MOULDING DISCRETION: HOW COURTS CAN HELP

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Flexibility or Certainty?

The theme of this conference is "From Zoning to Ad Hoc Development Control". The basic problem with which that theme is concerned is the conflict between flexibility and certainty. If planning controls are too rigid, or seek to be all-embracing, opportunities of valuable development may be lost: we live in an age in which there is considerable flexibility of approach by developers to the location of major developments and in which the time that would be lost in amending those planning controls could cause the developer to locate that development in another State or another country.

Even ten years ago, major developments were lost to Australia and were relocated elsewhere in the Asian region because of such planning delays. On the other hand, if controls are too flexible, providing little in the way of guidelines, the resultant uncertainty and the delays involved in the exercise of discretionary powers can also drive the development interstate or overseas.

Resolving the conflict between flexibility and certainty is by no means easy. So far as possible, those who are concerned with the development of our community, whether as developer or user, need to know where they stand in relation to planning controls. On the other hand, those who are devising and administering those controls cannot be expected to foresee all eventualities.

It is desirable for planning controls to set out as much as possible by way of guidelines for the information of the planners and of the planned alike. To what extent that can be achieved is beyond the scope of the present paper, which will consider only how far the courts can lend a helping hand in the moulding of discretion.

The Power of the Courts to Intervene

Courts may be involved in relation to planning control discretions at

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two levels. In New South Wales, New Zealand and Queensland, a court is constituted as the planning appeal body, exercising the powers which, in Western Australia, are vested in the Town Planning Appeal Tribunal or in the Minister (according to the choice made the appellant). In other jurisdictions, the courts can only intervene when the exercise of the discretion is challenged upon points of law.

In New South Wales, where the courts for many years have had the power to hear and determine planning appeals (now environment appeals), the courts have given valuable guidance indeed in relation to the proper exercise of planning discretions. Distinguished judges, notably the late Sugerman P., the late Hardie J.A., and Else-Mitchell J. have effectively moulded planning practice, as well as planning law. Because their decisions are decisions of a superior court, they have had an extensive impact on the exercise of planning powers in other States. In Western Australia, it is the Town Planning Appeal Tribunal which has the power to mould, through planning appeals, the exercise of planning control discretions but, because it is not a superior court, the impact of its decisions is more limited. Superior courts in other States and in other countries would pay no regard to them.

It is obviously desirable that companies which operate in a number of States should be able to expect as much uniformity as possible in the exercise of planning discretions. It is also of obvious advantage for those exercising planning discretions in one State to have the benefit of experience in the exercise of those discretions in other States. Western Australia, for example, has given the lead in the redevelopment of old and inappropriate subdivisions. Victoria has given the lead in the control of quarries.

Moulding Discretion Through Planning Appeal Decisions

No town planner worthy of his profession will wish to recommend to his planning authority decisions which are going to be consistently overturned on appeal. He will, therefore, find the exercise of his discretion moulded by the decisions of the planning appeal bodies. There has, for example, been a series of decisions by the Victorian Town Planning Appeals Tribunal and its successor, the Victorian Planning Appeals Board, that is undesirable for vehicles to have to back into or reverse out of a parking area.[1] A town planner would know that, when advising in Victoria, he would have a solid line of decisions on which to rely for refusing permission for a parking area that involved backing in or out and, if in

1 Andrianopoulos Nominees Pty Ltd v City of Melbourne (1981) 2 A P A. 41, Dandenong & District Aborigines' Co-operative Society Ltd v City of Dandenong (1981) 4 A P.A 475; Calcinotto v City of Brunswick (1983) 9 A.P A. 73

another State, he would know that there was a line of decisions which could be quoted in favour of such a proposition. The planner in New South Wales would know that he could recommend refusal of a permit for flats because their windows would overlook adjoining properties,[2] and so would a town planner in Victoria.[3] He would know, too, that he could recommend exercise of the planning discretion by requiring windows from which overlooking could otherwise occur to have minimum sill heights to preclude that overlooking.[4] The planner will know from the planning appeal decisions that old persons homes are not traffic generators.[5] He will have the guidance from planning appeal safely be exercised on the basis that fragmentation of rural land into small lots is undesirable.[6] Decisions of that nature give him some guidance in determining upon the proper exercise of the planning discretion.

What, however, of planning appeal decisions in New South Wales, Queensland,[8] South Australia,[9] Victoria[10] and Western Australia.[11] What constitutes the character of the area and whether or not something will adversely effect it or will be out of sympathy with it are necessarily subjective, aesthetic decisions upon which little guidance can be given by planning decisions.

Moulding Discretion Through Limitations on the Power

It is a well known principle controlling the exercise of a discretion that that exercise must not extend beyond the scope of the power that has been conferred upon the discretion-exercising body. The doctrine of ultra vires is too well established to require authority for its existence but it does, of course, apply to the imposition of conditions when granting planning permission.[12]

2 See Peter McDonnell Pty Ltd v Sydney City Council (1983) 6 A P A 1, Kioussis v Burwood Municipal Council (1982) 9 A P A 231

3 Jamay Associates v City of Coburg (1974) 1 V P A 265, Calcinotto v City of Brunswick (1983) 9 A P A 73

4 G Novati Design and Construction Pty Ltd v Leichardt Municipal Council (1981) 3 A P A 164

5 Lifelong Homes Pty Ltd v City of Coburg (1981) 5 A P A 328, Barrett v City of Ballaarat (1983) 9 A P A. 327

6 Mornington Projects Pty Ltd v Western Port Regional Planning Authority (1981) 4 A P A 435, Bosica Dion Pty Ltd v. Shire of Woorayl (1982) 6 A P A 393, Cocking v Melbourne and Metropolitan Board of Works (1982) 7 A P A 244

7 Dalla v. Great Lakes Shire Council (1981) 7 A P A 134

8 Smith v Woongarra Shire Council (1981) 5 A P A 148

9 E Marcel Constructions Pty Ltd v City of Henley and Grange (1984) 9 A P A 32

10 Tsiavis v Shire of Barrabool (1981) 5 A P A 296

11 Tang v City of Stirling (1982) 5 A P A 161

12 City of Unley v Clause Neon Ltd (1983) 32 S A S R 65 at 67-68

It is also well established that, to be valid, a condition of planning permission must "fairly and reasonably relate to the physical use to be made of the land or anything to be done physically on the land."[13]

Discretion must not be exercised for an ulterior motive.[14] This principle of course applies to the exercise of a discretion to grant or refuse licences.[15] Thus, the exercise of a zoning discretion has been quashed because it was "aimed at maintaining property values at a level which would enable the city to carry out its long-range acquisition policy"[16] and the granting of planning permission has been quashed because it was done "to improve the council's position in relation to... pending legislation."[17]

Not only must the taking into account of irrelevant considerations be avoided[18] but material matters must not be omitted from consideration.[19]

A very important example of the way in which the courts can mould the manner in which the exercise of a discretion is arrived at is afforded by *Parramatta City Council v. Hale,*[20] a decision of the New South Wales Court of Appeal. The case was one involving a challenge to the granting of planning permission for a major sporting facility which would be a very substantial traffic generator. It was expected that some 3,000-3,800 cars would be present at the one time. The decision to grant planning permission was a caucus decision carried by a majority of 9 to 8 at the council meeting. The application for planning permission was considered (mistakenly, as the court held) on the assumption that the council had no discretion to refuse it. The question, therefore, upon which the aldermen diverged was as to the conditions to be granted (some at least of the minority would have refused permission had they not misunderstood the legal position). The planning officer recommended that planning permission be granted subject to what the court described as "lengthy and detailed conditions" occupying "eleven pages of single-spaced foolscap". The majority aldermen caucused before the start of the council meeting and evolved substitute conditions of eight pages. When the meeting commenced it was adjourned for 15 minutes "to allow aldermen to peruse and analyse plans and documents relative to the proposed development". When the meeting resumed an amendment that "the chief town planner

13 Mixnam's Properties Ltd v Chertsey Urban District Council [1965] A C. 735
14 Congreve v. Home Office [1976] Q B. 629
15 Conmac Stages Ltd. v. Town of Sydney (1981) 15 M P.L R 165 at 169
16 Hault v City of Vancouver (1980) 12 M P.L R 125 at 130; aff'd. (1981) 15 M.P.L.R. 8
17 Freeman v Shoalhaven Shire Council (1979) 44 L G R A 70.
18 Attorney-General v Shire of Gisborne ex rel Whitten (1980) 45 L G R A. 1 at 7.
19 Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 K.B. 223 at 229 per Lord Greene M R
20 (1982) 47 L G R.A. 319.

report further on the effect of the amendments as outlined" by the majority aldermen was lost. The granting of planning permission was quashed, Street C.J. saying that:

> It is appropriate to observe that, not only were the aldermen who opposed the stadium left in the dark regarding the import of these new conditions and their effect upon the acceptability of the project as a whole, but also the majority group exercised their voting preponderance so as to preclude the new conditions being considered or reported on by the chief planner. The majority, in effect, cut themselves adrift from the chief town planner and the requirements of the other governmental authorities...The inescapable fact is that there was no real opportunity afforded to the aldermen present as a group at that meeting to comprehend, let alone give consideration to, the content or significance of the proposed new conditions and there was no opportunity whatever afforded to the council's officers to consider these and advise the council upon them. Having regard to the demonstrable significance of the changes, I find it impossible to resist the conclusion...that the council failed to give to the application the consideration required.[21]

The decision in *Hale's Case* is a very important one. For present purposes, there can be deduced from it three basic principles:

(a) a planning authority exercising a discretion must give proper consideration to the matter;
(b) that planning authority must ensure that all its members (not just the majority) have a fair opportunity of considering the matter, and considering it effectively: and
(c) the planning authority must afford itself the opportunity of obtaining adequate advice from its expert officers.

Certainly the decision in *Hale's Case* involved a major development. It is submitted, however, that those three basic principles should apply in any case in which the decision is a contentious one, or in which (although not contentious within the planning body itself) its approval involves the imposition of a considerable number of conditions or the imposition of conditions of a technical nature.

From the point of view of the particular planning authority, the decision in *Hale* was a loss. From the viewpoint of planning as a whole, it must be regarded as a gain. It moulds the whole process of the exercise of discretionary planning powers.

21 Id at 330-1

Requiring the Whole Matter to be Considered

The one planning proposal may involve a number of aspects. It is not open to a planning authority to grant permission for certain of those aspects and to defer consideration of other aspects to a later point of time. To take a simple example, the practice adopted by various planning authorities of granting permission for an industrial or commercial use, but subject to a purported condition reserving for later consideration the question as to whether or not an advertisement in relation to that use would be permitted, is invalid.[22] That decision relates to the question in what is probably its simplest form, but it is equally applicable to more complex situations. Thus, for example, it is not open to a planning authority to grant planning permission for a factory subject to a purported condition specifying that emission to atmosphere is to be the subject of later consideration. Thus, as it was expressed in the *Unley Case:*

> It is essential to bear in mind that the granting of a consent is an act in law that is final in the disposition of the application: the consent must be either refused, or granted unconditionally, or granted subject to conditions. A condition which imparts to a consent a quality in virtue of which it ceases to be a final one is not one...that falls within the structure of the Act. A condition so annexed ought to be directed and directed only, to circumscribing, with reasonable particularity, the acts of land use to which the authority or tribunal has given its consent, which would otherwise be unlimited in its generality and effect.[23]

Requiring Adequate Assessment of Environmental Impact

That this is so might well be held to follow from the basic nature of the power being exercised and the impact of that exercise upon the community generally. In the particular case, it was put on the specific basis that what is being done is to "adjudicate between the competing public interest requirements of, on the one hand, making available a valuable resource to the community and, on the other, of preventing environmental damage" - an exercise which it was held needs "some confidence that the sort of conditions [proposed] will have the consequence contended for".[24] Applied in conjunction with the principle in *Hale's Case,* the decision in *Hicks* v. *Baulkham Hills Shire Council*[25] moulds the exercise of the planning discretion by requiring not only an input by the experts officers employed by the planning authority (or by its expert consultants) but

22 City of Unley v Claude Neon Ltd (1983) 32 S A S R 65
23 Id at 67-68
24 Hicks v Baulkham Hills Shire Council (1981) 46 L G R A 115 at 122
25 Id

a proper assessment of environmental impact. The emphasis therefore is on a proper and informed consideration, not only by the members of the planning authority, but by those advising it.

The Requirement of Effectiveness

The field in which the courts can contribute substantially to the exercise of planning discretions is that of the formulating of conditions of planning permission. It is too easy to put pen to paper without fully appreciating the effect of what is being written. The drafting of planning conditions is not something to be undertaken lightly. It is easy to overlook the obvious. For example, the planning scheme which permitted motor driving tuition in a residential zone subject to a condition that it carried on wholly within a dwellinghouse obviously called for criticism. Not only must proposed planning conditions be carefully thought through, to determine whether or not they cover what is intended to be covered, but they must be effective. As has been held, it is not enough to rely upon "pious hopes". That was the phrase applied to a planning permission which would have allowed a major sports stadium to be established subject to a condition providing for the operator to negotiate with other landowners for the provision of proper parking areas. As Street C.J. put it: "It leaves open the prospect of the construction of this....stadium being completed without the...club having been able to negotiate successfully with private carpark owners for carparking spaces. One might simply ask — what is to happen then?[26]

His Honour, described as "vacuous and inadequate" [27] a condition reading "The applicant to discuss with the city engineer and the trustees means of providing improved pedestrian access to the stadium". Small wonder that this condition received judicial criticism.

Requiring Certainty in the Exercise of Planning Discretions

It has been held that a bylaw "must be certain; that is, it must contain adequate information as to the duties of those who are to obey".[28] *In Mixnam's Properties Ltd. v. Chertsey Urban District Council*[29] Diplock L.J. (later, Lord Diplock), after observing that "bylaws have in the past been declared void for 'uncertainty' ", went on to say that "Some doubt is cast on the correctness of 'uncertainty' as a separate ground of invalidity by

26 Parramatta City Council v Hale (1982) 47 L G R A 319 at 334
27 Id at 332
28 Kruse v Johnson [1898] 2 Q B 91 at 108 per Mathew J
29 [1964] 1 Q B 214

the speeches in the House of Lords in...*Fawcett Properties Ltd v. Buckinghamshire County Council.*"[30]

That case was one involving the invalidity of a condition attached to planning permission. Upon appeal to the House of Lords, the condition was held by majority to be void for uncertainty.[31] Subsequently, in relation to conditions forming part of a planning permission, it has been held by the then Supreme Court (now High Court) of New Zealand that "the test to be applied to conditions...is: do they express clearly and accurately and with some measure of certainty, the intentions and the requirements...?"[32] To avoid being void for uncertainty, a condition:

> must have sufficient clarity as to allow every well-intentioned citizen of common intelligence to understand it without having to guess at its meaning. Included in this consideration is the necessity that the intention of the [discretion-exercise body] be clear and unequivocal.[33]

Curiously, that concept of "clear and unequivocal" is met even although "there is ambiguity". Thus, the same judge in the same case held that the fact that the words used are "capable of more than one interpretation" is "not a ground for declaring the [provision] void" if "the meaning can be resolved to give a reasonable result".[34] Gobbo J. in the Supreme Court of Victoria, however, has expressly left "to another time" the question as to whether a court can "strike out a condition...in a planning permit simply on the basis that it is ambiguous and misleading.[35]

Can the Courts Give More Effective Help?

There has been a period until about two decades ago, when administrative law in the British common law system proceeded on the underlying assumption that the citizen had adequate protection against the bureaucracy and that no further development of the common law was needed on the part of the courts. The recognition that that assumption was unfounded extended to the development and expansion of administrative law to an extent that cannot unfairly be described in terms of an explosion. New doctrines have been developed and old principles have been applied in situations in which the lawyer, even of the 1950s,

30 Id at
31 [1965] A C 735
32 Bitumix Ltd v Mount Wellington Borough Council [1979] 2 N.Z L R 57 at 63
33 Red Hot Video Ltd v City of Vancouver (1983) 24 M P L R 60 at 63
34 Id
35 City of Keilor v Suraco [1981] V R. 865

would have regarded as inapplicable. Unfortunately, when a court is invested with powers that are limited to considering the legal validity of the exercise of a planning discretion, there has been no comparable development of the law in vital aspects. To mount a successful challenge to the validity of the exercise of a discretion on the ground of unreasonableness, the exercise has to be "something so absurd that no sensible person would ever dream that it lay within the powers of the authority" or "so unreasonable that no reasonable authority could ever come to it",[36] That was not a case of a condition of planning permission, but the same principle has been applied, it being held that such conditions "must not be so unreasonable that it can be said that Parliament cannot have intended that they should have been imposed".[37] That interpretation is a very restrictive one. Allied with it is the basic approach that "where the local authority purport to act [under statutory power] then they will be presumed to have done so lawfully pursuant to the [Act] — the maxim *omnia praesumuntur rite esse acta* applies."[38]

The presumption of regularity goes so far that it has been held to protect a statutory authority when a writ has been issued challenging its decision as going beyond its powers but the writ was issued after the statutory timelimit for such a challenge. The decision can, however, be challenged by way of defence to proceedings, by the statutory authority, even although the time limit for initiating the challenge has expired.[39] Those are doctrines of a former age in which the courts placed what today appears to be an almost pathetic faith in the efficacy of the ballotbox as a sufficient remedy. There is a need to rethink those unduly restrictive principles. It is a rethinking, however, which is unlikely to be achieved without legislation.

A factor affecting the extent to which the courts can help to mould the exercise of discretionary powers is the failure of the courts to have sufficient regard to previous judicial decisions. The common law is based upon the assumption that precedents will be followed. Admittedly, the number of precedents is now growing very rapidly, but it must be said that the amount of research being devoted to important cases is unsatisfactory in too many instances. Conflicting decisions of the courts which are increasing markedly, do nothing to mould the exercise of discretionary

36 Associated Provincial Picture Theatres Ltd v. Wednesday Corp [1948] 1 K B 223 at 228, 229-30 per Lord Greene M.R

37 Hall & Co v Shoreham-by-Sea Urban District Council [1964] 1 W L R 240

38 Stoke-on-Trent City Council v. B & Q. (Retail) Ltd [1983] 3 W L R 78 at 97, per Ackner L.J

39 O'Reilly v Mackman [1983] 2 A C. 237. Of course the decision can nevertheless be challenged by way of defence to proceedings by the statutory authority, even though the time limit for initiating the challenge has expired see Wandsworth London Borough Council v Winder [1984] 3 W L.R. 1254.

powers: they create confusion in an already complex and very difficult field.

The effectiveness of the courts in helping to mould the exercise of discretionary powers is also restricted by the failure to establish specialised divisions of the superior courts. The experience in New South Wales, which has for so long had a specialised superior court in this field (formerly the Land & Valuation Court and now the Land & Environment Court), shows the importance of appointing specialists to the bench and of appointing them to a court or division of the court the members of which are specialists. Lack of specialisation results in longer hearings, greater delays in judgments, less guidance in the reasons for decision and a greater risk of the overlooking of existing precedents.