THE REVIEW OF DISCRETION IN DEVELOPMENT CONTROL

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The Response of the Courts

Traditionally, the Courts have been reluctant to review the exercise of discretion. But whilst it is clear, as Wilcox points out in *The Law of Land Development in New South Wales*†, that "Generally speaking the courts will not interfere with the exercise of statutory discretions conferred upon public officers or public bodies", it is also clear that a statutory discretion must be exercised in good faith and otherwise than arbitrarily or capriciously or to serve purposes other than those for which it was conferred. It must be exercised, therefore, within limits which may be specified in the relevant statute or, if not, may be indicated by the nature of the purposes for which the decision-maker was entrusted with the relevant discretion.[1]

These principles were applied by the High Court in upholding the exercise of discretion by the Town Planning Board under s.20(1) of the *Town Planning and Development Act* 1928 (as it is now) with reference to the provision of subdivisional open space.[2] It is often said that a statutory discretion must be exercised "reasonably". In this context that term has a particular meaning. In *Associated Provisional Picture Houses Limited v. Wednesbury Corporation* Lord Greene MR said:

> It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own

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† M. Wilcox, *Law of Land Development in New South Wales* (1967) 29

1 Swanhill Corporation v Bradbury (1937) 56 C L R 746; Water Conservation and Irrigation Commission (N.S W.) v Browning (1947) C.L R. 492

2 Lloyd v. Robinson (1962) 107 C L R 142.

> attention to the matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said and often is said, to be acting 'unreasonably'.[3]

This approach was approved and applied by the House of Lords in *Fawcett Properties Limited v. Buckingham County Council.*[4] It is important to remember that in the *Wednesbury Corporation Case* the Court of Appeal was dealing not with a judicial act, but with an executive act in respect of which the matter was put within the discretion of the local authority without limitation. In addition, the case was one in which the statute provided no appeal from the decision of the local authority. Where there is a general right of appeal provided from the exercise of a statutory discretion, it has been suggested that there is no point in attacking a decision as invalid because unreasonable. If the decision is unreasonable it will be reversed by the appellate tribunal on the ground that the discretion was wrongly exercised, whether or not the error was so gross as to invalidate the decision as a matter of law.[5]

A right of appeal is, of course, a creature of statute and may provide a comprehensive method of reviewing the exercise of statutory discretion. An appeal usually involves a review of the merits of the decision appealed from. Judicial review otherwise than by way of appeal is generally confined to a review of the lawfulness of a decision. An appellate body often has power to substitute its own decision for that of the decision-maker. The review jurisdiction of the superior courts at common law did not extend to the substitution by the court of its own decision for that of the decision-maker.

There are two main grounds of judicial review, based upon the doctrines of *ultra vires* and jurisdictional error. Of these two doctrines the doctrine of *ultra vires* is the more recent. It was developed in the nineteenth century to control the activities of statutory bodies, such as the railway companies. It was extended to apply to local government authorities, statutory authorities, Ministers and the Crown.[6] The older doctrine of jurisdictional error was developed before that of *ultra vires* at a time when many administrative powers were exercised by justices and inferior courts.[7]

The doctrine of *ultra vires* is of relevance to the review of the exercise of statutory discretion. In its basic form the doctrine is known as *"simple*

3 [1948] 1 K B 223 at 229

4 [1961] A.C 636.

5 Woolworths Property Pty Limited v. Ku-ring-gai Municipal Council (1964) 10 L G R A 177 at 182 per Else-Mitchell J

6 S A de Smith, *Judicial Review of Administrative Action* 4th ed (1980) at 94-95

7 H Whitmore and M Aronson, *Review of Administrative Action* (1978) at 143

ultra vires". In this form the doctrine requires an answer to the question whether or not a decision-maker has exceeded an express power. A decision or action is *ultra vires* if it goes beyond what is authorised by law.[8] The doctrine in this form is also concerned with failure to observe a mandatory procedural requirement, but it may be necessary to show there has been substantial compliance with a directory requirement.[9]

A version of the doctrine of *ultra vires* known as *"extended ultra vires"* has been developed for the purposes of controlling the exercise of statutory powers, including discretionary powers. It is in the application of this doctrine that the exercise of a statutory discretion may be reviewed to ensure that it has been exercised in good faith for the purposes for which it was conferred, and not in an arbitrary or capricious manner. There are a number of categories of application of the doctrine of *"extended ultra vires".* First, the exercise of a statutory discretion or power may be found to be *ultra vires* if the power may be found to be ultra vires if the power or discretion was exercised for a purpose other than that for which it was conferred. Thus, where a power was conferred for the purposes of carrying out improvements or remodelling of the City of Sydney but was exercised for the purpose of gaining a financial advantage, the exercise of the power was held invalid.[10]

Secondly, a decision in the purported exercise of a statutory power or discretion may be attacked because it has been reached in bad faith or for an improper motive. This application of the doctrine is concerned with dishonesty as distinct from a purpose other than that for which the power was conferred.[11]

Thirdly, a decision may be attacked where the decision-maker has failed to take into account the relevant considerations or has taken into account irrelevant considerations.[12] The considerations which are relevant may be expressly stated in the statutory provision or otherwise implied from the purposes of the statute. [13] In *Employment Secretary v. ASLEF (No. 2)* Lord Denning MR said of the phrase: "If it appears to the Secretary of State":

> This in my opinion does not mean that the Minister's decision is put beyond challenge. The scope available to the challenger depends very much upon the subject matter with which the Minister is dealing. In this case I would think that, if the Minister does not act

8 London County Council v Attorney General [1902] A C 165

9 Scurr v Brisbane City Council (1973) 47 A L J R 532

10 Municipal Council of Sydney v Campbell [1925] A C 336

11 Cannock Chase District Council v Kelly [1978] 1 W L R 1

12 Associated Provincial Picture Houses Ltd v Wednesbury Corporation, supra, R v Trebilco, Ex-parte F S Falkiner & Son Ltd (1936) 56 C L R 20, Padfield v Minister of Agriculture Fisheries and Food [1968] A C 997

13 Swanhill Corporation v Bradbury (1937) 56 C L R 746

> in good faith, or if he acts on extraneous considerations which ought not to influence him, or plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong.[14]

Fourthly, a ground for challenging a decision arises where the statutory power or discretion to decide or to impose a condition may be attacked on the ground of uncertainty. It is of the essence of a decision or of a condition that they be certain. If the purported decision of a dicision-maker is no more than a decision to be undecided there is no decision at all. If the decision is expressed so uncertainly that one cannot determine what it was, the decision is bad for uncertainty.[15] The position in relation to a condition is the same.[16]

Finally, the purported exercise of a discretionary power or discretion may be invalid if the decision-maker has exercised the power at the direction or behest of some other person or body, or because he feels bound to act in accordance with a decision or finding of another body, or the power is exercised in accordance with a pre-determined rule or policy, irrespective of the merits of the individual case.[17] It has been made clear in these cases that a decision-maker is entitled to take into account government policy which is not inconsistent with the provisions or objects of the statute, although the decision-maker would not generally be under a statutory duty to regard himself as being bound by that policy. The decision-maker is not entitled to abdicate his function of determining whether on the material before him, the decision he is making is the correct or preferable one, in favour of a function of merely determining whether the decision will conform with whatever the relevant general government policy might be. The same applies to the application of so-called guidelines. It is necessary for an independent assessment and an independent determination whether or not the circumstances of the case are such that the correct decision is that resulting from the application of the stated policy or guidelines to the relevant facts. An unauthorised delegation of a discretionary power falls into the same category and is likewise open to attack.[18]

14 [1972] 2 Q B. 455 at 492-3.

15 Television Corporation Ltd. v The Commonwealth (1963) 109 C L R 59

16 Pyx Granite Co Ltd v Ministry of Housing & Local Government [1960] A C 209

17. R v. Anderson Ex parte Ipec Air Pty. Ltd (1965) 113 C.L.R 177, Murphyores Inc. Pty. Ltd v Commonwealth (1976) 9 A L R. 199; Drake v. Minister for Immigration and Ethnic Affairs (1979) 24 A.L.R 577; Ansett Transport Industries (Operations) Pty. Ltd v The Commonwealth (1977) 17 A L R 513, Nashua Australia Pty. Ltd. v Channon (1981) 36 A L R 215; Bread Manufacturers of N S W v Evans (1981) 38 A L R. 93, Nagrad Nominees Pty Ltd. v Howells (1981) 38 A L.R 415

18 Barnard v. National Dock Labour Board [1953] 2 K B. 18

The Town Planning Appeal Tribunal and Discretion

Where does the Town Planning Appeal Tribunal of Western Australia fit in? The Tribunal was constituted to hear appeals under Part V of the *Town Planning and Development Act* 1928. The jurisdiction of the Tribunal is alternative to the jurisdiction of the Minister.[19] The following appeals may be brought to the Tribunal by virtue of s.37 when read with s.39 of the Act:

(a) from a decision of a local authority under a town planning scheme that has effect under s.7 of the Act, if the appeal is in respect of the exercise of a discretionary power by the responsible authority under the scheme and the scheme provides a right of appeal;

(b) under s.8A of the Act from a decision of a local authority where —

  (1) under a town planning scheme, the grant of any consent, permission, approval or other authorisation is in the discretion of the responsible authority;

  (ii) a person has applied to the authority for such a grant, and

  (iii) the authority has refused the application or has granted it subject to any condition (such a right of appeal does not affect the operation of a right of appeal contained in a town planning scheme, but the exercise of one right extinguishes the other);

(c) under s.7B of the Act from the refusal by a council of any permit or from the conditions subject to which a permit is granted under an interim development order;

(d) under s.26(1)(a) of the Act from the refusal of the Town Planning board to approve a plan of subdivision of from the conditions affixed to the granting of such approval;

(e) by way of a reference under s.10(3) of the Act of a question whether any building or work contravenes a town planning scheme or whether any provision of a town planning scheme is not complied with in the erection of carrying out of any such building or work;

(f) under cl.33 of the *Metropolitan Region Scheme* ("M.R.S.") from a decision of the Metropolitan Region Planning Authority ("M.R.P.A.") or a local authority exercising the power duly delegated to it refusing an application for approval to commence development, or to approve an application subject to conditions

19 See s 39.

which are unacceptable to the applicant, except where the refusal or conditional approval is in accordance with the provisions of an operative town planning scheme or a town planning scheme made or amended pursuant to s.35 of the *Metropolitan Region Town Planning Scheme Act* 1959; and

(g) under s.35F of the *Metropolitan Town Planning Scheme Act* from a decision of the MRPA to refuse an application for approval to commence development of land in a planning control area or to approve an application subject to conditions which are unacceptable to the applicant, except when that refusal or approval is in accordance with an operative planning scheme or with the Metropolitan region Scheme, or relates to land which is reserved under the latter scheme for a public purpose.

Each category of appeal other than that referred to in paragraph (e) is an appeal from a decision involving the exercise of discretionary power.

Because of the definition of "appeal" in s.37(a)(i) of the Act which limits appeals against decisions under a town planning scheme to a case where "the appeal is in respect of the exercise of a discretionary power by the responsible authority under the scheme", it has been necessary to give consideration to the nature of a discretionary power. The Tribunal was required to consider this point when the first appeal came before it for hearing in August 1979.[20] The appellants appealed against a decision of the City of South Perth to refuse an appliation for approval to commence development under the provisions of the M.R.S. and the *City of South Perth Town Planning Scheme No. 2* which had effect under s.7 of the *Town Planning and Development Act.* Objection was taken to the appeal under the City's scheme on the ground that it was not an appeal "in respect of the exercise of a discretionary power by the responsible authority" for the purposes of s.37 of the Act. The relevant power which the council had exercised was that under clause 5.27 of the Scheme which contained a provision that before granting any approval that "the Council shall be satisfied that such building will not destroy local amenities and will not clash in harmony with the exterior design of adjoining buildings." It was contended on behalf of the City that, not having been satisfied as required by the that provision, the City had no discretion to grant approval for development and was obliged to refuse the application. The Tribunal held that the power to approve or disapprove was in the nature of a discretionary power and that clause 5.27 had formulated in advance certain conditions about which the Council was required to be satisfied before

20 Fairway Heights Pty Ltd v City of South Perth, Appeal No 2 of 1979, 5 September 1979 (Unreported)

it could approve. The Tribunal held that both on the question whether or not it was so satisfied and on the question whether or not it would approve the Council was required to exercise a discretionary power. This view was upheld by the Full Court in *City of South Perth v. Fair way Heights Pty. Ltd.* Burt C.J. said:-

> When, as here, a discretionary power is conditioned by the granting of it being satisfied as to the quality of something to be created under the authority of its exercise then the failure to be so satisfied leads as it must, to the refusal to exercise the power is, in my opinion, a decision which 'involves the exercise of discretion' and an appeal from that decision is an appeal 'in respect of the exercise of a discretionary power'. The refusal to approve the design and site plan involves the exercise of a discretion at the point of satisfaction or lack of satisfaction and the power being discretionary an appeal from the refusal to exercise it is an appeal in respect of the exercise of a discretionary power.
>
> I might add, although it was not argued, that a refusal to exercise a discretionary power is in my opinion a decision in respect of the exercise of a discretionary power within the meaning of s.37(a)-(i).[21]

Town planning schemes in Western Australia typically empower a local authority to grant or withhold planning consent or approval as a matter of discretion. The zoning provisions of schemes generally provide for three use categories, namely, uses which are permitted, uses which are prohibited outright and uses which are prohibited otherwise than with the approval of the council. Where a use is permitted and a development is proposed the council may nonetheless have a discretion to grant or refuse approval or grant subject to conditions. In the case of uses permitted only at the discretion of the council questions of discretion arise at two levels. The first is at the level of the question whether or not to approve the use. The second is at the level of whether or not to approve the development of the land for the purposes of the approved use. A number of town planning schemes set out criteria for the exercise of the given discretion. A number of town planning schemes also require that objections by persons whose land may be affected by the proposed development be given notice of it and an opportunity to object or make representations. Many town planning schemes do not, however, contain detailed criteria for the exercise of discretion at either of the two levels. In the case of subdivisions, no criteria are set out in the *Town Planning and Development Act* for

21 [1980] W A R 51 at 53

the exercise of the discretion vested in the Town Planning Board for the exercise of its discretion under s.20 of the Act. Clause 30(1) of the M.R.S. however, provides that:-

> The Authority or a local authority exercising the powers of the Authority so delegated to it under the *(Metropolitan Town Planning Scheme)* may consult with any authority that in the circumstances it thinks appropriate; and having regard to the purpose for which the land is zoned or reserved under the Scheme, the orderly and proper planning of the locality and the preseravtion of the amenities of the locality may, in respect of any application for approval to commence development, refuse its approval or may grant its approval subject to such conditions if any as it may deem fit.

An appeal to the Tribunal is in reality a proceeding de novo. The question before the Tribunal is whether upon the evidence before it the relevant application should be granted. It is in this sense that an appeal to the Tribunal is an appeal by way of rehearing.[22]

It follows that the task of the Tribunal is not to review the exercise of discretion by the local authority, Town Planning Board or the MRPA in the sense of determining whether the result of that exercise was right or wrong. The Tribunal is required to exercise that discretion anew based on the materials before it in the appeal.

Too much discretion?

The title of this Conference is "Too Much Discretion — From zoning to Ad Hoc Development Control". The theme of the Conference suggests that;

> In the last decade planning schemes have made almost every use subject to the discretion of local councils. Planning has become an ad hoc process of controlling development. Is there now too much discretion?

It follows from the categories of appeal that come before the Tribunal that it has been required on many occasions to determine how a given discretion should be exercised in a particular case. I propose to answer the question. "Is there now too much discretion?" from the standpoint of the Tribunal. I have looked particularly at the identification by the Tribunal of a relevant discretion and the criteria for its exercise. Naturally any comments I make are purely personal and do not necessarily represent the views of the Tribunal.

22 See Humphreys v Town Planning Board (Town Planning Court Appeal No 129 of 1974, 10 June 1975 (unreported) at 4-5 per Burt J; Dawe v. Town Planning Board (Town Planning Appeal Tribunal, Appeal No 5 of 1979, 17 December 1979) (unreported) at 5-7

I suggest that there is not too much discretion. Given that a proposal complies with the technical requirements of a town planning scheme it seems appropriate that the planning authority should be able to decide whether or not the scale or other features of the proposed development will have an adverse effect on the amenity of an area. There should be a residual discretion to refuse approval on relevant grounds. Such a discretion should apply even where the development is for a permitted use. Likewise the existence of discretionary uses enables the merits of a given proposal to be weighed against any adverse effect on amenity by permitting the relevant use.

In *Cipriano v. City of Perth*[23] there was an appeal against a refusal by the City of Perth to approve the use of a residence in North Perth as a school. The land fell within Zone 2 (Residential Flats) under *City of Perth Zoning By-Law No. 65.* The range of permitted uses for Zone 2 included Class A6, which encompassed a School. The commencement of use of a residence for a school was within the definition of "development" in s.2 of the *Town Planning and Development Act,* which definition applied to the *Metropolitan Region Town Planning Scheme Act* and the M.R.S. Consequently, the use of the land for the purposes of a school required the approval of the City of Perth under cl.24 of the MRS, the City of Perth was empowered to refuse its approval or grant its approval subject to conditions "having regard to the purpose for which the land is zoned or reserved under the Scheme, the orderly and proper planning of locality and the preservation of the amenities of the locality." The principal issue in the appeal was whether or not nearby residents would suffer a loss of amenity by reason of noise emanating from the activities of the children at the school. Amenity is an elusive concept. The Tribunal at 5 put forward the following definition:

> The amenity of an area is the sum of the expectations of the residents concerning the quality of their residential environment as determined by the character of the area, its appearance and land uses.[24]

Preservation of amenity is but one of the criteria referred to in the MRS. The reference to zoning is related to the use to which land may be put. The reference to orderly and proper planning requires the identification of relevant planning principles. Thus, the Town Planning Board in deciding whether to approve with or without conditions or refuse to approve a plan of subdivision must make its decision with reference to town planning principles.[25] In *Agnew Clough Limited v. Town Planning Board* the Tribunal said:

23 Town Planning Appeal Tribunal, Appeal No 20 of 1979, 21 Jan. 1980 (unreported)
24. Id at 5.
25 cf Lloyd v Robinson (1962) 107 C.L R 142 at 153-155 per Kitto, Menzies and Owen JJ

> The purposes for which the TPB is entrusted with its discretion, in terms of the long title of the Act, are related to the planning and development of land for urban, suburban and rural purposes. It is implicit that the discretion must be exercised in good faith for these purposes, the achievement of which would require the application of sound town planning principles. In so far as it may be found that the *Metropolitan Region Scheme* or a local authority town planning scheme has given statutory force and effect to a particular principle, the TPB would be bound to apply it. Where a proposal for amendment of an existing town planning scheme has been formulated and is being seriously entertained, that proposal may be evidence of that which is consistent with town planning principles because it is necessary for the orderly and proper planning of the area in question: see *Begley v. The Shire of Wanneroo* (1970) WAR 91 at p.95 per Virtue SPJ and *Della-Vedova v. Town Planning Board* (1978) unreported, Town Planning Court, Appeal No. 137 of 1979, 8th June 1975 at p.10 per Brinsden J. It follows that provisions with statutory force and effect apart, the identification of sound town planning principles is a question of fact. Thus, where a document is put forward as a statement of policy, a question will arise whether that policy is consistent with such town planning principles. A more difficult question is whether the TPB in considering applications for subdivision is entitled to take into account recommendations or proposals under consideration but not as yet approved or adopted by the responsible authority. In our opinion, in such a case, the TPB would be entitled to look at the document in question as possible evidence of what was required for the orderly and proper planning of the locality, giving it such weight as was consistent with its source, nature and content. This would be part of the process of determining what were the relevant town planning principles to be applied. It is in this sense that we agree with Brinsden J. at p.10 of *Della-Vedova's Case* that it is 'proper for the Board in the exercise of its discretion to have regard to the evidence relating to the contents of an interim report of Planning and Development Study of the South-East Corridor in the context of the Corridor Plan of Perth and the likely contents of the final report.'[26]

In such circumstances the Tribunal should avoid, as far as possible, giving a judgment or establishing a principle which would render more difficult ultimate planning decisions the subject of draft schemes or recom-

26 Town Planning Appeal Tribunal, Appeal No 1 of 1979, 1 May 1980, at 8 (unreported)

schemes or recommendations being seriously entertained.[27] In the *Agnew Clough Case* the Tribunal said that:

> The applicant for approval of a plan of subdivision is, as a matter of law, entitled to have his application determined in accordance with sound town planning principles applied in the context of existing controls on subdivision. To the extent that future planning options are mere possibilities, they should be excluded from consideration or, at best, accorded very little weight. Where matters have proceeded to the stage where future planning proposals are being 'seriously entertained' they may be taken into account, the weight to be given to them depending upon the circumstances. It is the duty of the TPB, and of this Tribunal on appeal, to give a decision on the merits of the application having regard to the existing planning controls applicable to the land. Where an amended planning scheme is being adopted and is currently under consideration, the contents of that scheme may be taken into account, particularly where town planning decisions have previously been made which are embodied in the scheme: cf. *Coty (England) Pty. Ltd v. Sydney City Council* supra; *Stelling v. Melbourne & Metropolitan Board of Works* (1977) 8 VPA 243. So far as the prejudice of future planning options is concerned, we consider that the principle is to be limited to circumstances where the grant of an approval (whether it be of an application to subdivide or of an application to commence development) would impair the objectives of a 'seriously entertained planning proposal': see *Graham v. Melbourne & Metropolitan Board of Works* (1980) 14 VPA 20; *H.C. Sleigh Ltd. v. Sydney City Council* (1965) 11 LGRA 14; *Park v. Warringah Shire Council,* Supra; *Gordon D. Boyd & Co. Ltd. v. Warringah Shire Council* (1971) LGRA 46 at 48-9; *Huon Investments Pty. Ltd. v. Port Stephens Shire Council* (1972) 25 LGRA 287 at 292; *Terrigal Grosvenor Lodge Pty. Ltd. v. Gosford shire Council* (1972) 25 LGRA at 454; and *Berger v. City of Morrabin* (1971) VPA 342. A planning proposal 'seriously entertained' is one that has a real likelihood of being adopted, although in Western Australia, where planning proceeds upon the more flexible instrument of policy, it is not necessary that the policy be given legal operation unless inconsistent with the provisions of an operative town planning scheme. Subject to this qualification we agree with what was said on this subject in *Graham v. Melbourne Metropolitan Board of Works* (supra).[28]

27 cf Coty (England) Pty Ltd v Sydney City Council (1957) 2 L G R A 117 at 125 per Hardie J, Park v. Warringah Shire Council (1970) 20 L G R A 312 at 314-315 per Else-Mitchell J

28 Supra n 26, at 33-34.

Although the *Agnew Clough Case* involved a sub divisional appeal, the principles referred to have been applied in development appeals.

The ambit of the discretion available to a local authority under its own town planning scheme and under the MRS arose for consideration in *Camfield Nominees Pty. Ltd. v. Town of Claremont*[29] and *Jobalin Pty. Ltd. v. City of Subiaco.*[30] In both of those cases the proposed development met all the technical requirements of the relevant local authority schemes and of the *Uniform Building By-Laws* 1974 in relation to such matters as plot ratio, height, setbacks, density, carparking, open space and landscaping. In each case the appellant required an approval both under the local authority scheme and under cl.30 of the MRS. The Tribunal held that the mere fact that a proposal conformed with a town planning scheme created no right to have it approved. In each case the proposal had to be considered having regard to the matters referred to in cl.30 of the MRS. Thus, the Council was entitled to find that the proposed development would be out of context with the surrounding residential area and have an adverse impact upon amenity, although it complied with the technical requirements of the scheme. In the *Jobalin Case* the Tribunal said that:-

> In emphasising the need to have regard to the preservation of the amenity of an area, cl.30. of the MRS has adopted an essentially conservative approach to development planning. This does not mean that there is no room for change or innovation. It does mean that attention must be paid to the existing character of an area in considering development applications.[31]

These decisions were applied by the Tribunal in *Tang v. City of Stirling*[32] which also applied the observations of the Tribunal in the *Agnew Clough Case* referrable to the exercise of discretion. The Tribunal said that:

> What is necessary for the orderly and proper planning of the area or the preservation of the amenities of the locality is not immutable. This may well be one reason why there is an overriding discretion conferred on the responsible authority by cl.30 of the MRS. This view is reinforced by the statutory requirement for a review of an operative town planning scheme every five years as provided in s.7AA of the *Town Planning and Development Act.* Where such a review has been carried out and has resulted in amendments which would affect the existing zoning under a proposed new scheme adopted by the authority, these facts may be relevant to the exercise of the

29. Town Planning Appeal Tribunal, Appeal No. 22 of 1979, 31 Jan. 1980. (unreported)
30 Town Planning Appeal Tribunal, Appeal No 24 of 1979, 28 Feb 1980 (unreported)
31 Id. at 11
32 Town Planning Appeal Tribunal, Appeal No 27 of 1981, at 3-4 (unreported)

> discretion. One difficulty, of course, is that the re-zoning proposal cannot be of legal force and effect unless and until the amendment is promulgated in substitution for the existing proposals which currently have legal force and effect. It is difficult to conclude that there is a 'real likelihood' of the proposed scheme being adopted at a stage prior to preliminary approval by the Minister. In the present case, all the indications are that the proposed scheme is in a form and which contains provisions which give rise to a reasonable expectation of approval. However, at this stage, we are unable to find that there is a 'real likelihood' of a proposed scheme being adopted. The question is one of weight. Although we are unable to make this finding, the evidence of the process of public participation and consultation with reference to the provisions of the proposed scheme, so far as the Mt. Lawley area is concerned, coupled with the expert evidence of Mr. Glover and Mr. Martin, have led us to the conclusion that the interests of orderly and proper planning require an exercise of discretion in this case to reduce the density of permitted development below that which would be possible under the existing scheme.[33]

This decision could well have played a role in the development of the theme "Too much Discretion?".

In *Aboriginal Boomerang Council of W.A. Inc. v. Town of Geraldton*[34] it was submitted on behalf of the appellant that if a proposed development was for a use permitted without the approval of the council, it followed that the council had no discretion to refuse the application. The Tribunal did not accept this submission because it overlooked the distinction between the concept of "use" on the one hand and "development" on the other. Section 2 of the *Town Planning and Development Act* contains the following definition of "development":

> 'development' means the use or development of any land and includes the erection construction alternation of carrying out, as the case may be, of any building, excavation or other works on any land.

In *University of Western Australia v. City of Subiaco*[35] Burt C.J. drew a distinction between "use" and "development" as two aspects of the concept of "development" as defined in the Act. The use of land for any particular purpose was contrasted with physical activity carried out on it resulting in some alteration in it, which was connoted by the normal meaning of the expression "development". The Tribunal has consistently drawn

33 Id at 18-19
34 Town Planning Appeal Tribunal, Appeal No 47 of 1981 (unreported)
35 Supreme Court of Western Australia, 11 May, 1980 (unreported)

that distinction in its interpretation and application of town planning schemes.[36] The *Town of Geraldton District Town Planning Scheme No. 1* contemplated that a development application consist of inter alia "a full description of the intended use of the land or building" and provide drawings for buildings or other structures "which shall consist of a site plan illustrating buildings, carparking, landscaped areas and the size, location and type of any advertising sign." A number of other schemes make separate provision for approval of a use requiring the approval of a council and the approval of development in its normal sense of involving the carrying out of building works. The Tribunal held that, upon the proper construction of the Geraldton scheme, although the Council had no discretion to refuse the application in so far as it comprised an application to use the subject land as "an institutional home" it nonetheless had a discretion to grant or refuse the application in so far as it comprised an application for approval for development of the subject land by way of construction of the institutional home. If this were not so there would be no room for the Council to exercise any discretion with respect to such matters as the scale of development. The scale may have an impact on both amenity and on orderly and proper planning in terms of such things as noise and traffic.[37]

The *Aboriginal Boomerang Council Case* was the first in which the Tribunal had to consider the existence or otherwise of a discretion to grant or refuse a development application involving a permitted use under a scheme in a context where the MRS had no application. The Geraldton Scheme set out in detail the matters which the Council was required to take into consideration in considering an application for development. These included such matters as "the character of the proposed development in relation to the development of the adjoining land and the locality and the intended future amenity" of the area. These and other requirements confirmed the existence of an overriding discretion to refuse to approve the development, notwithstanding that the use proposed was permitted under the scheme.

The question whether or not a use prohibited by a scheme without the approval of the council or permitted only with the approval of the council should be approved also involves the exercise of discretion. In *Aboriginal Hostels Limited v. Shire of Swan* the Tribunal said that:

36 Corporation of the Church of Jesus Christ of Latter Day Saints v Shire of Wanneroo Appeal No 4 of 1979, 28th February 1980 (unreported), Cipriano v City of Perth, Town Planning Appeal Tribunal, Appeal No 20 of 1979, 21 Jan 1980 (unreported), Aboriginal Hostels Limited v. Shire of Swan Appeal No 26 of 1979, 28th July 1980 (unreported), Windsor v. Subiaco City Council Appeal No 23 of 1980, 12th December 1980 (unreported), McDonald v Town of Armadale Appeal No 32 of 1980, 1st May 1981. (unreported)

37 cf. Food Plus Pty. Ltd v Perth City Council (1982) Appeal Nos 36 and 37 of 1981, 25th June 1982 (unreported)

> In the context of town planning law and the application of sound town planning principles it is now well established that a responsible authority charged with a duty of deciding whether or not a discretionary use should be permitted should first conduct an inquiry into the need for the proposed use and then balance the projected benefits derived from the satisfaction of that need against possible cost to the community by way of loss of amenity or other disadvantages. To the extent that the public interest in terms of need is in competition with the preservation of local amenity it is necessary to weigh the competing considerations in the light of the evidence in the particular case[38] *Methodist Church (N.S.W.) Property Trust v. Burwood Council* (1972) N.S.W.L.R.288.

It is one thing to assess need in the case of a proposed use of land for institutional purposes such as a school, hospital, church or nursing home. It is another thing to assess need in the context of a commercial enterprise such as a restaurant or an amusement parlour. In *Australian Mutual Provident Society v. City of Melville*[39] the Tribunal was called upon to consider an application for the location in a suburban shopping centre of a "Time Zone Family Leisure Centre" which was a form of amusement parlour which provided electronic games for amusement, largely of the variety known as "video games" many of which were successors to or variants upon "Space Invaders". The use of premises for public amusement was an "AA" use within the Melville City Centre zone and required the approval of the Council. One of the main issues in the appeal was the alleged detrimental effect on the amenity of the locality which had been the subject of objections from residents. Some of the objections were to the perceived undesirable social effects of amusement centres or amusement parlours:

> We note that in particular cases evidence relating to such considerations has led the Victorian Town Planning Appeals Tribunal to dismiss appeals from the refusal of approval by a local authority for the establishment of an amusement parlour in a shopping zone. In these cases, one of the main concerns was the possibility that the amusement parlours would attract an "undesirable element". Each case must be considered in the light of its own facts and circumstances. In the present case, the question is whether the fears expressed by residents who lodged objections with the council and

38 Supra n.36, at 5-7

39 Town Planning Appeal Tribunal, Appeal No 8 of 1983, 11 August 1983 (unreported)

whose views were represented by the three residents of Almondbury Road who gave evidence before us were 'reasonably entertained'.[28] In *Aboriginal Hostels Limited v. Shire of Swan* supra and in *Aboriginal Boomerang Council of WA Inc. v. Town of Geraldton* the Tribunal approved the views concerning amenity expressed in the report of the Minister for Local Government and Planning in the United Kingdom which were quoted with approval by the New South Wales Full court in *Exparte Tooth & Co. v. Parramatta City Council.* The Minister said:- 'In considering questions of amenity the local planning authorities have to assess public opinion as accurately as they can and in each case, to weigh the extent of the injury to amenity against the usefulness of the proposed development.'
In some cases it is necessary to weigh the advantages to be derived from the satisfaction of a community need against any disadvantages such as injury to amenity, as in *Aboriginal Hostels Limited v. Shire of Swan.* In the present case the proposed development is a form of leisure entertainment facility. In our view it is not appropriate to ask whether there is a need for such development or whether it would be useful. It is enough that the facility is one for which there is an apparent demand. The question is not whether the responsible authority, in this case the Tribunal, considers that amusement centres incorporating video games are desirable or undesirable. In this respect, it was properly conceded by counsel for the respondent that there was nothing intrinsically wrong with the appellant's amusement centres.[40]

In the result the Tribunal found that, given that the proposed amusement centres were managed in the manner proposed, the use of subject land for the proposed purpose would not occasion any nuisance by way of noise and light to residents in the locality or otherwise detrimentally affect the affect the amenity of the locality. It was a factor favourable to the appellant that it had a good record in the conduct of similar premises in other places.[41]

In *Erceg Management Pty. Ltd. v. City of Stirling*[42] the Tribunal was considering an appeal from the refusal of an application for approval to commence the development of a tavern. At 9 of its reasons the Tribunal noted an alternative approach to discretionary uses whereby an applicant for planning approval need not establish a demand for the proposed use at all.[43] On this approach, evidence showing that there was a need or de-

40 Id at 12-13
41 cf Village Family Entertainment Centres Pty Ltd v City of Frankston (1980) 17 V P.A 103
42 Town Appeal Appeal Tribunal, Appeal No 23 of 1982 (unreported)
43 Id at 9

mand for a proposed use or development was merely a factor which could be said to support the application. The absence of such evidence did not necessarily mean that the proposal should be rejected.[44]

The protection of existing businesses from competition appears to be a matter which planning authorities sometimes take into account. In *B.P. Australia Limited v. City of Perth*[45] it was submitted that there was no need for a proposed convenience store and that, if it were established, other shops would close down, with a consequent loss of amenity to the community, particularly to residents without vehicles. The Tribunal said that:

> In considering the submission, it is appropriate to mention that the Tribunal's function is to examine the proposed development from the point of view of orderly and proper planning. The possibility of commercial competition and the possible result of that competition are not relevant, except in limited circumstances which were described by Stephen J in *Kentucky Fried Chicken Pty. Ltd. v. Gantidis* as follows:- "If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical financial causes, and if the resultant community detriment will not be made good by the proposed development itself that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However the mere threat of competition to existing businesses, if not accompanied of a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration."[46]

On the evidence available before it the Tribunal could not conclude that the introduction of the proposed convenience store would result in the closing down of any other shop so that the overall shopping facilities available to the community would be reduced.

Conclusion

The review of some of the decisions of the Town Planning Appeal Tribunal of Western Australia illustrates that there are two main areas

44 Pacific Seven Pty Ltd City of Northcote (1978) 9 V P A 375 at 380, Elliot v City of Caulfield (1979) 14 V P A 315 at 317, Hall v City of Hawthorn (1978) 16 V P A 98 at 100, Ntellas v Melbourne & Metropolitan Board of Works (1980) 18 V P A 260 at 267

45 Town Appeal Appeal Tribunal, Appeal No 20 of 1983, 2 Dec 1983. (unreported)

46 Id at 17-18

in which local authorities are called upon to exercise discretion under town planning schemes. The first is in the relation to the approval of discretionary uses. The existence of such a discretion is important in that it enables the local authority to weight up the advantages to the community in the satisfaction of a particular need or demand, or the provision of a service against the disadvantages, if any, by way of adverse impact upon amenity, for example. It may be desirable for town planning schemes to spell out more clearly the criteria for decision in such cases, although relevant criteria has been identified in the course of decisions, both in Western Australia and in other jurisdictions.

The second main area is in relation to the identification by the Tribunal of a residual discretion to refuse to approve a development which otherwise meets the technical requirements of a given town planning scheme. Such a discretion is expressly contemplated and provided for by the MRS. A similar discretion has, however, been identified in cases where the MRS is of no application. It is suggested that the existence of such a discretion to refuse is of importance. In formulating a town planning scheme it is not possible to visualise the scale or the impact of every conceivable type of development which may conform to the technical requirements of the scheme. Hence, the existence of such a discretion provides a practical way of avoiding developments which may have an adverse impact on amenity, even though they otherwise comply with the provisions or a relevant scheme.

It is suggested that in neither of these two areas is there too much discretion in development control. In a context where the MRS and local authority town planning schemes are each given the force of law there is a danger of rigid commitment to "the plan". The existence of the two levels of discretion introduces a level of flexibility and a requirement that individual applications to be considered on their merits using the scheme as a framework or basis for the making of individual decisions, rather than simply resorting to the scheme to make a decision without any exercise of judgement on the merits. The existence of discretion and the requirements associated with its exercise ensures an ongoing process of operational review of an existing scheme, as opposed to blind implementation of the scheme merely because it has been given the force of law. It would be desirable, of course, for town planning schemes and other relevant legislation to set out clear criteria for the exercise of the relevant discretion, whether it be to approve a use or to approve development in the sense of the carrying out of works. This would facilitate the proper exercise of the discretion by the relevant decision-maker. There is a full right of appeal from any such decision on the merits to the Minister or to the Tribunal, backed up by the availability of a further right of appeal from the Tribunal to the Supreme Court on a question of law. Once the

relevant facts have been found, the question whether a discretion has been exercised within proper limits is a question of law. This right of appeal is coupled with the availability of remedies by way of the prerogative writs or a declaration of right by the Supreme Court in the exercise of its supervisory jurisdiction. Reform of this jurisdiction is under consideration in Western Australia. In these circumstances the scope for the exercise of discretion appears to be appropriate to the need and subject to reasonably adequate safeguards against the exercise of discretion by the relevant authority otherwise than in accordance with law. Naturally these safeguards can be improved. It is heartening that improvements both to the system of town planning appeals and to the supervisory jurisdiction of the Supreme Court are under current consideration.