

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1007/2016

APPLICANT	Maxwell Parsons
PLANNING AUTHORITY	Nillumbik Shire Council
RESPONDENT	Minister for Planning
SUBJECT LAND	125 Garden Hill Court KANGAROO GROUND VIC 3097
WHERE HELD	55 King Street, Melbourne
BEFORE	Mark Dwyer, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	18 October 2016
DATE OF ORDER	11 November 2016
CITATION	Parsons v Nillumbik SC [2016] VCAT 1898

ORDER

- 1 For the avoidance of doubt, the Minister for Planning is a party in the proceeding pursuant to s 39(2)(b) of the *Planning and Environment Act 1987* (Vic).
 - 2 Pursuant to s 39(4)(a) of the *Planning and Environment Act 1987* (Vic), the Tribunal makes the following declarations:
 - On 13 April 2016, Nillumbik Shire Council, in its capacity as the planning authority for Amendment C101 to the Nillumbik Planning Scheme, abandoned Amendment C101 pursuant to s 23(1)(c) of the *Planning and Environment Act 1987* (Vic).
 - Nillumbik Shire Council, in its capacity as the planning authority for Amendment C101 to the Nillumbik Planning Scheme, has failed to comply with s 28 of the *Planning and Environment Act 1987* (Vic), in that it has failed to tell the Minister for Planning in writing of its decision to abandon Amendment C101.
 - Nillumbik Shire Council is obliged by s 28 of the *Planning and Environment Act 1987* (Vic) to tell the Minister for Planning in writing of its decision to abandon Amendment C101.
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- 3 I direct that a copy of this order and reasons be forwarded to Planning Panels Victoria, in addition to the three parties to the proceeding.

Mark Dwyer
Deputy President

APPEARANCES:

For Maxwell Parsons	Jeremy Gobbo QC and Paul Connor of counsel, instructed by Equipe Lawyers
For Nillumbik Shire Council	Adrian Finanzio SC and Emrys Nekvapil of counsel, instructed by Maddocks Lawyers
For Minister for Planning	No appearance (excused from attendance)

INFORMATION

Nature of proceeding	Application under s 39 of the <i>Planning and Environment Act 1987</i> (Vic) – referral by applicant of alleged defect in procedure (by planning authority) in relation to a planning scheme amendment that has not yet been approved.
Planning scheme	Nillumbik Planning Scheme
Relevant Amendment to planning scheme	Amendment C101. The Amendment C101 proposes changes to planning controls covering extensive areas of the municipality that are subject to the Environment Significance Overlay, including the applicant’s land.
Land description	The land is Lot 7 on PS 6412766. Other than being land to which Amendment C101 would apply, if approved, the specific characteristics of the land are not relevant in the proceeding.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 In late 2015, in its capacity as a planning authority under the *Planning and Environment Act 1987* (Vic) (**P&E Act**), Nillumbik Shire Council (**Council**) exhibited Amendment C101 to the Nillumbik Planning Scheme (**Amendment C101**). Amendment C101 proposed changes to planning controls covering extensive areas of private land within Nillumbik that are subject to the Environment Significance Overlay.
- 2 The applicant, Maxwell Parsons, was one of 194 submitters who made a submission in relation to Amendment C101.
- 3 On 13 April 2016, a meeting of the Policy and Services Committee of the Council (**Committee**) was held to consider the submissions, together with an officer report recommending the referral of submissions to a panel. 52 submitters also addressed the Committee.
- 4 The Committee resolved (acting under delegation from the Council²) to receive and note the issues raised by submitters, and to abandon Amendment C101 in its entirety (**13 April resolution**).
- 5 On 26 April 2016, at its ordinary meeting, the Council considered a report and recommendation concerning the 13 April resolution. The report cast doubt on whether the Committee had delegated power to abandon Amendment C101, and recommended ratification of the Committee resolution or reconsideration by the Council.
- 6 The Council resolved to note the submissions and presentations to the Committee on 13 April 2016, to request that the Minister for Planning appoint a panel to hear submissions relating to Amendment C101, and to provide a Council submission to the panel seeking certain variations to the amendment documentation (**26 April resolution**).
- 7 Mr Parsons claims that the 13 April resolution was a valid and lawful exercise of power by the Council (acting under delegation) to abandon Amendment C101, which could not be undone through the 26 April resolution. Mr Parsons also claims that, as a consequence, the Council has failed to notify the Minister for Planning that Amendment C101 has been abandoned.
- 8 Based on these alleged defects in procedure in relation to Amendment C101, Mr Parsons has referred the matter to VCAT for determination pursuant to s 39 of the P&E Act. Pursuant to ss 39(4) and 39(5), VCAT may make any declaration that it considers appropriate and/or direct a

¹ The submissions and evidence of the parties, any supporting material provided at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

² The delegation was contained in an instrument of delegation from the Council to the Committee dated 16 October 2013. I will refer to the instrument of delegation later in these reasons.

planning authority to take specified action, but it cannot vary or substitute a decision made in relation to the matter.

WHAT ARE THE ISSUES?

- 9 In resolving to abandon Amendment C101, the Committee was purporting to act as the Council's delegate in exercising a power under s 23(1) of the P&E Act. A key question for VCAT is the interrelationship of this provision with ss 28 and 29 of the P&E Act (and whether s 23 provides a separate power of abandonment, or whether the ultimate power of abandonment resides only in ss 28 and 29). This is because s 188 of the P&E Act effectively prevents a planning authority (i.e. here, the Council) from delegating its powers under ss 28 and 29.
- 10 I agree with Mr Parsons that the key issues for resolution in this proceeding are therefore as follows:
- Does s 23(1)(c) of the P&E Act confer power on a planning authority to abandon Amendment C101?
 - Does s 188 of the P&E Act prohibit delegation of the power to abandon Amendment C101?
 - Is the Council required to tell the Minister for Planning (pursuant to s 28 of the P&E Act) that it has abandoned Amendment C101 through the 13 April resolution?
 - What is the status of the 26 April resolution?
- 11 I will deal with these matters in turn.
- 12 As a preliminary matter, I note for the record that:
- The material facts are not in dispute. Relevant background documents are contained in a common tribunal book filed by the parties.
 - The relevant instrument of delegation from the Council to the Committee is not itself in dispute.
 - There is no issue raised by the Council about VCAT's jurisdiction under s 39. The Council concedes that, if there is a failure to comply with the P&E Act, Mr Parsons is a person who is substantially or materially affected by that failure, and Mr Parsons has referred the matter to VCAT within time. Amendment C101 has not yet been approved.
 - Pursuant to s 39(2)(b), the Minister for Planning is automatically a party in the proceeding. Here, the Minister notified VCAT and the parties that he would not participate in the proceeding, and will abide by the outcome.
 - Although a panel has been appointed to consider submissions under Part 8 of the P&E Act, the scheduled panel hearing has been deferred pending the outcome of this proceeding.

DOES SECTION 23(1)(C) OF THE P&E ACT CONFER POWER ON A PLANNING AUTHORITY TO ABANDON AN AMENDMENT?

- 13 The power to abandon an amendment must be considered in the context of the overall planning scheme amendment process under Part 3 of the P&E Act. The process has been in place for nearly 30 years and is generally well understood. However, as this proceeding demonstrates, there are nuances in the wording of particular provisions that mean that some aspects of the process are not entirely beyond doubt. The parties' respective positions are based on various arguments about the proper statutory construction to be given to three or four particular provisions within the process.
- 14 A purposive and common sense approach is thus required in the construction and interpretation of these provisions. To give effect to that purposive approach, it is useful to set out relevant parts of the statutory process.
- 15 As a starting point:
- Sections 17, 18, 19 and 20 of the P&E Act set out the process for the preparation and exhibition of a planning scheme amendment, and the requirements for notice under s 19.
 - After an amendment has been prepared and exhibited, and notice has been given under s 19, any person may make a submission to the planning authority about the amendment (s 21(1) of the P&E Act).
 - A planning authority must consider all submissions made on or before the date set out in the notice (s 22(1) of the P&E Act).
- 16 Section 23(1) of the P&E Act then provides:
- 23 Decisions about submissions**
- (1) After considering a submission which requests a change to the amendment, the planning authority must—
- (a) change the amendment in the manner requested; or
 - (b) refer the submission to a panel appointed under Part 8; or
 - (c) abandon the amendment or part of the amendment.
- 17 The process then continues:
- If the submissions are referred to a panel, the panel must consider them and provide a reasonable opportunity to be heard (s 24 of the P&E Act). Part 8 of the P&E Act also deals with the panel process.
 - The panel must report its findings to the planning authority (s 25(1) of the P&E Act).
 - The panel report must be made public pursuant to specified timelines (s 26 of the P&E Act).

18 Section 27(1) of the P&E Act then provides:

27 Planning authority to consider panel's report

- (1) The planning authority must consider the panel's report before deciding whether or not to adopt the amendment.

...

19 Of significance to this proceeding, s 28 of the P&E Act then provides:

28 Abandonment of amendment

The planning authority must tell the Minister in writing if it decides to abandon an amendment or part of an amendment.

20 Section 29(1) of the P&E Act then provides:

29 Adoption of amendment

- (1) After complying with Divisions 1 and 2 in respect of an amendment or any part of it, the planning authority may adopt the amendment or that part with or without changes.

...

21 The process then continues:

- Under s 30(1) of the P&E Act, an amendment will lapse in certain circumstances, including if it is not adopted within two years after the initial s 19 notice, or any later period allowed by the Minister, or when the Minister refuses to approve it, or (under s 30(1)(c)):
 - (c) when the planning authority notifies the Minister in writing that it has abandoned the amendment or part.
- A planning authority must submit an adopted amendment to the Minister (s 31 of the P&E Act).
- Sections 32 to 38 of the P&E Act set out the process for the Minister's consideration and/or approval of the amendment, the commencement of the amendment, and the opportunity for Parliament to revoke an amendment. None of these provisions are relevant in this proceeding.
- Section 39 of the P&E Act provides for a person substantially and materially affected by a failure in the process to refer the matter to VCAT for determination. Section 39 forms the jurisdictional basis for this proceeding.

22 It can be seen that the amendment process proceeds in a largely sequential fashion under Part 3 of the P&E Act.

23 As I have indicated, the Committee here was purporting to act as a delegate of the Council/planning authority in considering the submissions under s 22(1) of the P&E Act, and making a decision under s 23(1) in relation to Amendment C101.

- 24 Both parties endorsed my observation in *Lend Lease Apartments (Armada) Pty Ltd v Stonnington CC*,³ where I had noted that s 23(1) of the P&E Act uses the word ‘must’, and the disjunctive word ‘or’ on two occasions between the sub-sections. The provision thus purports to create a mandatory obligation on a planning authority to do one of three alternative things in relation to each submission it receives requesting a change to an exhibited amendment. It may either change the amendment, refer the submission to a panel, or abandon the amendment, but it must do one of those three things.
- 25 Mr Parsons’ counsel also referred me to the observations of the Tribunal in *Canaan Holdings Pty Ltd v Whitehorse CC*.⁴ It was said that a planning authority has two clear opportunities to decide to abandon an amendment — first when it considers submissions under s 23(1)(c) of the P&E Act, and secondly after it receives and considers a panel report under s 27(1).
- 26 I agree with this observation. In doing so, I do not take the reference to ‘two clear opportunities’ to mean that there are no other opportunities within the process for an amendment to be abandoned. Indeed, the Council’s counsel advocated that there may be multiple opportunities for the abandonment of an amendment. The observation in *Canaan* relates to there being two particular and obvious opportunities to abandon an amendment that are expressly contemplated in the sequential statutory process that I have outlined above.
- 27 Considered in context, this is quite understandable. Following the consideration of submissions, the planning authority must change the amendment, refer submissions to a panel, or abandon the amendment. In this initial phase, a planning authority is acting as the effective gatekeeper for the amendment process that it has commenced, and exercising a threshold power as to the future course of the amendment after the initial public consultation. This includes a pre-emptive power to abandon the amendment under s 23(1)(c) if a proper consideration of the submissions it has received leads the planning authority to the view that that is the appropriate course, and that the amendment should proceed no further.
- 28 The second ‘clear’ opportunity to abandon an amendment arises in a different context, and only if the planning authority has referred submissions to a panel under s 23. The amendment has by this time gone through a further deliberative process, with scrutiny by an independent panel bound by principles of procedural fairness. Under s 27(1) of the P&E Act, the planning authority must consider the panel report before deciding whether or not to adopt the amendment. The Council is at this stage considering the fate of the amendment as a whole, rather than considering individual submissions.

³ [2013] VCAT 1663 (Dwyer DP).

⁴ [2015] VCAT 1608 [77] (Gibson DP).

- 29 Unfortunately, s 27(1) uses the terminology of ‘deciding whether *or not* to adopt’ the amendment, rather than using the word ‘abandon’, although it is perhaps implicit that a decision not to adopt an amendment leads to the same practical outcome. Indeed, it is sometimes the case that a panel recommends the abandonment of an amendment, or that a council expressly resolves at this stage to abandon an amendment based on its consideration of a panel report.
- 30 I agree with Mr Parsons that these two opportunities to abandon an amendment arise through separate sources of power, for different reasons, and at separate times within the sequential statutory process.
- 31 Moreover, having regard to the specific wording of s 23(1) of the P&E Act, I agree with Mr Parsons that s 23(1) clearly references a source of statutory power through its mandatory requirement that the planning authority ‘must’ at that time exercise one of three alternative options in its consideration of submissions. This includes the option under s 23(1)(c) to abandon the amendment at that time.
- 32 The Council’s contrary contention is that, although there may be various opportunities within the statutory amendment process for the abandonment of an amendment by a planning authority, the actual repository of the power to abandon the amendment effectively lies only in s 28 of the P&E Act. As will be recalled, that is the provision that states that ‘The planning authority must tell the Minister in writing if it decides to abandon an amendment or part of an amendment’.
- 33 Some of the Council’s contentions on this issue are also intertwined with the issue of delegation, which I will deal with further in the next section.
- 34 On its face, s 28 appears to be a mechanical notification provision, rather than the repository of a power. However, the Council contends that s 28 cannot be construed in such a limited way, given that s 188(2) of the P&E Act refers to ‘*the powers of a planning authority under sections 28, 29 and 191 ...*’, and expressly prevents the delegation of these three specific powers. The Council also refers to s 28 requiring the planning authority to tell a Minister in writing if ‘it’ decides to abandon the amendment. The Council places weight on the word ‘it’ as being a clear reference in a non-delegable provision to the planning authority itself.
- 35 Mr Parsons’ counsel submitted that the decision in *Canaan* stands for the proposition that the power to abandon an amendment is expressly conferred by s 23(1)(c), impliedly by ss 27(1) and 29(1), but not by s 28. In *Canaan*,⁵ it was said that s 28 confers an obligation on the planning authority to tell the Minister if it decides to abandon an amendment and that it is the equivalent of s 31 relating to the submission of an adopted amendment to the Minister. The inference from these comments is that s 28 was regarded in that case as being largely a notification provision. The interplay between

⁵ [2015] VCAT 1608 [83] (Gibson DP).

s 28 and s 188 (and the issue of delegation generally) was not before the Tribunal in *Canaan*, and I do not need to decide here the correctness of the observations in *Canaan* about a more limited purpose of s 28.

- 36 For present purposes, although there is perhaps an arguable anomaly in the way that s 28 might be construed, having regard to s 188(2), it does not automatically follow that s 28 provides the *only* power to abandon an amendment. In this regard, s 28 sits within a statutory process sequence, preceded by s 27 where a planning authority must consider a panel report in deciding *whether or not* to adopt an amendment, and followed by s 29 where a panel may adopt an amendment. To the extent that s 28 may include a power to abandon an amendment, it seems to neatly fit within the second opportunity to abandon an amendment that I have outlined above (i.e. after consideration of a panel report), as well as providing for a general obligation to notify the Minister if an amendment is abandoned. The existence of a ‘power’ in s 28 to abandon an amendment (if that is the case) does not detract from the existence of a separate power in s 23(1)(c) to abandon an amendment for different reasons and at an earlier stage in the amendment process.
- 37 Similarly, the Council places weight on s 28 requiring a planning authority to tell a Minister if it ‘decides’ to abandon the amendment, and that this is the only provision that expressly refers to a ‘decision’ to abandon. The Council also notes that other provisions in the statutory sequence do not refer expressly to ‘abandonment’, and that the only two provisions that do so are ss 23 and 28, and that the two provisions should therefore be read together, with the power to ‘decide’ to abandon residing only in s 28.
- 38 Again, I do not consider that this outcome follows. On a fair reading of s 23 (including its heading, although not determinative), a planning authority is implicitly (and, in my view, clearly) called upon to decide whether to change the amendment, refer a submission to a panel, or to abandon the amendment. The absence of the express word ‘decide’ does not detract from the mandatory obligation imposed under s 23. Moreover, as I have indicated, a proper construction of the statutory process leads to the view that s 23(1) provides a separate power to abandon an amendment at a threshold stage in the process if the initial consideration of public submissions leads the planning authority to the view that the amendment should not proceed further. Furthermore, the absence of the express word ‘abandon’ in s 27 is to my mind unimportant. Common sense, common practice, and a purposive approach to the provision would suggest that a decision ‘not to adopt’ an amendment has a similar practical effect to abandonment. Both ultimately lead to a lapsing of an amendment.
- 39 Finally, the Council appears to concede that the options under ss 23(1)(a) and 23(1)(b) to change an amendment, or to refer submissions to a panel, are both separate powers capable of being exercised by the planning authority after its initial consideration of submissions. Given the way the section is worded, it would seem a curious and unorthodox approach to

statutory construction, in the absence of express wording to the contrary, for two of the three alternative options in s 23(1) to be characterised as separate powers capable of being independently exercised, but for the third option (i.e. abandonment) to be characterised differently, and to be subservient to a separate power in s 28.

- 40 For the reasons set out above, I am of the opinion that s 23(1)(c) of the P&E Act, properly construed, confers a power upon a planning authority to abandon an amendment as one of three options open to it after its initial consideration of submissions. This power under s 23(1)(c) is independent of any separate or co-existent or implied power to abandon an amendment in ss 27, 28 or 29 of the P&E Act. In particular, I am of the opinion that s 28 is not the sole repository of power under the P&E Act for the abandonment of a planning scheme amendment.
- 41 It follows that s 23(1)(c) of the P&E Act conferred a power upon the Council to abandon Amendment C101. I therefore turn to the question of whether the Council was able to delegate that power to the Committee.

DOES SECTION 188 OF THE P&E ACT PROHIBIT DELEGATION OF THE POWER TO ABANDON AMENDMENT C101?

- 42 The relevant parts of s 188 of the P&E Act provide as follows:

188 Planning authorities and responsible authorities may delegate powers

- (1) A planning authority ... may by instrument delegate any of its powers, discretions or functions under this Act to –
 - (a) a committee of the authority; or ...
- (2) Subsection (1) does not apply to –
 - (a) the powers of the planning authority under sections 28, 29 and 191 and subsection (1); and ...

- 43 The relevant instrument of delegation from the Council to the Committee is not itself in dispute. I observed at the hearing that the instrument is, at least in my opinion, very poorly drafted and in need of updating. Nonetheless, the parties are agreed that:

- The instrument of delegation dated 16 October 2013 delegates to the Committee, amongst other things, the power to determine any issue, take any action, or do any act or thing arising out of or connected with any function or power conferred on the Council by or under any Act.
- The instrument of delegation is subject to an express condition or limitation, whereby the Committee must not determine an issue, take action, or do an act or thing that cannot be the subject of a lawful delegation.

- 44 It follows that the parties accept that the instrument of delegation is limited by s 188 of the P&E Act, and that the Committee could not lawfully

exercise a power that could not be delegated by reference to that provision. Equally, save for any limitation imposed by s 188 of the P&E Act, the parties accept that the instrument of delegation would otherwise allow the Committee to exercise the functions and powers of the Council in its capacity as a planning authority under the P&E Act.

- 45 It can be seen that, by reference to s 188(2), there are only a very small number of the powers of a planning authority that cannot be delegated. Relevantly, these include ss 28 and 29 of the P&E Act. As set out above, s 28 is the provision that requires the planning authority to tell a Minister in writing if it decides to abandon an amendment. Section 29 is the provision that empowers a planning authority to adopt an amendment with or without changes.
- 46 Mr Parsons' contention is simple and straightforward. Section 23(1)(c) of the P&E Act provides a separate power for a planning authority to abandon Amendment C101. The powers in s 23 are not mentioned in s 188(2) as powers that cannot be delegated. There is accordingly no limitation on the ability of the Council to delegate the planning authority's power under s 23(1) to the Committee. The Committee (as the delegate of the Council/planning authority) has validly and lawfully resolved through the 13 April resolution to abandon Amendment C101 under s 23(1)(c) of the P&E Act.
- 47 The Council contends for a different outcome. The Council submits that the 'evident purpose' of s 188(2)(a), and its prohibition on the delegation of the powers in ss 28 and 29, is to allow only the planning authority itself (without delegation) to have the power to either abandon or adopt an amendment. It says that, without such purpose, the reference in s 188(2) to the 'power ... under s 28' being non-delegable would have no meaningful work to do. It says that there is a sound policy basis for Parliament to require planning authorities to 'personally' exercise core powers in respect of determining the content of planning schemes, and in requiring a planning authority itself to make the significant, quasi-legislative decision to either adopt or abandon amendment.
- 48 I prefer the contentions of Mr Parsons on this issue, for a number of reasons.
- 49 First, the actual wording of s 188(2)(a) does not make reference to s 23 generally, or to s 23(1)(c) specifically. The sub-section has existed in the P&E Act for almost 30 years. Section 188(2) is very specific in its reference to particular sections of the P&E Act that cannot be delegated by a planning authority or a responsible authority. The Council's contention is contrary to the actual wording of s 188(2)(a) and requires me, in effect, to read into that sub-section an implied reference to an extra section that is not mentioned there.
- 50 Secondly, as I have found in the previous section of these reasons, s 23(1)(c) of the P&E Act provides a separate power for a planning

authority to abandon an amendment that exists independently of the non-delegable powers in ss 28 and 29. Applying a purposive approach to the provisions of Part 3 of the P&E Act, there is a clear opportunity provided by s 23(1)(c) for a planning authority to abandon amendment at a threshold stage in the process after consideration of initial submissions. This opportunity that exists independently of any further opportunity to abandon the amendment at a later stage in the process — e.g. after consideration of a panel report.

- 51 Thirdly, the Council contends that the Council’s powers in ss 23(1)(a) and 21(1)(b) are delegable, and not affected by any implied prohibition in s 188(2)(a). As I have alluded to earlier, I would find it a curious outcome, in the absence of express wording to the contrary, for two of the three alternative options in s 23(1) to be characterised as separate powers capable of being delegated to a Committee, but for the third option (i.e. abandonment) to be characterised differently.
- 52 Fourthly, whilst the decision to adopt an amendment under s 29 may arguably be a ‘significant, quasi-legislative decision’ that may ultimately affect the content of the planning scheme, I am not sure that the same applies to the abandonment of an amendment where no change to the planning scheme occurs. Indeed, I am not convinced that the allegedly ‘significant, quasi-legislative decision’ involved in the adoption of amendment (or even in the abandonment of an amendment) forms the underlying rationale as to why ss 28 and 29 of the P&E Act are non-delegable. Without determining this matter finally, I say this for two main reasons:
- The power under s 23(1)(a) to ‘change the amendment in the manner requested’ to give effect to a submission would also, on the Council’s argument, comprise a significant quasi-legislative decision that has the effect of determining the future content of a planning scheme (even more so than abandonment), yet the Council concedes that this power is delegable to the Committee.
 - The decision to adopt an amendment under s 29 is not the final act that determines the content of the planning scheme. It is the Minister who still takes the quasi-legislative step to approve an amendment and, interestingly, the Minister’s power in that regard is delegable under s 186 of the P&E Act. Indeed, the power to approve an amendment under s 35 is expressly referred to as a delegable power under s 186(2).
- 53 Fifthly, there are other plausible policy reasons why Parliament may have intended that ss 28 and 29 be non-delegable, whilst allowing delegation in other parts of the planning scheme amendment process. For example (and again without determining the matter finally):
- The adoption or abandonment of an amendment following a deliberative and independent panel process and report might be

considered a more significant step, warranting the exercise of the power only by the planning authority, as opposed to changes or abandonment of the amendment at a threshold stage under s 23 following the initial consideration of submissions.

- Section 30(1) of the P&E Act provides that an amendment lapses if it is not adopted by the planning authority within a designated time frame, or when the planning authority notifies the Minister in writing that it has abandoned the amendment. It is therefore the lapsing under s 30(1) that spells the final death knell for an amendment. Some of the wording in s 30(1) — in particular, the express wording in s 30(1)(c) — mirrors the wording in ss 28 and 29. Having regard to the statutory sequence I have outlined above, these latter provisions in ss 28 and 29 may therefore be non-delegable to ensure that it is the planning authority itself (as a matter of statutory certainty) that triggers or avoids the final act of the lapsing of an amendment, or its passage to the Minister for approval, for the purpose of s 30(1).

54 Sixthly, the Council contended that it was unlikely that Parliament intended to allow the formation of an opinion to be delegated, but not the exercise of the power. A number of authorities were advanced for this proposition, although they only deal with the issue of general principle (which is not materially in dispute), rather than being of assistance in the application of that principle to the circumstances of this case. I take the Council's argument to be essentially that s 28 should not be read only as a mechanical provision, requiring the Council to notify the Minister about the abandonment of the amendment, when the Council did not itself form the opinion that the amendment should be abandoned. Whilst I concede that s 28 is a little anomalous, having regard to s 188(2), I again reiterate that there are separate powers to abandon an amendment, arising at different times, and for different reasons, under Part 3 of the P&E Act. Here, I am satisfied that the Committee was exercising a power under s 23(1)(c), independently of any power under s 28, so the Council's contention does not really apply. Moreover, applying the same argument in a different manner, I note that the three options under s 23(1) (to change the amendment, refer a submission to a panel, or abandon the amendment) all arise after the consideration of submissions under s 22. The consideration of submissions under s 22 is clearly delegable to a Committee, and it would be curious, in the absence of express wording to the contrary, for the Committee considering the submissions and forming an opinion about them to have the delegated power to undertake two of the three available options under s 23 but not the third.

55 For all of these reasons, I reject the Council's contentions. I consider that the interpretation given to ss 23, 28 and 188 by Mr Parsons is to be preferred, and applies a straightforward, purposive and common sense approach to the statutory construction of the relevant provisions.

- 56 It follows that the Committee had the delegated power to abandon Amendment C101 under s 23(1)(c) through the 13 April resolution. In doing so, it was acting as a lawful delegate of the Council and making the decision in the name of the Council.
- 57 This does not of course mean that a committee of the Council automatically has an unfettered discretion to exercise the powers of the Council as a planning authority in relation to the abandonment of an amendment. The Council controls the instrument of delegation, and could choose to not delegate the power under s 23(1)(c) if it was minded to do so generally or within the context of a specific amendment. The present instrument of delegation does not do that.

IS THE COUNCIL REQUIRED TO TELL THE MINISTER FOR PLANNING (PURSUANT TO S 28 OF THE P&E ACT) THAT IT HAS ABANDONED AMENDMENT C101 THROUGH THE 13 APRIL RESOLUTION?

- 58 At a simplistic level, s 28 of the P&E Act is very straightforward in its terms:

28 Abandonment of amendment

The planning authority must tell the Minister in writing if it decides to abandon an amendment or part of an amendment.

- 59 Mr Parsons' contention is again simple and straightforward. On its face, the Council, in its capacity as the planning authority, is obliged to tell the Minister of the decision to abandon Amendment C101 that is encapsulated in the 13 April resolution. In failing to do so, the Council has failed to comply with s 28 of the P&E Act, with this constituting a relevant defect in procedure for the purpose of s 39.
- 60 The Council again contends for a different outcome. Its primary contention is that the Committee did not have the delegated authority to abandon Amendment C101, and the Committee's 13 April resolution does not therefore have any legal effect under the P&E Act that would require the Council to exercise its power under s 28. I have already disposed of this issue in my finding that the Committee did have the relevant delegated authority under s 23(1)(c).
- 61 Given this, the Council's reference to s 87(7) of the *Local Government Act 1989* (Vic) (i.e. that a decision of a special committee which does not relate to a matter delegated to the committee cannot be given effect to, until approved by the Council) does not apply. Here, the matter was delegated to the Committee.
- 62 The Council also effectively submits that s 28 uses the word 'it', and the planning authority is only obliged to tell the Minister when 'it' (i.e. the planning authority itself, without delegation) has decided to abandon an amendment. This argument misconceives the nature of delegation. The Committee here has made the decision under delegation, but acting as a delegate in the name of the Council/planning authority. Accordingly, the

planning authority (i.e. the ‘it’ in s 28) has decided to abandon Amendment C101, albeit through a delegate.

- 63 As will be evident, I again prefer the contentions of Mr Parsons on this issue.
- 64 Subject to what is said in the next section about the Council’s 26 April resolution, neither the Committee nor the Council has purported to rescind the Committee’s 13 April resolution, assuming either had the power to do so. The 13 April resolution therefore still stands as an effective decision through which the planning authority decided to abandon Amendment C101.
- 65 It follows that, in my opinion and since 13 April 2016, the Council has been obliged to tell the Minister of the decision to abandon Amendment C101, in accordance with s 28 of the P&E Act. That obligation still stands.

WHAT IS THE STATUS OF THE 26 APRIL RESOLUTION?

- 66 Mr Parsons submits that, unsurprisingly, the P&E Act does not confer any power upon a planning authority to refer submissions to a panel after the planning authority has resolved to abandon the amendment in its entirety.
- 67 *Canaan* stands for the proposition that, having adopted an amendment, a Council has exhausted its function as a planning authority to decide whether to abandon or adopt an amendment, and it is therefore not capable of making any further decision to abandon or adopt an amendment.⁶ The Council has become *functus officio*.
- 68 Mr Parsons contends that the same outcome applies here. He says that, having abandoned Amendment C101 through its delegate, the Council has exhausted its function as a planning authority to decide whether to abandon or adopt the amendment, or to reinstate the process by referring submissions to a panel. It is not therefore capable of making a further decision to abandon or adopt the amendment or to refer submissions to a panel. If this is correct, then the 26 April resolution has no legal effect.
- 69 There are perhaps some nuanced differences between an initial decision to abandon an amendment (as here) and a decision to adopt an amendment (as in *Canaan*), in terms of what follows. The parties did not deal with this specifically in submissions, nor did the Council directly challenge the correctness of the decision in *Canaan*.
- 70 The Council nonetheless argues that, if the Committee had been validly delegated the power to abandon Amendment C101, it was only a partial or limited exercise of power that did not render the Council *functus officio*. The full exercise of the power to terminate an amendment is such that it requires the act of notification to the Minister under the non-delegable power in s 28 of the P&E Act, and the consequential operation of

⁶ [2015] VCAT 1608 [44]–[80] (Gibson DP).

s 30(1)(c), to ‘perfect’ the abandonment through the formal lapsing of the amendment.

- 71 The Council also relies on s 40(a) of *Interpretation of Legislation Act 1984* (Vic), to the effect that the duty of the planning authority to comply with s 28 of the P&E Act and notify the Minister is to be exercised from time to time, and ‘subject to any contrary intention’. The Council says that there is a contrary intention here, created through the additional step under s 28, through which the planning authority must ‘perfect’ or finalise the abandonment. Given that s 28 is non-delegable, it is submitted that it cannot have been Parliament’s intent to empower a planning authority to delegate to a committee the power to abandon an amendment, on the basis that the planning authority was then bound by the delegate in relation to the exercise of the non-delegable power under s 28.
- 72 I am not convinced that this argument necessarily follows, given the distinction I have made about abandonment at different times and for different reasons within the amendment process. Moreover, it is the Council (and not Parliament) that decided in its wisdom to delegate the power here, and it is somewhat bound by the consequences of its actions in that regard.
- 73 The Council’s argument nonetheless relies on its assertion that, if the Committee did have power to decide to abandon Amendment C101, the power could nevertheless still be exercised by the Council from time to time, as the occasion required, until the abandonment was perfected by notification under s 28. On this view, the Council says that it still retained the power to decide not to abandon the amendment, and instead to refer submissions to a panel through the 26 April resolution.
- 74 Although I do not accept this argument, it may have held greater weight if the Council had purported in some formal way to rescind the 13 April resolution, assuming it had the power to do so having regard to the decision in *Canaan*. That is not what has occurred. The Council has not taken any formal step to rescind the 13 April resolution, or to formally reconsider the merits of the resolution, prior to its purported resolution to instead refer submissions to a panel. It has determined to treat the 13 April resolution as legally ineffective, and has thus ignored it, based on its view about the lack of lawful delegation. Given I have found that view to be mistaken for all of the reasons set out earlier in this decision, the 13 April resolution is not legally ineffective, and therefore still stands as an effective decision of the planning authority to abandon Amendment C101.
- 75 The Council did not address me on whether it considered that it had the power to rescind the 13 April resolution. That power certainly does not reside in the P&E Act, nor can it be necessarily implied from s 40(a) of the *Interpretation of Legislation Act 1984* (Vic). It would therefore presumably need to be founded in the *Local Government Act 1989* (Vic) and/or Council meeting procedures and, as I have said, the Council did not directly challenge the decision in *Canaan* in this regard.

- 76 In terms of whether the power to reconsider the exercise of the power could be implied, I agree with the reference by Mr Parsons to the decision in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs*.⁷ That decision observes that the implication into an express grant of statutory power of a power to reconsider its exercise would be capable, if not subject to limitation, of generating endless requests for reconsideration on new material or changed circumstances. In the consideration of planning scheme amendments, certainty and finality are important, including by reference to the objectives of planning in s 4(2)(h) of the P&E Act. In my opinion, there would need to be some clear and formal rescission of the 13 April resolution if indeed that were possible, to remove the legal effect of the Committee's decision to abandon the amendment, prior to there being any prospect of reconsideration and a substituted approach. That has not occurred here.
- 77 It follows in my view that it is the 26 April resolution that is legally ineffective. However, given what I have said, I do not propose to make any formal declaration in relation to the status of the 26 April resolution. It is sufficient that I have made a declaration about the abandonment of the amendment through the 13 April resolution, and consequential declaration about the Council's obligation to tell the Minister in writing of that abandonment pursuant to s 28 of the P&E Act. In my view, the Council will need to take relevant administrative steps to now 'undo' the current panel process that it has triggered. I was not asked to make any directions in that regard.
- 78 From a more practical perspective, if a planning authority formed the view that either it, or its delegate, had wrongly abandoned an amendment, particularly at an early threshold stage, the planning authority could simply re-exhibit the amendment and bring it quickly back to the same point (including deeming submissions made to the earlier amendment as being submissions made to the re-exhibited amendment). It could then lawfully refer submissions to a panel. I am aware of circumstances where this has in fact occurred following the discovery of a defect in the first process. Although there is potentially a short delay and extra steps involved in a re-exhibition process, the process then properly follows the sequential process under Part 3 of the P&E Act.

CONCLUSION

- 79 Theoretically, it would be open to the Council to re-exhibit an amendment similar or identical to Amendment C101. A re-exhibition process would render much of the current proceeding largely academic. That is ultimately a matter for the Council, as the prevailing circumstances may have changed. In any event, by reference to s 39(5) of the P&E Act, I am precluded from varying or substituting a decision of the Council. I can only make relevant declarations and directions.

⁷ [1992] FCA 414 [30], referred to in *Canaan* at [74].

80 I am nonetheless of the opinion that Mr Parsons has made out his case under s 39 of the P&E Act, and he is entitled to the relief that he seeks in giving effect to the decision to abandon Amendment C101 that is encapsulated in the 13 April resolution, and to have a declaration obliging the Council to notify the Minister of that decision pursuant to s 28 of the P&E Act.

Mark Dwyer
Deputy President