DISCRETIONARY POWERS IN APPROVED PLANNING SCHEMES

By J. D. MERRALLS*

The makeshift beginnings of the Victorian Town and Country Planning Acts have been commented upon by Dr Ledgar and Professor Derham elsewhere in this issue of the *Review*. Professor Derham has mentioned the unfortunate effect of piecemeal legislation upon administrative procedure during the preparation of planning schemes by the various authorities charged under the Acts (now the Act[1]). But if the vagueness of the legislation has led to the adoption of unsatisfactory expedients at the stage of interim development control, section 14[2] attains a level of sophistication foreign to those sections which deal with the content and administration of approved schemes. On these matters responsible authorities have assumed a *carte blanche* and a consequential startling divergence of practice has appeared between the different authorities.

The relevant sections of the Act are few and pithy—

Section 8 (1): 'A planning scheme may be made in accordance with the provisions of this Act with respect to any land.'

Sections 10, 11, 12, 13, 16 (2), 18 and 22 proceed in some detail to make provision for the machinery of preparing a scheme and obtaining the necessary reports and approval of the responsible authority, the Minister for Town and Country Planning, the Town and Country Planning Board, the Governor-in-Council and the Houses of Parliament. But when it comes to the subject-matter of a scheme, the Act is vague and unhelpful. Section 16 (1) states that:

> Every planning scheme—
> (a) shall make provision for such of the matters referred to in the Second Schedule to this Act[3] with all such particularity as the Minister requires; and
> (b) shall be prepared in accordance with the regulations.

The oddly-phrased sub-section (a) with its two 'such' phrases governing the words 'as the Minister requires' leaves it uncertain whether the Second Schedule is intended to be the sole repository of 'matters' which may be dealt with in a scheme, or the matters in the Schedule are the only ones upon which the Minister may give directions as to the particularity with which they are to be treated in the Scheme.

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[1] Town and Country Planning Act 1958.

[2] *Ibid.*

[3] The Second Schedule is set out *supra* p. 305, n. 6.

Section 21 imposes obligations on authorities for the enforcement of the scheme after final approval:

> When a planning scheme has been approved by the Governor-in-Council—
> (a) it shall be the duty of the responsible authority to observe and to enforce the observance of the requirements of the Scheme in respect of all future subdivisions of land and all new works or buildings of any description thereafter undertaken carried out or erected within any area included in the Scheme, whether by the responsible authority or by any other person;
> (b) the responsible authority shall not thereafter undertake or permit—
> (i) any subdivision of land;
> (ii) any alteration or modification of any existing works or buildings; or
> (iii) the carrying out or erection of any new works or buildings—
> whether by the responsible authority or by any other person otherwise than in conformity with the tenor of the scheme; and
> (c) unless the Governor-in-Council on the recommendation of the Minister otherwise directs the scheme shall be binding upon public authorities.

Section 20 (1) empowers the Governor-in-Council to prescribe 'sets of general provisions for carrying out the general objects of planning schemes, and in particular for dealing with matters set out in the Second Schedule', and sub-section (2) provides that 'such general provisions may be adopted with such adaptations as are necessary or desirable in any planning scheme'. The allusion in this section is to draft clauses for model planning ordinances such as are frequently prepared at the direction of the Minister for Housing and Town and Country Planning in England for the guidance of local authorities. The powers under the Victorian Act to exercise a guiding hand in this way have not as yet been used.

Clause 7 of the Town and Country Planning Regulations (No. 7)[4] elucidates the meaning of 'planning scheme' so far as its components are concerned by providing that a scheme shall comprise (a) a map or maps delineating the locality and extent of the various components of the planning scheme, known as the 'Planning Scheme Map', and (b) enabling clauses known as the 'Planning Scheme Ordinance' which extend or prescribe the functions of the components of the Planning Scheme Map and the method and means of implementing the planning scheme. Clause 20 of the Regulations is similar to section 21 of the Act:

> After the approval of any planning scheme no person shall subdivide any land, construct alter or extend any building or other works, or use or adapt for use any land or building for any purpose otherwise than in conformity with the provisions of the approved planning scheme.

[4] *Victorian Government Gazette* No. 329 of 1955, 31 May 1955.

One might make hair-splitting distinctions of meaning between the different expressions used by the draftsmen of the Act and the Regulations: 'the requirements of the scheme' (section 21 (a)), 'the tenor of the scheme' (section 21 (b)), and 'the provisions of the approved planning scheme' (Regulations (No. 7), clause 21); but assuming each phrase to mean the same thing, each raises the important question of whether all matters with which the owner or occupier of land has to comply must be found from a reading of the components of the scheme, or whether the responsible authority may reserve a discretionary power to authorize changes in the use of land[5] or to impose conditions upon a change of user authorized by the scheme.

This question has been in issue between the Town and Country Planning Board and the responsible authority for the Melbourne Metropolitan Area, the Board of Works. The Town and Country Planning Board takes the view that, because the legislation contains no procedure or machinery for lodging applications for planning permission under an approved scheme, it is not desirable that a responsible authority should be given a discretion subject only to such controls as the ordinary courts might be able to impose. The occupier of land, the argument runs, is entitled to know from the Ordinance and Map the uses to which he may put his land now and in the future; it is undesirable that the uncertainty which exists under an Interim Development Order imposing a blanket prohibition of all development except with the consent of the authority should be carried over to the last stage in the formal planning process when the approved scheme has become operative. The planning schemes prepared by the Town and Country Planning Board as responsible authority contain no reserved discretionary powers; all restrictions on land user within the area covered by the scheme are set out in the zoning clauses of the Scheme Ordinance.

The Board of Works planners, on the other hand, think that effective planning is only possible where the scheme itself is flexible. The part of the Ordinance should be to describe by zoning the predominant character (be it residential, light industrial, business, offensive

[5] The curious position of existing non-conforming uses is beyond the scope of this article. A non-conforming use is the use of land at the date the planning scheme becomes operative for purposes which do not conform to the provisions of the scheme. Non-conforming uses are not expressly protected by the Act, though planning schemes to the writer's knowledge always contain provisions permitting the continuance of lawful non-conforming uses. If this protection were not afforded by the scheme it is submitted that s. 21 which requires the observance of the requirements of the scheme in respect of *future* sub-divisions and *new* works or buildings by implication may prevent a scheme from operating to terminate existing purposes of land user. This point was not taken in *R. v. City of Moorabbin, ex parte Kans Food Products Pty Ltd* [1954] V.L.R. 465 where Dean J. held that clause 3 of the Second Schedule ('The prescription of areas in which land is to be used for specified purposes and the prohibition restriction or regulation of the use of land in those areas for any other purpose.') enables an authority to exempt land from restrictions on land user on considerations of its past use and ownership.

industrial) or purpose (reserved living, reserved industrial, university, hospital) of an area, and to limit the use of land within each zone to purposes consistent with its character. Some purposes will be obvious: a domestic dwelling will be permitted in a residential area, while a motor racing speedway or a stock saleyard will not. But some uses will not in themselves be either consistent or inconsistent with the character of the zone. Is a public hospital or a petrol filling station an appropriate purpose for a residential zone? The Board of Works says that before an answer can be given more must be known about the proposed hospital or filling station and more about the development which has already taken place in the particular zone, so that the effect of the proposed use upon the zoned land can be gauged. Then and only then can it be said that the proposed use is consistent with planning principles applicable to the neighbourhood.

The Board of Works has accordingly drafted the table of land uses permissible in the various zones in the Metropolitan Planning Area in five columns.[6] The first column contains the planning zones. Column 2 sets out the purposes for which land may be used in each zone without conditions or the express consent of the authority. Column 3 sets out the purposes for which land may be used provided certain conditions set forth beside them are complied with. No application for consent is required. In Column 5 are the purposes inconsistent with the character of the zone which are absolutely prohibited. Column 4 serves two purposes. It permits land lawfully used at the commencing date of the scheme for any of the purposes specified in the column to continue to be used for such purpose, or to be used with the consent of the responsible authority for any other purpose specified in the column. The Scheme also provides that 'land not used at the commencing date for any of the purposes specified or included in Column 4 may with the consent of the responsible authority be used for any of such purposes and shall not be used therefor without such consent'.

If the Ordinance said no more about the discretionary powers reserved by the Board of Works to permit or prohibit Column 4 uses, there would be at least a highly arguable case that the discretion was *ultra vires* the authority on the ground that it purported to confer an absolute and unfettered discretion to refuse consent and to impose conditions, the exercise of which might be governed by matters which have no connection with town and country planning considerations.[7] But the draft Ordinance of the Melbourne Metropolitan Planning

[6] The operative clause of the Melbourne Metropolitan Planning Scheme Ordinance in this connection is clause 7. The key to the Columns in the Table to the clause is in clause 7 (a).

[7] *Swan Hill Corporation v. Bradbury* (1937) 56 C.L.R. 746; *Shrimpton v. The Commonwealth* (1945) 69 C.L.R. 613 *per* Rich and Williams JJ.; *Dawson v. The Commonwealth* (1946) 73 C.L.R. 157; *Olsen v. City of Camberwell* [1926] V.L.R. 58;

Scheme has recently been amended to state 'the matters to be considered and the purpose to which the power is to be directed'.[8]

The Board's power is now expressed as

> having regard to the primary purpose for which the land is zoned, the orderly and proper planning of the zone and the preservation of the amenity of the neighbourhood,

to refuse its consent to the use of land for any of the purposes specified in Column 4 or to grant its consent 'subject to such conditions as it may deem fit'.[9] The ambit of the discretion is prescribed by clause 40:

> that in the exercise of its discretion to consent or impose conditions the responsible authority shall—
> (i) where such consent relates to land in any zone have regard to the primary purpose for which land is zoned the orderly and proper planning of the zone and the preservation of the amenity of the neighbourhood, and
> (ii) where such consent relates to reserved land have regard to the purpose for which the land is reserved pursuant to clause 32[10] hereof the period of time which may elapse before it is required for such purpose and the purpose for which any adjoining land is or may in conformity with the Planning Scheme be used.[11]

The words 'the primary purpose for which land is zoned' are related to the purposes specified in Columns 2 and 3 respectively of the Table to clause 7.[12]

It remains to be seen whether this attempt to arrive at a workable compromise between the views of the Board of Works and the Town and Country Planning Board will be accepted when the Minister has to decide whether to make any modifications to the Scheme before

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Dewar v. Shire of Braybrook [1926] V.L.R. 201; *R. v. Shire of Fern Tree Gully, ex parte Hamley* [1946] V.L.R. 401; *Staples and Co. Ltd v. City of Wellington* (1900) 18 N.Z.L.R. 857; *Meredith v. Whitehead* [1918] N.Z.L.R. 1041. But *cf. Cook v. Buckle* (1917) 23 C.L.R. 311; *Stenhouse v. Coleman* (1944) 69 C.L.R. 457; *Ex parte Cottman; re McKinnon* (1935) 35 S.R. (N.S.W.) 7. Certain aspects of *Bradbury's* case are criticized by Starke J. in *Brunswick Corporation v. Stewart* (1941) 65 C.L.R. 88, 95.

[8] *Shrimpton v. The Commonwealth* (1945) 69 C.L.R. 613, 624 *per* Dixon J.

[9] Clause 7 (b).

[10] Clause 32 reserves certain lands for use for government and other public purposes. Clause 33 provides that reserved land may be used—

> '(a) for the purpose for which it was lawfully used immediately before the commencing date . . . or
> (b) *for such other purpose which the responsible authority may absolutely or conditionally permit;*
> (c) where such land is vested in a public authority, for any purpose for which such land can lawfully be used by the authority, or the Council of a municipality;
> (d) where such land is vested in and occupied by the Council of a municipality for any purpose for which such land can lawfully be used by the Council;
> (e) for the purpose for which land is reserved pursuant to Clause 32 hereof;
> (f) *for the purpose of buildings and works of a public authority or a Council of a municipality which in the opinion of the responsible authority will not interfere with the use of such land for any purpose described in paragraphs (b), (c), (d) or (e) hereof,*
>
> and for no other purpose.'

[11] Clause 40 (a). [12] Clause 40 (b).

approval. (It will be remembered that the Minister is required first to obtain a report of the Town and Country Planning Board before approving any scheme.) It is also still open to doubt whether the Board of Works' Ordinance complies with the Act. The prohibition of subdivision or works 'otherwise than in conformity with the tenor of the scheme' in section 21 suggests that a person wishing to know the purposes to which he may put his land must be able to find them in the documents which comprise the Scheme. The authority's purported consent, with or without conditions, on this view would be a planning scheme in respect of the land concerned prepared otherwise than in conformity with the Act.[13]

Against this can be cited *dicta* in a series of cases to the effect that

> if it is within the ambit of a by-law making power to prohibit altogether either the doing of a class of things or the doing of particular things within the class, such a prohibition may be imposed *simpliciter* or *sub modo*

and it is not necessarily an objection that the *modus* involves the exercise of discretion.[14] But in these cases the point in issue was the meaning of a power to regulate or prohibit certain activities or things. The mode of regulation is in most cases by by-law. The cases distinguish between the verbal formulae used in conferring power, between the power to prohibit on the one hand and the power to regulate on the other. Whereas a mere power to regulate does not enable a subordinate authority to prohibit either absolutely or subject to conditions, a power to prohibit imports a power to forbid all or part of a course of conduct either absolutely or conditionally.[15] It is, of course, no answer once a condition is found to be invalid that the authority might have exercised, had it wanted to, its more stringent power to prohibit altogether.[16]

It is submitted that the by-law cases, being concerned principally with the manner of exercising a power to 'prohibit or regulate' a

[13] An argument of this kind was rejected by the Court of Appeal in *Taylor v. Brighton Borough Council* [1947] 1 K.B. 736.

[14] *Ex parte Cottman; Re McKinnon* (1935) 35 S.R. (N.S.W.) 7, 12 *per* Jordan C.J. Also *Charlton Shire v. Ruse* (1912) 14 C.L.R. 220, 226; *Shire of Tungamah v. Merrett* (1912) 15 C.L.R. 407; *Melbourne Corporation v. Barry* (1922) 31 C.L.R. 174; *Country Roads Board v. Neale Ads. Pty Ltd* (1930) 43 C.L.R. 126 (overruling *Miller v. City of Brighton* [1928] V.L.R. 375); *Levingston v. Shire of Heidelberg* [1917] V.L.R. 263; *Potter v. Davis* (1948) 48 S.R. (N.S.W.) 523; *Williams v. Weston-Super-Mare U.D.C.* (1908) 98 L.T. 537; *Slattery v. Naylor* (1888) 13 App. Cas. 446.

[15] *Country Roads Board v. Neale Ads. Pty Ltd* (1930) 43 C.L.R. 126, 134 *(per* Knox C.J., Starke and Dixon JJ.) and 139 *(per* Isaacs J.): 'Where the by-law itself prohibits, and in the absence of a written consent prohibits completely, the consent if refused simply leaves the by-law to operate without it, and if given satisfies the provision of the by-law by a factum which excludes the given case from its operation.' *Cf. Swan Hill Corporation v. Bradbury* (1937) 56 C.L.R. 746, 770.

[16] *Fawcett Properties Ltd v. Buckingham County Council* [1958] 1 W.L.R. 1161, 1168.

particular course of conduct, are not applicable to the problem of discretionary powers in planning schemes. In them the courts were not attempting to enunciate a rule of general application to all classes of delegated powers. As the High Court said when asked to reconcile the conflicting decisions in a series of previous cases,

> The whole controversy illustrates the danger which attends the formulation of principles and doctrines and all reasoning *a priori* in matters which in the end are governed by the meaning of the language in which the legislature has expressed its will.[17]

THE EXERCISE OF DISCRETIONARY POWERS BY RESPONSIBLE AUTHORITIES

From the validity of planning discretions we turn now to their exercise.[18]

It was mentioned earlier that neither the Act nor the Regulations lays down a procedure for obtaining the consent of an authority once an approved scheme is operative. The Melbourne Metropolitan Ordinance briefly prescribes the formal steps for making an application and requires the authority where consent is refused to state reasons.[19] Reasons are not required to be given where consent is conditional. The applicant is not entitled to make oral submissions—indeed, he is not entitled to submit argument of any kind, though a determined applicant would not be deterred from supporting his written application for consent with explanation and argument. There is no provision for administrative review of the authority's decision.

The Scheme itself states matters which the authority must consider in exercising its discretion. But expressions such as 'the primary purpose for which land is zoned', 'the orderly and proper planning of the zone' and 'the preservation of the amenity of the neighbourhood' are imprecise and best restrain the authority from basing its decision upon the most glaring irrelevancies. What, for instance, is embraced by 'proper planning' or 'amenity of the neighbourhood'? The difficulty of the task of the court (or authority) called upon to define the limits of discretionary powers of this kind is brought out in the following passage from a judgment of Dixon J. (as he then was):

> In the course of the modern attempt by provisions of a legislative nature to reconcile the exercise and enjoyment of proprietary and other private rights with the conflicting considerations which are found to attend the

[17] *Country Roads Board v. Neale Ads. Pty Ltd* (1930) 43 C.L.R. 126, 135. 'I think we should look at the body which is entrusted with the power, and then at the power which is entrusted to that body, and then at the subject-matter with which the body has to deal.': *Levingston v. Shire of Heidelberg* [1917] V.L.R. 263, 275 *per* Hodges J.

[18] It will be assumed for the purposes of discussion that discretionary powers coupled with standards for their exercise such as are found in the Melbourne Metropolitan Planning Scheme Ordinance are valid.

[19] Clause 46.

pursuit of the common good, it has often been thought necessary to arm some public authority with a discretionary power to allow or disallow the action of the individual, notwithstanding that it has been found impossible to lay down for the guidance of the individual, or of the public authority itself, any definite rule for the exercise of the discretion. The reason for leaving the ambit of the discretion undefined may be that legislative foresight cannot trust itself to formulate in advance standards that will prove apt and sufficient in all the infinite variety of facts which may present themselves. On the other hand, it may be because no general principles or policy for governing the particular matter it is desired to control are discoverable, or, if discovered, command general agreement. Whatever may be the cause, the not infrequent result has been a general embargo or fetter upon the exercise of the individual's private or proprietary rights unless he obtains the sanction of the public authority. When a provision of this kind is made, it is incumbent upon the public authority in whom the discretion is vested not only to enter upon the consideration of applications for its exercise but to decide them *bona fide* and not with a view of achieving ends or objects outside the purpose for which the discretion is conferred. The duty may be enforced by *mandamus*. But courts of law have no source whence they may ascertain what is the purpose of the discretion except the terms and subject matter of the statutory instrument. They must, therefore, concede to the authority a discretion unlimited by anything but the scope and object of the instrument conferring it. This means that only a negative definition of the grounds governing the discretion may be given. It may be possible to say that this or that consideration is extraneous to the power, but it must always be impracticable in such cases to make more than the most general positive statement of the permissible limits within which the discretion is exercisable and is beyond legal control.[20]

In the muddled state of the Victorian legislation, it is hard to describe the broad limits of proper planning considerations. Planning in Victoria has proceeded in halting steps, and for various reasons planning authorities have never attempted to deal with some matters which planning theory would regard as proper to planning. The redevelopment of obsolescent areas has been carried out, where at all, by the central government under its housing legislation, yet this is a matter which in American and English experience is not infrequently dealt with as integral with the negative aspects of planning exemplified by the prescriptive regulation of land use. Yet the Board of Works within the bounds allowed by available finance has embarked upon the positive aspects of traffic engineering in its planning capacity.

[20] *Swan Hill Corporation v. Bradbury* (1937) 56 C.L.R. 746, 757-758. In the same case Rich J. said, 'All that can be done is to weigh the entire assemblage of words which expresses the power and apply the sum of meaning which can be discovered in them to the subject matter described, not forgetting that the nature of the subject is likely to contain the key to the intention which might otherwise be ambiguously disclosed by the mere words.' *Ibid.* 754. See also *R. v. Boteler* (1864) 33 L.J.M.C. 101; *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223, 228.

Where do planning considerations end? Sugerman J. of the New South Wales Land and Valuation Court has mentioned the distinction which must be made between town and country planning considerations and social or economic considerations of a general character not specifically related to town planning, between

> on the one hand, the responsible authority, which is the local municipal or shire council, directing its mind to considerations of town planning and, on the other hand, its directing its mind to considerations which go beyond town planning and are of a general social or economic nature, more appropriate to be dealt with by the central government, such as . . . the rationalisation of industry.[21]

An English Ministerial Circular warned authorities against using planning powers 'as a sort of universal longstop when other powers are not available'.

> It will often be found that matters which are of proper concern to planning are already regulated either by statute or common law. In such cases it is generally undesirable to seek to cover the same ground by attaching conditions to a planning permission. The existence of the condition will not free the developer from his other responsibilities; if the requirements are the same the condition is unnecessary, while if they conflict, confusion will result.[22]

This distinction from general government powers is likely to be of great significance in Victoria too, since it is through an excess of enthusiasm rather than discrimination against an applicant that excess of power can be feared. It is a nice point how far the authority may consider matters which lie within its competence under other legislation.

Local authorities in England are assisted in separating relevant matters from irrelevant in granting consents or imposing conditions by the valuable series of Bulletins of Selected Appeal Decisions issued at regular intervals by the Ministry of Housing and Local Government. Though these, being notes of administrative decisions only, have no legal force, they are useful as guides to authorities in exercising their powers and as precedents within the Ministry when questions are taken on appeal.

A random selection of cases illustrates the Ministry's concern lest

[21] *Ampol Petroleum Ltd v. Warringah Shire Council* (1956) 1 L.G.R.A. 276, 279. In a later case in reference to *public interest* as a matter to be considered by the planning authority, Sugerman J. said, 'It is difficult to draw any general line between considerations of public interest which are considerations relevant to town and country planning, and considerations of public interest which are not. . . . In some, perhaps many, cases it may depend upon from what point of view one approaches the particular consideration.' *Greenberg v. Sydney City Council* (1958) 3 L.G.R.A. 223. In *Ex parte S. F. Bowser & Co.* (1927) 27 S.R. (N.S.W.) 209 a local council's zeal to protect Australian industry by prescribing, in the exercise of power to regulate structures on footpaths, that all petrol pumps should be made in Australia, was forestalled by *mandamus*.

[22] Circular 58/51 of the Ministry of Local Government and Planning 12.

planning powers should be used to impose regulation of a general governmental character. The Minister's decision in these cases is expressed, albeit briefly, in something of the manner of a judicial declaration of right.

In one case the Corporation of a provincial town attached as a condition to its consent to the extension of factory premises, that the owners should enter into an agreement binding them to observe certain obligations of a general character relating to the display of advertisements and the use of smokeless fuel. The owners appealed to the Minister on the ground that it was not within the competence of the corporation to reinforce other of its powers with an undertaking which would give it additional rights and remedies upon breach. The Minister accepted the owners' submission and granted permission without the conditions.[23]

Where the consent given to the use of premises as a physiotherapy clinic was made conditional upon apparatus being screened to prevent interference with broadcast or television reception, the Minister allowed an appeal on the ground that the reasons which led the Council to impose the condition were matters for consideration between the Post Office and the developer and were not appropriate to planning.[24]

In another case the authority attempted to suppress the existing use of certain land (as factory premises by pickle manufacturers) as a condition to a permit to erect a pickle factory on another site. On appeal to the Minister the authority sought to justify the condition on the ground that it was directed toward the regrouping of industries, hitherto scattered throughout the district, in compact estates. The Minister stated that a condition of this type could not be imposed, as suppression of an existing use could only be achieved by an Order under another part of the Act.[25]

Whilst parallels between administrative and judicial review of administrative discretion are not normally of much use because of the greater breadth of considerations which can be taken into account in administrative review where the decision of the reviewing authority is substituted for that of the inferior authority,[25a] the questions raised in the English cases are important in indicating the scope of planning discretions.

English planning authorities also have the assistance of Ministerial Circulars explaining the legislation and indicating the matters relevant to concepts such as 'amenity of the locality'.[26]

[23] (1947) *Bulletin of Selected Appeal Decisions* (I/18).
[24] (1952) *Bulletin of Selected Appeal Decisions* (XI/16).
[25] (1950) *Bulletin of Selected Appeal Decisions* (VII/12).
[25a] See *University of Ceylon v. Fernando* [1960] 1 W.L.R. 223, 236.
[26] See, *e.g.*, Circular No. 58/51 of the Ministry of Local Government and Planning, *supra* n. 22.

Of more direct relevance to the position in Victoria are the few English cases in which in an action for judicial relief the courts have been asked to decide whether particular conditions were validly attached to planning consents. The most important of these cases is that of *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government* in the Court of Appeal.[27] A quarrying company sought a declaration that certain operations it intended to carry out on its freehold land could under the appropriate legislation be undertaken without permission or, if permission had to be obtained, that the conditions imposed by the Minister were invalid as restrictions on an existing use which could be imposed only under another section of the Town and Country Planning Act which provided for compensation. The Minister had attached as conditions to the quarrying, (1) that crushing and screening should only be operated between such hours as might be agreed, and that steps should be taken to control the emission of dust therefrom, and (2) that all plant, machinery and foundations should be removed when they were no longer required, and that the site be left in a tidy condition.

The defendant Ministry raised the preliminary objections that the court had no jurisdiction to grant the declarations sought since the Act stated that an application made to the Minister to determine whether permission was required should be final, and the only method of determining such a question was by application to the local authority (with the possibility of a reference being made to the Minister); secondly, the wide discretion conferred on the Minister by the Act to impose conditions disentitled the company from claiming from the court a declaration that any condition was invalid.

The three Lords Justices composing the Court were divided on each of the questions. Denning and Morris L.JJ. held that there was nothing in the Act which excluded the jurisdiction of the court to grant a declaration that permission was not required for particular proposed development. Hodson L.J. dissented, taking the view that planning was the creature of statute and that Parliament had provided its own method of determining whether permission was required, and had given exclusive jurisdiction to the local authorities and the Minister.[28] Secondly, Denning and Hodson L.JJ., with Morris L.J. dissenting, held that permission was required for the proposed quarrying.[29]

[27] [1958] 2 W.L.R. 371; 1 Q.B. 554. The decision of the Court of Appeal was reversed by the House of Lords on the preliminary point that the proposed development was exempt from the provisions of the Town and Country Planning Act 1947. With the exception of Lord Goddard, their Lordships expressly refrained from commenting upon the Court of Appeal's remarks on the matters relevant to the exercise of planning discretions and the availability of an action for a declaration to test the validity of conditions attached to planning permission. [1959] 3 W.L.R. 346.

[28] The House of Lords affirmed the holding of Denning and Morris L.JJ.

[29] On this point the House of Lords preferred the judgment of Morris L.J.

Thirdly, Denning and Hodson L.JJ. held, Morris L.J. agreeing with Denning L.J., that the conditions imposed were valid as being fairly and reasonably related to the permitted development.[30] At this point the views of Denning L.J. and Hodson L.J. diverged. Denning L.J. thought that a declaration was clearly available as a remedy but doubted whether *certiorari* would have lain to the Minister. Hodson L.J. on the other hand was doubtful whether the Minister's decision could be impeached *(sic)* by declaration and considered that that could only be done by *certiorari*. In the event, both these observations were by way of *obiter dicta* but they do raise a point of acute significance to the Victorian legislation which will be considered in the next section.

Denning L.J. after some hesitation held that the conditions were not invalid as the machinery and plant were used for purposes in connection with the permitted development. His Lordship said that the Minister appeared to take the view that if the company wished to win stone from the quarries for some years to come, they should take steps to ensure that there was as little nuisance as possible either from the blasting operations or from the ancillary operations of crushing and screening the stone; and they should clear up the place when they had finished. His Lordship added:

> There is nothing unfair or unreasonable about that. After all, if the company do not wish to accept the permission on those conditions, their remedy is not to work the quarry. But if they do continue to work the quarry, they can fairly be expected to comply with these conditions. It would be very different if the Minister sought to impose like conditions about plant or machinery a mile or so away.[31]

Fairness and reasonableness are by themselves vague and unreliable as criteria of the validity of discretionary conditions. The courts now treat them, rather than as independent grounds for judicial review, as subsidiary matters for consideration when administrative action is impugned as being *ultra vires*.[32] But the Lord Justice probably intended no more than to allude to his earlier statement on *vires* that the law says that planning conditions, 'to be valid, *must fairly and reasonably relate to the permitted development*'.[33]

[30] *Cf.* (1951) *Bulletin of Selected Appeal Decisions* (IX/5).

[31] [1958] 2 W.L.R. 371, 385; 1 Q.B. 554, 573-574.

[32] *Harman v. Butt* [1944] K.B. 491; *R. v. East Kesteven R.D.C.* [1947] 1 All E.R. 310; *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223; *Arthur Yates & Co. Pty Ltd v. Vegetable Seeds Committee* (1946) 72 C.L.R. 37.

[33] [1958] 2 W.L.R. 371, 384. This apparent resurrection of reasonableness as a ground of review has caused trouble to at least one commentator. See de Smith, *Judicial Review of Administrative Action* (1959) 246, n. 22a. But *cf. Fawcett Properties Ltd v. Buckingham C.C.* [1958] 1 W.L.R. 1161, 1168 *per* Roxburgh J.: 'Persons entrusted with a statutory duty have to perform their duty in a manner which is fair, not only to the landlord but to all other classes in the community who may be concerned.'

The authority is nevertheless permitted to adopt a policy which it may apply to all classes of applications of a particular kind. If the policy has been adopted for reasons which the authority may legitimately entertain, this course is permissible, but it may not, under the guise of passing the rule, decide not to receive any application of a particular kind.[34] The distinction is not easy to apply.

LEGAL CHECKS ON EXCESS OF POWER BY RESPONSIBLE AUTHORITIES

The availability of legal remedies for excess or abuse of power by planning authorities is likely to be relevant in four situations. These are, first, where a person who wants to change the purpose for which his land is used or to extend or alter buildings on it asks whether the planning authority's consent to the change is required; secondly, where it is alleged that the authority's consideration of an application for consent has been defective, and the applicant attempts to impugn the decision. The other two cases are similar: where the question is whether a permit has been rightly withheld, and whether attached conditions are valid.

Though some issues are common to all situations, each raises its own distinct problems and is conveniently examined separately.

Obligation to Apply for Consent

The question whether consent is required will normally involve the classification of proposed uses or the determination of whether what is proposed amounts to a change of use. The person wanting to subdivide or to execute works on land affected by a scheme, and the authority itself, may both wish to raise it.

There has been no case decided in Victoria on this point and the means by which the question can be raised are open to debate.

The matter is complicated by sub-section (3) of the enforcement powers section, section 26. This states that

> if any question arises whether any building or work contravenes the planning scheme or whether any provision of a planning scheme has not been complied with in the erection or carrying out of any such building or work *such question shall be referred to the Minister and the decision of the Minister shall be final and conclusive.*

The place of the courts in deciding whether consent is required will in part be determined by where the boundary is drawn of the availability of the declaration in administrative law; in part it may depend upon the point of time the question arises for decision.

[34] *R. v. Port of London Authority, ex parte Kynoch Ltd* [1919] 1 K.B. 176, 184; *R. v. Torquay Licensing Justices* [1951] 2 K.B. 784; *R. v. London County Council, ex parte Corrie* [1918] 1 K.B. 68.

If the words 'if any question arises whether any building or work contravenes the planning scheme' are confined to a dispute between landowner and authority after the authority has attempted to exercise its powers under section 26 to order the removal or alteration of works which contravene the scheme, the developer can raise the question of his obligation to apply for consent for judicial determination before work is begun. There is much to be said in support of this construction of the sub-section. It appears in a section concerned with enforcement against offending works. It uses the words 'building or work' which may be compared with the expression 'use or development of any land or the erection construction or carrying out of buildings or works' in section 14 where future development is meant. It would be quite absurd if it were inferred from the last words of section 26 (3) that questions of compliance with a scheme could be raised only after commencement of work or even possibly after service of notice by the authority.[34a] The courts have given such a narrow interpretation to privative clauses which use the 'final and conclusive' formula that the likelihood of section 26 being construed so as to oust the jurisdiction of the courts to issue a declaration that a proposal to carry out works on land requires consent can be discounted.[35]

It is safe to prophesy that before commencement of development a court would make a declaratory order upon the motion of the developer or the authority. Though there have been few reported cases of declarations of this kind, a probable explanation is the understandable reluctance of potential plaintiffs to force the issue. Normally an application would be lodged and litigation would be considered only if consent were refused.[36] Before a declaration will issue the plaintiff must satisfy the court that his proposals are genuine and the question before the court is not a hypothetical one involving plans which are not likely to be realized.[37]

A more difficult problem arises when constructional work has taken

[34a] S. 26: (1). The responsible authority may at any time after giving such notice as is prescribed by such a planning scheme and in accordance with the provisions of this Act—

(a) require the owner of any land comprised in the scheme to remove pull down take up or alter any building road or other work in the area included in the scheme which has been commenced or continued after publication . . . of notice of the approval of the scheme and which is such as to contravene the scheme or in the erection or carrying out of which any provision of the scheme has not been complied with;

(b) if the owner of any land comprised in the scheme fails to comply with such a requirement itself do any of the things so required. . . .

[35] De Smith, *op. cit.*, 226 ff., Anderson, 'Parliament v. Court', 1950) 1 *University of Queensland Law Journal* 39.

[36] *Re Caldicot and Wentlooge Act, Eton College v. Commissioners of Sewers* [1920] 2 Ch. 463 is an instance of a private plaintiff's obtaining a declaration concerning the powers of a public authority, but the facts of this case are unlike those in planning in that it was the authority itself which doubted the scope of the powers contended.

[37] See de Smith, *op. cit.*, 391-394, and also *Re Carnarvon Harbour Acts* [1937] Ch. 72; *Faber v. Gosforth U.D.C.* (1903) 88 L.T. 549.

place. Until the authority has given notice to the landowner it would appear that the same principle applies as where work has not commenced. For a 'question' to 'arise' within the meaning of sub-section (3), there should be a dispute between the authority and the developer as to compliance with the scheme.

But where there is a dispute and where the authority has threatened or commenced enforcement proceedings the question of the effect of 'exclusive reference' clauses upon the court's power to issue a declaration is squarely raised. An almost identical provision was in point in the *Pyx Granite* case[38] where the House of Lords held that a declaration should issue that certain proposed development might be undertaken. In the course of his speech Viscount Simonds said:

> It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is . . . a 'fundamental rule' from which I would not for my part sanction any departure.[39]

In the Court of Appeal some store was set by the Lords Justices whose decision was affirmed by the House of Lords on this point (Denning and Morris L.JJ.) on the permissive language of the English Act. It was mentioned in the House of Lords only by Lord Jenkins, and then in passing.[40] The main ground of their Lordships' decision is applicable also to mandatory language such as is found in section 26. To distinguish a line of cases tracing from *Barraclough v. Brown*[41] the House of Lords contrasted rights expressly conferred by statute coupled with particular remedies in prescribed courts or tribunals for breaches of those rights, and interference by statute with the rights of a landowner to deal with his land as he pleases coupled with a direction of procedure for ascertaining the extent of the statutory restrictions. In the latter case it was important that the landowner if he pleased should have access to the ordinary courts. Their Lordships expressed approval of the case of *Francis v. Yiewsley and West Drayton Urban District Council*[42] where a declaration issued that an enforcement notice was invalid notwithstanding the existence of statutory procedure for applying to a court of summary jurisdiction.

The further question which is posed only when the Minister has given his decision that consent is required, possibly can be dealt with by declaration but raises also the vexed problem of the scope of *certiorari* and will be dealt with later. It should be mentioned at this point that section 26 applies only to 'building' and 'work' and may not cover all changes in land user.

[38] [1959] 3 W.L.R. 346. See also *Hamilton v. West Sussex County Council* [1958] 2 Q.B. 286. [39] [1959] 3 W.L.R. 346, 357. [40] *Ibid.* 372.
[41] [1897] A.C. 615. [42] [1957] 2 Q.B. 136; [1958] 1 Q.B. 478.

The developer might also apply to the authority to decide whether consent is necessary. It has been noted that the Act and Regulations do not anticipate the presence of discretionary powers in planning schemes and they are, of course, silent upon an authority's capacity to determine preliminary matters. Section 23 directs responsible authorities to issue certificates stating whether land is affected by interim development orders or planning schemes. But this power is confined to declaring whether land is within a particular area, and does not on its face extend to stating how the land is affected. An authority might not be precluded from including in its certificate a statement of the manner in which the land is affected and it is at least arguable that section 23 (2)[43] might be construed as creating a form of statutory estoppel in respect of all matters stated in the certificate.[44]

One other matter of importance which could arise where the responsible authority is also the authority from which building permits are obtained is that the developer's failure to obtain consent may be raised by the authority when a building permit application is lodged. If a permit is refused on this ground alone, it is not clear that *mandamus* can be obtained to compel the issue of a building permit.[45]

Alleged Defects in Authority's Consideration of Application for Consent

The defects to be discussed in this section are of the nature of form rather than of substance. The next two sections deal with allegations of defects which go to the merits of the authority's decision.

It is possible to offer only broad statements of general principle as to the judicial remedies which may be obtained by an aggrieved person where vitiating defects of this class are alleged to have occurred, for the class is far from homogeneous and the availability of a particular remedy will depend upon the facts peculiar to each case. In the past hundred and fifty years administrative law remedies (as

[43] S. 23 (2): 'The production of a certificate so signed shall for all purposes whatsoever be deemed conclusive proof that at the date of the certificate the facts stated therein were true and correct, and any person acting in pursuance of any such certificate who suffers loss or damage by reason of any error or mis-statement therein shall be entitled to recover compensation therefor from the responsible authority.'

[44] The correctness of this view would depend upon the construction given to clause 19 (1) of Town and Country Planning Regulations (No. 7) as amended by clause 2 of Town and Country Regulations (No. 9): 'The certificate referred to in the Town and Country Planning Act 1954 shall be in, or to the effect of, the form contained in the Twelfth Schedule hereto.' The form in the Schedule contains no space for stating the manner in which the land is affected by the planning scheme in question.

[45] *R. v. City of St. Kilda, ex parte Rodd* [1937] V.L.R. 48. The general availability of *mandamus* in connection with the Victorian Uniform Building Regulations is discussed in *R. v. City of Fitzroy, ex parte Atlantic Union Oil Company* [1957] V.R. 279. See also *R. v. City of Moorabbin, ex parte Kahn* [1948] V.L.R. 173; *R. v. City of Richmond, ex parte E. B. May Pty Ltd* [1955] V.L.R. 379.

they now are called) have tended to become an army of single instances.

Allegations that a tribunal has failed in the performance of its duty to hear and determine according to law are of three main kinds: that procedural formalities have not been complied with; that the tribunal has adverted to irrelevant and extraneous considerations in reaching its decision; and that fraud, *mala fides* or bias has tainted the tribunal's determination.

Allegations of defects in procedural formalities can further be divided into failure to comply with statutory requirements and denial of natural justice[46] by denying a party the right to present his case adequately. The Town and Country Planning Act and Regulations express no procedure for obtaining an authority's consent. The Melbourne Metropolitan Planning Scheme Ordinance contains meagre provisions directing the applicant as to the details which must be given in the application form,[47] and empowering the authority to obtain further information it may require of the applicant.[48] The only positive obligations placed on the authority are to notify the applicant of its decision and to give reasons where an application for consent is refused.[49] If the authority refuses to accept an application in the prescribed form or does not comply with either of these positive obligations, there is no doubt that *mandamus* will lie to direct it to consider the application.

But where the alleged default is not in connection with express procedural requirements but is alleged to be a failure to permit a party to present his case as the law allows, difficult problems arise. What rights does the law confer on an applicant in the presentation of his case? Is the authority under any duty to act judicially in the sense that those words are applied to statutory tribunals? What is the relationship between the prerogative writs of *mandamus* and *certiorari* and planning authorities in respect of alleged procedural defects of this kind?

Discussion of the elementary principles of procedure to which statutory tribunals must conform is hedged about by the tautological *dictum* of Atkin L.J. in *R. v. Electricity Commissioners*[50] that *certiorari* and prohibition would issue 'wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially' exceeds its authority. The tempting corollary of this proposition, that tribunals not having a duty to act judicially are under no legal obligation in respect of procedure except those expressly imposed by statute or some subordinate legislative instrument, is not supportable. Where a narrow reading of

[46] This phrase normally encompasses fraud, *mala fides*, bias and pecuniary interest as well as the so-called *audi alteram partem* rule.
[47] Clause 46 (a).
[48] Clause 46 (b).
[49] Clause 46 (c).
[50] [1924] 1 K.B. 171, 205.

the *dictum* of Atkin L.J. may be of practical importance in denying an aggrieved party a remedy by way of statutory writ, is that *certiorari* may now lie for procedural defects to a more limited group of tribunals than in the nineteenth century,[51] that is, those whose task it is to decide a dispute in the form of a lis or a quasi-lis between two parties.

The factor which might influence a court to hold that the planning authority is under a duty to act judicially in the strict sense where *certiorari* will lie is that it is by its Ordinance required to consider a proposal of facts in relation to a number of standards for the exercise of its powers.[52] The argument does not rest on the duty to decide but is based on the inclusion in the Ordinance of specific matters to which the authority is directed to have regard. The High Court's decision in *Delta Properties Pty Ltd v. Brisbane City Council*,[53] a case in which *mandamus* was awarded, held that where an authority (in this case a municipal council) is given a discretionary power involving the formation of an opinion about particular property

> the law insists, according to long-established doctrine, that the step which will have [the] prejudicial effect, namely the formation and expression of the opinion, requires for its efficacy the prior observance of the fundamental principles of natural justice.[54]

The point on which this case can be distinguished from planning consents is that the formation of the council's opinion was the mainspring of the decision which adversely affected the plaintiff's land and the opinion was as to the existence of a state of facts.[55] A planning

[51] The conceptual weaknesses in the application of the *dicta* of Atkin L.J. in the *Electricity Commissioners'* case in such recent well-known cases as *Nakkuda Ali v. Jayaratne* [1951] A.C. 66, *R. v. Metropolitan Police Commissioner, ex parte Parker* [1953] 2 All E.R. 717, and *Ex parte Fry* [1954] 1 W.L.R. 730 are commented upon by D. G. Benjafield, 'Statutory Discretions' (1956) 2 *Sydney Law Review* 12 ff. Dr Benjafield contrasts the *Electricity Commissioners dicta* with the series of cases which culminated in *Board of Education v. Rice* [1911] A.C. 179 (notably *Cooper v. Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 80 and *Hopkins v. Smethwick Board of Works* (1890) 24 Q.B.D. 712: these were both cases concerning demolition orders). In the earlier cases the duty to decide the matter judicially arose as a consequence of the 'duty of deciding or determining questions' (*Rice's* case, *op. cit.*, 182 *per* Lord Loreburn) but later the duty to act judicially became a separate antecedent requirement for the issue of prohibition and *certiorari*.

[52] For the purposes of this analysis it has to be assumed that a Planning Scheme Ordinance in which discretionary powers are reserved will, like the Melbourne Metropolitan Scheme Ordinance, set out matters which shall guide the authority in exercising its powers. [53] (1956) 95 C.L.R. 11. [54] *Ibid.* 18.

[55] The relevant statute provided: 'It shall not be lawful for any person upon land which is *so situated as not, in the opinion of the council, to be capable of being drained* to erect any building to be used wholly or partly as a dwelling'.

[56] *Cf.* H. W. R. Wade, 'Quasi-Judicial and its Background' (1949) 10 *Cambridge Law Journal* 216 where a most convincing case is made for isolating the fact-finding and submission-making stage in the administrative process from the decision-making stage where policy considerations which are irrelevant to the judicial function will come into play. The House of Lords' broad characterization of the Minister's functions in *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87 as administrative throughout, weakens the persuasive force if not the logic of Mr Wade's argument.

authority's discretion is of a much less precise nature and its opinion is as to the probable effects of the applicant's proposed activities. In this sense the 'judicial' aspects of its decision-making process are less obvious as the datum points are more fluid.[56] It is of some interest to note that the High Court in the *Delta* case assiduously avoided the snare of the words 'judicial' and 'duty to act judicially'. *Cooper v. Wandsworth Board of Works* is cited but not *R. v. Electricity Commissioners.*

On the other hand it might be said that as the authority is obliged to give reasons it is reasonable to imply a right for the applicant to make submissions apart from the bald presentation of facts in his application.

Even if *certiorari* does not lie to a tribunal which is not under a duty to act judicially in the *Electricity Commissioners* case sense, there is some authority that *mandamus* will issue if a tribunal in the position of a planning authority refuses to entertain argument of any kind by an applicant.[57] But the authority is not bound to afford him an oral hearing unless to deny him this would be to deny him ' a full and fair opportunity' of placing his case before the authority.[58] The High Court has, however, intimated that *mandamus* will not issue interchangeably with *certiorari* where procedural defects are alleged to have occurred. The effect of the defect must be that the tribunal's purported consideration of the matter before it is not a real performance of the duty imposed on it by law.

> The correctness or incorrectness of the conclusion reached by the tribunal is beside the question whether the writ lies. It is also beside the question that the determination, although not void, is yet one which, because of some failure to proceed in the manner directed by law, or of some collateral defect or impropriety, is liable to be quashed by a court which on appeal, *certiorari* or other process is competent to examine it.[59]

[57] The *locus classicus* of this proposition is in Lord Loreburn's speech in *Board of Education v. Rice* [1911] A.C. 179, 182 (statutory appeal by a teacher). See also *Cooper v. Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180, 187, 194 (demolition order); *Masters v. Pontypool Local Government Board* (1878) 9 Ch. D. 677; *Hopkins v. Smethwick Board of Health* (1890) 24 Q.B.D. 712 (demolition order); *Sydney Corporation v. Harris* (1912) 14 C.L.R. 1, 5, 16 (demolition order); *R. v. War Pensions Entitlement Tribunal, ex parte Bott* (1938) 53 C.L.R. 228 (war illness compensation tribunal: *mandamus* was refused in this case on its peculiar facts); *R. v. Milk Board, ex parte Tomkins* [1944] V.L.R. 187 (milk zoning); *R. v. Melbourne Corporation, ex parte Whyte* [1949] V.L.R. 257 (taxi cab licensing); *Delta Properties Pty Ltd v. Brisbane City Council* (1955) 95 C.L.R. 11 (decision that land is unsuitable for residential development).

[58] *Local Government Board v. Arlidge* [1915] A.C. 120; *R. v. Central Land Tribunal, ex parte Parton* (1916) 32 T.L.R. 476; *R. v. Melbourne Corporation, ex parte Whyte* [1949] V.L.R. 257.

[59] *R. v. War Pensions Entitlement Tribunal, ex parte Bott* (1933) 50 C.L.R. 228, 242 *per* Rich, Dixon and McTiernan JJ. In fact *mandamus* was not granted in this case on the ground that there had been no failure to hear and determine according to law.

It is also doubtful whether a declaration can be obtained in a case where *mandamus* will not issue, as the declaratory order in form states no more than that the authority has failed to consider the application in accordance with its legal duty.[60] A declaration is nevertheless an alternative or auxiliary remedy in any case of this kind where *mandamus* can be obtained.[61]

Mandamus or other administrative remedies may well prove to be cold comfort for the aggrieved applicant. The effect of their issue is to have the matter remitted to the authority for consideration and the applicant may find himself no better for his efforts. Administrative law remedies are much less effective weapons for an aggrieved person who has to obtain a consent or permit from an administrative authority as a condition precedent to a course of conduct than to a person who is adversely affected by action initiated by an authority, such as the issue of a demolition order or a rating notice. It seems generally to be the case that the person or authority seeking to depart from the *status quo* is in the more disadvantageous position when a prerogative writ or a declaratory order is sought. This is not so where the authority is directed by *mandamus* to perform a purely ministerial function which the plaintiff has the right to have performed, but where a discretionary element is involved it is not difficult for the authority to 'wrap up' its refusal in such a way that the courts will provide no redress.

Alleged Substantive Defects in Authority's Consideration of Application for Consent

None of the administrative law remedies will issue to direct an authority how it should exercise its discretion.[62] The most an applicant for one of the prerogative writs or a plaintiff in an action for a declaration can hope to achieve is to quash the authority's order and to have the matter remitted for reconsideration. Unless the authority has proceeded in mistake upon totally irrelevant grounds the result on remission, as was said in the last section, may afford the applicant no more satisfaction than before. But this state of affairs can be remedied only by the creation of a right of appeal on matters of law where the decision of the appellant tribunal or court is substituted for the authority's determination.

A requirement that the authority give reasons for refusal of consent does leave the way clear to the applicant to obtain judicial relief if the

[60] This is implicit in the court's reasoning in *Healey v. Minister of Health* [1955] 1 Q.B. 221.

[61] *Delta Properties Pty Ltd v. Brisbane City Council* (1955) 95 C.L.R. 11.

[62] Early authority for this proposition is contained in *R. v. Taylor* (1842) 3 B. & C. 544, 547. It has more recently been stated forcefully by Dixon J. in *Swan Hill Corporation v. Bradbury* (1937) 56 C.L.R. 746, 757 ff.

reasons are wrong in law. Error of law may occur if the reasons show the authority to have been influenced in its decision by irrelevant matters or if it is attempting to use its powers for a purpose not authorized by the empowering legislation. Relevancy is to be ascertained expressly or by implication from the words of the authorizing legislation.

Where the authority has proceeded on irrelevant grounds it will be held that there has been no real determination of the matter at all and *mandamus* will lie.[63] The nice questions of relevancy which may be involved in the exercise of planning discretions have been mentioned and the answers of the Minister in charge of the English planning legislation have been examined in a selection of issued cases.[64] It must be remembered that these cases and cases decided in the Land and Valuation Court of New South Wales[65] were statutory appeals in which the reviewing tribunal is able to subject the authority's decision to much closer scrutiny than a court is when asked to issue one of the prerogative writs. A court must be convinced that the authority has proceeded on the basis of matters which are so irrelevant to the objects and purpose of the power that it cannot be said that the power has been exercised at all. The court will not be hasty in substituting its own ideas of relevance for those of the tribunal, especially where it is clear from the empowering legislation that a wide discretion is intended.

> The discretion is . . . unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be *definitely extraneous to any objects the legislature could have had in view.*[66]

Starke J., who it must be admitted adopted a very conservative approach to judicial intervention, commented on a series of cases[67] in which the court had been prepared to exercise its discretion to issue *mandamus* that

> it might perhaps have been better if the courts had examined the topics of regulation entrusted to public authorities and, when it appeared that a regulation was upon a topic of regulation entrusted to an authority, then to concede the validity of all regulations upon that topic which, within reason, were appropriate and adapted to the purpose of regulating the subject matter and were not prohibited by law.[68]

[63] The cases in which *dicta* to this effect have been expressed are legion. It is sufficient here to refer to recent High Court authority in *Victorian Railways Commissioners v. McCartney* (1934) 52 C.L.R. 338, 391, 393; *R. v. Trebilco, ex parte F. S. Falkiner & Sons Ltd* (1936) 56 C.L.R. 20, 26, 27, 32; *Andrews v. Diprose* (1937) 58 C.L.R. 299; *Shrimpton v. The Commonwealth* (1945) 69 C.L.R. 613; *Water Conservation and Irrigation Commission (N.S.W.) v. Browning* (1947) 74 C.L.R. 492.

[64] *Supra*, pp. 369-370.

[65] Reported in the New South Wales Local Government Reports and their successor, the Local Government Reports of Australia.

[66] *Water Conservation and Irrigation Commission (N.S.W.) v. Browning* (1947) 74 C.L.R. 492, 505 *per* Dixon J.

[67] *Supra*, n. 63.

[68] *Brunswick Corporation v. Stewart* (1941) 65 C.L.R. 88, 95.

The Melbourne Metropolitan Planning Scheme Ordinance states certain matters which the authority must 'have regard to' in exercising its discretion.[69] But expressions such as 'the primary purpose for which land is zoned', 'the orderly and proper planning of the zone' and 'the preservation of the amenity of the neighbourhood' are so vague that they provide little qualification of the matters which could be implied from the character of the legislation. They do, however, limit 'the general considerations regarding the social, political or economic conditions of the community'[70] which might otherwise be taken into account.

One other factor which might influence the court in granting relief is that the discretionary power arises in a list of permissible uses of land classified by purpose. When the question to be decided by the authority is whether (irrespective of conditions) the proposed use should be permitted 'the primary purpose for which land is zoned' might also become the primary matter which the authority must consider. This may not help to decide whether a petrol-filling station should be permitted in a residential area but in other cases it might be important.

This argument would be relevant to an action for *certiorari* rather than *mandamus*. At least since the much discussed decision of the Divisional Court of the King's Bench Division in *R. v. Northumberland Compensation Tribunal, ex parte Shaw*[71] *certiorari* has issued to quash the decision of an administrative tribunal for errors of law on the face of the record where a 'speaking order' has been given. In such cases the writ will be available even though the error does not go to the jurisdiction of the tribunal and though there has been no failure to hear and determine to justify *mandamus*. It is conceivable that this ground might support a much closer examination of the factual basis of the decision than on an application for *mandamus*. Where the published reasons do not on their face disclose an error of law *mandamus* might issue if the applicant could prove that irrelevant matters had been considered, but *certiorari* would not be obtainable.[72]

There is authority that a declaratory order that the authority's decision is invalid will be made in lieu of or in addition to *certiorari*

[69] Clause 40 (a).

[70] *Victorian Railways Commissioners v. McCartney* (1934) 52 C.L.R. 383, 393 *per* Starke J. (This case arose by way of statutory appeal.)

[71] [1951] 1 K.B. 711, affirmed by the Court of Appeal [1952] 1 K.B. 338 (compensation for removal from office). See D. M. Gordon, (1951) 67 *Law Quarterly Review* 452; G. Sawer, 'Error of Law on the Face of an Administrative Record' (1954) 3 *University of Western Australia Annual Law Review* 24; J. A. Iliffe, 'An Historical Addendum' (1954) 3 *University of Western Australia Annual Law Review* 37; de Smith, *Judicial Review of Administrative Action* (1959) 294 ff. The *Northumberland* case has been applied in Australian courts in *Ex parte Henry Berry & Co. (Australia) Ltd* [1955] Argus L.R. 675 and *Ex parte Hopkins; Re Cronin* (1957) S.R. (N.S.W.) 554.

[72] *R. v. Paddington & St. Marylebone Rent Tribunal, ex parte Kendal Hotels Ltd* [1947] 1 All E.R. 448.

or *mandamus* for abuse of power.[73] Denning L.J. in a well-known passage in *Barnard's* case treats the declaration as having a scope of the greatest amplitude:

> It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by *certiorari* is hedged about by limitations and may not be available. Why then should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law.[74]

Whilst it is submitted that the words 'does not observe the law' do not convey anything different from the grounds for which the prerogative writs will lie, it appears from this case, the House of Lords' decision in *Vine v. National Labour Dock Board*[75] and the *Pyx Granite* case[76] that there is at least strong persuasive authority for Australian courts that declaratory relief will be available to invalidate the decision of an administrative tribunal whose functions are not sufficiently 'judicial' in nature for it to be amenable to *certiorari*.

Where defects of form involving a denial of natural justice are alleged which would entitle the applicant to judicial relief by prerogative writ or declaratory order he cannot act in defiance of the authority's determination and attempt to raise its invalidity as a defence to enforcement proceedings. The decision, if invalid, is voidable not void and cannot be impugned in collateral proceedings.[77] Where on the other hand a defect of substance is involved the decision is a nullity and will not support an enforcement action. But where there is a positive requirement that the person wanting to use his land for certain purposes should first obtain the consent of an authority he must procure a decision in his favour before he can commence his operations.[78]

Validity of Conditions Attached to Consent

The validity of conditions can be raised for judicial consideration in the same way as the refusal of consent. The nature of the conditions may be such that it is clear that the authority has taken irrelevant matters into account; or the conditions may be void in themselves. In either case a declaration is probably the most convenient remedy. Its use for this purpose was upheld by Denning L.J. with Morris L.J.

[73] *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223; *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18; *Delta Properties Pty Ltd v. Brisbane City Council* (1955) 95 C.L.R. 11; *Pyx Granite Co. Ltd v. Minister of Housing and Local Government* [1959] 3 W.L.R. 346, 360.

[74] [1953] 2 Q.B. 18, 41. [75] [1957] A.C. 488. [76] [1959] 3 W.L.R. 346.

[77] *Dimes v. Grand Junction Canal Proprietors* (1852) 3 H.L.C. 759; *Wildes v. Russell* (1866) L.R. 1 C.P. 722.

[78] *Swan Hill Corporation v. Bradbury* (1937) 56 C.L.R. 746, 757 ff.

concurring (Hodson L.J. *dissentiente)* in the *Pyx Granite*[79] case and this remedy has since been obtained in another English case where invalid conditions were attached to a planning consent.[80]

What is the consequence of a declaration that conditions are invalid? In the *Pyx Granite* case Hodson L.J. said that if he had held the conditions in that case invalid he should have thought that it was impossible to 'mutilate the decision by removing one or more of the conditions'. The Lord Justice added:

> The permission given has been given subject to those conditions, and *non constat* but that no permission would have been given at all if the conditions had not been attached. The consequence would be that if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning permission would fall with it, and the respondents would be left without any planning permission at all, for it would not be open to the court to leave the planning permission standing shorn of its conditions, or any of them.[81]

In a later case where conditions to the effect that certain cottages situated in a green belt were to be occupied only by agricultural workers, Roxburgh J. refused to follow this *obiter dictum* and held that a permit should stand that the cottages should be used for residential purposes free of any conditions.[82] This decision would appear to be palpably wrong since it has the effect of substituting the court's opinion of what the authority would have permitted if the matter had been remitted to it for the authority's statutory discretion. But whatever is the correct approach under the English Act clearly in Australia the court could not normally sever invalid conditions from a planning consent to unconditionally authorize land uses which the authority may think fit to permit only subject to conditions other than those invalidated.[83] One qualification must be made to this: where the conditions are held to be void on the ground that they have been imposed in the furtherance of a purpose which is beyond the authority's powers (as for instance a usurpation of general governmental powers) the court might hold that blue pencil severance does not affect the authority's consent. The authority's excess of zeal might be said to be quite unrelated to the purpose for which the land was authorized to be used, and the consent be allowed to stand.

[79] [1958] 2 W.L.R. 371; 1 Q.B. 554.
[80] *Fawcett Properties Ltd v. Buckingham County Council* [1958] 1 W.L.R. 1161.
[81] [1958] 2 W.L.R. 371, 390. No opinion was expressed by Denning or Morris L.JJ. upon this point.
[82] *Fawcett Properties Ltd v. Buckingham County Council* [1958] 1 W.L.R. 1161.
[83] *Pidoto v. Victoria* (1943) 68 C.L.R. 87; *Olsen v. City of Camberwell* [1926] V.L.R. 58.