

NFP'S LOSING AT VCAT MAY BE LIABLE FOR LEGAL COSTS

In the VCAT matter of the [Drysdale Clifton Springs Community Association \("DCSCA"\) Inc v Greater Geelong CC \[2015\] VCAT 1208](#) (the "Costs Decision"), DCSCA was ordered to pay the legal costs of Milemaker Petroleum Pty Ltd ("Milemaker"). This particular decision was specifically on the question of costs.

The facts and background are contained in [Drysdale Clifton Springs Community Association \("DCSCA"\) Inc v Greater Geelong CC \[2015\] VCAT 350](#) (the "Factual Decision").

In the Factual Decision DSCA sought to cancel a Planning Permit issued by Greater Geelong City Council to Milemaker for the use and development of the subject land for a service station.

The Factual Decision ordered that:-

"The request [by DCSCA] to cancel Planning Permit No. 1565/2013 is struck out as misconceived pursuant to section 75 of the Victorian Civil and Administrative Tribunal Act."

The question of costs was subsequently determined in the Costs Decision after considering submissions.

As a general principle each party in VCAT proceedings must bear their own costs, unless VCAT determines that it is fair and reasonable to make an award of costs.

The Costs Decision noted at paragraph 7:-

"In considering whether it is fair to require a party to pay all or part of another party's costs, the Tribunal must consider the following factors:

- (a) *whether a party has conducted the proceedings in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as –*
 - (i) *failing to comply with an order or direction of the Tribunal without reasonable excuse;*

- (ii) *failing to comply with this Act, the regulations, the rules or an enabling enactment;*
- (iii) *asking for an adjournment as a result of (i) or (ii);*
- (iv) *causing an adjournment;*
- (v) *attempting to deceive another party or the Tribunal;*
- (vi) *vexatiously conducting the proceedings;*
- (b) *whether a party has been responsible for prolonging unreasonably the time taken to complete the proceedings;*
- (c) *the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;*
- (d) *the nature and complexity of the proceeding;*
- (e) *any other matter the Tribunal considers relevant.”*

The Costs Decision found that notwithstanding it considered DCSCA had:-

- (a) Not unnecessarily disadvantaged Milemaker;
- (b) Not prolonged unreasonably the proceedings;
- (c) Not found DCSCA to be vexatious.

The Tribunal however did find against DCSCA for the following reasons:-

“

- *The lack of veracity of the association’s position as a matter of law.*
- *DCSCA had been warned in the Facts Decision that their application was “manifestly hopeless” and “doomed to fail”.*
- *The Facts Decision also found that the DCSCA could not reasonably satisfy any ground under Section 87 of the Planning and Environment Act 1987 as the legal threshold for a request to cancel the permit;*
- *Factors pertaining to the exercise of the Tribunal’s discretion were strongly weighed against the Association’s claim.*

- *The Tribunal had made very clear that an application to cancel a permit is a very serious proceeding that may have significant consequences for a permit holder and others.*
- *An application to cancel a Planning Permit that has already been issued is vastly different from a proceeding in which the merits of a planning proposal are under review.*
- *Milemaker’s Solicitors had clearly indicated to DCSCA prior to the proceedings that the Application was misconceived and that an application to strike out and for costs would be made if it were not withdrawn.*
- *Notwithstanding the volunteer nature of the association and its assertion that it was “the voice of the local community”, this was not sufficient to come within the scope of “public interest litigation”.*

The overriding consideration for the Tribunal was that DCSCA had “no chance of success, even having regard to the threshold legislative tests. It did not raise legitimate issues for determination.”

Accordingly, the Tribunal made an award of \$5,500 in costs against DCSCA.

The lesson for NFP’s is that they are not immune from a costs order at VCAT simply because they are an NFP. The Tribunal will look towards the merits of the respective cases and therefore careful thought should be given to the nature and basis of legal proceedings instituted by any party, including NFP’s.

Date Published: 14 October 2015

Victor Hamit
Wentworth Lawyers Pty Ltd
Level 40
140 William Street
MELBOURNE VIC 3000

Tel: +61 (3) 9607 8380
Mobile (Aust.): 0408 590 706

Email: vhamit@wentworthlawyers.com.au
Website: www.wentworthlawyers.com.au

Disclaimer:

These materials are provided as a general guide on the subject only, not as specific advice on any particular matter or to any particular person. Please seek specific advice on your own particular circumstances as situations and facts vary.

Liability limited by a scheme approved under the Professional Standards Legislation