CONFLICT OF PLANNING LEGISLATION WITH PRIVATE INTERESTS: LITIGATION LIKELY TO ARISE FROM THE IMPLEMENTATION OF A PLANNING SCHEME*

The first group of papers in your Summer School is concerned with local government and property law, and in particular with the implementation of planning legislation. Town planning has become a major pre-occupation of central and local government. Citizen participation and interest in the administration of planning schemes ensures that this area of local government is not attended by the apathy frequently accorded to other branches of the legislative and administrative process. By its very nature town planning tends to precipitate situations in which the landowner finds himself subject to irksome restrictions. But for the most part he has come to accept town planning as an inevitable fact of life with a complacency which would make his 19th century laissez-faire landowning ancestor turn in his grave. But, fortunately for the lawyers, he does not give up without the occasional struggle. If a planning scheme affects him too closely for his liking he will exhibit that sturdy spirit of independence which characterised his forbears. And that spirit of independence will take him into court where he will hope to throw off some of the shackles with which the town planners have bound him.

I propose in this paper to discuss some of the more common forms of litigation which arise out of the implementation of planning schemes. In doing so, I am not unmindful of the fact that Western Australian practitioners may not necessarily have to deal with the same problems as have arisen in New South Wales. Yet I venture to think that the problems which you experience, and will experience, differ little from those encountered elsewhere. A broad examination of your town planning legislation leads me to believe that it places much the same kind of restrictions on landowners as arise under our legislation.

In assaying the task of discussing some of the more common forms of litigation in this branch of the law, I am conscious that within the limitations of this paper I can only give a cursory examination of each

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* A paper read at the Annual Summer School at the Law School of the University of Western Australia, February 1971.

matter discussed. The matters upon which I propose to offer some comment are:

1. Land Use Control—Continuance of existing uses.
2. Land Use Control—Enlargement and extension of existing buildings.
3. Claims for Injurious Affection.
4. Imposition of Conditions on Development Consents.
5. The Forum for Determining Conflicts of Private Interests with Planning Schemes.

To embark upon a detailed discussion of each matter would make this paper of inordinate length. But I hope that what I have to say will be relevant to your consideration of some of the problems with which you will be confronted arising out of the implementation of planning schemes.

LAND USE CONTROL—CONTINUANCE OF EXISTING USES

It is usual for town planning schemes to provide that existing uses of lands and buildings may be continued notwithstanding the provisions of the scheme. For example, by-law 372 applying to the Shire of Perth provides:

> If at the date of the publication of these by-laws in the Government Gazette, any land, building or structure is being lawfully used for a purpose or built on in a manner not permitted by these by-laws, such land, building or structure may continue to be used for that purpose or in that manner but no such building or structure shall be added to or altered unless special permission to do so is granted by the Board.

Provisions of this kind immediately give rise to questions as to the "purpose" for which the relevant land or building was used at the date of commencement of the planning scheme. Planning schemes commonly provide for the zoning of land, and in relation to each kind of zone, provision is made forbidding use of the land or building therein except for purposes described in the scheme. These purposes are commonly described in very general terms, for example "light industry", without further specification of the particular purposes permitted. Does the right to continue the use of land for the purpose for which it was being used at the relevant date include a right to use it only for the particular purpose for which it was then being used? The question arose before Jackson J. (as the Chief Justice then

was) in *O'Keefe v. Shire of Perth.*[1] In that case, a piece of land was being used for the purpose of a pottery at the time of the introduction of a planning scheme which classified the land as being within a 'residential and flat zone'. Subsequently, the land was put to use for the manufacture of metal office cabinets and similar articles. The relevant by-law was in the terms mentioned above permitting land to be continued 'to be used for that purpose or in that manner' as it was being used at the time of the publication of the by-law. His Honour held that the purpose for which the land might continue to be used was not limited to the particular purpose for which it had previously been used, that is as a pottery. His Honour adverted to the listing in the by-laws of "light industry" as a "purpose", and held that the land might continue to be used for any purpose of any of the permitted uses of a general class within which the particular purpose fell. As a pottery fell within the general class of "light industry" his Honour held that the land could be used for any other purpose comprehended by the word "light industry". This liberal approach differed from the view taken in New South Wales where, in a series of decisions, Sugerman J. (as he then was) had confined the meaning of the word "purpose" in similar legislation to the particular purpose for which the land was being used at the relevant time.[2] On appeal to the High Court in *O'Keefe's* case[3] the more liberal approach did not find favour. The High Court held that the land might continue to be lawfully used for pottery making but not for the purposes of any other activity within the category of "light industry".

This decision has important practical consequences and a practitioner needs to bear it in mind when advising a client as to his right to change the use of his land or premises without first obtaining a town planning consent. It is not always easy to decide whether a change in the nature of the activities carried on leads to a change of use. For instance, does the fact that premises were used as a butcher's shop at the date of commencement of a scheme entitle the owner, or a subsequent owner, to change the use of the premises to a grocer's shop? In *O'Keefe's* case Kitto J. thought not[4] but Menzies J. had doubts on the matter.[5]

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1 [1964] W.A.R. 89.

2 Forrester v. Marriackville Council, (1954) 19 L.G.R.(N.S.W.) 232; Bonus Pty. Ltd. v. Leichhardt Municipal Council, (1954) 19 L.G.R.(N.S.W.) 375; Price Pty. Ltd. v. Leichhardt Municipal Council, (1959) 4 L.G.R.A. 63.

3 (1964) 110 C.L.R. 529.

4 Id. at 535.

5 Id. at 537.

In *Thompson v. Cash Clearances Pty. Ltd.*[6] Moffitt J. (as he then was) held, following *O'Keefe's* case, that it was an insufficient categorisation of the "purpose" of an existing use to define it as merely being that of a retail shop. In that case, on the day when the scheme took effect, the subject building was used as a shop for the sale of groceries, soft drinks, fruit and vegetables. The defendant was charged with using the premises (without consent) as a retail electrical goods shop. It seems clear from his Honour's decision that he regarded such a change as being a change of use and not within the right to continue the existing use of the premises.

But even on Kitto J.'s view, there is room for a change in the nature of the activities carried on in a particular shop before such change amounts to a change of use for planning purposes. There is obvious need for flexibility in the application of a provision of this kind which is designed to enable businessmen to continue to conduct their existing businesses notwithstanding the introduction of a planning scheme. This flexibility was reflected in a recent decision in New South Wales of Else-Mitchell J. in *Rankine v. Lane Cove Municipal Council.*[7] In that case shop premises had been used as a general grocery store before the implementation of a planning scheme. The owner desired to conduct upon the premises the business of a spirit merchant in conjunction with the sale of groceries. It was held that the conduct of the business of a spirit merchant did not require fresh planning consent as that business fell within the business of a general grocery store, and was hence covered by the existing use provisions.

It will be seen that it is often a question of some nicety whether there has been a change of use or not. The answer in each case may depend on matters of fact and degree. The above cases afford a measure of guidance in reaching a conclusion in any particular case.

It must be borne in mind that even if a planning scheme permits a existing use to be continued without planning consent, the right to continue such a use may be lost if there is some substantial interruption in the particular use. This is so even in the absence of a provision in the scheme terminating existing use rights upon discontinuance of the use for any particular period. It will be remembered that the right given by the Shire of Perth by-law is that land 'may *continue* to be used' for the purpose for which it was being used at the date of publication of the by-law. Reference to one or two cases on the sub-

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6 (1967) 14 L.G.R.A. 347.
7 (1969) 18 L.G.R.A. 40.

ject may give some guidance in reaching a conclusion whether a use which was originally protected by an existing use provision has lost its protection by reason of discontinuity.

In *William McKenzie Pty. Ltd. v. Leichhardt Municipal Council*[8] premises which had been used for many years as a factory in which boilers and boiler components were made were vacated by the owner. The plant and equipment previously used in the factory were dismantled and taken away. Thereafter the premises remained vacant for a period of six months and were not occupied for any purpose. Else-Mitchell J. was of the the opinion that

> a mere temporary interruption in the conduct of a trade or business will not prevent its being carried on continuously for the concept of continuity . . . is not one which is absolute in time.

But he held that the facts admitted of no other construction but that the previous use had come to an end upon vacation of the premises.

In *Rosenblum v. Brisbane City Council*[9] the High Court, in dealing with analogous legislation said:

> It is not difficult to agree that the use of premises for a given purpose is not necessarily interrupted whenever activities for that purpose are temporarily stopped. When such an ordinance as is here in question refers to the purpose for which land or a building 'was used' on a given day, it calls for an inquiry not limited to the physical activities which might have been observed on the land or in the building on that day, but taking account of any course of user which may fairly be regarded as having been current on that day. Most forms of user of land or buildings involve not continuous activity but recurring activities. There is no inaccuracy in describing a grocer's shop as being used as such on every day of the period in which the grocer has his business there, notwithstanding that on Sundays and holidays it is locked up and no activity of any sort occurs. Whether an interruption of activity put an end to the user must always be a question of fact, and in resolving the question in each case that arises the circumstances of that case must necessarily be considered as a whole.

No doubt the period of interruption in continuity of use required to destroy existing use rights will depend on the nature of the activity. To close a retail shop for a month may amount to a discontinuance of use, especially if the premises are put to some other use whilst retailing activities are discontinued. On the other hand, intermittent use of some types of industrial premises will not destroy existing use rights. Some industrial uses of land tend to be spasmodic, for example,

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8 (1964) 10 L.G.R.A. 137.
9 (1957) 98 C.L.R. 35.

quarrying. In *R. v. City of Oakleigh*[10] Sholl J. had to consider the effect of legislation which authorised 'the continuance of the use of any land' for the purpose for which it was used prior to the coming into operation of the relevant by-law. He held that the concept of continuance in this context was the notion of keeping on doing what was done on the land before the relevant by-law came into operation, not necessarily without interruption, but without abandonment of the relevant purpose and without a definite change to any other use. Applying this test, he was of the opinion that a company which used land for the business of quarrying clay and making bricks did not lose the right to continue such use merely because use of the land for such purposes ceased on various occasions due to wartime restrictions and vicissitudes of trade. The company had intended to resume operations as soon as commercial and other conditions allowed and accordingly there had been no abandonment of use.

It will therefore be seen that questions of fact and degree will not only determine whether a particular use is within the protection afforded by an existing use clause, but will also determine whether the protection originally afforded has been lost.

LAND USE CONTROL—ENLARGEMENT AND EXTENSION OF EXISTING BUILDINGS

Not only do planning schemes usually give a right to continue existing uses, but they frequently give a right to enlarge and extend existing buildings. See, for example, clause 31(1)(b) of the Bunbury Scheme which provides that the scheme shall not preclude—

> (b) the enlargement, rebuilding or extension of any building or the continuance of the use of the building as so enlarged, rebuilt or extended for the purpose for which it was lawfully used immediately before the approved date, provided the building as so enlarged, rebuilt or extended does not extend beyond—
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> (i) the premises on which the building was situated immediately before the approved date; or
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> (ii) any adjoining land which immediately before the approved date was in the same ownership and might lawfully have been used for the same purposes.

The right to enlarge and rebuild buildings without planning consent is, of course, a very valuable one, as frequently a planning authority may be minded to refuse consent if its consent is required. Developers

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10 [1963] V.R. 679.

seek to place the widest possible interpretation upon such clauses in order to be able to expand their premises, particularly commercial and industrial buildings, untrammelled by town planning control. It is therefore not surprising that the courts have been called upon to determine the extent of the protection given by clauses of this type.

In *R. v. The Shire of Ferntree Gully; Ex parte Hamley*[11] the relevant by-law prohibited the erection or alteration of buildings except under certain circumstances but did not preclude

> the continuance of the use of any land or any building for any purpose for which the same was used immediately before the coming into operation of the by-law or the enlargement, rebuilding or extension of any building used for any such purpose whether or not such enlargement, rebuilding or extension involved the use of adjoining land which immediately before the coming into operation of the by-law was in the same ownership.

For many years prior to the coming into operation of the by-law the land had been occupied by a residence and out-buildings, including a large poultry shed and associated buildings. The owner wished to place a further two poultry sheds on the land. Herring C.J. held that such work was protected by the legislation, which you will observe was in terms similar to those which are found in clause 31(1)(b) of the Bunbury Scheme. The Chief Justice said:

> It is thus the 'enlargement, rebuilding or extension' of a building or buildings, that is authorised and one moreover that may involve the use of adjoining land. The question is what is the meaning of the word 'extension' in this connection. That it is not used in the sense of 'enlargement' is clear from the context, for if so read it would add nothing to the words that go before. 'Enlargement' involves an increase in the size of an existing building, and no doubt when it involves an increase in the area covered by the building, there may be said to be an 'extension' of it. But it would not cover the case where an additional wing or an annexe is added to an existing building. In such a case there is a spreading out or 'extension' and it seems to me that the word 'extension' in the proviso covers the building of additional or supplementary buildings.[12]

This interpretation of a provision frequently found in planning legislation gives to the landowner a most valuable right to extend his premises without planning consent. At the date when a scheme takes effect an industrialist may own a parcel of land five acres in extent upon which is erected a factory building only one acre in area. He

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11 [1946] V.L.R. 501.
12 Id. at 513-514.

may well be able to add greatly to the size of the existing factory and to erect separate and free standing buildings on the balance of his five acre parcel without obtaining further development consent. Herring C.J.'s decision was followed by Sholl J. in *R. v. City of Oakleigh*.[13] It was there held that the above by-law authorised the pulling down of an existing brick making plant and the building of another larger and more efficient plant. His Honour thought that this was 'an extension in the relevant sense'.[14]

Broadly similar provisions are found in the New South Wales legislation. In *Panaretos v. Rockdale Municipal Council*[15] Hardie J. (the Judge of the New South Wales Land and Valuation Court) had to decide whether a shop which had been demolished to make way for a road widening scheme could be rebuilt without planning consent. It was intended to set the new shop back some little distance from the new road alignment. The relevant clause in the planning ordinance permitted an existing building to be 'altered, enlarged, rebuilt, extended or added to by the erection of new buildings' without consent. Hardie J. held that the clause authorised the building of the new shop without consent. Being functionally adapted for the same purpose as the old shop was used, he thought that the new shop would constitute a "rebuilding" of the old demolished premises within the meaning of the clause.

A more cautious and perhaps narrower interpretation of the same clause was given by Else-Mitchell J. in *Woollahra Municipal Council v. Double Bay Marina Pty. Ltd.*[16]

I think I have said enough to indicate that there is much scope for conflict between landowner and planning authority in the existing use provisions commonly found in planning schemes. There is no reason to suppose that in the future landowners will show any reluctance to resort to the existing use provisions of planning schemes in order to circumvent the limitations otherwise placed on the development of their lands. Lawyers are likely to find themselves called upon with increasing frequency to help resolve conflicts of this kind.

CLAIMS FOR INJURIOUS AFFECTION

Whilst the community generally may benefit from the implementation of a town planning scheme, it is likely that the interests of some people

13 [1963] V.R. 679.
14 Id. at 683.
15 (1965) 12 L.G.R.A. 139.
16 December 1969—as yet unreported.

will be adversely affected by it. For this reason planning schemes make provision for injurious affection claims. The valuable rights to continue the existing use of land and buildings and to enlarge and extend existing buildings do much to reduce the restricting effect which a scheme would otherwise have on land use. Injurious affection is, of course, to be distinguished from disappointed expectation. A person has no claim because his land has not been increased in value by a favourable zoning.

Although the New South Wales legislation contains elaborate provisions for the making of injurious affection claims, there has been a remarkable dearth of litigation in this area of the law. And my reading of your law reports leads me to believe that your experience is no different from ours. This may be because the most obvious injurious affection claims would arise where lands are zoned in such a way as to lead to their subsequent public acquisition. Zoning of lands for public highways and public parks would be examples. As to the making of claims in such cases see section 36 of the Metropolitan Region Town Planning Scheme Act 1969, as amended. In these cases the element of injurious affection is no doubt taken into account in bargaining between the owner and the resuming or acquiring authority. This avoids the necessity for litigation to enforce separately the claim for injurious affection, a claim which may well have arisen upon prescription of the planning scheme. Nevertheless, I suspect that many valid injurious affection claims never see the light of day in court because of lack of familiarity by the profession with the details of planning legislation and inability to distinguish the compensable injurious affection claim from the non-compensable "disappointed expectation". I am sure this is the position in my own State, and it may also pertain in yours.

Section 11(1) of the Town Planning and Development Act provides, inter alia, that—

> Any person whose land or property is injuriously affected by the making of a town planning scheme shall, if such person makes a claim within the time if any limited by the scheme . . . be entitled to claim compensation in respect thereof from the responsible authority.

The right to compensation exists only where injurious affection is suffered by a person whose land or property is affected by the making of the scheme and not where damage results from activities or proposed activities on lands not owned by the claimant. This distinction

is brought out in the decision of Virtue J. in *Folkestone v. Metropolitan Region Planning Authority*.[17] The plaintiffs were the owners of land contiguous to land which had been reserved and zoned for the construction of roads by the promulgation in 1963 of the Metropolitan Region Town Planning Scheme. The plaintiffs contended that their land had been injuriously affected within the meaning of section 11(1) notwithstanding that no part of their land was resumed, nor were any restrictions placed upon the use or development of it. They claimed that the construction of the proposed roadway upon the contiguous land would diminish the attractiveness and value of their land, and that this was compensable. His Honour held that there was no right to compensation for injurious affection. Such injury as the plaintiffs' land had suffered was not related to any restriction placed on the enjoyment or development of it. His Honour pointed out that if the argument for the plaintiff were to be accepted, any owner of land, the value of which was affected in the slightest degree by the possible effect of the implementation of the scheme would be entitled to recover compensation whether or not the scheme imposed any impediment on its use. In rejecting the argument, his Honour adverted to the terms of the Act which state that the right to compensation under section 11 is limited to compensation for injurious affection 'by the making of the Scheme', not for injury resulting from implementation of the scheme. This is an important distinction.

If your experience of town planning is anything like ours, a long period of gestation precedes the birth of the scheme. What is the position of the landowner whose land is diminished in value *prior* to the commencement of the planning scheme because of public knowledge that his land is likely to be injuriously affected when the scheme comes into force? This can be a real problem. If it is known that a parcel of land is likely to be zoned for a road or a public park, its value may be diminished before the scheme takes effect. What is the position of such an owner whose land is resumed by a public authority prior to the coming into force of the planning scheme? He has no claim for injurious affection because he cannot bring himself within the terms of section 11(1) in the absence of a planning scheme having been "made". Upon resumption, he is entitled to the value of the land resumed, but how is this value to be determined? In *Chapman v. The Minister*[18] land was resumed at a time when a draft planning scheme

17 [1968] W.A.R. 164.
18 (1966) 13 L.G.R.A. 1.

was under consideration. The provisions of the draft planning scheme operated to depreciate the value of the land as at date of resumption. But upon prescription of the planning scheme, a right to claim compensation for injurious affection would have been given to the owner. The New South Wales Court of Appeal held that in assessing the value of the land for resumption purposes, regard must be had to the circumstance that the plaintiff was not only having his land taken from him, but also his inchoate right to compensation for injurious affection. The Court held that the probability of an equalising right of compensation for injurious affection should be taken into account along with the depreciating effect of the draft planning scheme when compensation was assessed. The Court reached this conclusion by adopting and applying the reasoning in *Thistlewayte v. The Minister.*[19] The decision may be of considerable importance to landowners in your State whose lands are resumed for public purposes prior to the coming into force of a planning scheme. The case is distinguishable from *Konowalow and Felber v. Minister for Works*[20] where Virtue J. had to deal with a situation where part only of the plaintiff's land was resumed and a claim was made for injurious affection of the remaining land alleged to be caused by roadworks carried out on the resumed area.

From a practical point of view great difficulty can arise in determining the value of land which is resumed at a time when there is uncertainty as to its future zoning. The very state of uncertainty may well make the land almost unsaleable as at date of resumption and hence a valuer may find it impossible to find sales of comparable lands in order to fix its value. In such a case, a plaintiff may well be in a dilemma as to the evidence which he should call in support of a claim for compensation. If his valuer places a value on the land based upon a zoning which it is anticipated will be given to the land, and if the court does not accept that the land will be so zoned, the plaintiff may be in a position where he has not led evidence of value on a basis acceptable to the court. In this situation, the result can be disastrous, as is exemplified by the decision of Else-Mitchell J. in *Stocks & Parkes Investments Pty. Ltd. v. The Minister.*[21] In that case, a large parcel of land was resumed at a time when the draft planning scheme proposals for the area did not envisage its subsequent zoning for residential purposes. Notwithstanding this, the only evidence of

19 (1953) 19 L.G.R. (N.S.W.) 87.
20 [1961] W.A.R. 40.
21 (1968) 17 L.G.R.A. 192.

value led by the plaintiff was based on its future zoning for residential purposes. The defendant led no evidence at all. The judge was left in the position where he could not place a residential value on the land and, having no other evidence before him felt constrained to place a nominal value of one dollar upon it. The decision is subject to appeal, but it demonstrates the wisdom of leading evidence on alternative bases of value when land is resumed at a time when there is any doubt as to its likely future zoning.

The restrictions imposed upon the making of injurious affection claims by the provisions of section 12(2) of the Town Planning and Development Act no doubt account, to a large degree, for the paucity of such claims. A provision of this kind is commonly found in town planning legislation, presumably to avoid the making of claims for compensation beyond the capacity of the community to meet them. Section 12(2) has its counterpart in the New South Wales legislation and hence the judicial interpretation of our legislation in this respect may be of interest.

Section 12(2) provides:

> land or property shall not be deemed to be injuriously affected by reason of the making of any provisions inserted in a town planning scheme which, with a view to securing the amenity, health, or convenience of the area included in the scheme, or any part thereof, prescribe the space about or limit the number, or prescribe the height, location, purpose, dimensions, or general character of buildings, or any sanitary conditions in connection with buildings, or the quantity of land that may be taken for parks or open space, which the local authorities, having regard to the nature and situation of the land affected by the provisions, considered reasonable for the purpose.

Section 342 AC(2)(c) of the Local Government Act 1919 (N.S.W.) as amended, provides:

> Compensation shall not be payable in the following cases . . .
> (c) where an estate or interest in land is affected by any provision of the prescribed scheme which prescribes the space about buildings or limits the number of buildings to be erected, or prescribes the height, bulk, floor space, use, design, external appearance, or character of buildings.

In *Baker v. Cumberland County Council*[22] Sugerman J. held that no compensation was payable for diminution in the value of land in an area zoned under the County of Cumberland Planning Scheme Ordi-

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22 (1956) 1 L.G.R.A. 321.

nance as a "Green Belt Area". The Scheme Ordinance provided that in such a zone buildings could not be erected for most purposes. Dwelling houses were permitted to be erected with the consent of the Council provided they stood on an area of land not less than five acres in extent. His Honour held that the relevant provisions of the ordinance did not amount to a 'provision which prescribed the space about buildings' within the meaning of section 342 AC(2)(c). He further held that they did not amount to a 'provision which limits the number of buildings to be erected'. More importantly, however, he held that the relevant provisions of the ordinance, insofar as they dealt with the erection of buildings in a Green Belt zone, and prescribed the purposes for which such buildings might be erected with consent, were provisions which prescribed the "character" of buildings. This being so, no compensation was payable. If this decision were followed in Western Australia, it would seem that injurious affection claims stemming from mere zoning restrictions would not succeed.

Nevertheless, your legislation, like ours, still leaves areas where injurious affection claims are probably maintainable. Zoning or reservation of land for road purposes is probably one such area. A claim for injurious affection based on the zoning of land for road purposes would probably not be caught by section 12(2), but would it be caught by section 12(1)? That subsection provides:

> (1) Where land or property is alleged to be injuriously affected by reason of any provisions contained in a town planning scheme, no compensation shall be payable in respect thereof if or so far as the provisions are also contained in any public general or local Act, or in any order having the force of an Act of Parliament, in operation in the area, or are such as would have been enforceable without compensation, if they had been contained in a by-law lawfully made by the local authority.

A substantially similar provision appears in the New South Wales legislation. However, in *Bingham v. Cumberland County Council*[23] Sugerman J. held that such a provision did not disentitle the landowner from bringing his claim for injurious affection, and this notwithstanding the existence in our legislation of various provisions entitling public authorities to acquire lands for road-making and road-widening purposes. No doubt similar provisions appear in your legislation. Sugerman J. took the view that there was a great difference in a provision which specifically zoned a particular parcel of land for road purposes, and those provisions of the general law which enable

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[23] (1954) 20 L.G.R. (N.S.W.) 1.

public authorities to carry out their road-making functions. He thought that these latter provisions were no more than general empowering provisions with no greater applicability to the claimant's land than to any other land in the State. The reasoning which led his Honour to reject the argument that the claim for injurious affection was barred because a similar provision was contained in other legislation would seem to be applicable to the provisions of section 12(1).

Within the restricted field allowed by the legislation there is still room for the valid claim for injurious affection. The proliferation of planning schemes will undoubtedly lead to an increase in the number of such claims. The task of the lawyer, not always an easy one, is to distinguish the compensable from the non-compensable claim. It is but another area in which the conflict of private interest with planning legislation calls for increased awareness by the profession of the problems involved.

IMPOSITION OF CONDITIONS ON DEVELOPMENT CONSENTS

Given a situation in which a landowner requires consent to use land or erect a building, it is likely that the planning authority may be prepared to grant such consent only subject to a number of specified conditions.[24]

Questions therefore arise as to the ambit of the power of a planning authority to annex conditions to a consent which it grants. An applicant who receives a consent subject to conditions may elect to exercise his right of appeal against the imposition of such conditions, and seek to persuade the appellate tribunal that the imposition of the conditions is an unreasonable exercise of power. On the other hand he may wish, in an appropriate case, to challenge the very power of the planning authority to impose the relevant conditions. It may therefore be helpful to refer to some of the decided cases on the ambit of the power to impose conditions in order to gain some appreciation of the limits to which planning authorities can safely go in imposing conditions on consents issued by them.

A useful starting point is the oft-applied dictum of Lord Jenkins in *Fawcett Properties Ltd. v. Buckingham County Council.*[25] His Lordship said:

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[24] See s. 26(2) of the Town Planning and Development Act 1928, as amended.
[25] [1961] A.C. 636, 684.

> The power to impose conditions though expressed in language apt to confer an absolute discretion on a local planning authority to impose any condition of any kind they may think fit is, however, conferred as an aid to the performance of the functions assigned to them by the Act as the local planning authority thereby constituted for the area in question. Accordingly the power must be construed as limited to the imposition of conditions with respect to matters relevant, or reasonably capable of being regarded as being relevant, to the implementation of planning policy.

But the 'implementation of planning policy' frequently carries with it the erosion of common law rights to user of property and the gaining of a consent may well be at the price of the giving of a *quid pro quo*. This is made clear in the judgment of the High Court in *Lloyd v. Robinson*,[26] a decision on appeal from the Supreme Court of Western Australia. It was there sought to be contended that certain conditions imposed by a Town Planning Board when approving a proposed subdivision under the provisions of section 20 of the Town Planning and Development Act were invalid, and that a decision of the Minister on appeal from the Board was not binding on the plaintiffs. The plaintiffs argued, *inter alia*, that it was *ultra vires* the Board and the Minister to impose a condition requiring a transfer of land to the Crown free of cost, because in the absence of any provision for compensation the Act should not be construed as intending to authorise what was alleged to be a confiscation of private property. The High Court rejected this approach and held that provided that the condition sought to be imposed was relevant to the town planning issues involved, there was

> no foothold for any argument based on the general principle against construing statutes as enabling private property to be expropriated without compensation. The Act at its commencement took away the proprietary right to subdivide without approval, and it gave no compensation for the loss. But it enabled landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the Board was entrusted with the relevant discretion.[27]

Within the limitations imposed by the above statements of principle, it is possible for a planning authority to impose a wide variety of conditions on planning consents. Provided the condition is in further-

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26 (1962) 107 C.L.R. 142.
27 Id. at 154.

ance of the policy discoverable in the planning legislation, it is likely to be valid.

One matter which can cause concern to a planning authority when granting a development consent to the erection of a building is the question whether the actual building work involved in the erection of the building will interfere with the amenity of the neighbourhood. For example, if a planning consent is being given to the erection of a substantial residential flat building in a residential area, the planning authority may think it desirable to limit the hours of work during the construction of the building so as to preserve the amenity of the neighbourhood whilst the building is being erected. There is no doubt that it can impose conditions related to the completed structure, either as to size, height or any other physical feature, but does the power to impose conditions extend to the imposition of limitations upon the hours of construction work? This interesting question was recently decided by the High Court in *Allen Commercial Constructions Pty. Ltd. v. North Sydney Municipal Council.*[28] The Court was unanimously of the opinion that the New South Wales planning legislation authorised the imposition of such a condition on a planning consent. The broad terms of your legislation might well justify the imposition of a condition of the kind upheld in the *Allen Commercial Constructions* case. Walsh J. (with whose judgment Barwick C.J. and Windeyer J. concurred, and with whom Menzies J. concurred with a reservation immaterial for present purposes) thought that it was wrong to say that because the planning legislation was primarily concerned with the purposes for which buildings were to be used, therefore it must be construed as only dealing with buildings after they have been erected. The consent which was required extended to the putting up of the building, and there was no warrant for saying that the planning authority was bound to grant that consent unconditionally. It was not precluded from taking into account matters relating to the actual erection of the building, as distinct from its future use.

But wide as is the power to impose conditions, the courts will bring them down if they do not have the necessary relevance to the power being exercised. Thus, where a planning authority granted a consent in the nature of a development consent to use land as a caravan park and sought to impose conditions in favour of prospective occupiers of caravans *qua* security of tenure and other matters, the House of

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28 December 1970—as yet unreported.

Lords had no difficulty in holding that the conditions went beyond the powers conferred by the relevant Act upon the local authority and were *ultra vires.*[29] In *Woolworths Properties Pty. Ltd. v. Ku-ring-gai Municipal Council*[30] Else-Mitchell J. held in the New South Wales Land and Valuation Court that it was beyond the power of a local authority to impose a condition upon a developer seeking to erect a supermarket requiring him to pay a sum of money to the local authority towards the cost of providing car parking facilities for the local shopping centre. His Honour's decision would have been different if the contribution had been required by the Council to defray the cost of providing parking facilities for prospective customers of the supermarket. And in another, but similar, context see *Marsh v. Shire of Serpentine-Jarrahdale,*[31] where the High Court held that the power to make by-laws to regulate or prohibit quarrying on land without the licence of a Board did not extend to imposing a condition upon grant of a licence requiring payment of a sum of money related to the volume of material to be quarried. There may also be cases of invalidity of conditions on the ground of uncertainty.[32]

THE FORUM FOR DETERMINING CONFLICT OF PLANNING LEGISLATION WITH PRIVATE INTERESTS

The inevitability of litigation arising out of the implementation of planning schemes, whether related to injurious affection claims or planning appeals or other types of dispute, gives rise to the question as to the most suitable forum for the determination of such disputes. Few people would dispute that a judicial determination in a court is the only satisfactory manner of determining matters such as injurious affection claims, claims for betterment, compensation claims, and the like. And the traditional supervision by the courts of administrative bodies will continue to protect the landowner from actions taken in excess of power and will enable the community, developer and planning authority alike, to obtain declarations in appropriate cases as to the proper construction of the powers and duties arising under planning legislation. Hence, the courts must in the future, as they have in the past, play an important part in the implementation of planning schemes.

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29 Mixnam's Properties Ltd. v. Chertsey Urban District Council, [1965] A.C. 735.
30 (1964) 10 L.G.R.A. 177.
31 (1966) 40 A.L.J.R. 317.
32 Television Corporation Ltd. v. The Commonwealth, (1963) 109 C.L.R. 59 per Kitto J. at 70-71.

But there is room for argument as to the most suitable appellate tribunal to determine appeals from planning authorities in respect of applications for consent made to them. I understand this is a matter of some current interest in Western Australia and is the subject of a Bill currently before the Legislative Assembly. The purpose of the Bill is to add a Part V to the Town Planning Development Act for the purpose of providing for alternative appeals to the Minister or to a Town Planning Court. It is not for me, unversed as I am in the ways of town planning in your State, to make suggestions as to the best form of appellate procedures in your State. But some observations on the relative merits of judicial and non-judicial appeals in a somewhat similar town planning climate elsewhere may be of interest.

No doubt every case and every appeal is of importance to the protagonists. But some cases are more important than others. I suggest that more often than not planning appeals involve more important issues than are involved in many other forms of litigation. Frequently the financial stakes involved are higher than in other forms of litigation. A permission to use a parcel of land for, say, a service station or a hotel or a factory may add greatly to the value of the land. In such a case the appellant is usually prepared to support his appeal with the best available technical evidence and is anxious that his case should be presented by his legal adviser and that the adversary's case should be tested. And since town planning bodies (whether attached to the central government or to local government) are subject to the usual pressures of competing interests, there is a very strong case to be made for requiring such important disputes between the citizen and the planning authority to be determined by a completely independent and impartial tribunal. I believe that a large section of the community holds firmly to the view that a tribunal is much more likely to be independent and impartial if it is also a judicial tribunal.

It is sometimes said that town planning appeals, involving as they do decisions on matters of policy, are best decided by administrative tribunals and not by the courts. I believe this to be a generalisation which does not bear close examination. Given the existence of government policy as expressed in an Act of Parliament or legislative instrument it has always been the task of the courts to interpret that policy and to give decisions within the framework of that policy. And given the existence of government policy *qua* planning as disclosed in town planning legislation and planning schemes, there appears to me to be no sound reason for saying that a court is less able to interpret and

apply that policy in particular cases than is any other tribunal. Indeed, experience proves the contrary.

There is a distinction to be made between appeals brought at a time before a planning scheme has reached its final form (in New South Wales called "interim development" appeals) and appeals brought after a scheme has reached its final form and has passed into law. There is much to be said for the view that until the planning authorities have determined what form a planning scheme should take and what land zonings should be adopted, it is desirable that decisions on planning appeals should remain with the planning authority itself.[33] But where a planning scheme has reached finality, the making of a decision whether a particular development should be permitted within the framework of that scheme involves an evaluation of the merits of the particular application. The making of such an evaluation, probably after hearing expert evidence on both sides, is one for which a court is peculiarly fitted. More especially is this the case if the court is constituted by a judge who, by experience in dealing with such appeals, is able to formulate general principles and thus maintain a consistent approach to varying factual situations. And the parties to the appeal are more likely to be satisfied with the decision if it comes from the judiciary rather than from a tribunal which, however fair in its approach, does not have that mark of impartiality which characterises the Bench. I am sure this is the general feeling of the legal profession in my State, and I think it is shared by local government bodies and developers alike. No doubt this is partly due to the respect which the Judges of the Land and Valuation Court have engendered over the period of twenty years in which planning appeals have gone to that Court. But I think it is also due to the general preference which the community has for the judicial determination of disputes arising out of conflicts of private interests with central and local government policies—whether those policies be planning policies or otherwise.

If one puts aside those appeals that arise for consideration before details of a planning scheme have been sufficiently worked out to be incorporated into a final scheme, it is difficult to see a valid reason for preferring a non-judicial tribunal.

Judges have always been equal to the task of adjudicating upon disputes involving differing points of view in a particular field of expertise. Every day of the week judges decide cases in which differing

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33 Begley and Begley and Anor. v. Shire of Wanneroo, [1970] W.A.R. 91.

points of view are put forward by architects, engineers and other experts. There is no reason why "other experts" should not include town planners.

It is sometimes said that a hearing in court is likely to be more expensive and involve greater delay than a hearing before an administrative tribunal. As to expense, there is little difficulty in framing rules which require all parties to bear their own costs, except in quite exceptional circumstances, or alternatively, in providing for scales of costs appropriate to the nature of the issues in the appeal. For instance, the rules of our Land and Valuation Court empower a judge to order an unsuccessful party to pay the whole, three-quarters, half, or one-quarter of his successful opponent's costs, depending upon the nature and importance of the case. Indeed, it is not uncommon for an order to be made that each party bear its own costs, whatever the result. In practice, it is usually found that costs are no deterrent to either party as the importance of the issue involved makes it worthwhile to litigate the matter. In any event if parties wish to be legally represented before an administrative tribunal the costs of such representation are unlikely to be much less than the costs of representation in court. It is interesting to note that section 41 of the Bill presently under consideration gives the Minister power to award such costs as he thinks fit in a case where an appeal is taken to him rather than to the Court.

One considerable advantage of judicial determination of planning appeals is that over a period of time a body of precedents is built up and this tends to assist developers in deciding whether it is worthwhile to prosecute an appeal. Many appeals which would otherwise be brought are not instituted because it can be seen by examination of reasons for judgment given in earlier cases that success in the appeal is unlikely. And if a planning appeal is heard before a court questions of construction of the planning appeal legislation and the ambit of the power to impose conditions may be more satisfactorily and speedily resolved at the same time as the determination of the merits of the appeal.

In New South Wales subdivision and building matters (as distinct from planning appeals) are dealt with by Boards composed of panels of experts, with a right of appeal on questions of law to the Land and Valuation Court. These Boards work fairly satisfactorily, but it is doubtful whether appeals to them are heard more expeditiously or at less cost than are planning appeals heard by the Court. Particularly is this so where questions of law are involved, and it is necessary to

state a case for the opinion of the Court on the questions of law before a final determination can be made by the Board in the subdivision or building appeal.

The Bill presently before your Parliament provides for alternative appeals to the Minister or to a court to be known as a Town Planning Court. Section 43(2) provides that a court shall consist of a President, who shall be a Judge appointed by the Chief Justice and two members, one to be appointed by each of the two parties to the appeal. Each of those members must, in the opinion of the President, be an appropriate person by reason of his qualifications or experience to participate in the hearing and determination of the appeal. The position of the judge in such an appeal appears to bear some resemblance to that of an umpire sitting with two arbitrators, one appointed by either party to the dispute. The proposal to give an alternative right of appeal is an interesting innovation. If it is adopted by Parliament it may well be found that in matters of minor importance the parties will prefer to appeal to the Minister. But I would venture the prediction (based on our experience) that in cases where significant planning issues are involved or the appeal involves property of substantial value, the parties will prefer a hearing before the Town Planning Court.

The programme for your Summer School includes papers on setting up a planning scheme from the points of view of the town planner and the lawyer. Logically, perhaps, this paper should have followed rather than preceded those papers. However, by drawing your attention to some of the types of litigation likely to arise from the implementation of planning legislation I trust that you may be able to follow those papers with a greater appreciation of the consequences which flow from the setting up of a planning scheme.

I trust you will find your Summer School for 1971 enjoyable as well as instructive and interesting, and thank you for your invitation to be present at it.

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