

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1042/2022

CATCHWORDS

Section 184A of the *Planning and Environment Act 1987*; Ending of section 173 agreement; In principle agreement by responsible authority; Process for ending section 173 agreement; Jurisdiction of Tribunal; Consideration of *Anderson v Moira SC* [2018] VCAT 1882; Application for summary dismissal; Section 75 of the *Victorian Civil and Administrative Tribunal Act 1998*; Application summarily dismissed.

APPLICANT	Montclair Realty Pty Ltd
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	52 Montclair Avenue GLEN WAVERLEY VIC 3150
HEARING TYPE	Practice Day Hearing
DATE OF HEARING	28 October 2022
DATE OF ORDER	7 November 2022
CITATION	Montclair Realty Pty Ltd v Monash CC [2022] VCAT 1279

ORDER

Summary Dismissal

- 1 Proceeding P1042/2022 is summarily dismissed under section 75(1) of the *Victorian Civil and Administrative Tribunal Act 1998* on the basis that the application is misconceived.

Vacate hearing

- 2 The hearing scheduled to commence at 10.00 am on **9 February 2023** for one day is vacated. No attendance is required.

Teresa Bisucci
Deputy President

APPEARANCES

For Montclair Realty Pty. Ltd	How Ng, planning consultant, of Melbourne Planning Pty Ltd
For Monash City Council	Maria Marshall, lawyer, Maddocks Lawyers



REASONS

BACKGROUND

- 1 The application is brought under section 184A(1)(c)(ii) of the *Planning and Environment Act 1987* (**PE Act**) by Montclair Realty Pty Ltd (**applicant**) seeking a review of the decisions of the Monash City Council (**council**) to refuse to end the four section 173 agreements registered on the certificate of title for the land at 52 Montclair Avenue, Glen Waverley (**land**).
- 2 The four section 173 agreements are:
 - a dealing number: AN109578Y entered into on 6 September 2016;
 - b dealing number: AQ368201A entered into on 6 October 2017;
 - c dealing number: AQ250642A entered into on 5 July 2017; and
 - d dealing number: AM307242P entered into on 27 October 2015.
- 3 The officer's report provided with the application to the Tribunal provides a detailed history relating to the section 173 agreements. In brief, I note that on 30 August 2011, council issued Planning Permit TPA/38878 (**2011 permit**) for the use and development of a six-storey building comprising café, restaurant, place of assembly, massage facilities and an on-premises liquor licence. No parking was provided on the land and the 2011 permit required a section 173 agreement to be entered into for payment of a car parking contribution as required by the car parking overlay that applied at the time the 2011 permit was issued.
- 4 The 2011 permit has been amended on several occasions including to allow for new uses that generated additional car parking. Further, on 8 September 2015 TPA/44329 (**2015 permit**) was issued by council for the construction of an additional storey to the building permitted by the 2011 permit. Additional section 173 agreements were entered into for the parking contributions.
- 5 The land is presently developed with a seven-storey building comprising various uses including cafes, restaurants, place of assembly, liquor licence and massage facilities.
- 6 The purpose of the section 173 agreements was to defer the payment for car parking spaces.
- 7 On 5 April 2022, the applicant made an application to council to end all four section 173 agreements on the basis that the 'parking scene' had changed since the gazettal of Amendment VC148 to the Monash Planning Scheme (**scheme**) and the revocation of clause 45.09 of the scheme. Further, the applicant advised that it had decided to abandon the restaurant uses allowed under the 2011 permit and commence 'afresh'.
- 8 On 17 June 2022, council advised the applicant that it did not agree in principle to the ending of the agreements and thus, the application for the ending of the agreements was refused.



- 9 The purposes of the practice day hearing are:
- to ascertain whether the responsible authority has provided in principle agreement to the ending of the section 173 agreements, in accordance with the decision of the Tribunal in *Anderson v Moira SC* [2018] VCAT 1882 (*Anderson*);
 - to consider whether the application should be struck out or summarily dismissed; and
 - future conduct.

10 For ease, I now set out the relevant paragraphs of *Anderson*:

11. Section 178A enables an owner of land to apply to the responsible authority for agreement to a proposal to amend an agreement in respect of that land. Section 178A(3) provides that the responsible authority must notify the owner as to whether it agrees in principle to the proposal. If the responsible authority agrees with the proposal in principle then subsequent provisions of the Act apply relating to the giving of notice of the proposal; objections and submissions to the responsible authority; making a decision to amend or end the agreement; giving notice of the decision to amend or end the agreement; and registering the amendment or ending of the agreement.
12. Sections 184A – 184D give various people a right to apply to the Tribunal for review of a decision of the responsible authority under section 178E to amend or end the agreement or to refuse or fail to end or amend the agreement. However, the only decision of the responsible authority that is open to review is one made under section 178E of the Act. A decision under section 178E can only be made in respect of a proposal that has been agreed to in principle by the responsible authority and that has gone through the processes outlined in sections 178C *et seq.* There is no right of review if the council refuses to agree in principle to a proposal by an owner to amend or end an agreement.
13. The Tribunal is commonly referred to as ‘a creature of statute’. This means that the Tribunal only has those powers that are conferred on it by a statute. In the case of a proposal to amend or end a section 173 agreement, the Tribunal only has power to review a decision involving a proposal to amend or end an agreement where the responsible authority has initially agreed in principle to the proposal, even if the ultimate decision is a refusal. The Tribunal has no jurisdiction if the responsible authority does not agree in principle to the proposal.
14. Consequently, the Tribunal cannot consider the Andersons application to review the council’s refusal to agree in principle to amend or end the section 173 agreement affecting the subject land because it has no power to do so. In circumstances where the Tribunal has no power to consider an application for review,



it cannot deal with any of the Andersons arguments going to the merits of the subdivision application.

- 11 Having regard to the submissions of the parties, I agree with the analysis of the relevant parts of the PE Act set out in *Anderson*. Accordingly, the application is summarily dismissed under section 75(1)(a) of the *Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act)* because it is misconceived. My reasons follow.

SUBMISSIONS

Applicant

- 12 The applicant says that nowhere in section 178E of the PE Act is an ‘in principle’ agreement by the responsible authority mentioned let alone required. Further, it says that the phrase ‘in principle’ appears in section 178C(1)(a) of the PE Act and only relates to whether the responsible authority can proceed to advertise the proposal and does not deprive the Tribunal of jurisdiction.
- 13 The applicant casts doubt on the ‘correctness of the statement’ of the following statement in *Anderson*:
- A decision under section 178E can only be made in respect of a proposal that has been agreed to in principle by the responsible authority.¹
- 14 Further, the applicant claims that there is nothing in section 178 E of the PE Act to prevent the responsible authority from deciding to refuse the proposal when it does not agree in principle.
- 15 Thus, the applicant takes issue with concluding comments in *Anderson* that the Tribunal does not have jurisdiction to consider an application if the responsible authority does not agree in principle. The applicant says that the decision in *Anderson*:
- ...elevated the responsible authority to the status of a dictator. It deprives the Tribunal of its inherent appellate function and makes s.184G a Clayton’s provision. Common sense would suggest this should not be followed.
- 16 The applicant says that the correct approach to the interpretation of the provisions is set out in *D&L MacPherson Nominees Pty Ltd v Bass Coast SC* [2016] VCAT 647 (*D&L Macpherson Nominees*) from paragraph 19:

Consideration of issues – the s 184A application

19. It is appropriate to first consider the application in relation to the ending of the Agreement.
20. Under s 184A of the P&E Act, a person who applied to the Council to end an agreement may apply to VCAT to review a Council decision to refuse to end the agreement. This follows a Council process under ss 178A-178I of the P&E Act, including

¹ Applicant’s submissions at page 3.



a requirement under s 178B(2) that, in considering a proposal to end an agreement, the Council must consider:

- (a) the purpose of the agreement; and
- (b) whether and why the agreement is no longer required; and
- (c) whether the ending of the agreement would disadvantage any person, whether or not a party to the agreement; and
- (d) the reasons why the responsible authority entered into the agreement; and
- (e) any relevant permit or other requirements the land is subject to under the *Subdivision Act 1988*; and
- (f) any other prescribed matter.

21. Following a review under s 184G of the P&E Act, VCAT may direct the Council to end the Agreement, or determine that the Agreement should not be ended. Pursuant to s 184G(4), s 84B(2) of the P&E Act does not apply to a review under these provisions so VCAT is not required to take into account the broader planning objectives and considerations that otherwise apply in a 'planning merits' review. The relevant factors that VCAT must consider are therefore essentially the same matters that the Council must consider under s 178B(2).

- 17 It is said by the applicant that *Anderson* took a 'very narrow view' of the PE Act whereas *D&L Macpherson* 'took a more liberal and tenable view'.
- 18 The applicant says that I should follow the approach set out in *Liebler v City of Moorabin* 8 A.A.T.R. 188 (*Liebler*) as set out below:

Indeed, the Supreme Court in *Leibler v. City of Moorabbin*, 8 A.A.T.R. 188, at p.192, said as follows:

"A court when interpreting ordinary or subordinate legislation should eschew creating absurdities. See *Australian Boot Trade Employers Federation v. Wybrow* (1930) 11 C.L.R. 311 per Higgins J. at 371 and *Broken Hill South Ltd. v. Commissioner of Taxation (NSW)* (1937) 56 C.L.R. 337 per Dixon J. at 371 and locally *Tumer v. Ciappara* [1969] V.R. 851 and *Norton v. Long* [1968] V.R. 221 at 223 which affirmed *Metropolitan Coal Co. of Sydney & Shale Employees Federation* 24 C.L.R. 85 per Isaacs and Rich JJ.:

'In construing an instrument where its words are susceptible of two meanings it is always legitimate to take into account reasonableness, justice and consistency on the one hand and unreasonableness, injustice and absurdity on the other.'

- 19 Lastly, the applicant says that the core of the Tribunal’s jurisdiction is to review decisions of a responsible authority and that *every* decision is capable of review under section 149B of the PE Act.

Council

- 20 At the practice day hearing, council provided an overview of its understanding of Division 2 of Part 9 of the PE Act. In summary, it says as follows:

- section 177 of the PE Act provides for circumstances for the ending of a section 173 agreement. Section 177 of the PE Act provides:

When does an agreement end?

- (1) An agreement may provide that the agreement ends wholly or in part or as to any part of the land on or after—
 - (a) the happening of any specified event; or
 - (b) a specified time; or
 - (c) the cessation of the use or the development of the land or any part of the land for a specified purpose.
 - (2) An agreement may be ended wholly or in part or as to any part of the land—
 - (a) by agreement between the responsible authority and all persons who are bound by any covenant in the agreement; or
 - (b) otherwise in accordance with this Division.
- section 177(1)(a-c) of the PE Act refers to the ending of an agreement being set out by the terms of the agreement itself;
 - section 177(2)(a) of the PE Act applies if the responsible authority and all parties bound by the agreement agree to end the agreement;
 - section 177(2)(b) applies if section 177(1)(a-c) and 177(2) of the PE Act do not apply or are not invoked. In those circumstances, the PE Act sets out the process to be followed. This process involves a stepped process once an application is made to the responsible authority under section 178A of the PE Act. The process commences by the responsible authority notifying the applicant as to whether it agrees in principle to the proposal to end the agreement. If the responsible authority agrees in principle to the proposal to end the agreement then, it notifies the owner of its ‘in principle’ agreement under section 178(3) of the PE Act. Following that notification, the responsible authority must give notice under section 178C of the PE



Act to all parties to the agreement and any other person, if the ending of the agreement may cause material detriment to them.²

- Division 2, Part 9 of the PE Act intends to put the responsible authority in ‘the driver’s seat’ when it comes to a consideration of ending or amending section 173 agreements. This is particularly so, as section 173 agreements are ‘hybrid instruments’ with quasi contractual obligations.

21 Council says that it has not given ‘in principle’ support to the applicant for the ending the four section 173 agreements because the intention of the agreements is for them to end when the parking contribution has been paid to council. The required car parking contributions have not been paid and in accordance with their terms, the agreements have not ended.

22 Council says that on 17 June 2022 it advised the applicant as follows:

I refer to your request under Section 178A of the Planning and Environment Act 1987 to, end Section 173 Agreements AM307242P, AN109578Y, AQ250642A and AQ368201A affecting land at 52 Montclair Avenue, Glen Waverley.

I advise that having regard to Section 178B of the Act, Council does not agree in principle to the ending of these agreements and therefore refuses your request.

23 Further, council relies on *Anderson* and says that the Tribunal does not have the jurisdiction to entertain the application and that it ought to be summarily dismissed as it is misconceived and lacking in substance.

TRIBUNAL DETERMINATION

24 For completeness, I now set out sections 178A, 178B(2), 178C(1-3), 178D and 178E of the PE Act:

178A Proposal to amend or end agreement

- (1) An owner of land, or a person who has entered into an agreement under section 173 in anticipation of becoming the owner of the land, may apply to the responsible authority for agreement to a proposal—
 - (a) to amend an agreement in respect of that land; or
 - (b) to end an agreement in respect of that land, wholly or in part or as to any part of that land.
- (2) An application under subsection (1) must—
 - (a) be made in accordance with the regulations; and
 - (b) be accompanied by the information required by the regulations; and
 - (c) be accompanied by the prescribed fee.

² I am only referring to the ending of section 173 agreements and not any amendment of such agreements.



- (3) The responsible authority must notify the owner as to whether it agrees in principle to the proposal under subsection (1).
- (4) ...
- (5) The responsible authority may, on its own initiative, propose to amend or end an agreement.

178B Matters to be considered in considering proposal to amend or end agreement

...

- (2) In considering a proposal under section 178A to end an agreement, the responsible authority must consider—
 - (a) the purpose of the agreement; and
 - (b) whether and why the agreement is no longer required; and
 - (c) whether the ending of the agreement would disadvantage any person, whether or not a party to the agreement; and
 - (d) the reasons why the responsible authority entered into the agreement; and
 - (e) any relevant permit or other requirements the land is subject to under the **Subdivision Act 1988**; and
 - (f) any other prescribed matter.

178C Notice of proposal

- (1) This section applies if—
 - (a) an application is made under section 178A and the responsible authority agrees with the proposal in principle; or
 - (b) the responsible authority proposes to amend or end an agreement.
- (2) The responsible authority must give notice of the proposal to—
 - (a) all parties to the agreement; and
 - (b) any other persons, if the responsible authority considers that the decision to amend or end the agreement may cause material detriment to them.
- (3) Subsection (2)(a) is subject to any provision of the agreement that specifies the parties to the agreement to be notified of a proposal to amend or end an agreement.

...

178D Objections and submissions to responsible authority

Any person who was given or ought to have been given notice under section 178C of a proposal to amend or end an agreement may object to, or make any other submission in relation to, the proposal.

178E Decision to amend or end agreement

- (1) If the responsible authority is required under section 178C to give notice of a proposal to amend or end an agreement, the responsible authority must not make a decision on the proposal until at least 14 days after the giving of the last notice under section 178C.
- (2) If no objections are made under section 178D, the responsible authority may, after considering the matters in section 178B—
 - (a) amend or end the agreement in accordance with the proposal; or
 - (b) amend or end the agreement in a manner that is not substantively different from the proposal; or
 - (c) refuse to amend or end the agreement.
- (3) The responsible authority, after considering any objections or other submissions and the matters in section 178B, may—
 - (a) decide to amend or end the agreement in accordance with the proposal; or
 - (b) decide to amend or end the agreement in a manner that is not substantively different from the proposal; or
 - (c) propose to amend or end the agreement in a manner that is substantively different from the proposal; or
 - (d) refuse to amend or end the agreement.
- (4) Sections 178C, 178D and this section apply to a proposal under subsection (3)(c) as if it were a new proposal.

...

25 I start by highlighting the nature of section 173 agreements. In *Kinchington Estate Pty Ltd v Wodonga CC*³ (*Kinchington*) Quigley J made the following relevant observations:

³ [2019] VSC 745.

Nature of a s 173 agreement

[20] Section 173 agreements have a number of features that are pertinent to understanding the statutory regime by which they are amended or ended:

- (a) Firstly, they are a planning tool or mechanism which allows for the use and development of land in a manner and direction which is consistent with the objectives of planning in Victoria and the relevant planning scheme but can provide for terms or conditions which are not appropriate or easily included in a planning permit or other approval.
- (b) Secondly, the responsible authority (usually the municipal council) is always a party to a s 173 agreement.
- (c) Thirdly, s 173 agreements can be registered on title so that they are enforceable against subsequent owners.
- (d) Fourthly, s 173 agreements may be enforced under s 114 of the P&E Act with aspects of their enforceability and interpretation being reviewable pursuant to ss 149 and 149A of the P&E Act.

(footnotes omitted)

26 In *Solid Investments Australia Pty Ltd v Greater Geelong CC*⁴ (*Solid Investments*) the Tribunal stated as follows:

The nature of a section 173 agreement

[43] A section 173 agreement can be described as a hybrid instrument. In part such an instrument has the character of a private agreement. However it is also an instrument that forms part of the planning controls which apply to land ...

27 Having regard to the above cases, a section 173 agreement is a hybrid document with its inception in the PE Act but its obligations are as a private agreement between a land owner and a responsible authority. In my view, this assists in understanding the statutory regime established to end agreements.

28 I agree with the analysis in *Anderson*, that the Tribunal only has power to review a decision involving a proposal to end an agreement if there has been in principle agreement by the responsible authority to the ending of the agreement. The Tribunal has no jurisdiction if the responsible authority refuses to agree in principle to the ending of the agreement.

29 In my view there is no ambiguity in the PE Act, section 178A(3) requires the responsible authority to notify the applicant (owner) whether it agrees in principle to the proposal to end the agreement. Notice of the application under section 178C(1) of the PE Act can only occur if an application to end the agreement under section 178A of the PE Act has been made and the responsible authority agrees to the ending of the agreement in principle.

⁴ [2004] VCAT 2356.



This much is clear from the opening words of section 178C of the PE Act which state:

- (1) This section applies if —
 - (a) an application is made under section 178A **and*** the responsible authority agrees with the proposal in principle; or
 - (b) the responsible authority proposes to amend or end an agreement.

(* **my emphasis**)

- 30 An application to end an agreement can only proceed to notice if the responsible authority agrees in principle to the ending of the agreement or if the responsible authority itself proposed to end the agreement.
- 31 Given that section 173 agreements are in the nature of a private agreement between a land owner and a responsible authority, it is no surprise that the legislative regime for the ending of such agreements provides a responsible authority with a right not to agree in principle to its ending. This situation only arises if section 177(1)(a-c) of the PE Act does not apply, that is, there is no express provision within the agreement dealing with its termination or ending.
- 32 Section 184A of the PE Act provides:

184A Application to Tribunal by applicant in relation to decisions under Subdivision 2

- (1) A person who applied to amend or end an agreement under Subdivision 2 may apply to the Tribunal for review of a decision by the responsible authority under section 178E—
 - (a) to amend the agreement in a manner that is different from the proposal; or
 - (b) to end the agreement in a manner that is different from the proposal; or
 - (c) to refuse—
 - (i) to amend the agreement; or
 - (ii) to end the agreement, wholly or in part or as to any part of the land subject to the agreement.
- (2) If the responsible authority—
 - (a) fails to give notice of a proposal under section 178C for the amendment of an agreement or the ending of an agreement within the prescribed time after the responsible authority gives notice that it agrees in principle under section 178A(3) or (4); or
 - (b) fails to decide on an application under section 178E within the prescribed time after the responsible

authority gives notice that it agrees in principle under section 178A(3) or (4)—

the applicant may apply to the Tribunal for review of the failure to make a decision on the matter.

- 33 Notably, only a decision under section 178E of the PE Act allows an application under section 184A of the PE Act. Section 184A(2) of the PE Act also connects the failure to give notice with the responsible authority agreement in principle with the ending of an agreement.
- 34 Whilst the applicant relies on *D&L Macpherson Nominees*, I cannot see how it is relevant to the question of the Tribunal's jurisdiction. The Tribunal did not deal with the question of whether the responsible authority provided its in principle agreement. *D&L Macpherson Nominees* involved two applications, one under section 184A of the PE Act to review the decision of the responsible authority to refuse to end an agreement and another under section 79 of the PE Act for failure to grant the planning permit within a prescribed time. Objectors were involved in *D&L Macpherson Nominees*, but it appears only in respect of the application to end the section 173 agreement as the application for planning permit had not been the subject of notice throughout the council process. There is no mention whatsoever as to the process under the PE Act if a responsible authority fails to provide its agreement to the ending of the agreement in principle. Having regard to this, I do not agree with the applicant that *D&L Macpherson Nominees* takes a different approach to *Anderson* in the interpretation of the PE Act. As to the applicant's submissions regarding *Liebler*, I see no ambiguity nor absurdity arising from the interpretation set out in *Anderson*.
- 35 Lastly, I note that the applicant's submission regarding the analysis in *Anderson* and council's decision leaving the Tribunal with no decision to review. In my view, that is the outcome of the process set out in the PE Act for the ending of agreements. However, that does not mean that a responsible authority can exercise its right to refuse its 'in principle agreement capriciously. A detailed discussion of the nature of the power of a responsible authority to refuse in principle agreement to a proposal is set out in *Kinchington*. I do not need to provide any analysis of this case, only to note that the Supreme Court of Victoria has dealt with the nature and character of such a decision.
- 36 Having regard to the above it follows that application is summarily dismissed under section 75(1)(a) of the VCAT Act because it is misconceived.

Teresa Bisucci
Deputy President