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

Not Restricted

S ECI 2022 00635

KEITH BADGER — Plaintiff

v

BAYSIDE CITY COUNCIL — Defendant

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	9 March 2022
DATE OF JUDGMENT:	23 March 2022
CASE MAY BE CITED AS:	Badger v Bayside City Council
MEDIUM NEUTRAL CITATION:	[2022] VSC 140

STATUTES – Delegated legislation – Interpretation – Whether erecting corflute sign by cable ties constitutes 'development' or 'use' – Meaning of 'event' and applicable time limit for display of signs – *Planning and Environment Act 1987* (Vic) Pt 2 – Bayside Planning Scheme cl 52.05.

CONSTITUTIONAL LAW – Implied freedom of political communication – Validity of delegated legislation – Whether Bayside Planning Scheme cl 52.05 effectively burdened freedom – Whether cl 52.05 reasonably appropriate and adapted to serve a legitimate end – Whether necessary to reach constitutional question – Whether live controversy exists once interpretation question resolved.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J Evans QC with Ms V Bell	Adley Burstyner
For the Defendant	Mr E Nekvapil with Ms K Brown	Maddocks

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HIS HONOUR:

Introduction

1 It is notorious that there will be a Federal Election in 2022, however the writs are yet to issue. It is also well understood that, subject to limitations, the precise date for a Federal election, and its precise format, are within the discretion of the Prime Minister. Plainly legitimate campaigning for the forthcoming election has been underway for some time. It has long been a practice for candidates for an election, whether federal, state or local, to publicise their candidacy by the use of signs located on private property.

2 The municipality of the defendant, Bayside City Council ('**Bayside**'), falls within House of Representatives Electorate of Goldstein. Ms Zoe Daniel has declared that she will stand as a candidate for this seat. The plaintiff, Mr Keith Badger, is her campaign director and a resident of Brighton in Bayside. Mr Badger contended, self-evidently, that name recognition within the electorate is critical for a candidate, new to politics, running without the backing of a major political party, and against an incumbent from a major party. A key strategy adopted by Ms Daniel's campaign is to 'produce signage to be displayed by supportive individuals on their properties within the electorate', which are known in the vernacular as 'yard signs'.

3 This proceeding concerns the manner in which the right of an occupier of land within Bayside to display a yard sign on their land is regulated by law. The regulating provisions are found in the Bayside Planning Scheme ('**Scheme**').

Background facts

4 Before any signs were erected, enquires were made of Bayside who responded that election signage is exempt from requiring a planning permit. By 8 February 2022, Bayside had received complaints about Ms Daniel's election signage. Following a discussion between Steven Boyce, a senior investigations officer at Bayside, and Mr Badger, Mr Boyce subsequently stated Bayside's position to be that:

(a) political signs such as this must be tied to an event which in this instance would be an election being called;

(b) Once an election is called, candidate material may be displayed without a planning permit;

(c) The relevant provisions form part of Victoria-wide planning legislation under the *Planning and Environment Act 1987* (Vic) (the '**Act**') and are not peculiar to Bayside.

(d) Unauthorised signs must be removed until the election is called.

5 Bayside's response reflected its interpretation of the Scheme, in particular cl 52.05-10 'Signs not requiring a permit'. As Mr Boyce noted, the clause governs 'the erection of signage … publicising a … political … event'. He further noted:

> For political signage the 'event' is the calling of an election. Until an election is called election signage is considered a promotional sign.

6 Bayside researched the intricacies of when the next Federal election for a House of Representatives seat might be held, taking advice from the Australian Electoral Commission, and informed all currently known Federal election candidates for the seat of Goldstein that any sign associated with that candidate would be unlawfully erected if no election had been called (as is the case) or the sign is erected prior to 3 June 2022, being three months prior to the latest possible date calculated by the Parliamentary Library on which a House of Representatives election could be held.

7 Mr Badger took issue, contending:

(a) Clause 52.05-10 applies to the development, not the use, of land;

(b) If cl 52.05-10 did apply, Bayside's interpretation,

(i) is contrary to basic principles of statutory interpretation;

(ii) restricted inappropriately the constitutionally implied freedom of political communication of the occupier of the land;

(c) Bayside's view is contrary to its previous advice; and

(d) Bayside's position is contrary to the practice of other councils in Melbourne with an identical planning scheme.

The first two of these contentions are presently relevant.

8 On 1 March 2022, Mr Badger received a letter addressed to 'The Occupier' signed by Mr Boyce which relevantly stated:

> Under State planning legislation community based signs, which includes political signs, can only be displayed when an election date has been called. The relevant section, cl 52.05-10 in the Bayside Planning Scheme, only allows the erection of a political sign without a planning permit when the event (election date) has been called.
>
> **Although not Council's preferred course of action fines may be issued for not complying with State legislation. Your cooperation therefore is required in removing or completely covering the sign within 2 days of the date of this letter.**
>
> The sign can be redisplayed after an election date has been announced.
>
> (emphasis in original)

9 Multiple residents across the Bayside municipality have received a copy of the same letter addressed to the occupier and hand delivered to their post boxes on 28 February 2022 and 1 March 2022. There was no evidence of the precise date on which any recipient of such a letter, including Mr Badger, commenced to display a yard sign.

10 Following the issue of the originating motion, Bayside undertook to the court and to Mr Badger that:

> until 5pm on 9 March 2022 it will not, by its servants or agents, take any steps to issue infringement notices to, or commence criminal proceedings against, landowners within the area covered by the Bayside Planning Scheme in respect of the display by the landowner of a Zoe Daniel sign (as defined in paragraph 1 of the originating motion), or in any way interfere with the display by a landowner of a Zoe Daniel sign.

That undertaking was duly extended to the day on which the court delivers judgment in the proceeding.

11 On the evidence before the court, Mr Badger's yard sign is a corflute sign. Corflute is corrugated polypropylene, a type of plastic usually 3 millimetres or 5 millimetres in

width. From a photograph, the sign appears to be approximately 1 metre high by 1.4 metres wide. There is no evidence of construction of the sign, or of a support for the sign, on the land. It is displayed by being affixed to a fence with cable ties.

12 The sign is dominated by a photograph of Ms Daniel. In the upper right-hand side of the sign are the words:

> Independent for Goldstein
>
> Zoe 1
>
> Daniel
>
> Find your voice

Below those words appear a QR Code and a statement of authorisation. In the bottom left-hand side of the sign are the words:

> Climate
>
> Prosperity
>
> Integrity
>
> Equality
>
> [Website address]

13 Mr Badger seeks relief by way of declarations and injunctions in particular terms. It is not in contest that this court has jurisdiction to grant the relief sought, if appropriate.[1]

(a) A declaration that the display of signs by landowners within the area covered by the Scheme, promoting Zoe Daniel as a candidate for election in the Commonwealth House of Representatives seat of Goldstein in respect of the election to be held in the year 2022, does not constitute a contravention by the landowners of the Scheme.

(b) Alternatively, a declaration that the display by landowners within the area covered by the Scheme, for a period not exceeding 3 months, of Zoe Daniel

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1 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421, 434; *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 139 ALR 663, 670-1. See also *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 52(1) – the Victorian Civil and Administrative Tribunal lacks jurisdiction as no action has yet been taken by Bayside City Council under the relevant planning enactment.

signs, does not constitute a contravention of the Scheme, unless the Zoe Daniel sign remains on display for more than 14 days after the holding of the election in the Commonwealth House of Representatives seat of Goldstein to be held in 2022.

(c) Further or alternatively, a declaration that the election in the Commonwealth House of Representatives required to be held in 2022 is an event for the purpose of cl 52.05-10 of the Scheme regardless of whether a writ for general elections of the House of Representatives has been issued by the Governor-General.

(d) Further to paragraph (a), an injunction restraining Bayside from taking any steps to issue fines to, or commence criminal proceedings against, landowners within the area covered by the Scheme in respect of the display of a Zoe Daniel sign.

(e) Further to paragraph (b) and alternatively to paragraph (d), an injunction restraining Bayside from taking any steps to issue fines to, or commence criminal proceedings against, landowners within the area covered by the Scheme in respect of the display of a Zoe Daniel sign, unless the landowner displays the sign for a period exceeding 3 months, or the sign remains on display for more than 14 days after the holding of the election in the Commonwealth House of Representatives seat of Goldstein to be held in 2022.

Principles applying

14 A planning scheme regulates both the development of land and the use of land. The use of land is generally related to purpose. For example, to achieve the purpose of displaying information, an occupier may choose to display a sign on their land rather than place an advertisement in a newspaper. Use of land may not involve building any structure. Development of land generally refers to either the subdivision or consolidation of land titles or the demolition, construction or alteration of buildings or structures.

15 The relevant provisions in the Scheme are uniform provisions that apply across

Victoria by force of the Act. Critically for present purposes, s 3 of the Act provides that the 'development' of land includes 'the construction or putting up for display of signs'. Section 3 of the Act provides:

> **development** includes –
>
> (a) the construction or exterior alteration or exterior decoration of a building; and
>
> (b) the demolition or removal of a building or works; and
>
> (c) the construction or carrying out of works; and
>
> (d) the subdivision or consolidation of land, including buildings or airspace; and
>
> (e) the placing or relocation of a building or works on land; and
>
> (f) the construction or putting up for display of signs or hoardings
>
> ...
>
> **use** in relation to land includes use or proposed use for the purpose for which the land has been or is being or may be developed

The proper interpretation of the Scheme provisions requiring permits for development of land, requires focus on how the words 'putting up for display' found in the definition in the Act are to be construed.

16 The use of land to display a sign does not require a permit. Clause 62.01 of the Scheme provides:

> **USES NOT REQUIRING A PERMIT**
>
> Any requirement in this scheme relating to the use of land other than a requirement in the Public Conservation and Resource Zone, does not apply to:
>
> ...
>
> - the use of land to display a sign

17 Turning then to the Scheme provisions for development of land by putting up a sign for display, the relevant provisions of the Scheme are as follows:

> **52.05** **SIGNS**
>
> **Purpose**
>
> To regulate the development of land for signs and associated

structures.

To ensure signs are compatible with the amenity and visual appearance of an area, including the existing or desired future character.

To ensure signs do not contribute to excessive visual clutter or visual disorder.

To ensure that signs do not cause loss of amenity or adversely affect the natural or built environment or the safety, appearance or efficiency of a road.

52.05-1 **Application**

This clause applies to the development of land for signs.

52.05-2 **Requirements**

Sign categories

Clauses 52.05-11 to 52.05-14 specify categories of sign control. The zone provisions specify which category of sign control applies to the zone.

Each category is divided into three sections.

If a sign can be interpreted in more than one way, the most restrictive requirement must be met.

Section 1

A sign in Section 1 of the category may be constructed or put up for display without a permit, but all the conditions opposite the sign must be met. If the conditions are not met, the sign is in Section 2.

Some overlays require a permit for Section 1 signs.

Section 2

A permit is required to construct or put up for display a sign in Section 2.

This does not apply to a sign specified in Clause 52.05-10.

All the conditions opposite the sign must be met. If the conditions are not met, the sign is prohibited.

Section 3

A sign in Section 3 is prohibited and must not be constructed or put up for display.

52.05-10 **Signs not requiring a permit**

> Despite any provision in a zone, overlay, or other particular provision of this scheme, a permit is not required to construct or put up for display any of the following signs:
>
> ...
>
> A sign with a display area not exceeding 5 square metres publicising a local educational, cultural, political, religious, social or recreational event not held for commercial purposes. Only one sign may be displayed on the land, it must not be an animated or internally illuminated sign and it must not be displayed longer than 14 days after the event is held or 3 months, whichever is sooner. A sign publicising a local political event may include information about a candidate for an election.

18 Clause 73.02 sets out the 'sign terms'.

(a) It defines a 'promotion sign' as being:

> A sign of less than 18 sqm that promotes goods, services, an event or any other matter whether or not provided, undertaken or sold or for hire on the land or in the building on which the sign is sited.

(b) It defines 'sign' as 'Includes a structure specifically built to support or illuminate a sign.'

19 Residential land is classified as 'category 3' land under cl 32.04-15 of the Scheme. Accordingly, under cl 52.05-13 a promotion sign is a 'section 2' sign for which a permit is required.

20 Finally, I note that s 126(2) of the Act provides that the owner of any land is guilty of an offence if the land is used or developed in contravention of a planning scheme. Section 130 of the Act enables an authorised officer of a responsible authority to serve a planning infringement notice where the authorised officer has reason to believe that a person has infringed against s 126 of the Act. Such an infringement may attract a penalty as specified in s 130(3) of the Act.

21 The general principles of statutory interpretation that I am applying are well understood. I note the summary in the judgment of French CJ and Hayne J in *Certain*

Lloyd's Underwriters v Cross.[2]

(a) Statutory construction begins with a consideration of the text itself. Historical context and extrinsic materials, while relevant, cannot displace the clear meaning of the text.

(b) Statutory intention should be determined by the language used in the text, but the meaning of the text may require considering its context, which includes the purpose and policy of a provision and, in particular, the mischief it seeks to remedy.

(c) The statute must be construed consistently with the language and purpose of all provisions of the statute, viewed as a whole.

(d) The purpose of a statute or of particular provisions, may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. It cannot be based on an assumption about what is desirable – the purpose must be derived from what the legislation says.

(e) Purpose is not to be determined by searching for the literal intention of those who enacted the legislation. Legislative intent, and legal meaning, is revealed through compliance with rules of construction.

(f) Ordinarily the legal meaning will be the grammatical meaning. However, the meaning can depart from the grammatical meaning if the context, the consequence of a literal construction, the purpose of the statute or the canons of construction require a different construction.

(g) Considerations of context require that a definition from one statute (the source Act) applied in another piece of legislation, be construed by reference to the context provided by the source Act.

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2 (2012) 248 CLR 378, 388-92 [23]-[32]. See also the authorities cited therein.

Issues for determination

22 The issues to be determined are:

(a) does cl 52.05 of the Scheme regulate Mr Badger's yard sign?

(b) If it does, was the sign exempt from requiring a development permit? This also requires determining the time period in which the exemption applies.

(c) If the sign required a permit, does the Scheme impermissibly interfere with the constitutionally implied freedom of political communication?

Does clause 52.05 apply?

23 Mr Badger contended that the clause does not apply to signs like this yard sign, i.e. corflute signs that are only attached by cable ties to existing developments on the land (light fences), and do not involve any structure, construction, or assembly - in other words, temporary signage.

24 Mr Badger argued, and I accept, there is a distinction between 'development' and 'use' of land. Clause 62.01 applies to the 'use' of land. It provides that '[a]ny requirement in this scheme relating to the use of land ... does not apply to: [t]he use of land to display a sign'. Clause 52.05-1, in contrast, provides that cl 52.05 applies only to the 'development of land for signs'.

25 Mr Badger is using his land to display a sign. He is entitled to do so without a permit for that use. He has attached a prefabricated corflute sign by cable ties to an existing fence. He has not constructed the sign or its support structure.

26 Mr Badger contended that the court must interpret the Scheme to avoid conflicting or redundant provisions, and maintain the unity of all the provisions.[3] Clause 62.01 must regulate signs whose display require some construction on the land, a 'development' of the land. The cable tied corflute signs are not 'development', they are 'use' and require no permit.

27 Recognising that 'development' and 'use' are defined terms, and the phrase 'putting

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3 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [69]-[70].

up for display', in paragraph (f) of the definition of 'development' does not, in its ordinary grammatical meaning, necessarily require any construction or supporting structure, Mr Badger submitted that the Act's definitions do not apply to the Scheme. Alternatively, Mr Badger submitted that 'putting up for display' should be coloured by the context of 'to construct' in the composite phrase, 'to construct or put up for display', which appears both in the definition of 'development' in the Act and in the exemption clause 52.05-10. The words 'or to put up' should be considered to require an activity in the nature of construction. The phrase only captures doing some form of building or erection of a structure or frame, at a minimum for example inserting posts into the land to support the sign. The 'display' of a sign, in contradistinction to 'putting up', is something less, involving no activity that might fall within a wide understanding of the concept of 'construct' such as propping a sign in a window, or, in the front yard against a garden gnome, or by cable tying it to a fence.

28 Mr Badger contended that failing to exclude from the definition of development the display of a 'relatively flimsy' sign for political advertising by attaching it with cable ties, produced the absurd result that the putting up of these signs would be prohibited without a permit.[4] Any informal sign a resident might display - an anodyne sign saying 'home sweet home' or 'live laugh love', a sign communicating support for Ukrainians, protesting fake climate science, or identifying 'Grandmothers supporting Asylum seekers', a poster supporting a sports team (unconnected to publicising a particular local event), or other organisation affiliation, a political statement, or show of support for healthcare workers during a pandemic - would be prohibited in residential areas, and not be eligible for a permit,[5] unless it was a promotion sign, which must promote 'goods services, an event or any other matter'.

29 Mr Badger submitted that such consequences should be avoided as a matter of

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4 According to cl 52.05-13 of the Scheme, in a category 3 area (like the residential area in question in Bayside), s 1 provides that a resident may only display certain bed and breakfast, home-based business and direction signs without a permit. Section 2 provides that a resident may only display certain listed signs with a permit (above-veranda, business identification, electronic, floodlit, high-wall business logo or street number, internally illuminated, pole, promotion or reflective signs), with certain specifications. Section 3 provides that any other sign is prohibited.

5 Ibid - in category 3, high amenity areas, cl 52.05-13, s 3 provides that any sign not expressly listed in ss 1 and 2 are prohibited altogether.

statutory interpretation. Where there are multiple possible constructions, the court should avoid the one that is capricious, unreasonable, inconvenient or unjust;[6] should prefer the interpretation that would interfere the least with private property rights;[7] should avoid the construction that could substantially infringe upon the implied freedom of political communication;[8] and in construing a penal statute, ought to resolve an ambiguity in favour of the subject.[9]

30 As Bayside submitted, this approach to construing the Scheme is misconceived and I reject it.

31 The definition of 'development' in s 3 of the Act is incorporated by reference into the term 'development' as it appears in the Scheme. Section 23 of the *Interpretation of Legislation Act 1984* (Vic) provides:

> **Construction of subordinate instruments**
>
> Where an Act confers power to make a subordinate instrument, expressions used in a subordinate instrument made in the exercise of that power shall, unless the contrary intention appears, have the same respective meanings as they have in the Act conferring the power as amended and in force for the time being.

32 The Scheme was amended in 2018 specifically to deal with the use and development of land for signs. The term 'advertising signs' was replaced with the general term 'signs'. Extrinsic material, in the form of an Advisory Note published by the Victorian Department of Environment, Land, Water and Planning,[10] explained that the 'change reflects the fact that planning schemes regulate a range of sign types, including direction and information signs'. In addition, the Advisory Note recorded that the 'term [sign] has not been defined and so has its ordinary meaning.'[11]

33 The Advisory Note recorded, as the text of the Scheme makes clear, that it was amended so that a 'permit is no longer required to use land to display a sign. An

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6 See *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99, 109 (***'ABC v APRA'***).

7 *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [43] (***'Fazzolari'***).

8 *Coleman v Power* (2004) 220 CLR 1, 87-9 [227]-[230] (***'Coleman'***).

9 *Chew v The Queen* (1992) 173 CLR 626, 632 (***'Chew'***).

10 Planning Advisory Note 72 VC, July 2018, Amendment VC148.

11 Ibid 7-8.

exemption has been included in Clause 62.01 (Uses not requiring a permit).' Clause 52.05 was amended to 'clarify that the clause only applies to the development of land for signs' and to 'replace the phrase "display a sign" with "construct or put up for display a sign" to align with the definition of 'development' in section 3 of the Act'.[12]

34 Prior to these amendments, when the Scheme dealt with 'advertising signs' instead of 'signs', the court considered the regulation of signs under the Act in *APN Outdoor (Trading) Pty Ltd v Melbourne City Council* ('***APN***').[13] Cavanough J held:

> First, the respondent submitted that the Act uses the terms 'development' and 'use' disjunctively. They are two distinct concepts with no overlap between them. The ongoing display of a sign after it has been erected must therefore be either development or use but cannot be both at the same time. This was common ground between the parties, and I agree that it is correct.
>
> Second, the respondent submitted that the concept of use refers to the purpose for which a development is used and not to the physical structure of the thing developed itself. I also accept this proposition.
>
> ...
>
> In my view, the purpose of paragraph (f) [the definition of 'development' that includes 'the construction or putting up for display of signs or hoardings'] is not to create a new and distinct concept of a 'sign'. Its purpose is to make clear that 'development' includes the construction or putting up of any type of sign where there otherwise may be doubt.
>
> First, paragraph (f) ensures that no matter what form signs may take, planning schemes will be able to regulate their being put up. Although a large panel sign such as the subject of this proceeding easily fits the description of a 'structure', there are many types of sign which could not readily be described as a building or structure. For example, some signs are painted directly onto the side of existing buildings or walls. Some signs are printed on paper or fabric which is affixed to a pre-existing surface. Some signs are loaded onto a trailer or vehicle and not affixed to the ground at all. Some signs take the form of banners or flags that are strung from trees or poles. Some signs can take the form of light projected onto a surface. An advertisement might even be mown into the grass on a field with the intention that it be seen by passengers in aircraft landing at a nearby airport. The ingenuity of advertisers and businesses will no doubt continue to find more and more ways to display advertising messages. The purpose of paragraph (f) is to ensure that signs of all types and forms can be regulated.
>
> Second, by including the putting up of a sign under the definition of 'development', paragraph (f) makes clear that councils can regulate the putting up of signs even where they are ancillary to a business lawfully being

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12 Ibid 7-8.
13 (2012) 187 LGERA 231.

conducted on the same site and could not be regulated as a separate use of land.

...

The Act uses the term 'development' in an active sense and not as a concrete noun. The Act regulates the 'development of land', in other words, the doing of some action to the land or upon the land. ... The Act distinguishes between the action and the concrete product of that action by using the term 'development' to refer exclusively to action and concrete nouns such as 'a building' and 'works' to refer to the product of that activity.

More particularly, the examples in paras (a) to (e) in the inclusive definition of 'development' all refer to some sort of action or activity that produces some sort of change. The focus in those sub-paragraphs is not on the building, works or land that are the subject of the change but on the process of effecting the change. They do not refer to the ongoing existence or use or continuation of that change once it has been effected. In that context, it would be rather odd if sub-paragraph (f) referred not only to the process of constructing or putting up a sign but also to the ongoing existence of the sign as it displayed its message.

Moreover, the Act contemplates that use ordinarily follows development. This is evident from the definition of use which 'includes use or proposed use for the purpose for which the land has been or is being or may be developed.' Land is not developed for the sake of development but is developed for use. There is nothing in the Act indicating that this ordinary progression from development to use does not apply to signs.

Finally, and in my opinion significantly, paragraph (f) refers not merely to the display of signs but to the 'construction or putting up for display'. It is well accepted that all words in a legislative provision are presumed to have some meaning or effect. The words 'construction or putting up' cannot be ignored. Those words evince a distinction between the original erection of a sign and its ongoing display. It is clear, in my opinion, that only the original construction or putting up of a sign constitutes development.

...

There are many aspects of display of a sign that remain to be regulated after it has been put up. These may include the length of time that the sign may remain in place or the type of messages that may be displayed. Not all signs are static panel signs such as the sign the subject of these proceedings. Other signs may have more aspects that can be regulated. Such regulation may not fit easily under the description of regulating 'development' because the features being regulated may not involve any physical adjustment to the sign itself.[14]

35 With respect, I agree with Cavanough J's careful analysis, noting in particular the distinction between development and use, and the meaning of 'construct or put up for display' in the definition of 'development'. These conclusions remain relevant following the 2018 amendments. They present an insurmountable difficulty for Mr

14 Ibid 239 [28]-[29], 241-3 [45]-[47], [50]-[53], 248 [78] (citations omitted).

Badger's first submission. The purpose of the Scheme is to regulate the display of all conceivable types of signs.

36 Clause 52.05 regulates the development of land by any and all types of signs. It makes no distinction between temporary and permanent signs. Corflute signs fall into the definition of 'signs' and can be 'put up for display', as contemplated by the definition of 'development' in the Act, by being attached to a fence by cable ties.

37 The construction contended for by Bayside is consonant with the purposes of the clause – to regulate the development of land for signs and associated structures; to ensure signs are compatible with the amenity and visual appearance of an area; to ensure signs do not contribute to excessive visual clutter or visual disorder; to ensure that signs do not cause loss of amenity or adversely affect the natural or built environment or the safety, appearance or efficiency of a road. Signs that are 'constructed' and signs that are merely 'put up' and made of less permanent materials, can all contribute to visual clutter, to the detriment of amenity.

38 It must follow that the clause applies to prohibit all signs of any description, unless a permit may be sought, or the display of a sign without a permit is expressly carved out from the prohibition.

39 There is no basis in the text, context or purpose of the Act or Scheme for reading down the plain meaning of 'putting up' a sign to display it, as Mr Badger contended. Development of the land includes any physical changes or additions to the land and is mutually exclusive with the concept of 'use'. Appending a corflute sign to a fence is not 'use' of the land. It is the development of the land.

40 The continued display of the sign, however, is use of the land, as no further change is being effected to the land. Clause 62.01 makes it clear that after the initial development of the land by putting up a sign, its continued display does not require an additional 'use' permit. That clause is not redundant on the proper construction of the Scheme.

41 Mr Badger submitted rules of statutory construction avoided this result – that the

interpretation should avoid unpalatable results like the prohibition of any homemade signs,[15] the presumption against interference with private property rights,[16] that the construction should avoid substantially infringing on the implied freedom of political communication,[17] and that any ambiguity should be resolved in favour of a subject in construing a penal statute[18] – which are all rules that are enlivened when there is an ambiguity or a number of possible constructions. Interpreting the plain text of the instrument, in context and in light of its purpose, leads inevitably to the conclusion that Mr Badger's contention that a corflute sign, affixed by cable ties, is not 'development' and was not 'put up for display', within the meaning of the Scheme, is misconceived.

42 The Scheme represents a balancing of competing interests, including private property rights and freedom of political communication, against maintaining the amenity of residential and mixed use areas in Bayside (and through uniform application in cognate planning schemes, throughout Victoria). It is not for the court, in interpreting that Scheme, to impose its own preferred balance of these competing interests and its own policy choices. These purposes are to be found within the text of the Scheme itself.

43 Mr Badger's 'Zoe Daniel' yard sign is a 'promotion sign' within the meaning of cl 73.02 of the Scheme. In a high amenity zone, i.e. a residential zone,[19] it is subject to cl 52.05 of the Scheme and cannot be displayed without a permit,[20] unless it falls under one of the exceptions listed in cl 52.05-10.

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15 *ABC v APRA* (1973) 129 CLR 99, 109, 'If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust'.

16 *Fazzolari* (2009) 237 CLR 603, 619 [42] '[The presumption] does not, of course, authorise the court to put to one side "the unambiguous effect of the words which the Parliament has seen fit to use"'.

17 *Coleman* (2004) 220 CLR 1, 87-8 [227], 'the interpretive principle of constitutional conformity ... the precise meaning of the word ... is unclear in the context of the disputed provision in the Act, the word should be construed in a manner that avoids [the provision being] incompatible with the Constitution'.

18 *Chew* (1992) 173 CLR 626, 632, 'The historical and contextual relationship ... leads us to the conclusion ... Had we not come to that conclusion, we would have considered that the provision was ambiguous in that respect. In that event, all other indicia having failed, the provision, being penal in character, should be interpreted in favour of the strict ... meaning'.

19 Clause 32.04-15 of the Scheme.

20 Clause 52.05-15, s 2 of the Scheme.

Is the sign exempt from requiring a permit?

44 Clause 52.05-10 provides that a permit is not required to construct or put up for display any of the following signs:

> A sign with a display area not exceeding 5 square metres publicising a local educational, cultural, political, religious, social or recreational event not held for commercial purposes. Only one sign may be displayed on the land, it must not be an animated or internally illuminated sign and it must not be displayed longer than 14 days after the event is held or 3 months, whichever is sooner. A sign publicising a local political event may include information about a candidate for an election.

45 Both parties maintained that the sign did not enjoy this exemption, although for different reasons.

46 Mr Badger contended that the sign was not publicising an event. It was publicising that Zoe Daniel is a candidate in the election, but not the event of the election itself. Zoe Daniel's candidacy, while an 'occurrence' is not an 'event' within the meaning of cl 52.05-10 of the Scheme. Accordingly, the exemption does not apply.

47 Bayside argued that an 'event' is something that occurs at a particular time and place, because it must be 'held', and it must finish on a particular date in order for its removal to be required 14 days thereafter. The date must be crystalised in order for the occurrence to constitute an 'event' under the exemption clause.

48 Bayside's submission went further. The concept of an event in the clause cannot encompass a future event the occurrence of which is certain when the precise date and time is uncertain. The sign, by implication, was publicising the upcoming Federal election. While it is certain that an election will be held this year for the House of Representatives, and that the election of the member for Goldstein will be a 'local political event' when it happens, there is not yet an 'event' of the kind that engages the exemption clause. This was so because the date of the election is unknown and it could be more than three months hence, as far distant as 3 September 2022 if a half-Senate election was held without an election for the House of Representatives.

49 Bayside submitted that unless an 'event' be confined to a community activity that will occur on a particular date, the meaning of 'event' would be so wide as to admit

anything as an event. For example, a person coming up with an idea or discovering a certain state of affairs would constitute an 'event'. That is why Zoe Daniel intending to nominate as a candidate in the election, or her announcement of such candidacy, could not be an 'event' for the purposes of cl 52.05-10. The implied event in this case, must be the forthcoming election.

50 Importantly, Bayside's contention was that for the exemption to apply, the event in question must be definitely three months or less into the future. Bayside contended that the three month period, like the 14-day period, must be contiguous with or overlap the event and so the exemption cannot be engaged more than three months before the date fixed for the event. Hence its assertion that because, in theory, the latest the election can be held for the House of Representatives is 3 September 2022, signs may fall within the exemption if put up from 3 June 2022, or they may be put up once the writs have been issued and there is a definitive date for the 'event' that will be within the three month period.

51 If this were not the case, Bayside submitted, there would be opportunity for abuse contrary to the purpose of the provision – '[t]o ensure signs do not contribute to excessive visual clutter or visual disorder',[21] by, for example, display of a sign such as the one in question a year ahead of an event.

52 Perhaps in recognition of the extent to which Bayside's primary submission extended beyond the text of the clause, it offered, as an alternative position, that if an 'event' need not be on a fixed date, and the three-month period need not be tied to that specific date, then the requirement that 'only one sign may be displayed on the land', means that only one sign may ever be displayed on that land in respect of one event. This would prevent a landowner from perpetually publicising an event by taking down the sign temporarily and putting it back up again, or putting up a slightly different sign for a further three-month period.

53 On this alternative construction, contended Bayside, Mr Badger's sign does currently

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21 Clause 52.05, 'Purpose'.

fall into the exemption clause, but only for a period of three months from the date it was first put up for display. Thereafter, he will not be able to display on his land any sign in respect of a forthcoming election for the seat of Goldstein.

54 The initial concession is sensible, as I will explain, although the contention that the textual requirement that only one sign may be displayed on the land governs the message being communicated, rather that the physical sign, is misconceived.

55 Mr Badger submitted that the consequence of Bayside's alternative construction of 'event' would be that residents would have to guess as to when the election might be, and choose to display their signs three months out from that date, gambling that signs either display for a short time before the election is called - perhaps as little as 33 days - or could result in the permissive three months expiring weeks or months before the election is held, resulting in a prohibition on political campaigning in the critical time period immediately prior to the election, unless a permit was obtained.

56 Is the sign publicising an event? And is it a local political event? Each question must be answered in the affirmative.

57 The sign does not expressly refer to the election in the sense of an event defined by a date. It does not primarily communicate a message that there will be a House of Representatives election for Goldstein, yet to be called. The election is not the only event contemplated by the sign. It is communicating that Zoe Daniel will nominate as a candidate for election as member for Goldstein when the writs issue, which could be considered a forthcoming event. By necessary implication, the sign contemplates that she will be a candidate in the forthcoming federal election, whenever that election is held. The election is plainly an anticipated event being publicised by the sign.

58 The message communicated by the sign pertains to politics in the local electorate of Goldstein. It is about a local political event, namely Zoe Daniel's candidacy in the election for the federal member for Goldstein, viz. the local member. Clause 52.05-10 expressly contemplates that signs publicising local political events may include information about a candidate for an election. While the sign makes no mention of the

actual, or any anticipated, date of the election, self-evidently it publicises and promotes Zoe Daniel as a candidate at the election, not a candidate in the abstract. The raison d'être of the sign is the forthcoming election.

59 There is nothing in cl 52.05-10 that confines an 'event' to something that occurs at a particular time and place. Bayside's characterisation of the event contemplated by the clause extends beyond what the text, context and purpose of the clause requires. It contended that the time limits for display of the sign required this characterisation.

60 I do not accept this submission. The time limit – not be displayed longer than 14 days after the event is held or three months, whichever is sooner – plainly governs the period of display of the sign. It does not require that the event be on a date that is certain when the sign is put up for display. Many local events publicised by a sign will be on a certain date and the essence of the message will be to communicate that very fact, for example, a primary school fete. However, not all will. While the period '14 days after the event is held', contemplates an event that is held at a particular time (though not necessarily at a particular place), the words 'or 3 months' are not tied to when or where the event is held. It is a time limit on the display of the sign, from the date when it is 'put up for display'.

61 As Mr Badger submitted, if it were intended that the three-month limitation be a restriction on when a sign may be displayed relative to the date of an event, in distinction to the period of display about the event, the provision would have read 'must not be displayed earlier than three months prior to the happening of the event, or 14 days afterwards'. It did not.

62 The clause does not require that an event to which the exemption applies needs to be fixed, and identified in time or place, to be publicised without a permit. The writs do not need to be issued for an election in order for it to be an 'event' within the exemption in cl 52.05-10 of the Scheme. It is plain that the forthcoming Federal election is an event.

63 When an event does have a fixed date, the sign publicising it cannot be up for more

than 14 days after the event has ended. But if an event does not have a fixed date, or that date has not yet crystalised, then the sign may be put up for display for a total of three months. Whichever date (three months from when it was put up, or 14 days after the event) comes first, will be the date the sign ceases to enjoy the protection of the exemption from needing a permit.

64 By the Scheme, properly construed and in the circumstances, the sign was exempt from requiring a permit for it to be put up for display, and Mr Badger is entitled to display it for three months. Conversely, Bayside is not entitled to maintain that the sign cannot be put up for display until the election is called and that it must be removed from display, or that Bayside is entitled to issue infringement notices to, or commence criminal proceedings against, Mr Badger (or any other resident in similar circumstances).

65 There remain two further questions relevant to the status of the sign at the expiry of the three-month period. It is not necessary to determine these questions in view of my findings. Circumstances may change in myriad ways before three months expire. However, I will briefly state my views in deference to counsel's careful submissions.

Further construction issue

66 Dealing first with another issue about how the clause is properly construed, Bayside contended that the requirement that '[o]nly one sign may be displayed on the land' meant that only one sign *per event* may be displayed on each parcel of land. Otherwise, residents could take down their sign and immediately put them back up again, or they could slightly amend their signs and continue to display them past the three-month mark, which, it submitted, would be contrary to the purpose of cl 52.05.

67 This contention is misconceived. The limitation in the clause that '[o]nly one sign may be displayed on the land' is a limit to the number of signs that may be displayed at any one time on one piece of land. There cannot be two or more signs on one piece of land at any given time 'publicising a local education, cultural, political, religious, social or recreational event not held for commercial purposes'. The clause does not state a limit of one sign per event. It does not purport to limit the consecutive display

of different signs. The wording could easily have been expressed to achieve such a result.

68 That said, the issue is, on the facts before me, hypothetical.

Implied freedom of political communication

69 Given my findings that the sign may be displayed for a period of three months without a permit, the remaining question is whether I need determine whether the Scheme impermissibly limits the implied constitutional freedom of political communication.

70 Mr Badger submitted that I ought nevertheless to answer the constitutional question. He submitted that in circumstances where the date of the election is unknown and Mr Badger has expressed his intention to display the sign up until the election is held, there is a sufficient controversy that the implied freedom may be burdened by the Scheme for the court to determine whether to make the first declaration sought by Mr Badger in the originating motion.[22]

71 Bayside submitted that if, as I have found, Mr Badger is entitled to display the sign for a period of three months from putting it up, then the court need not, and indeed cannot, determine the constitutional question. Mr Badger is well within the time allowed by the Scheme exception, and as the sign is being displayed there is currently no constitutional question in the factual controversy before the court.

72 Embarking on this issue raises the question of whether adequate notice was given to the Attorneys-General under s 78B(1) of the *Judiciary Act 1903* (Cth), which provides that where a cause pending in a State court involving a matter arising under the Constitution or involving its interpretation, the court's duty is not to proceed in the cause unless satisfied that the Attorneys-General of the Commonwealth and of the States have had a reasonable time to consider whether to intervene in the proceedings or remove the cause to the High Court.

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22 A declaration to the effect that the display of the sign by landowners does not constitute a contravention of the Scheme. This is framed in general terms and does not impose any time limit on the display of the signs.

73 Mr Badger's solicitor filed an affidavit setting out the steps taken by him to give the requisite notice. Mr Badger's solicitor received responses from Tasmania, Queensland, Northern Territory, Australian Capital Territory, Victoria, South Australia, Western Australia and the Commonwealth, stating either that the Attorneys-General did not wish to intervene in the proceedings or acknowledging receipt of the notice without indicating any desire to intervene. The solicitor contacted the New South Wales Crown Solicitor's office and was advised that the notice had been received and was in the process of being dealt with by the Constitutional and Administrative Law practice group.

74 Mr Badger submitted, and I accepted, that while the notice period afforded to the Attorneys-General was very short and might ordinarily not constitute sufficient notice, given the high rate of responses from the affected parties, and in particular the Attorneys-General of Victoria and the Commonwealth, who both indicated they did not wish to intervene, that the requirements of s 78B had been met in this instance. I am satisfied that the Attorneys-General were given a reasonable time to consider whether to intervene, in all the circumstances.

75 Bayside objected that Mr Badger could not give opinion evidence about what would be effective in a political campaign, although he could give evidence about how the campaign is intended to run. I was not persuaded that assessing any burden of the Scheme on the freedom of political communication was a matter for expert evidence, but, as I have noted, it has not become necessary to rule on these objections.

76 Bayside also submitted that the only admissible evidence of the display of the sign was from Mr Badger concerning his own sign and his correspondence with the Council, and therefore sought to strike out from his affidavit any statement about the display of the sign more generally in Bayside.

77 I declined to strike out this part of Mr Badger's affidavit during the hearing. I noted the objections and that there is other material before the court, particularly in the exhibits to Mr Badger's affidavit, that speaks to Bayside's notices being distributed to

other parties.

78 Be that as it may, Bayside referred me to authorities that supported its contention that the constitutional question cannot be reached in these proceedings.

79 In *Mineralogy Pty Ltd v Western Australia*,[23] the High Court held:

(a) Parties have no entitlement to an answer to a question of law unless there exists a state of facts which makes it necessary to decide the question to do justice in the given case and to determine the rights of the parties.

(b) This cautious and restrained approach is a manifestation of a more general prudential approach to resolving questions of constitutional validity founded on the basal understanding of the nature of the judicial function as that which has informed the doctrine that the High Court lacks original or appellate jurisdiction to answer any question of law if that question is divorced from the administration of law.

(c) This avoids formulating rules of constitutional law broader than required by the precise facts to which it is to be applied and avoiding the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation.

(d) The court does not answer questions of law for advisory reasons, but for adjudicative reasons. Performance of the adjudicative function proceeds best when the court determines only what is practically necessary to determine a legal right or legal liability in controversy.

(e) It is ordinarily inappropriate for a court to be drawn into consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise.

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23 (2021) 95 ALJR 832, 846–7 [56]–[61]. See also, *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432, 437–8 [21]–[22]; *Duncan v New South Wales* (2015) 255 CLR 388, 410 [52]; *Knight v Victoria* (2017) 261 CLR 306, 324 [32]; *Lambert v Weichelt* (1954) 28 ALJ 282, 283.

80 While the High Court has clarified in *Clubb v Edwards* that this is not a rigid rule imposed by law that cannot yield to special circumstances, it is usual practice based on prudential considerations.[24] The High Court explained that for the Court to proceed to determine the validity of a statute where a case does not require it may create the appearance of an 'eagerness' that may detract from the Court's standing.

81 That said, the implied freedom is not a personal right; it is to be understood as a restriction upon legislative power. Whether a statute impermissibly burdens the implied freedom is not to be answered by reference to whether it limits the freedom on the facts of a particular case, but rather by reference to its effect more generally. In this context, the High Court in *Clubb v Edwards*[25] referred to its decision in *Unions NSW v New South Wales*, where it held:

> In addressing this question, it is important to bear in mind that what the Constitution protects is not a personal right. A legislative prohibition or restriction on the freedom is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally. The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?[26]

82 I am not persuaded that it is necessary or desirable to determine whether cl 52.05 impermissibly burdens the implied freedom of political communication. For that reason I will not burden this judgment with an account of the parties submissions.

83 Circumstances may change before the sign must be removed. Bayside may not determine to enforce any prohibition arising in the time remaining prior to the election. Further, the requisite facts and evidence about the period of display of the signs prior to the election is not, and cannot be, before the court. Mr Badger maintained that the signs may possibly not be up for the 'critical period' prior to the election, if the question is not now determined; the Council maintained that a three-

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24 (2019) 267 CLR 171, 192-3 [35]-[36].
25 Ibid.
26 (2013) 252 CLR 530 at 554 [36] (citations omitted).

month duration means campaign signs will be up for that 'critical period'. These submissions were hypothetical. The court cannot presently determine whether the effect of the Scheme generally is to impermissibly limit the implied freedom of political communication in accordance with the tests laid down by the High Court.

84 This proceeding was brought on an expedited basis in the Practice Court, to obtain immediate relief from Bayside's threatened enforcement action. As this will be achieved, the facts, as they currently stand, do not give rise to a controversy that can be settled only by resolving the constitutional question.

85 That said, in my view, signs identifying and promoting the candidates for an election appear central to the implied freedom of political communication. It is a mechanism by which the electorate is informed, or communicates, about the available alternative candidates for public office, and it contributes to the system of representative and responsible government under the Constitution. It is no answer to the burden that cl 52.05 places on the use of these signs, to say that residents, permitted three months to display a yard sign, must correctly guess when an election might be in order to enjoy that full entitlement, or accept the limitation of being confined, perhaps, to half of that time. My tentative view, for what it might be worth, is that there is likely to be an alternative measure to cl 52.05 which is equally practicable and which at the same time is less restrictive on the freedom and is obvious and compelling. Such a measure might be readily identified by excluding political signs from the clause and from the grab bag – educational, cultural, religious, social or recreational events not held for commercial purposes – and separately regulating that form of development of land.

86 However, the proportionality enquiry, and the impact that the permit and exemption from fees processes may have on that enquiry, is an analysis that must wait for another day.

Relief

87 Returning to the relief sought, set out above at [13], paragraphs (a) and (d) are more far-reaching general declarations and injunctions that recognise no time limit on the display of the signs. That relief would flow had I accepted Mr Badger's primary

submission, that cl 52.05 does not apply at all to the signs, or ruled in his favour on the constitutional issue, but I have not done so.

88 In the light of my findings above, I will make orders consistent with paragraphs (b), (c), and (e) of the originating motion. I will:

(a) declare that the display by occupants of land within the area covered by the Bayside Planning Scheme, for a period not exceeding 3 months, of Zoe Daniel signs, does not constitute a contravention of the Bayside Planning Scheme, unless the Zoe Daniel sign remains on display for more than 14 days after the holding of the election to be held in 2022 in the Commonwealth House of Representatives seat of Goldstein.

(b) declare that the election in the Commonwealth House of Representatives required to be held in 2022 is an event for the purpose of section 52.05-10 of the Bayside Planning Scheme regardless of whether a writ for general elections of the House of Representatives has been issued by the Governor-General.

(c) restrain Bayside City Council, by its employees, agents or howsoever otherwise, from taking any steps to issue fines to, or commence enforcement proceedings against, occupiers of land within the area covered by the Bayside Planning Scheme in respect of the display of a Zoe Daniel sign, unless the landowner displays the sign for a period exceeding 3 months, or the sign remains on display for more than 14 days after the holding of the election in the Commonwealth House of Representatives seat of Goldstein to be held in 2022.

For the purposes of these orders, 'a Zoe Daniel sign' has the content, appearance and characteristics described in paragraphs [11] and [12] of these reasons.

89 Subject to receiving further submissions from the parties, I am tentatively of the view that costs should follow the event and the plaintiff's costs should be assessed on a standard basis and paid by the defendant.

CERTIFICATE

I certify that this and the 27 preceding pages are a true copy of the reasons for judgment of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered 23 March 2022.

DATED this 23rd day of March 2022.

Associate