# LEGISLATIVE COMMENT

## TOWN AND COUNTRY PLANNING (MISCELLANEOUS PROVISIONS) ACT 1978 (VIC.)

T. L. BRYANT*

A significant amendment to s. 21 of the *Town and Country Planning Act* 1961 (Vic.) came into force on 19th December 1978 which affects appeals before the Town Planning Appeals Tribunal. The new sub-ss. (4H) and (4I) of s. 21 provide that where the Tribunal or the Minister is of the opinion that an appeal "raises a major issue of policy" and the determination of the appeal "may have a substantial effect" on the achievement or development of planning objectives in a region, then the Tribunal is required to hear the appeal but not make a determination thereon. Section 21(4J) states that after the Tribunal has heard all the evidence it shall advise the Minister of its opinion thereon and within 30 days of receiving this opinion the Minister is required to refer the appeal to the Governor in Council for decision.

These new provisions will have far reaching effects on the power of the Victorian Town Planning Appeals Tribunal to make independent decisions. Before the Tribunal was established in 1968 appeals were heard by the Minister for Local Government whose decision was final.[1] The Minister still has power under s. 22E to hear appeals in relation to certain matters.[2]

Prior to the current amendments to s. 21 the Appeals Tribunal was the final body of appeal on all matters except questions of law. Its role is to rectify errors made by the responsible authority in coming to its determination but not to make a decision on a permit as a substitute for the responsible authority. The Tribunal has no greater power than the respective responsible authorities.[3]

What, then, is the reason for these amendments to s. 21 of the Act? There have been recent Tribunal decisions which ran counter to existing governmental planning policies. For example, the future governmental planning policy on subdivisions in the Lilydale area was to raise the minimum size of subdivision of rural land to 40 hectares. A submission to this effect was made by the Minister of Planning to the Tribunal with

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1 S. 14(3) *Town & Country Planning Act* 1958 (Vic.).

2 The owner, user or developer of land, or the responsible authority, may refer a matter to the Minister where a dispute arises with regard to things that have to be done to the satisfaction of the responsible authority, either under an operative scheme, interim development order or a condition in a permit. The Minister's determination is final.

3 *L'Estrange* v. *City of Hawthorn* [1972] V.P.A. 5, 8.

regard to an appeal against the refusal by the responsible authority to grant a permit to subdivide 540 hectares of rural land into 30 lots. The Tribunal upheld the appeal basing its decision on existing planning regulations.[4] Before s. 21 was amended there was nothing in the Act requiring the Tribunal to make its determinations in accordance with future governmental planning policy. Thus, although the government could present future governmental planning policies at a hearing, the Tribunal, being an independent body, was not bound to follow this policy and could decide the case on its merits. This included the right to make a decision contrary to future government policy in a particular area and the Tribunal did so in the above case.

The amendments have overcome difficulties where the Tribunal is hearing an appeal raising major policy issues and the decision may affect the achievement or development of planning objectives in a region. Now the Tribunal can hear the appeal *but* cannot make a determination thereon, and in such cases the Tribunal gives its opinion on the matter to the Minister who refers the appeal to the Governor in Council for decision.

There are some questions raised as to how these new sub-sections will operate. For example, who decides whether or not a particular appeal raises major issues of planning policy? The legislation makes it clear that this can be decided either by the Tribunal or the Minister. The other question raised but not answered in the legislation is at what stage of an appeal can the Tribunal or Minister intervene? One presumes that the policy matters set out in s. 21(4H) and s. 21(4I) will either come to the Tribunal's notice during the course of the hearing or to the notice of the Minister whilst he makes his submission to the Tribunal on governmental policy in an area. So that where the matter before the Tribunal not only affects the land in question but raises a major issue of policy which may have far-reaching effects for the State or region as a whole, the Tribunal or Minister can intervene by giving notice pursuant to s. 21(4H) or s. 21(4I) at any point before a final determination is made. Once this notice is served on the Tribunal its role is then to hear all the evidence and make a recommendation to the Minister, leaving the final decision to the Government.

Thus, under the new amendments to s. 21, at any stage during the hearing until its determination, the Tribunal may refer the matter, with an advisory opinion, to the Minister. The Minister may also at any stage during the hearing direct the Tribunal that a matter is to be determined by him. In effect the government can decide what are matters of major policy and make a determination which does not conflict with these policies. Once the Minister serves a s. 21(4I) notice on the Tribunal or the Tribunal exercises its power pursuant to s. 21(4H) the parties to the appeal are not informed what advice the Tribunal gives to the Minister. This situation is similar to that existing under the old appeal system before 1968, where the parties to the appeal only received the Minister's final determination and not the recommendations of the delegates.

[4] See Herald 23rd November 1978, p. 15.

The Governor in Council makes the final determination on the matter pursuant to s. 21(4J). All that is required to be done under this section is to place a notice of the determination in the Government Gazette stating whether or not the appeal has been upheld, with no reasons given for the determination. The ultimate effect of s. 21(4J) is to deprive the parties of their right under s. 22B(3) of the Act to appeal to the Supreme Court on questions of law. Thus if no reasons are given by the Governor in Council as to why that determination was made, apart from stating that the appeal is refused or allowed, there is no basis upon which a disgruntled party could appeal to the Supreme Court.

Although there have been two cases where the Minister has intervened pursuant to these amendments, there have been no cases where the Tribunal has exercised its powers under s. 21(4H). In one of the two cases where the Minister has exercised his power under s. 21(4I) a final determination has yet to be made by the Governor in Council. In the first case *McGawley* v. *Shire of McIvor*,[5] the appellants objected to the Shire of McIvor granting a permit to build a caravan park on the shore of Lake Eppalock. The objectors appealed against this determination and at the commencement of the hearing the Tribunal was served with a s. 21(4I) notice from the Minister. On 22nd March 1979 the Minister directed the Tribunal to hear the said appeals but not to make a determination thereon as the appeal raised a major issue of policy. Also, a determination of the appeal might have a substantial effect on the achievement of planning objectives or the development of planning objectives within the Lake Eppalock region. The Governor in Council made a determination on 31st July 1979 allowing the appeals and directing that a permit should not issue. No reasons were given for the determination.

The second case where the Minister served a notice on the Tribunal under s. 21(4I) concerned the granting of a permit to extend a regional shopping centre (Doncaster Shopping Town). There were two sets of appeals before the Tribunal against this proposed development. The first appeal was *Newcomb & Others* v. *City of Doncaster & Templestowe*,[6] objecting against the determination of the City of Doncaster and Templestowe to grant a planning permit subject to certain conditions for extensions to Doncaster Shopping Town. The second appeal was *Westfield Corporation (Victoria)* v. *City of Doncaster and Templestowe*,[7] objecting to the imposition of conditions in the permit. Both these appeals had been heard and considered by the Tribunal in August 1978 and the Tribunal had also made an interim determination on 23rd August 1978. What remained to be done on 26th June 1979 was to hear evidence from Mr E. T. Phillips (the Engineer in charge of planning for the Dandenong region for the Country Roads Board) assessing the effects of the closure of Goodson Street. Upon receiving this report the Tribunal made a final determination of the matter on 18th July 1979 allowing both appeals in part and deter-

[5] Unreported Appeal No. X78/1356A.
[6] Unreported Appeal No. X77/1704B.
[7] Unreported Appeal No. X77/1787B.

mined that the permits issued for the development in accordance with the changes indicated on an enclosed plan subject to conditions agreed upon by the parties.

In the meantime on 24th October 1978 Brooking J. in *Addicoat* v. *Fox (No. 2)*[8] indicated that if substantial changes occurred in development plans from those submitted in the initial permit application to those considered during the hearing of the appeal, then the applicant would have to reapply for a fresh planning permit. As a result Westfield Corporation made a fresh application to the City of Doncaster and Templestowe for a planning permit on the basis of the amended plan but the Council refused to grant permission for the development. The applicant Corporation appealed against this determination to the Appeals Tribunal on 25th June 1979 and the original objectors (Newcomb and others) were represented at the appeal. The Victorian Chamber of Commerce and the five municipalities of Kew, Nunawading, Melbourne, Heidelberg and Box Hill sought leave to be added as parties to the appeal. However, the Tribunal held that the Chamber of Commerce, being an unincorporated body, did not qualify as a "person" within the meaning of the Act. Also it was held that the five municipalities were not "persons aggrieved" under the Act and therefore their application to join in the proceedings was refused. Before this case was finally heard by the Tribunal, the Minister served s. 21(4I) notice and, as a result, the Tribunal made its submission to the Minister.

In the first set of appeals the Tribunal was threatened with *mandamus* by the Westfield Corporation if it did not make a determination. The Minister's order was not directed at these appeals and the Tribunal was therefore able to make its determinations on 18th July 1979 in accordance with its preliminary determinations. As a result, the Tribunal's power to make a determination on the first set of appeals before it was not affected by the Minister's notice pursuant to s. 21(4I). However, the second appeal, although relating to the same development, could not be finally determined by the Tribunal because of the Minister's intervention. These two appeals illustrate the confusion that has arisen when the Minister exercises his powers under s. 21(4I).

Although the Tribunal makes its recommendation to the Minister it no longer has the power to make the final determination. It is unfortunate that the parties to the appeal are left "in the dark" for a period of 30 days pursuant to s. 21(4J) whilst the appeal is being referred to the Governor in Council. Even when the determination is made no reasons will be given for the decision. As stated previously, this has the effect of taking away the parties' right to appeal to the Supreme Court under s. 22B(3) of the *Town and Country Act* 1961. These new amendments to s. 21 of the *Town and Country Planning Act* 1961 have the effect of reducing the power of the Town Planning Appeals Tribunal. It may be argued that matters of major policy affect only a small percentage of cases, as the determination of the Governor in Council "shall operate in all respects as the determi-

[8] [1979] V.R. 347.

nation of the Tribunal".[9] Nevertheless, the new sub-section does have the effect of reducing the independent decision-making power of the Tribunal and this raises the issue of whether or not the government will legislate again to whittle away further powers of the Tribunal.

The effect of the amendments is that in a small percentage of cases there is a reversion to the pre-1968 system of the hearing of planning appeals, where the Minister appointed delegates to hear the appeal and he could accept or reject their recommendations. Similarly, under the new amendment the Minister hears recommendations from the Tribunal and presumably he can accept or reject the recommendations made. The amendments to s. 21 of the *Town and Country Planning Act* 1961 mean that the Tribunal is no longer the final arbiter of all planning disputes. In certain instances the government of the day has power to make final determinations on cases involving future planning policy for an area or region, as the Governor in Council is empowered to step into the shoes of the Tribunal.

## LEGISLATIVE COMMENT

### THE MARKET COURT ACT

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In 1978 the Victorian Parliament enacted legislation establishing a Market Court.[1] This comment examines and evaluates the functions and procedures of this legislation which is aimed at protecting consumers and regulating traders.

In announcing the legislation, the then Minister for Consumer Affairs, Mr Ramsay, stated that it represented an attempt to regulate or eliminate those traders who have thus far been able to avoid the impact of Victoria's existing consumer-orientated legislation, those traders "whose main concern seems to be to take from the consumer without giving value in return".[2] The new Act adds to the existing consumer legislation a power vested in the Director of Consumer Affairs to take action against a trader who in the opinion of the Director has "repeatedly engaged in conduct that is unfair to consumers".[3] The potential magnitude of this addition is vast, as the Act has created the machinery whereby trading practices which are deemed unfair can be prevented without the need for further ad hoc

[9] S. 21(4J) *Town & Country Planning Act* 1961.

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[1] *Market Court Act* 1978 (Vic.) commenced on 1 June 1979 (hereinafter referred to as "the Act").

[2] *Victorian Parliamentary Debates* (Hansard) 19 October 1978, 4936.

[3] S. 15.