

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

Not Restricted

S CI 2016 04773

JOHN RAYMOND ANDERSON	First Plaintiff
DEMITRA ANDERSON	Second Plaintiff
v	
BUILDING APPEALS BOARD	First Defendant
CITY OF STONNINGTON	Second Defendant

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<u>JUDGE:</u>	McDonald J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	22 June 2017
<u>DATE OF JUDGMENT:</u>	21 July 2017
<u>CASE MAY BE CITED AS:</u>	Anderson v Building Appeals Board
<u>MEDIUM NEUTRAL CITATION:</u>	[2017] VSC 415

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JUDICIAL REVIEW - Decision of Building Appeals Board upholding City of Stonnington's refusal to consent to a proposed development not complying with reg 414 of the *Building Regulations 2006* (Vic) - whether the Board's decision was attended by jurisdictional error by reason of taking into account an irrelevant consideration - application for judicial review dismissed - ss 1, 4, 188A *Building Act 1993* (Vic) - regs 101, 414, 416 *Building Regulations 2006* - order 56 *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr M G Roberts QC with Mr I Munt	Fairweather Legal
For the First Defendant	Mr A Woods	Solicitor for the Building Appeals Board
For the Second Defendant	Mr J M Forrest	Russell Kennedy

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HIS HONOUR:

1 On 22 June 2017 the Court heard an application for judicial review of a decision of the Building Appeals Board ('the Board') dated 19 September 2016. The application is brought under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic). The plaintiffs contend that the decision of the Board discloses jurisdictional error and should be quashed. For the reasons which follow I reject this contention. The plaintiffs' application for judicial review is dismissed.

### Background

2 The plaintiffs in this proceeding are the registered proprietors of a residential property located at 21 William Street, South Yarra ('No 21 William St'). No 21 William St is a double storey Italianate villa located on the western side of William Street. The property adjoining the northern border of No 21 William St is a three storey block of flats ('No 23 William St').

3 In 2014 and 2015 the plaintiffs undertook various building works at No 21 William St. On 22 December 2014 the plaintiffs were issued a building permit in respect of stage one of works to be carried out on the rear of the dwelling. The building permit identified the plaintiffs' chosen builder as 'Period Extensions & Designs' ('the Builder'). The building permit extended only to the partial demolition, construction of ground floor works and the first floor sub frame.

4 In December 2014 the Builder prepared working drawings in respect of further works to be carried out on the rear of the dwelling. This included the addition of a third storey 'loft'. However, these proposed works would encroach on the minimum setbacks from both the northern and southern side boundaries and the rear boundary prescribed by reg 414 of the *Building Regulations 2006* (Vic) ('the Regulations'). The Regulations have since been revoked but were in force at all material times in this matter. Regulation 414 provided:

414 Side and rear setbacks

(1) If—

- (a) an allotment is in a zone of a planning scheme specified in Schedule 5; and
- (b) a Schedule to that zone in the planning scheme specifies minimum setbacks from side and rear boundaries—

a building on the allotment must be set back from a side or rear boundary not less than the relevant setback specified in that Schedule.

- (2) If subregulation (1) does not apply, a building must be set back from a side or rear boundary not less than the distance specified in respect of that boundary in Table 414.

**TABLE 414—SIDE AND REAR SETBACKS**

<i>Building height at any point</i>	<i>Minimum setback from side or rear boundary at that point</i>
3.6m or less	1m
More than 3.6m but not more than 6.9m	1m plus an additional distance calculated at the rate of 300mm for every metre of height over 3.6m
More than 6.9m	2m plus an additional distance calculated at the rate of 1m for every metre of height over 6.9m

- (3) The following may encroach into the setback distance required by subregulation (1) or (2) by not more than 500mm—
  - (a) porches and verandahs;
  - (b) masonry chimneys;
  - (c) sunblinds;
  - (d) screens referred to in regulation 419(5)(d) or 419(6);
  - (e) flues and pipes;
  - (f) domestic fuel tanks and water tanks;
  - (g) heating and cooling equipment and other services.
- (4) The following may encroach into the setback distance required by subregulation (1) or (2)—
  - (a) landings with an area of not more than 2m<sup>2</sup> and less than 1m high;
  - (b) unroofed stairways and ramps;

- (c) pergolas;
  - (d) shade sails;
  - (e) eaves, fascia, gutters not more than 600mm in total width;
  - (f) carports (subject to regulation 415).
- (5) This regulation does not apply to a wall that complies with regulation 415.
  - (6) The report and consent of the relevant council must be obtained to an application for a building permit in relation to a design that does not comply with this regulation.

5 Regulation 416(1) provided:

416 Daylight to existing habitable room windows

- (1) A building must be set back from a habitable room window in an existing dwelling on an adjoining allotment to provide for a light court to the window that has a minimum area of 3m<sup>2</sup> and a minimum dimension of 1m clear to the sky.

6 Clause 4A of Schedule 2 to the *Building Act 1993* ('the Act') outlines matters to which a reporting authority must have regard when considering an application for report and consent under reg 414(6):

**4A Reporting authority must have regard to section 188A guidelines in some cases**

- (1) This clause applies if –
  - (a) a reporting authority is required by this or any other Act or by the regulations to report on, or to consent to, an application for a building permit for a single dwelling, within the meaning of section 188A(4); and
  - (b) the regulations provide that section 188A applies to applications of that kind.
- (2) In reporting on, or considering whether to consent to, the application, the reporting authority –
  - (a) must have regard to the guidelines for the time being in force under section 188A; and
  - (b) in having regard to those guidelines, if in the opinion of the reporting authority the application may result in a nearby allotment suffering detriment, must give the owner of the allotment an opportunity to make a submission in respect of the possible detriment; and

- (c) must consider any submission made under paragraph (b); and
- (d) must refuse to give its consent to the application if the application does not comply with any matter set out in those guidelines.

7 By virtue of cl 4A(2)(a), a reporting authority, in reaching its decision, is required to have regard to the guidelines in force under s 188A of the Act, the *Minister's Guideline MG/12* ('the Minister's Guidelines').<sup>1</sup> The Minister's Guidelines relevantly provide:

#### **PURPOSE OF GUIDELINE**

The purpose of this Guideline is to set out the considerations to be applied to the design and siting of single dwellings under the building regulations where a reporting authority is considering an application for a report and consent for a variation to the standards applying to the design and siting of single dwellings. It should be noted that the definition of single dwellings includes a Class 1 building and a Class 10 building associated with a Class 1 building.

Each provision comprises a statement of the objective and matters to be considered in deciding if the objective is met. However, if any matter set out in this Guideline is not met, clause 4A(2)(d) of Schedule 2 of the Act requires that the reporting authority must refuse consent.

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#### **SIDE AND REAR SETBACKS**

##### **Objective**

To ensure that the height and setback of a building from a boundary respects the existing or preferred character and limits the impact on the amenity of existing dwellings.

##### **Decision Guidelines**

The reporting authority may give its consent to an application for a building permit for a single dwelling, which does not comply with regulation 414 of the Building Regulations 2006, if -

...

- (f) the setback will not result in a significant impact on the amenity of the secluded private open space and habitable room windows of existing dwellings on nearby allotments;

...

#### **DAYLIGHT TO EXISTING HABITABLE ROOM WINDOWS**

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<sup>1</sup> Minister's Guideline MG-12, Siting and Design of Single Dwellings issued June 2006.

## Objective

To allow adequate daylight into habitable room windows.

## Decision Guidelines

The reporting authority may give its consent to an application for a building permit for a single dwelling, which does not comply with regulation 416 of the Building Regulations 2006, if –

- (a) the building will not impact on the amenity of existing dwellings on nearby allotments; and
- (b) the building is consistent with a building envelope that has been approved under a planning scheme or planning permit and or included in an agreement under section 173 of the Planning and Environment Act 1987.<sup>2</sup>

8 As the proposed works did not comply with the setback requirements in reg 414, the plaintiffs were required by reg 414(6) to obtain the report and consent of the second defendant, the City of Stonnington. The plaintiffs made such a request on 30 January 2015. The second defendant refused to give its consent on 27 February 2015 on the basis that the proposed changes were not supported by paragraph [f] of the Minister’s Guidelines on side and rear setbacks (‘the Reg 414 Ministerial Guidelines’). That is, the second defendant was of the opinion that the proposed works would ‘result in a significant impact on the amenity of the secluded private open space and habitable room windows of the existing dwellings on nearby allotments’.<sup>3</sup>

9 The plaintiffs lodged an appeal against the second defendant’s decision with the Board pursuant to s 144 of the Act. On 29 July 2015, the Board partially affirmed the second defendant’s decision (‘the First Board Decision’).<sup>4</sup> The Board affirmed the second defendant’s decision in respect of the reduced setbacks at the northern boundary. However, the Board set aside the second defendant’s decision in respect of the southern boundary and consented to elements of the proposed works that encroached upon the setback requirements along the southern boundary of the

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<sup>2</sup> Ibid 1, 4-6.

<sup>3</sup> Exhibit 1N to the Affidavit of Demitra Anderson Sworn 18 November 2016, Decision of City of Stonnington Building Control Services dated 27 February 2015.

<sup>4</sup> Exhibit 1O to the Affidavit of Demitra Anderson Sworn 18 November 2016, Determination of the Building Appeals Board dated 29 July 2015.

property.<sup>5</sup>

10 In November 2015, the plaintiffs submitted a second application to the second defendant for its report and consent to further works. The plans for these further works had been altered following the First Board Decision. The plaintiffs still proposed to add a third storey 'loft', however proposed to shift the third storey powder room from the northern side to the southern side of the dwelling. The works proposed in the second application aimed to address the Board's concerns about the impact the initial proposed works would have on the amenity of apartments at No 23 William St.

11 On 19 November 2015, the second defendant refused to consent to the plaintiffs' second application on the basis that the proposed works would result in a loss of amenity to a number of apartments at No 23 William St.<sup>6</sup> On 3 December 2015, the plaintiffs filed a second appeal with the Board. On 19 September 2016, the Board partially affirmed the decision of the second defendant.<sup>7</sup> The Board determined as follows:

- (i) pursuant to section 149(1)(a) of the Act, to affirm the decision of the City of Stonnington to refuse consent to the reduced setbacks of the building from the northern side boundary; and
- (ii) pursuant to section 149(1)(d) of the Act, to set aside the decision of the City of Stonnington to refuse consent to the reduced setbacks of the building from the southern side boundary and substitute its own decision as follows:

*To consent to the construction of a proposed dwelling powder room and store (at third storey level) with reduced setbacks of the building from the southern side boundary of.*

- 4.24m in lieu of 7.11m for a height of 12.01m to the upper floor (third storey) loft (rear terrace roof); and
- 2.55m in lieu of 7.45m for a height of 11.49m to the powder room and store.<sup>8</sup>

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<sup>5</sup> Ibid 1.

<sup>6</sup> Exhibit 1R to the Affidavit of Demitra Anderson Sworn 18 November 2016, Decision of City of Stonnington Building & Local Law Services dated 19 November 2015, 3.

<sup>7</sup> Exhibit 1A to the Affidavit of Demitra Anderson Sworn 18 November 2016, Determination of the Building Appeals Board dated 19 September 2016.

<sup>8</sup> Ibid 1.

12 The reasoning of the Board pertinent to the current proceeding is as follows:

In relation to the location of the proposed stairwell to the loft opposite a habitable room window of unit 4, the Panel notes that this unit is located on the ground floor level and that the height and setbacks of the existing building at the subject address substantially encroach beyond that required under Regulation 414. The Panel considers that the amenity of this dwelling would already be negatively impacted by the existing building at the subject address by reducing the aspect to clear sky and daylight. The Panel considers that further encroachment of this side boundary and setback opposite the habitable room windows of unit 4 (and units 8 and 12 on the upper floors) would further compound the current negative impact such that it would be significant and unreasonable.

In relation to the 1<sup>st</sup> floor gym and bedroom 4 and rear terrace area of the proposed loft opposite a habitable room window of unit 16, the Panel notes that the degree of non-compliance with Regulation 414 is more than that previously considered by the Board and for which consent was not provided. The Panel is not satisfied that there has been any substantive change in the circumstances of the subject address, the adjoining property at 23 William Street or the proposed building works that would warrant a change to the previous decision of the Board. The Panel considers that the degree of encroachment of the required setback of the proposed building is such that it will substantially reduce the aspect of the habitable room window of unit 16 (and units 14 and 15 on the lower floors) to clear sky and daylight. The Panel is satisfied that this will have a significant and unreasonable impact on the amenity of these dwellings.<sup>9</sup>

### The plaintiffs' grounds of review

13 The originating motion outlines four broad grounds of review, and a number of alleged errors are particularised in respect of each ground.<sup>10</sup> However, in their written submissions and at the hearing on 22 June 2017, the plaintiffs confined the scope of the application for judicial review to two grounds.

### Ground of review one

14 The first ground of review is as follows:

The First Defendant had regard to an irrelevant consideration, being daylight access, when determining whether it was acceptable to grant (report and consent) to the plaintiffs proposal under Regulation 414 of the *Building Regulations 2006 (Regulations)*.<sup>11</sup>

15 The plaintiffs correctly accepted that in order for this ground to be made out it must

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<sup>9</sup> Ibid 6.

<sup>10</sup> Originating Motion for Judicial Review dated 18 November 2016.

<sup>11</sup> Plaintiffs' Outline of Submissions dated 10 May 2017, [3.1].



be established that the Board was prohibited from having regard to the irrelevant consideration in question.<sup>12</sup> The plaintiffs also correctly accepted that this is ultimately a matter of statutory construction.<sup>13</sup> This involves the determination of whether the statute in question prohibits consideration of the impugned factor through its subject-matter, scope and purpose.<sup>14</sup>

16 The plaintiffs contend that the Board had regard to an irrelevant consideration in taking into account the extent to which the proposed works would reduce the aspect to clear sky and daylight in habitable rooms in a number of apartments at No 23 William St.<sup>15</sup> The plaintiffs submit that these are factors which cannot be taken into account in assessing whether to grant report and consent in relation to an application under reg 414(6). The plaintiffs' submission is based on a construction of reg 414(6) in the context of Division 2 of Part 4 of the Regulations.

17 The plaintiff accepts that the Board did not err in having regard to the Minister's Guidelines.<sup>16</sup> Paragraph [f] of the Reg 414 Ministerial Guidelines provides:

- (f) the setback will not result in a significant impact on the amenity of the secluded private open space and habitable room windows of existing dwellings on nearby allotments

18 'Amenity' is not defined in the Act. The plaintiffs accept that the authorities define the term broadly.<sup>17</sup> In *Broad v Brisbane City Council*,<sup>18</sup> Thomas J (with whom Connolly J agreed) described the term as follows:

The wide-ranging concept of amenity contains many aspects that may be very difficult to articulate. Some aspects are practical and tangible such as traffic generation, noise, nuisance, appearance, and even the way of life of the neighbourhood. Other concepts are more elusive such as the standard or class of the neighbourhood, and the reasonable expectations of a neighbourhood. The creation of an institution within a neighbourhood is in my view capable of altering its character in a greater respect than can be measured by the

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<sup>12</sup> Ibid [5], citing *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 and *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746.

<sup>13</sup> Plaintiffs' Outline of Submissions dated 10 May 2017, [6], citing *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24.

<sup>14</sup> Ibid.

<sup>15</sup> Plaintiffs' Outline of Submissions dated 10 May 2017, [33].

<sup>16</sup> Ibid [24].

<sup>17</sup> Ibid [27].

<sup>18</sup> [1986] 2 Qd R 317.

additional noise, activity, traffic and physical effects that it is likely to produce.<sup>19</sup>

- 19 The Full Court of the Supreme Court of Queensland's discussion of the concept of 'amenity' in *Broad* was cited with approval in *City of Camberwell v Cherry Nicholson*.<sup>20</sup>
- 20 Despite the broad meaning of the term, the plaintiffs contend that 'amenity' in paragraph [f] of the Reg 414 Ministerial Guidelines should be construed narrowly in the context of Division 2 of Part 4 of the Regulations as a whole.
- 21 The plaintiffs submit that Division 2 of Part 4 of the Regulations is a comprehensive 'code' for the protection of amenity and neighbourhood character.<sup>21</sup> The plaintiffs submit that each of the regulations in this Division are focussed on a particular aspect of 'amenity' – for example, reg 415 relates to walls and carports on boundaries, reg 417 relates to solar access to existing north-facing windows, and reg 419 relates to overlooking.<sup>22</sup> Importantly to the plaintiffs' submission, reg 416 protects daylight to existing habitable room windows.
- 22 The plaintiffs submit that '[e]ach regulation addresses a separate and distinct aspect of the amenity of a habitable room window on an adjoining allotment so as to provide a comprehensive code directed at achieving the purpose of protecting the amenity of a habitable room window on an adjoining allotment'.<sup>23</sup> The plaintiffs submit that the term 'amenity' should therefore be construed narrowly to avoid 'overlapping and hence potentially inconsistent considerations when deciding whether to report and consent to a variation to one or more of the regulations'.<sup>24</sup> The plaintiffs submit that the correct construction of 'amenity' is therefore one that 'limits the ambit of the word to the specific aspect of the amenity of a habitable room window on an adjoining allotment which is addressed by each specific regulation'.<sup>25</sup>

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<sup>19</sup> Ibid 319-320.

<sup>20</sup> Unreported, Supreme Court of Victoria, Ormiston J, 2 December 1998.

<sup>21</sup> Plaintiffs' Outline of Submissions dated 10 May 2017, [30].

<sup>22</sup> Ibid [28]-[29].

<sup>23</sup> Ibid [29].

<sup>24</sup> Ibid [30].

<sup>25</sup> Ibid [30].

23 The plaintiffs submit that there was no contest before the Board that reg 416 was complied with.<sup>26</sup> The plaintiffs submit that the proposed works therefore complied with the daylight aspect of 'amenity' as required by reg 416.<sup>27</sup> The plaintiffs submit that it follows that the Board was not permitted to have regard to this aspect of 'amenity' in considering whether to grant report and consent in respect of the proposed side and rear setback.<sup>28</sup>

24 The plaintiffs submit that a construction of 'amenity' that precludes consideration of impact on daylight is supported by ss 188A(2)(a), 188A(2)(b) and 188A(2)(d) of the Act.<sup>29</sup> Section 188A provides:

**188A Decision guidelines on design and siting of single dwellings**

- (1) The Minister may from time to time issue guidelines relating to the design and siting of single dwellings.
- (2) Without limiting subsection (1), these matters may include—
  - (a) matters relating to the consideration of neighbourhood character and amenity and the acceptability of the design and siting of the proposed dwelling in the neighbourhood;
  - (b) matters relating to the availability of light to, and the overshadowing of, nearby buildings and allotments;
  - (c) matters relating to privacy and overlooking, in relation to nearby buildings and allotments;
  - (d) matters relating to the height of a building, and the distances from buildings to the boundaries of an allotment or to nearby buildings;

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25 The plaintiffs highlight that in s 188A(2)(a) the term 'amenity' is used in the context of the neighbourhood, and does not relate to the amenity of a specific building or habitable room.<sup>30</sup> In contrast, the plaintiffs note that the term 'amenity' is not used in

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<sup>26</sup> Ibid [32].

<sup>27</sup> Ibid.

<sup>28</sup> Ibid [32]-[33].

<sup>29</sup> Ibid [31].

<sup>30</sup> Ibid [27].

paragraphs (b) or (d).<sup>31</sup> The plaintiffs submit that '[h]ad Parliament intended for consideration of the matters addressed in sections 188A(2)(a) and 188A(2)(b) to overlap with the matters addressed in section 188A(2)(d) of the Act then it would have had identified those matters separately'.<sup>32</sup>

26 The second defendant submits that the question for this Court to determine is whether Parliament intended the term 'amenity' to be construed in the manner contended by the plaintiffs.<sup>33</sup> I accept this submission. In order for this ground to succeed, the plaintiffs have to establish that the term 'amenity' is to be construed in the Reg 414 Ministerial Guidelines such that it prohibited the Board from having regard to the impact on daylight and views to the sky.

27 The second defendant submits that the subject matter, scope and purpose of the legislation does not imply the limitation on the term 'amenity' contended for by the plaintiffs.<sup>34</sup> The second defendant submits that the starting point in construing the term 'amenity' is the general principle of statutory construction that an interpretation that promotes the purpose or object of a piece of legislation is to be preferred to one that does not.<sup>35</sup> As the authorities make clear, in ordinary circumstances the literal interpretation of a statute will give effect to its purpose.<sup>36</sup>

28 The purposes of the Act are outlined in s 1 and include inter alia 'to provide an efficient and effective system for issuing building and occupancy permits and administering and enforcing related building and safety matters and resolving building disputes'. One of a number of objectives outlined in s 4 of the Act is to 'enhance the amenity of buildings'.

29 The objectives of the Regulations are outlined in reg 101 and include 'to prescribe

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Outline of Submissions of the Second Defendant dated 29 May 2017, [35].

<sup>34</sup> Ibid [82].

<sup>35</sup> Ibid [42], quoting *DPP v Leys & Leys* [2012] VSCA 304, [45]-[46] and *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd* [2016] VSCA 328, [50].

<sup>36</sup> See *DPP v Leys & Leys* [2012] VSCA 304, [45]; *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd* [2016] VSCA 328, [47]-[54].

requirements for the design and siting of single dwellings and associated buildings'.<sup>37</sup>

30 The purpose of the Minister's Guidelines is 'to set out the considerations to be applied to the design and siting of single dwellings under the building regulations where a reporting authority is considering an application for a report and consent for a variation to the standards applying to the design and siting of single dwellings.'<sup>38</sup> The objective of the Minister's Guidelines relating to side and rear setbacks is '[t]o ensure that the height and setback of a building from a boundary respects the existing or preferred character and limits the impact on the amenity of existing dwellings'.<sup>39</sup>

31 The second defendant submits that the express language in reg 414 and Part 4 of the Regulations is consistent with the purpose of the Act, the Regulations and the Minister's Guidelines.<sup>40</sup> Further, the second defendant submits that the construction of 'amenity' contended for by the plaintiffs does not give effect to the purpose and objects of the Act, Regulations and Guidelines as this construction may result in the inhabitants of No 23 William Street suffering a significant loss of amenity in respect of the loss of daylight and access to clear sky.<sup>41</sup>

32 The second defendant submits that reg 414 does not expressly provide that in considering whether to grant report and consent a reporting authority is precluded from taking into consideration the impact of the proposed building work on access to daylight and the sky.<sup>42</sup> The second defendant submits that there is likewise no express limitation on the term 'amenity' in the Reg 414 Ministerial Guidelines.<sup>43</sup> The second defendant submits that had Parliament intended the term to be subject to such a limitation it would have done so expressly.<sup>44</sup>

33 Further, the second defendant notes that the plaintiffs have accepted that the term 'amenity' is sufficiently broad to encompass all of the matters addressed in Division 2

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<sup>37</sup> *Architects Regulations 2006* (Vic), reg 101(e).

<sup>38</sup> Minister's Guideline MG-12, *Siting and Design of Single Dwellings* issued June 2006, 1.

<sup>39</sup> *Ibid* 4.

<sup>40</sup> Outline of Submissions of the Second Defendant dated 29 May 2017, [51].

<sup>41</sup> *Ibid* [90].

<sup>42</sup> *Ibid* [56].

<sup>43</sup> *Ibid* [71].

<sup>44</sup> *Ibid* [60], [75].

of Part 4 of the Regulations.<sup>45</sup> The second defendant submits that 'amenity' as used in the Minister's Guidelines should be construed to include consideration of the impact on daylight and access to sky.<sup>46</sup>

34 The second defendant denies that the proposed works comply with reg 416.<sup>47</sup> The second defendant submits that there was a contest before the Board as to whether reg 416 had been satisfied.<sup>48</sup> The second defendant however accepts that the Board ruled during the course of the hearing that it would only be considering reg 414.<sup>49</sup>

35 The second defendant submits that even if the proposed works satisfy reg 416, this is not a sufficient basis upon which to preclude the Board from having regard to the impact that works that do not meet reg 414 have upon access to daylight in habitable rooms.<sup>50</sup> The second defendant submits that reg 416 merely provides minimum requirements for access to daylight that, if satisfied, will not require a person to seek the report and consent of the relevant reporting authority.<sup>51</sup> The second defendant submits that in some circumstances compliance with this minimum will result in an entirely unacceptable impact on the amenity of an existing building.<sup>52</sup> The second defendant submits that the proper construction of reg 414 and the Minister's Guidelines permits the reporting authority to have regard to such an impact.<sup>53</sup> In the present case, the Board determined that the proposed works would have a 'significant and unreasonable impact' on the amenity of a number of apartments at No 23 William St due to the reduction in access to daylight in habitable rooms.<sup>54</sup> The second defendant notes that the plaintiffs' construction of 'amenity' would preclude the Board from having regard to this impact.<sup>55</sup>

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<sup>45</sup> Ibid [69].

<sup>46</sup> Ibid [71].

<sup>47</sup> Ibid [106].

<sup>48</sup> Ibid [95].

<sup>49</sup> Ibid [99].

<sup>50</sup> Ibid [106]-[110].

<sup>51</sup> Ibid [108]-[110].

<sup>52</sup> Ibid [109]-[110].

<sup>53</sup> Ibid [116].

<sup>54</sup> Exhibit 1A to the Affidavit of Demitra Anderson Sworn 18 November 2016, Determination of the Building Appeals Board dated 19 September 2016, [18].

<sup>55</sup> Outline of Submissions of the Second Defendant dated 29 May 2017, [117].

36 The second defendant further submits that the construction of reg 414 contended for by the plaintiffs is contrary to that suggested by the plaintiffs' experts before the Board.<sup>56</sup> At the hearing before the Board, the plaintiffs relied upon the expert evidence of Mr Kevin McCullagh, a town planner.<sup>57</sup> Mr McCullagh's expert report included a section entitled 'Minister's Guidelines MG12 and Amenity'.<sup>58</sup> Under this section, Mr McCullagh refers specifically to the reduction in access to clear sky and daylight that would result from the proposed works.<sup>59</sup> The conclusion of Mr McCullagh's report states:

The degree of loss of amenity per reduction in access to daylight and clear sky is relatively marginal on account of the extent of the proposed works. The impact on amenity is strictly limited and can, in no way, be construed as have a substantial or significant effect on the amenity of the dwelling units at No 23 William St.<sup>60</sup>

37 At the hearing before the Board, the plaintiffs also relied upon the expert evidence of Mr John Saunders, registered architect.<sup>61</sup> Mr Saunders' report included section 3.1 entitled 'Submission addressing the relevant parts of the Minister's Guidelines for Side and Rear Setbacks'.<sup>62</sup> This section referred to paragraph [f] of the Reg 414 Ministerial Guidelines.<sup>63</sup> Mr Saunders' opinion under this paragraph concerned the loss of amenity relating to the reduction in daylight and access to the sky to windows in habitable rooms.<sup>64</sup>

38 The second defendant submits that it is contradictory for the plaintiffs to submit that access to daylight and clear sky are irrelevant considerations under paragraph [f] of the Reg 414 Ministerial Guidelines when their experts considered this to be a relevant consideration during the hearing before the Board.<sup>65</sup> Further, the second defendant

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56 Ibid [128]-[144].

57 Exhibit 1BB to the Affidavit of Demitra Anderson Sworn 18 November 2016, Submission on Amenity, Kevin McCullagh, dated March 2016.

58 Ibid.

59 Ibid.

60 Ibid.

61 Exhibit 1P to the Affidavit of Demitra Anderson Sworn 18 November 2016, Submission addressing the relevant parts of the Minister's Guidelines, J Saunders, dated 29 October 2015.

62 Ibid.

63 Ibid.

64 Ibid.

65 Outline of Submissions of the Second Defendant dated 29 May 2017, [144].

submits that counsel for the plaintiffs did not submit to the Board that this was an irrelevant consideration.<sup>66</sup>

39 The central issue in the current proceedings involves a question of statutory construction: what is the meaning of 'amenity' in [f] of the Reg 414 Ministerial Guidelines?

40 The correct approach to the interpretation of statutory provisions was considered by the Victorian Court of Appeal in *Treasurer of Victoria v Tabcorp Holdings Limited*.<sup>67</sup> Maxwell P, Beach JA and McMillan AJA stated:

As the High Court has repeatedly emphasised, the task of statutory interpretation begins, and ends, with the words which Parliament has used. For it is through the statutory text that the legislature expresses, and communicates, its intention.

Interpreting a particular provision requires consideration of the legislative context and – where relevant – the legislative history. But if the words are clear and unambiguous, and can be intelligibly applied to the subject-matter, the provision must be given its ordinary and grammatical meaning, even if the result may seem inconvenient or unjust.<sup>68</sup>

41 The Oxford English Dictionary defines 'amenity' as 'the quality of being pleasant or agreeable; a. of places, their situation, aspect, climate'.<sup>69</sup> The term 'amenity', when given its ordinary meaning, is clear and unambiguous and can be intelligibly applied to the subject matter of [f] of the Reg 414 Ministerial Guidelines. This conclusion is reinforced by the prescribed objective of the relevant guideline: to ensure that the height and setback of a building from a boundary respects the existing or preferred character and limits the impact on the amenity of existing dwellings.

42 Paragraph [f] of the Reg 414 Ministerial Guidelines requires consideration of the impact of the setback of a proposed development upon the amenity of secluded private open space and habitable room windows of an adjoining existing dwelling. Applying the ordinary meaning of 'amenity', the assessment of this impact requires consideration of any adverse effect upon access to light. However, the plaintiffs'

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<sup>66</sup> Ibid [145]-[151].

<sup>67</sup> [2014] VSCA 143.

<sup>68</sup> Ibid [1]-[2], citations omitted.

<sup>69</sup> *The Oxford English Dictionary* (Oxford University Press, 2ed, 1989) 396.



construction of [f] would exclude from consideration the impact of the setback of a proposed development upon access to light. So construed, the construction of [f] contended for by the plaintiff is inconsistent with the plain meaning of [f].

43 Mr Roberts submitted that the express regulation of the provision of daylight to existing habitable room windows in reg 416(1) precludes consideration of access to daylight as forming part of amenity in [f] of the Reg 414 Ministerial Guidelines.<sup>70</sup> Mr Roberts accepted that his submission engages the *expressio unius* principle of statutory construction: an express reference to one matter indicates that other matters are excluded.<sup>71</sup> It is well established that recourse to the *expressio unius* principle of statutory construction should be approached with caution. It is not a principle of universal application and applies only where the intention it expresses is discoverable upon the face of the instrument.<sup>72</sup>

44 When considering the application of the *expressio unius* principle in the current proceeding, it is important to bear in mind that [f] of the Reg 414 Ministerial Guidelines prescribe criteria which underpin the exercise of a discretion conferred upon the second defendant to consent to an application for a building permit which does not comply with reg 414. In *Re Australian Broadcasting Tribunal, ex parte 2HD Pty Ltd*,<sup>73</sup> the High Court stated:

The general rule is that a discretion expressed without any qualification is unconfined except in so far as it is affected by limitations to be derived from the context and scope and purpose of the statute. The fact that a discretion relating to a different subject matter is confined to a particular consideration provides no rational reason for saying that another discretion expressed without qualification does not embrace that particular consideration.<sup>74</sup>

45 The discretion conferred upon the second defendant by [f] of the Reg 414 Ministerial Guidelines is unconfined. There is no basis for reading down the ordinary meaning of 'amenity' (which includes accessibility of daylight) because reg 416(1) provides that

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<sup>70</sup> Transcript of Proceedings, *Anderson v Building Appeals Board* (Supreme Court of Victoria, S CI 2016 04773, McDonald J, 22 June 2017) T35 L24 - T36 L15.

<sup>71</sup> *Ibid* T22 LL10-17.

<sup>72</sup> *Houssein v Undersecretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 94; *O'Sullivan v Farrer* (1989) 168 CLR 210, 215.

<sup>73</sup> (1979) 144 CLR 45.

<sup>74</sup> *Ibid* [50].

a building must be set back from a habitable room window in an existing dwelling on an adjoining allotment to provide for a light court to the window that has a minimum area of 3m<sup>2</sup> and a minimum dimension of 1m clear to the sky.

46 Mr Roberts submitted that each of the matters regulated by regs 414-421 are discrete aspects of amenity.<sup>75</sup> He submitted that the aspect of amenity consisting of access to daylight to an existing habitable window is dealt with exclusively by reg 416.<sup>76</sup> The upshot of Mr Roberts' submission is to dramatically curtail the ordinary meaning of 'amenity' in [f] of the Reg 414 Ministerial Guidelines. His submission, if accepted, would preclude from consideration of amenity in [f] of the Reg 414 Ministerial Guidelines, not only the matters which are the subject of reg 416, but also each of the matters which are the subject of regs 415 and 417-421.

47 Contrary to Mr Roberts' submission, contextual matters favour a construction of 'amenity' in [f] of the Reg 414 Ministerial Guidelines which is consistent with its ordinary meaning. The application of the Reg 414 Ministerial Guidelines arises in circumstances where an application for a building permit does not comply with reg 414. Insofar as the Guidelines confer a discretion upon the second defendant for consent to be given notwithstanding non-compliance, the exercise of that discretion must be read in light of the prescribed objective of limiting the impact of the height and setback of a building from a boundary on the amenity of existing dwellings. When [f] of the Reg 414 Ministerial Guideline is read in conjunction with the prescribed objective, this does not favour a departure from the ordinary meaning of the word, let alone the dramatic curtailing of its ordinary meaning proposed by Mr Roberts.

48 Mr Roberts accepted that in order to establish an entitlement to relief in the nature of *certiorari* quashing the decision of the Board, the plaintiff must establish jurisdictional error.<sup>77</sup> He contends that the jurisdictional error consists of the Board taking into

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<sup>75</sup> Transcript of Proceedings, *Anderson v Building Appeals Board* (Supreme Court of Victoria, S CI 2016 04773, McDonald J, 22 June 2017) T36 L30 - T38 L4.

<sup>76</sup> Ibid T37 LL4-13.

<sup>77</sup> Ibid T25 L22 - T25 L12.

account an irrelevant consideration; i.e. the impact on amenity of an adjoining building consisting of the impact on daylight to existing habitable room windows. A decision will only be affected by jurisdictional error by reason of the taking into account of an irrelevant consideration where the decision-making body is precluded from taking the particular consideration into account by reason of the subject matter, scope and purpose of the statute imposing an implied limitation on the factors to which the decision-maker may legitimately have regard.<sup>78</sup> Plainly, the Board was permitted to have regard to the impact of the proposed development upon the amenity of habitable room windows of adjoining properties. Insofar as the Board considered the impact of the proposed development upon access to daylight and clear sky, the Board did not take into account an irrelevant consideration. Rather, it applied the ordinary meaning of the term 'amenity' where it appears in [f] of the Reg 414 Ministerial Guidelines.

#### **Ground of review two**

49 The second ground of review is as follows:

The First Defendant misdirected itself when considering whether to grant report and consent to the plaintiffs proposal under regulation 414, by applying regulation 416 of the Regulations.<sup>79</sup>

50 The plaintiffs' written submissions did not elaborate any further on this ground of review, nor did Mr Roberts make any submissions referable specifically to this ground at the hearing on 22 June 2017. I have proceeded on the basis that the plaintiffs' submissions in respect of ground one apply equally to ground two.

51 For the reasons outlined in relation to ground one, this ground of review must fail.

#### **Discretionary considerations**

52 For the reasons set out above I reject the plaintiffs' contention that the Board fell into jurisdictional error by taking into account an irrelevant consideration. However, even if I had accepted the plaintiffs' contention I would have declined to grant the relief

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<sup>78</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40.

<sup>79</sup> Plaintiffs' Outline of Submissions dated 10 May 2017, [3.2].

sought. Relief in the nature of certiorari is discretionary.<sup>80</sup> A significant discretionary consideration which weighs against the plaintiffs is that they did not submit to the Board that when considering impact of amenity in paragraph [f] of the Reg 414 Ministerial Guidelines that it was impermissible to consider the impact of the proposed development upon daylight to existing habitable room windows in adjoining properties. Mr Roberts conceded that the plaintiffs did not advance before the Board the construction argument advanced in the current proceedings.<sup>81</sup> Mr Roberts contended that the foundation of the plaintiffs' contention that the Board took into account an irrelevant consideration when considering amenity arises from the decision of the Board. In effect he submitted that no criticism could be levelled at his clients for not advancing the construction argument below.<sup>82</sup> I reject this submission. The plaintiffs' contention that the Board took into account an irrelevant consideration is inextricably intertwined with the construction argument they have advanced for the first time in the current proceedings. At no point in the proceedings before the Board did the plaintiffs advance a submission that:

- (i) amenity, consisting of access to daylight, is exclusively regulated by reg 416; and
- (ii) when considering the impact on amenity of existing habitable room windows of adjoining properties no regard could be had to access to daylight.

53 Further, the plaintiffs conducted the proceeding before the Board on the basis that it was legitimate for the Board to consider the impact on access to daylight of the adjoining property. At [14] of its determination, the Board set out the following evidence given by the plaintiffs' town planner, Kevin McCullagh:

In his evidence on behalf of the Appellant by Mr Kevin McCullagh (Town Planner), stated:

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<sup>80</sup> *Mann v Medical Practitioners Board of Victoria* [2004] VSCA 148, [17] (Nettle JA).

<sup>81</sup> Transcript of Proceedings, *Anderson v Building Appeals Board* (Supreme Court of Victoria, S CI 2016 04773, McDonald J, 22 June 2017) T22 L10-25.

<sup>82</sup> *Ibid* T22 L26 - T23 L5.

The pertinent contributors to the amenity of the south facing habitable room windows of the Units at 23 William Street are identified as access to daylight and clear sky.

The proposed extensions to the dwelling at 21 William Street will cause some loss of access to daylight and clear sky and thereby some loss of amenity.

The degree of loss of amenity per reduction in access to daylight and clear sky is relatively marginal on account of the extent of the proposed works. The impact on amenity is strictly limited and can, in no way, be construed as having a substantial or significant effect on the amenity of the dwelling units at No 23 William Street.

54 In the Board proceedings the plaintiffs filed a 'Submission on Amenity' prepared by Mr McCullagh.<sup>83</sup> The introduction to the submission states:

This submission examines the amenity enjoyed by the properties located on the allotment at No 23 William Street and reviews the effect on that amenity caused by the works proposed under the existing building permit and the subsequent applications for report and consent.<sup>84</sup>

55 In considering the impact on amenity Mr McCullagh specifically addressed the issue of access to daylight on existing windows. Based on the submissions advanced in the current proceedings there was no basis for him to have done so. In fact, based on the evidence of Mr McCullagh, it was appropriate for the Board to have considered the impact of the proposed development upon access to daylight in the adjoining property, when considering the question of amenity under [f] of the Reg 414 Ministerial Guidelines.<sup>85</sup>

### Conclusion

56 The plaintiffs' application for judicial review is dismissed. I shall provide the parties with an opportunity to make submissions on the question of costs.

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<sup>83</sup> Exhibit 1BB to the Affidavit of Demitra Anderson Sworn 18 November 2016, Submission on Amenity, Kevin McCullagh, dated March 2016.

<sup>84</sup> Ibid.

<sup>85</sup> See, eg, *HW Greenham & Sons Pty Ltd v Bruns* [2016] VSC 669, [4].

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CERTIFICATE

I certify that this and the 20 preceding pages are a true copy of the reasons for Judgment of McDonald J of the Supreme Court of Victoria delivered on 21 July 2017.

DATED this twenty first day of July 2017.



A red circular seal of the Supreme Court of Victoria is stamped over a handwritten signature. The seal contains the text "SUPREME COURT OF VICTORIA" at the top and "Associate of a Judge of the Court" at the bottom. The signature is written in cursive and appears to be "J. McDonald".