expire fifteen (15) years after the date it is issued' (as required by cl 52.05-9)
  - No completion condition
- Signs operational January 2023, nearly four years after the permit issued
- Council: permit expired February 2021 under the s 68(1)(b) two-year default
- VCAT refused permit holder's application for a declaration that the permit had not expired, following *Crossway* [2020] VCAT 411

Maple Media

'A permit for the development of land expires if – … (b) the development or any stage is not completed within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit …'

Planning and Environment Act 1987, s 68(1)(b) (as in force before the 2025 amendments)

1. **Feb 2019** — Permit issued (VCAT-directed)
2. **Feb 2021** — Two-year default – displaced
3. **Jan 2023** — Signs operational
4. **Feb 2034** — Condition 8 expiry = time specified

The underlying question – is a permit construed like a statute, or on its face?

Maple Media

Leave granted; appeal allowed; permit not expired

'Planning permits are documents that are entitled to be treated by the public as enduring documents that run with the land … Nor should they be given a purposive or contextual interpretation by reference to applicable planning schemes and Acts, if that would defeat the plain meaning conveyed by the words of the permit.'

Justice Gray

- A permit is construed objectively, on its own terms, for practical results
- 'Time specified' = a time conveying to the reasonable reader the last permissible time for completion
- Condition 8, in a development-only permit, specified 15 years for completion; the two-year default was displaced
- Court held that *Crossway* incorrectly decided; *Fivex* distinguished

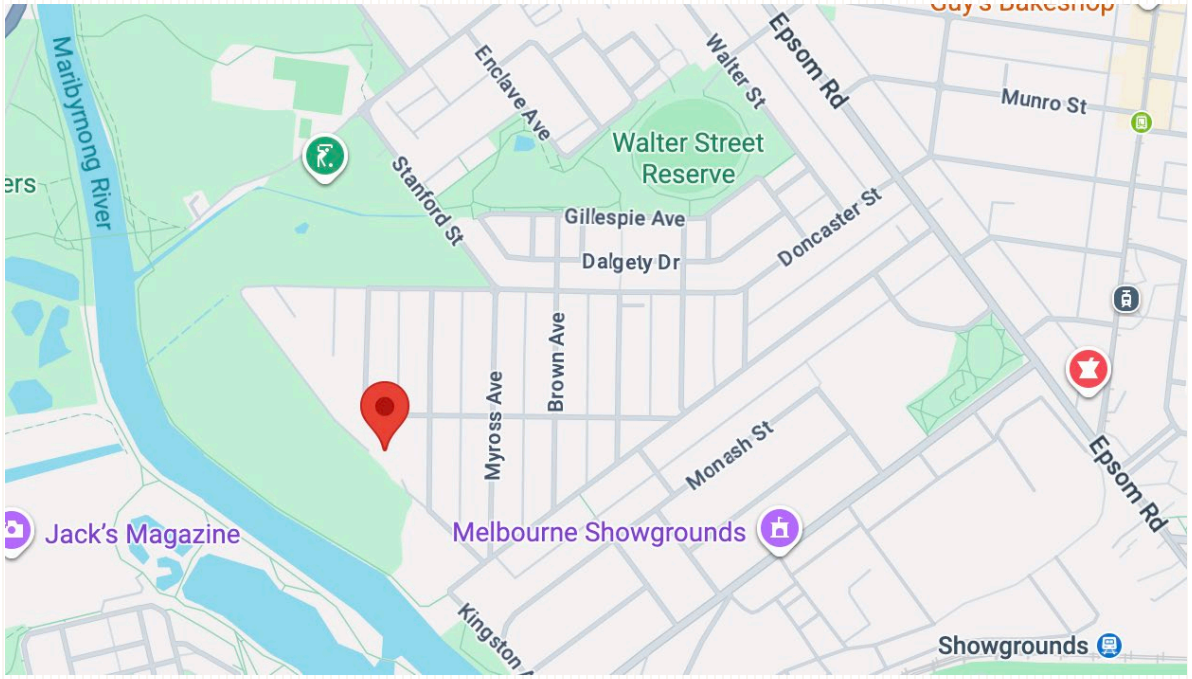
Maple Media

Takeaways

- Difference in approach: P&E Act and Planning Scheme construed purposively; the permit construed plainly, objectively, on its face
- Nothing should be read into the words of a permit:
  - if a completion time is intended, it must be expressed
- Standard-form major promotion sign permits: the expiry condition is the completion time
- The ‘power argument’ (cl 52.05-9 and s 62) was not directly decided, but his Honour was inclined against it
- Postscript: the 2025 amendments changed the default expiry conditions to 3 years to commence and 5 years to complete

QUIZ

Round 4


Maribyrnong River
Enclave Ave
Walter St
Epsom Rd
Munro St
Walter Street Reserve
Stanford St
Gillespie Ave
Dalgety Dr
Doncaster St
Brown Ave
Myross Ave
Monash St
Epsom Rd
Jack's Magazine
Melbourne Showgrounds
Showgrounds

Kingston City Council v Mobius Materials Recovery Pty Ltd

[2025] VSCA 322



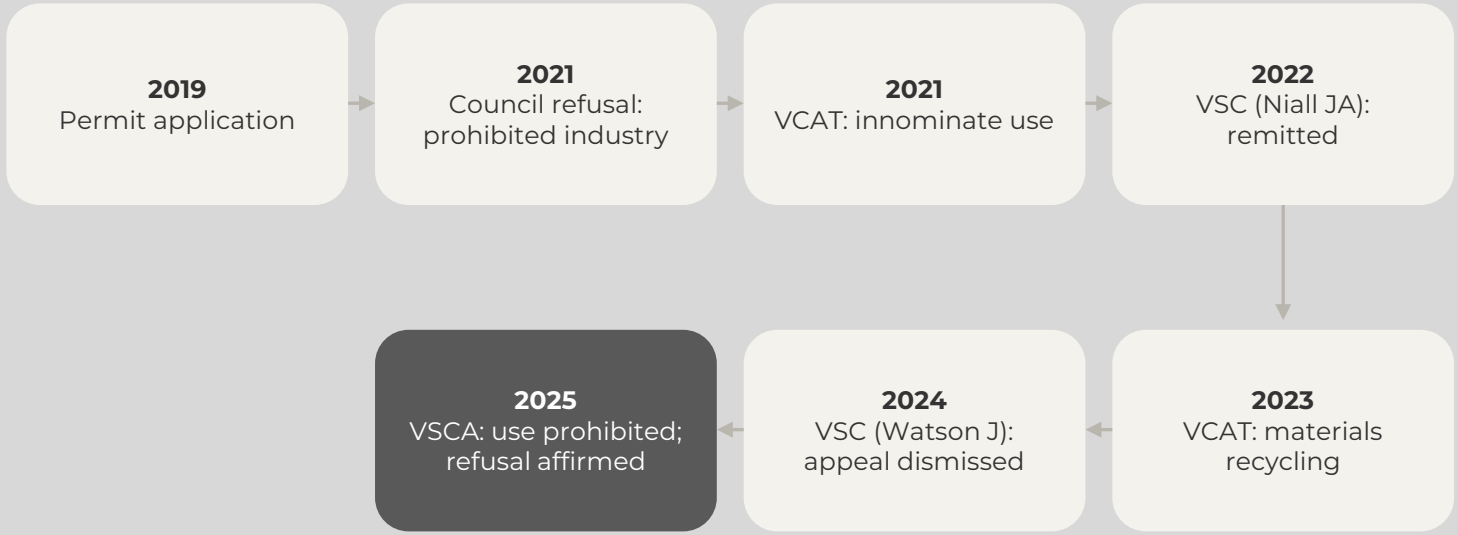
Mobius

- An appeal to the Court of Appeal from a decision of a single judge of the Trial Division. The decision appealed from was a determined s 148 appeal
- Coarse timber mulch carted to Pine Lane, Heatherton (Green Wedge Zone), temporarily stored, then reground into fine mulch for sale
- ‘Materials recycling’ is a section 2 use: ‘must be used in conjunction with Refuse disposal or Transfer station’; if a condition is unmet, the use is prohibited (cl 71.03-2)
- Refusal (2021) → two VCAT determinations → two Trial Division appeals → Court of Appeal
- No merits hearing ever held
- Mobius filed a notice of intention not to contest the VSCA appeal

Mobius

The procedural history

Four and a half years; no merits hearing



A preliminary question determined early can be efficient… but a contested one can become all consuming

Mobius

The scheme provisions

Two uses, or one?

If a use must be carried on 'in conjunction with' another use: 'there must be an essential association between the two uses; and the use must have a genuine, close and continuing functional relationship in its operation with the other use.'

Kingston Planning Scheme, cl 64.02

- Characterisation: ascertain the real and substantial purpose of the use
- The claimed second use: temporary storage of the same mulch, awaiting regrinding, said to be a 'Transfer station'

Mobius

Leave granted; appeal allowed; use prohibited

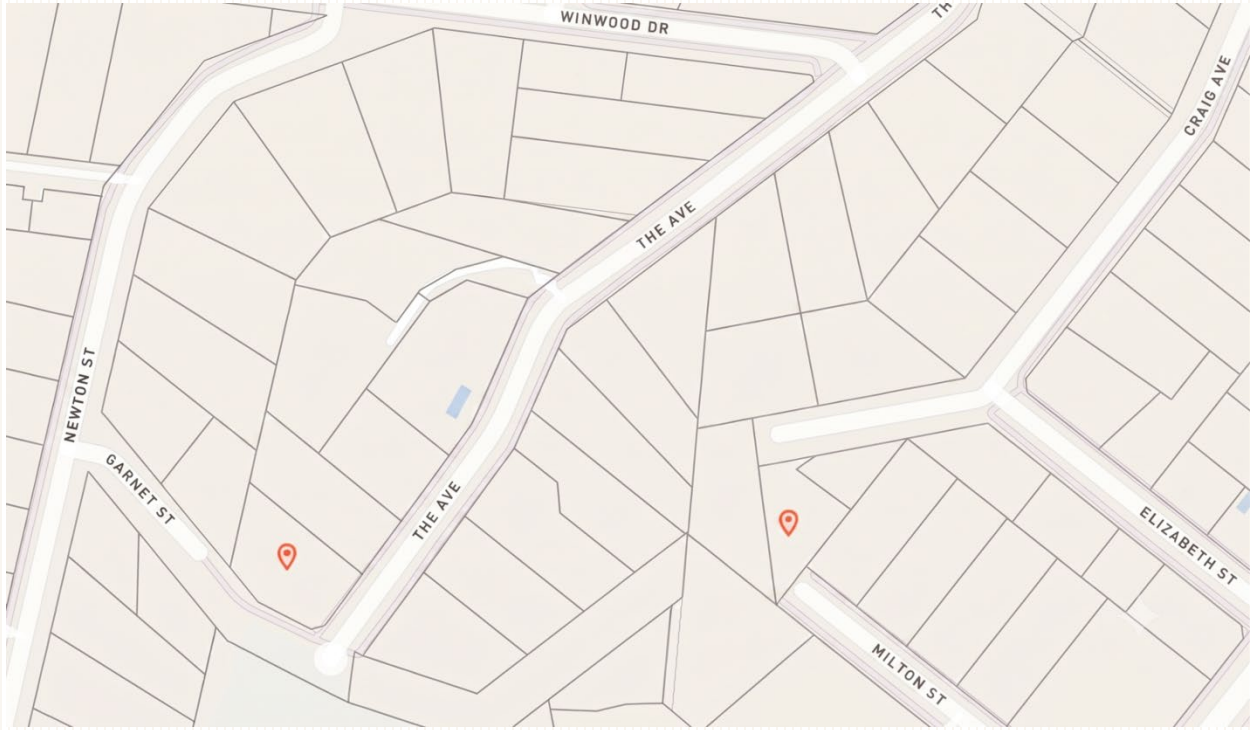
'Temporary storage of mulch pending its recycling is not the real and substantial purpose for which the land is to be used. In other words, such storage is not a separate or independent use of the land.'

President Emerton, Justices of Appeal McLeish and Lyons

- One use cannot be 'in conjunction with' itself: the formula requires two uses
- The same activities, by the same operator, for the same purpose, cannot be counted twice
- Condition unmet → prohibited; the Council's 2021 refusal affirmed, no remitter
- A cautionary tale for a 'preliminary question' engulfing the procedure

QUIZ

Round 5


WINWOOD DR
CRAIG AVE
THE AVE
NEWTON ST
GARNET ST
THE AVE
ELIZABETH ST
MILTON ST

> *'Except for an application under this section, a person cannot bring an action in respect of a failure to comply with Division 1 or 2 or this Division or Part 8 in relation to an amendment which has not been approved.'*
>
> Planning and Environment Act 1987, s 39(8)

IGA Retail Services Pty Ltd v Minister for Planning

[2025] VSCA 180; (2025) 264 LGERA 154

- Proposed Amendment C245gshe (Shepparton North Activity Centre)
- Supermarkets without a permit, up to 13,500 m^2
- Judicial review of the Panel report and Council adoption before ministerial approval
- Held: s 39(8) does not prevent the relief sought – 'action' read down (Kirk; ILA s 6) so as not to extend to judicial review for jurisdictional error
- Section 39(7) protects only an approved amendment, not the anterior steps – the Panel report and adoption are not covered
- But review for error of law on the face of the record is excluded (not entrenched), possibly subject to VCAT Act s 52(2)
- On appeal to the High Court (M103/2025), with interveners; heard May 2026; judgment reserved

IGA Retail Services

The route to the High Court

Judicial review – not a s 148 appeal

The statutory amendment process

Panel report
recommends adoption → **Council adoption**
April and July 2024 → **Ministerial approval**
not yet given

The challenge

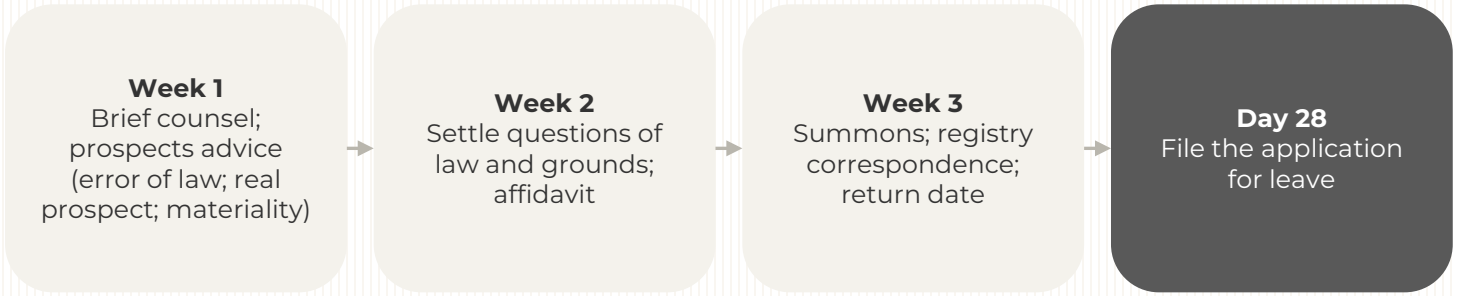
Originating motion
Trial Division, June 2024 → **s 17B questions reserved**
for the Court of Appeal → **VSCA, 7 August 2025**
s 39(8) read down (Kirk) → **High Court, M103/2025**
heard May 2026; reserved

- Held: 'action' in s 39(8) does not extend to judicial review for jurisdictional error
- s 39(7) protects only an approved amendment, not the anterior steps
- Review for error of law on the face of the record is excluded (not entrenched)
- In the High Court: where is the limit of legislative power to avoid judicial review

Preparing an application for leave to appeal

Practical tips

- Request written reasons (if required)
- Engage a barrister early for a review of the VCAT decision, identification of potential grounds of appeal and prospects advice
- Consider the strategic merit of an appeal
- Compliance with the 28-day filing deadline
- Affidavit material, including transcript
- Correspond with the Court Registry to obtain a date for the first return
- Initiating documents (including notice of appeal and summons) to be served on all parties to the proceeding at VCAT
- Respondent parties may elect to not participate, but agree to abide by the Court's decision
- An application does not automatically stay an order



Preparing an application for leave to appeal

Practical tips (continued)

- Procedural orders and the two ‘standard’ directions hearings
- Appeal Costs Fund
- VCP Practice Note
- Supreme Court (General Civil Procedure) Rules **2025**

QUIZ

Answers

1. *Sweetvale Pty Ltd v Minister for Planning* (2004) 16 VPR 224; [2001] VSC 426
   - "BHP Building" at 171 Collins Street, Melbourne
2. *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; [2008] VSCA 217
   - Pullman Hotel, East Melbourne
3. *Boroondara CC v 1045 Burke Road Pty Ltd* (2015) 49 VR 535; [2015] VSCA 27
   - 1045 Burke Road, Camberwell
4. *Benedetti v Moonee Valley CC* (2021) 21 VPR 95; [2005] VSC 434
   - 8 Angler Parade, Ascot Vale
5. *Knox CC v Tulcany* (2004) 18 VPR 229; [2004] VSC 375
   - 54 The Avenue and 10 Milton Street, Ferntree Gully

Questions



Peter O'Farrell KC

E: peterofarrell@vicbar.com.au

T: 03 9225 6761

M: 0412 745 774

VicBar Profile



Michael Beaconsfield

E: mbeaconsfield@vicbar.com.au

T: 03 9225 7777

M: 0499 100 645

VicBar Profile

Join us again next week

INSIDE PLANNING & ENVIRONMENT LAW

WITH FOLEY'S LIST BARRISTERS

PART 5 OF THE PLANNING AND ENVIRONMENT ACT

CHANGES TO THE COMPENSATION REGIME

THUR 20 AUG 2026 | 4:15 - 5:15PM

PRESENTERS:

Jennifer Trewhella & Kate Lyle



1 CPD POINT