RECENT DEVELOPMENTS IN WEST AUSTRALIAN TOWN PLANNING LAW: WITH PARTICULAR REFERENCE TO THE DECISIONS OF THE TOWN PLANNING APPEAL TRIBUNAL

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The Town Planning Appeal System

Although this paper focuses upon the decisions of the Town Planning Appeal Tribunal I should like at the outset to make some general observations concerning the planning appeal system in Western Australia.

The general system of town planning in Western Australia conforms largely to the systems found in each of the other States of Australia. It is also similar to the planning systems found in common law jurisdictions elsewhere. More significantly, perhaps, the tensions found within the system are also observable in other systems. It appears, for example, invariably to be an issue in every jurisdiction whether an appellate body should be a "Tribunal" or a "Court" - one apparent distinction between the two being that a Tribunal is treated as a lower status body, not comprised exclusively of lawyers. A Court may, of course, be comprised of lawyers and non-lawyers as for example, The Land and Environment Court of New South Wales.

In Western Australia the matter is further complicated by the right to appeal either to an appellate Tribunal or directly to the responsible Minister. Although the current appeal system in Western Australia is explicable by historical analysis, personally I find it undesirable.

It was not until 1970 that an appeal to a body other than the Minister became possible. In that year, an amendment to the *Town Planning & Development Act 1928*, created a Town Planning Court as an alternative body to which a planning appeal might be made.

For various reasons, however, the Court was considered to be a dismal failure.[1] At the end of 1972, of 401 appeals made following the cre-

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1 Hiller, Town Planning Appeals (1971-72) 10 *U W A Law Review* 144 surveys the appeal system up to and including the creation of the Town Planning Court in 1970 A Ministerial veto over appeals to the Court, often exercised during this early period, also helps to explain these statistics.

ation of the Court, 400 had been made directly to the Minister. Although in subsequent years more appeals were made to the Court, they were insufficient in number to make it a success.

In 1978, further amendments to the Act set up the present Town Planning Appeal Tribunal. No attempt was then made, however, to remove the alternative right of appeal to the Minister.

Since the Tribunal commenced operation in 1979, to the end of 1985, 294 appeals have been made to it.[2] By contrast, 3811 appeals have been made to the Minister during the same period.[3]

Although for present purposes it is enough merely to note the statistics, it may be useful to list the reasons suggested by Hiller some 14 years ago for the apparent failure of the Town Planning Court.[4]

The first reason suggested was the customary practice, well entrenched at the time, of appeals to the Minister. Secondly, the "fair hearing" accorded by the Minister. Thirdly, the reduced import given to public concerns by the Minister. Fourthly, the costs attendant on appeal proceedings in the Court.

How many of them remain true?

It appears that there are proposals abroad that the Tribunal be abolished and the appellate jurisdiction be incorporated in a special Administrative Division of the Supreme Court, adequately supported by

2 Personal Communication, Registrar, Town Planning Appeal Tribunal, April 1986

Tribunal Appeal Statistics					
Year	Received	Allowed	Dismissed	Withdrawn	A S D
1979	32	11	11	8	2
1980	34	9	5	19	1
1981	51	21	8	19	3
1982	37	14	9	10	4
1983	41	18	6	13	4
1984	61	16	12	27	6
1985	38	7	4	18	9

3 Personal Communication, Chairman, Town Planning Appeal Committee to the Minister, 17 April 1986 The following table provides some interesting statistics

Ministerial Appeal Statistics				
Year	Received	Allowed or in part	Dismissed	Other
1979	646	317	243	86
1980	523	288	178	57
1981	670	374	227	69
1982	578	320	201	57
1983	456	193	215	48
1984	499	259	197	43
1985	439	207	163	69

* Includes appeals withdrawn, incompetent, not proceeded with and undetermined

4 Hiller, supra n 1

"lay" Planning Assessors.[5] One might remark upon the capacity of history to repeat itself!

It is not clear whether these proposals are accompanied by a further proposal that the Supreme Court have virtually an exclusive appeal jurisdiction.

It is my belief that until such time as the present right of appeal to the Minister is abolished in respect of all, or most, planning matters, no alternative appeal system, whether it involve a Tribunal or a Court, can be successful.

Furthermore, I am not sure that I would be in total agreement with any proposal to engage Supreme Court Judges as, essentially, part-time planning arbiters. I would prefer to see a specialist appeal Court or Tribunal, together with Assessors, to which all planning appeals were directed.

The experience in other jurisdictions suggests the wisdom of such a course.

This issue requires more detailed consideration which I have provided on this occasion and I suggest it will remain an important issue for planning lawyers for some time to come.

Parties to an Appeal

(a) Introduction

Exactly who are, or should be, the parties to an appeal in the Town Planning Appeal Tribunal?

Lawyers steeped in the traditions of the common law may suggest that only the principal protagonists should be parties - the developer and the primary approval authority (whether that be a local authority or the State Planning Commission).

As those involved in the planning system fully appreciate, however, planning is "political" by nature. By this is meant that planning decisions involve the making of choices from amongst (often equally valid) alternatives. It has, therefore, a substantial public element.

The public, or perhaps more properly, each member of the public, should have a right to represent a view, or put a case, to an approval authority at both the primary level of decision making (local authority or SPC) and the appellate level (the Tribunal). Each member of the public should have the right to appear on his or her own behalf and not merely derivatively through the planning authority, or the Minister.

The *Town Planning and Development Act* has remarkably little to say about parties to an appeal. As with the bulk of the planning rules in Western

5 See, eg., the reasoning in the Law Reform Commission of Western Australia, Working Paper and Survey, Project No.26 *Review of Administrative Decisions, Part 1 - Appeals,* (1978)

Australia it is to each Town Planning Scheme that one must look for the solutions to these legal questions.

The Act, in Part V, does little to resolve the primary issue of who a party to an appeal is. Although the expression "party" is employed in that part of the Act, the expression is defined in a circular way in section 37, to mean "a party to an appeal". This suggests that it is important to understand what an "appeal" is.

In this respect section 37 defines an "appeal" to mean -

(i) An appeal to the Minister under -
  (a) a Town Planning Scheme that has effect under section 7 of this Act, if the appeal is in respect of the exercise of a discretionary power by the responsible authority under the Scheme;
  (b) section 8A of this Act;
  (c) sub-section 6 of section 7B of this Act; and
  (d) sub-section 1 of section 26 of this Act.
(ii) A reference to the Minister under sub-section (3) of section 10 of this Act;
(iii) An appeal to the Minister under clause 30(3) of the Metropolitan Region Scheme; and
(iv) An appeal under section 35F of the Metropolitan Region Town Planning Scheme Act 1959.

This definition leads to the conclusion that no person has the right to appeal from or against any planning decision, or respond to an appeal, except to the extent that a Town Planning Scheme or specific provisions of the Act grant such a right.

As a convenient way of taking the matter further I will proceed to discuss who is an "Appellant" and who is a "Respondent" by reference to the class of appeal which arises under section 37(a)(i).

(b) The Appellant

In *Northlake Investments Pty Ltd* v. *Town of Geraldton*[6] the Town Planning Appeal Tribunal had an early opportunity to consider who was entitled to appeal to the Tribunal under section 37(a)(i). A developer sought to attack an approval granted by the approval authority to another developer for the construction of a shopping centre. It lodged an appeal with the Tribunal and relied upon s.37(a)(i) of the Act for its right to do so. The developer boldly argued that any person could appeal to the Tribunal under s.37(a)(i) where a responsible authority had, in fact, exercised discretionary power under a Town Planning Scheme whether or not that person was the applicant for planning permission.

The Tribunal concluded, rightly in my view, that s.37(a)(i) does not

6 Appeal No 31 of 1981

confer a right of appeal where one does not exist under a Town Planning Scheme. Subject to s.8A of the Act, the comments of the Tribunal are instructive and govern the standing rules to be satisfied by an appellant in respect of a s.37(a)(i) appeal:

> [T]here must first be found in the Scheme a provision for an appeal to the Minister before section 37(a)(i) can operate. Such an appeal will only qualify as an appeal under Part V if it also is an appeal in respect of the exercise of a discretionary power. The matter of standing is otherwise remitted to the provisions of the Scheme. Standing to institute an appeal becomes a matter for the construction of the appeal provisions of each individual Scheme.

On the facts of the case before it, the Tribunal held that Northlake Investments Pty. Ltd. were not accorded a right of appeal against the planning decision. It was expressly limited to an "Applicant" for planning permission.

By contrast, the Tribunal pointed out that the City of Melville Town Planning Scheme No. 2 provides in Part I:-

> "Where the Council exercise discretion in deciding any matters pertaining to this Scheme, a right of appeal to the Hon. the Minister for Town Planning shall exist."

The Tribunal expressed the opinion, without having to decide the matter, that such a provision does not limit the class of appellants under s.37(a)(i).

Section 8A of the Act, introduced in 1983, allows any "applicant" to appeal in respect of the exercise of a discretionary power whether or not the Scheme allows an appeal. This section does not create third party appeal rights. It has, however, allowed appeals to be made in respect of State Planning Commission decisions taken under the Metropolitan Region Scheme.[7]

There are of course various ways in which the right of a person to appeal against decisions made by planning approval authorities may be qualified. A time honoured way, used, for example, in Victoria, is to allow any person who "feels aggrieved" by a decision to appeal. As the Tribunal pointed out in the *Northlake Investments Case*, this formula has enabled such bodies as the National Trust of Australia (Victoria) to become involved in town planning appeals in that State.[8]

There are, however, other formulas. In New South Wales, for example, *any person* may appeal against a decision by an approval authority

7 See M W H Pty Ltd v Metropolitan Region Planning Authority (1976) (Appeal No 19 of 1985)
8 See National Trust of Australia (Victoria) v T & G Mutual Life Association (1976) V R 592.

in respect of "designated development" but only if that person has previously made a written submission to the planning authority in respect of the development application.

It should be pointed out however, that there are those who are dissatisfied with this particular formula because it limits the right of appeal to "designated development" which is confined to large-scale development.

In most Australian jurisdictions fairly generous appeal rights have been established by legislation.[9] It is my view that the issue of who may appeal needs to be addressed at a State government policy level, and the appeal right embodied in legislation.

As the Tribunal commented in the *Northlake Investment Case*:

> It is unfortunate that there are differences between schemes. It would be desirable to adopt a uniform right of appeal. If necessary, this could be achieved by an amendment of the Town Planning and Development Act.

(c) The Respondent

Equally, the Act does not indicate who other parties to a s.37(a)(i) appeal are, or may be. And in this case the provisions of a town planning scheme are rarely, if ever, helpful.

Section 50(3) of the Act does provide, however, that:-

> The Appeal Tribunal has, until it has made its determination all the powers of the Supreme Court insofar as may be necessary for hearing and determining the appeal.

It might be suggested therefore that the Tribunal has the inherent power to enable a range of interested persons to become parties to the appeal once it has properly been made; or may adopt the Rules of the Supreme Court as a guide in such matters.

Additionally, s.55 of the Act enables regulations to be made prescribing the persons and bodies to be given notice of an appeal. This may suggest that those persons and bodies who received notice are entitled to be treated as parties to the appeal.

The Town Planning Appeal Tribunal Rules, 1979, Regulation 6, in broad terms, requires notice of an appeal to be given to the responsible Minister and the authority responsible for the making of the planning decision. Depending on the nature of the appeal - under which subparagraph of s.37 the appeal arises - notice of the appeal may have to be given to the local approval authority, the State Planning Commission

9. Fogg, 'Third Party Objections and Appeals in Development Control Decision Under Town Planning Legislation' (1985) 2 *Environmental and Planning Law Journal* 4 provides a comprehensive survey of third party appeal rights in Australia.

and the responsible Minister. Some planning schemes require the concurrent consent of other public authorities or Ministers, and so notice may also have to be given to such bodies.

The Act incidentally provides in s.45 that:-

> Every party who desires to contest an appeal shall lodge with the Registrar a short statement of the grounds on which he intends to rely....

This section, it may be said, is also unhelpful in deciding who a party to an appeal is, for it proceeds on the basis that a party has already been identified by some other provision of the Act.

In an early decision of the Town Planning Appeal Tribunal, a fairly liberal view was taken of who was entitled to be treated as a party to the appeal. It may be said, with respect, that the issue was not, at that time, raised as a substantive one and accordingly was not the subject of detailed consideration by the Tribunal.

The particular appeal, *Aboriginal Hostels Ltd* v. *Shire of Swan,*[10] involved the decision of the approval authority to refuse an application for the development of a hostel. Three persons resident in the area of the proposed development filed a Statement by Respondent and were treated as parties to the appeal.

The Tribunal noted that in considering the application under the relevant Town Planning Scheme the Shire was required to consider any objections to it. The Tribunal took the view, as a consequence, that it also was required to consider any objections.

Thus, the Tribunal reasoned:

> In that sense the parties to an application under (the Scheme) are the applicant and any objectors. Consequently, on an appeal against a refusal to grant approval, an objector who desires to contest an appeal is a 'party' for the purposes of section 45 of the Town Planning and Development Act.

In a subsequent appeal the Tribunal took the matter much further. In *Claridge Pty Ltd* v. *Metropolitan Region Planning Authority and St. Martin's Properties (Australia) Pty Ltd and City of Stirling*[11] the two last- mentioned parties sought leave to be joined as parties to an appeal against the decision of the former MRPA to reject a shopping centre development application.

In its decision the Tribunal noted the considerable vagueness of the Act and the Rules more or less in the terms discussed above. It concluded that there are two categories of persons who may be heard upon an

10 Appeal No 26 of 1979.
11. Appeal No.43 of 1981.

appeal. First, there are the direct parties to the appeal who are limited to the appellant, as discussed above, and possibly persons who could claim an entitlement under the Rules of the Supreme Court Order 18 Rule 6 to be joined as a party to proceedings.

Then there is a second category of persons entitled to be heard before the Tribunal, namely, those with a "sufficient interest" in the appeal. In respect of this second category the Tribunal noted:

> Those persons do not have the right of parties but may take such part in the proceedings as the Tribunal, acting in accordance with the Act and the Rules determines. The Tribunal's powers in this respect being wide, the interested person might take a small part in the proceedings or, if appropriate, participate as if he were a party.

Use; In the circumstances of the particular appeal a rival shopping centre operator, St. Martin's Properties, was not considered to have a sufficient interest to be joined as a party, or the equivalent of a party. Neither was it considered entitled to be joined as a party under Order 18 Rule 6(2) of the Supreme Court Rules, which enables the Supreme Court to order that any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, be added as a party.

It goes without saying that an attempt must be made, through legislation, to clarify the rights of persons who are to be treated as parties to an appeal in the Town Planning Appeal Tribunal.

Again it may be useful to examine the right of a person to be joined as a party to an appeal in other jurisdictions. In Victoria, the legislation enables a person who was an objector to the grant of a permit, and a person who was not an objector but who nevertheless is "aggrieved" by the grant of approval (where there has been at least one objector), to become a party to an appeal hearing.

In New South Wales, the legislation enables any person who was an objector to "designated development" to become a party to an appeal.

To the extent that one can divine a policy preference in the two Town Planning Appeal Tribunal decisions referred to, the Tribunal obviously considered it appropriate in the *Aboriginal Hostels* decision, to enable objector-residents to be parties to an appeal. In the shopping centre case, however, the "aggrieved person" approach was obviously taken.

It is my view that it is appropriate to allow any person who has objected in the primary approval process to become a party to a subsequent appeal, as well as to allow any person who has a "special interest" in the subject matter of the proceedings to become a party whether or not that person was an earlier objector.

Whatever may be the rule it should be enshrined in legislation.

Development; Use; Use and Development

There is one feature of the planning system in Western Australia which may be unique. Whether or not it is, the feature has caused, is causing and will continue to cause trouble for planners, developers, planning approval authorities and lawyers. The feature is the requirement that all development must be approved. Trouble arises because of the distinction which courts have traditionally made between the "use" of land and the "development" of land.

The Town Planning and Development Act, as is well known, by s.2 defines the term "development" as:-

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

In the *University of Western Australia* v. *The City of Subiaco*[12] the issue arose as to whether the University was required to obtain planning approval under either the Town Planning Scheme of the City of Subiaco or the Metropolitan Region Scheme.

The Metropolitan Region Scheme by clause 16(1)(a) provides that:-

> Reserved land owned by or vested in a public authority may ... be used without the written approval of the authority ... if the land is used -
>
> (a) for the purpose for which it is reserved under the Scheme....

The University proposed to construct a building for the purpose of recreation connected with University activities. The land upon which the construction was proposed was reserved for University purposes. The land also happened to fall within with City of Subiaco's Planning Scheme No. 1 District Zoning Scheme. The City's approval to development is required under the Scheme in respect of land which is "reserved under the Scheme".

Although the Chief Justice held that the development proposal was not affected by the City's planning scheme he found that the University did require approval under the Metropolitan Region Scheme. He reasoned that the MRS clause 16(1)(a) exception only benefited the University to the extent that it required approval for the "use" of the land. He held that the physical "development" of the land is a different matter.

As the Chief Justice observed:-

> In my opinion the definition of 'development' in the Town Planning Development Act makes use of and encompasses two ideas. The first being 'use' of the land which 'comprises activities which are done in... or on the land but do not interfere with the actual physical

12 (1980) 52 L G.R A 360

> characteristics of the land' and the second being 'activities which result in some physical alteration to the land which has some degree of permanence to the land itself': see *Parkes* v. *Environment Secretary* (1978) 1 W.L.R. 1308 at 1311 per Lord Denning M.R. Applying that distinction to the Region Scheme text, I understand clause 16 of it to be speaking of, as in terms it does, 'use' in that sense and to be confined to use in that sense. It does not extend to 'development' in the second sense which would include the erection of a building.... Hence it is unable to do what it proposes to do without first applying for and obtaining the written approval of the authority to do so.

This reasoning has governed a number of planning appeals, and has been relied upon explicitly in the Town Planning Appeal Tribunal. The trouble is that although many town planners in Western Australia fully understand the distinction between "use" on the one hand, and "development" in the colloquial sense on the other, not every town planning scheme embraces the distinction. Often the result is much confusion.

The typical town planning scheme in its zoning table sets out which "uses" of land are permitted ("P" use), which are permitted with approval of council ("AA" use), which are incidental to a permitted use ("IP" use) and, through the scheme text, provides that all other uses are either prohibited or may be the subject of special approval. Many schemes today, of course, also create other special use zones and set out special terms upon which development may be approved or permitted therein. The overall point is that the zoning table relates to the "use" of the land, not to its physical "development".

At the same time, the typical town planning scheme provides that no person shall commence "development" on land without the approval of the council. Alternatively there is a provision which provides that:

> A person who desires to develop land for any purpose shall make application to the Council for planning consent to the development before applying for a building licence.

The typical town planning scheme adopts the definition of development used in s.2 of the Town Planning and Development Act. The result is that whilst some "uses" of land may be permitted, no "development", in the colloquial sense, may be commenced without the approval of Council.

To a person well-versed in planning law in other jurisdictions this seems odd. Elsewhere it is usually the case that the zoning classification indicates whether a development application needs to be made at all. Thus, in an area zoned "P" use, no development application would be necessary. A developer would only have to comply with development standards spelt out in a scheme and, of course, with the requirements attached to a building licence.

Under the Western Australian planning system, however, the "P" use classification does not have this effect. The position is perhaps best explained by the decision of the Tribunal in *Aboriginal Boomerang Council of W.A. Inc.* v. *Town of Geraldton*.[13] There the appellant was entitled to use land for the purpose of an "institutional home" as a right. In other words the use of the land was a "P" use. It was argued that in such circumstances the planning approval authority could not reject the application.

The Tribunal adverted to the distinction drawn between the terms "use" and "development" by Burt C.J. in the *University of Western Australia* v. *City of Subiaco* and concluded:

> In our opinion having regard to the characterisation of the proposed development as an "institutional home" the Council had no discretion to grant or refuse permission to use the land for that purpose. It does not follow that the Council had no discretion so far as the proposed construction was concerned.

In an earlier decision, *Aboriginal Hostels Ltd* v. *Shire of Swan*, [14] the Tribunal had remarked that an application for approval of a proposed use under a Town Planning Scheme was distinguishable from an application to commence development, although the latter would conclude an application for approval to commence a particular use.

It is necessary to be aware of the distinction and, in particular, to be aware that an application for approval to "use" land does not encompass an application to "develop" land in the colloquial sense.

However, the Town Planning Appeal Tribunal is prepared to treat an application for planning consent, or an application to commence development, as encompassing an application to "use" land as well as to "develop" land in its colloquial sense.

The distinction between "use" and "development" provides even more difficulties in the area of planning enforcement[15] than in the area of development approval, an issue I will not explore further here.

The question may be asked whether the distinction is one which should

13. (1982) 5 A R A D 1.

14. No 26 of 1979.

15 See Esther Investments Pty. Ltd. v. Dawson (unreported decision of the Full Court of Western Australia, 31st October 1985) This decision deals with the enforcement powers under s 42 of the Metropolitan Region Town Planning Scheme Act 1959 The Full Court held, inter alia, that the term "development" where it appears in s.42 refers to physical development. The significance of that finding is that in order to prosecute for a breach of the condition attached to planning approval, it is necessary, in many cases, to prove the breach of a condition prior to the completion of the physical development. The decision has undoubted ramifications for enforcement proceedings taken under s 10(4) of the Town Planning Development Act 1928. It should be noted, however, that a breach of a continuing development condition may still be prosecuted under s.42(a) of the Metropolitan Region Town Planning and Development Act. Note also, s.10(4)(a)(i)(g) The *Town Planning and Development Act* which enables prosecution for breach of a Scheme. This may enable the difficulty to be overcome in most cases where the Scheme provides that there must be compliance with the conditions of approval

be retained. Control over development can be achieved by other means. Those land uses over which a town planning authority wishes to retain discretionary control, can all be placed in an "AA" zone. Otherwise, development conditions written into a planning scheme, as well as building controls, are capable of achieving the amenity requirements of a planning authority. As a matter of policy, how keen are we to introduce a system of universal development control in Western Australia, for that is in truth what we have?[16] I intend that question to be rhetorical!

The Tribunal's Methodology in Determining an Appeal

When an appeal is made to the Tribunal, with what method does it approach its task?

The Tribunal, of course, does not play the role of an appeal court interested only in issues of law but instead deals with appeals coming before it "de novo".

This position is achieved by various provisions of the *Town Planning and Development Act*. By s.44, the Tribunal is empowered to hear and determine all appeals referred to it and may allow an appeal with or without conditions, affix further conditions, or dismiss the appeal either in whole or in part. By s.50(1), the Tribunal is able to require any person to give evidence before it and may require the production of any documents, plans or other papers in the custody or control of any party. By s.51 an appellant is not restricted to the grounds stated in the notice of appeal, nor is a party contesting the appeal restricted to the grounds earlier stated in a Statement by Respondent. And, most importantly, by s.52, on the hearing of the appeal the Tribunal is required to act according to equity and good conscience and the "substantial merits" of the case without regard to technicalities or legal forms. It is not bound by any rules of evidence, subject to the requirements of justice, and may inform itself in any matter in such manner as it thinks fit.

The Tribunal has long taken the view that in the exercise of a discretionary power to approve the "use" of land (leaving aside for the moment the question of the approval of "development" where the particular use is permitted by the Scheme), it should basically adopt a three-step inquiry: into need, advantage, and disadvantage.

In *Aboriginal Hostels Ltd* v. *Shire of Swan*[17] the Tribunal observed that:

> 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 the duty of deciding whether or not a

16. The extent to which our system of planning should be founded on universal development control is the subject of other articles in this issue

17 Appeal No. 26 of 1979.

> discretionary use should be permitted should first conduct enquiry 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.

The Tribunal cited a number of decisions from the Victorian Planning Appeals Board in support of this proposition, as well as a decision from New South Wales.

The Tribunal consistently has applied the three-step inquiry in determining planning appeals. An interesting recent application of that approach may be found in *Rajneesh Foundation* v. *Shire of Manjimup*.[18] In that appeal, which involved considerable evidence and argument, the Tribunal found that there was a need for the proposed development (a school for the children of members of the Rajneesh Foundation), that the proposed development would not affect the amenity of the locality, but that the proposed development would be inconsistent with carefully researched future uses in that particular region of the state. Having weighed the disadvantages of the development proposal against the benefits, the Tribunal determined that, on balance, it should exercise its discretion to refuse the proposed development.

As noted above, the Tribunal has firmly established the three-step inquiry in cases where the "use" of the land is in the discretion of the planning approval authority. But does the Tribunal and, if it does, should it, adopt the same approach to applications for approval to commence development in respect of land which may be used for that purpose as of right (that is, a "P" use)?

That issue came squarely before the Tribunal in *Aboriginal Boomerang Council of W.A. Inc.* v. *Town of Geraldton*.[19] Having noted the distinction discussed above between applications for approval to "use" and applications for approval to "develop", the Tribunal concluded that:

> [A]lthough the Council had no discretion to refuse the application insofar 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 insofar as it comprised an application for development by way of construction of the Institutional Home.

The Tribunal went on to find that in exercising this discretion matters such as noise and traffic generation relating to the scale of the proposed development, as distinct from the nature or character of the use as such, would be relevant. On the other hand, the Tribunal found that the charac-

18 Appeal No 10 of 1985
19 (1982) 5 A P A D 1

ter of the proposed development in relation to the development on the adjoining land and the locality, which was a relevant factor listed in the Scheme, would have to be approached on the footing that the proposed use was permitted.

The problem under the particular Town Planning Scheme was that the factors listed in the Scheme to be considered by the planning authority did not discriminate between use applications and physical development applications. Nevertheless, the Tribunal concluded that:

> to the extent that, by reason of the scale of the proposed development, for example, some adverse impact upon the amenity of the joining land was perceived, it would be necessary to balance that impact against the benefits to be derived from the development. In our opinion this involves a similar inquiry into need and balancing the projected benefits derived from the satisfaction of that need against the possible cost of the community by way of loss of amenity or other disadvantages as in *Aboriginal Hostels Ltd* v. *Shire of Swan*.

This observation leaves one with the impression that the three-step approach is relevant not only to "use" applications but also to simple development on land which may be used as of right for that particular purpose. The result, conceivably, is that in some cases the development application may be refused by reason of the general planning disadvantages.

The obvious problem with the application of the three step inquiry in respect of permitted uses, is that the zoning classification may end up not meaning what it says. Amenity factors, for example, may be relied upon in effect to re-zone the land. Ultimately there is no difference between a "P" use and a totally discretionary "AA" use.

This conclusion is confirmed by the recent decision of the Tribunal in *Jennings Industries (W.A.) Pty Ltd* v. *Shire of Mandurah*.[20] The appellant applied to the approval authority for permission to extend its shopping centre into a larger, "District" shopping centre. The approval authority was opposed to the development on the basis of need - the argument being that the area did not require additional shopping facilities. The use, however, was permitted as of right under the relevant Town Planning Scheme, but the approval authority had a discretion to approve the commencement of development. The appellant argued explicitly that:

> If the development satisfies the usual development standards, to refuse it on some other ground (such as community need) is an improper exercise of the discretion to regulate development. To say otherwise is to say that the discretion to regulate is in truth a discretion to refuse use.

20 (1985) 14 A P A D 40

The response of the Tribunal to this submission was that the approval authority could properly consider the "over-supply" of shopping facilities, and thus the "need" therefor, because a clause of the Scheme required it to consider, *inter alia*, any policy adopted by council for the development of the zone. Council had in fact adopted a policy concerning retail shopping. Additionally, the Tribunal considered the "over-supply" claim raised an amenity issue, which was another consideration the approval authority was properly entitled to take into account under the Scheme. Consequently, the Tribunal entered into a "needs" inquiry even though the use was a "P" use under the Scheme.

It may be that the Tribunal's analysis here is correct as a matter of law. But it does not detract from the policy analysis provided above, namely, that ultimately, on this approach, there may be little difference between a "P" use and an "AA" use. The truth of our planning system is that all uses are discretionary. Again I raise the policy issue: how keen is the community to introduce a system of universal development control? I am not sure that most people are aware that that is what we presently have.

This raises the issue discussed above. Is it appropriate to have the permitted use zoning classification and at the same time have a system of near universal physical development approval? Cannot the so-called amenity factor be met by the setting of appropriate development standards instead of creating them through the use of development control? These questions too are intended to be rhetorical.

A Litany of Relevant and Irrelevant Planning Factors Before the Tribunal

In this section various factors are mentioned which are all of some importance by reason of their regular invocation in planning appeals. No attempt has been made however to detail exhaustively all relevant and irrelevant planning factors.

(a) The view of the planning approval authority

An issue of considerable importance in planning law in every jurisdiction is the relationship between the appellate body and the primary approval authority. In many cases the primary approval authority is a local authority, democratically elected and representing the residents of the municipality. Increasingly, metropolitan municipalities are sophisticated in their outlook and experienced in their determination of planning issues. It might be argued that an appellate body should respect the autonomy of a local authority and only overturn its decision where it has erred on some crucial issue of fact or law.

Yet, as we have seen, the Town Planning Appeal Tribunal is empowered to consider matters afresh and is not limited to determining whether

an irrelevant factor was taken into account or some relevant factor overlooked.

Nonetheless, in a number of decisions the Tribunal has indicated its desire not arbitrarily to ignore the decision of a local authority.

In Tang v. *City of Stirling*[21] the Tribunal observed that:

> for present purposes, the amenity of an area is the sum of the expectations of the residents concerning the character in quality of their residential environment. Quite apart from the petition, the City through its process of meetings and consultations had established those expectations during the course of the review of the existing planning scheme. In refusing this application the City appears to have acted to preserve the amenity of the area, consistently with those expectations. In *Camfield Nominees Pty Ltd* v. *Town of Claremont* ... we indicated that in the absence of any evidence to suggest that the Council or the residents were acting unreasonably or capriciously or were activated by some extraneous considerations, this tribunal would be reluctant to disturb a decision made by the elected representative of the local residents, as in this case. In our opinion, having regard to the preservation of the amenities with a locality and the orderly and proper planning of the locality, the Council acted in accordance with sound town planning principles in refusing the application.

In terms of principle this statement is more evocative than precise. It would seem that insofar as the view of the Tribunal and the local authority coincide as to what amounts to orderly and and proper planning, the Tribunal will not override the decision of the Council. There has never been any suggestion by the Tribunal that it will ever be reluctant to override the determination of a local authority which does not, in its opinion, accord with sound town planning principles.

Perhaps the highest statement of principle one might derive from the Tribunal's attitude is that if there is genuine room for dispute as to what the application of sound town planning principles demand in the circumstances of the appeal, the Tribunal will be reluctant to displace the local authority's determination.

(b) Proposed planning schemes

A different matter, however, is where the approval authority in the exercise of its planning powers has in train a new planning proposal for the land the subject of the appeal.

Determining an appeal where the planning authority is proposing radical land use changes has never been easy.

21 (1982) 5 A P A D. 161, 171

In New South Wales the "Coty principle"[22] was established in the mid-1950's, as follows:

> It is important, in the public interest, that whilst the respondent council's local scheme is under consideration this Court should, in the exercise of its appellate jurisdiction..., avoid, as far as possible, giving a judgment or establishing any principle which would render more difficult the ultimate decision as to the form the scheme should take. It is also important, in the public interest, that during that period this court should, in the exercise of the jurisdiction referred to, arrive at its judgment, as far as possible, in consonance with town planning decisions which have been embodied in the local scheme in the course of preparation.

The Tribunal in a number of decisions has effectively adopted this approach. In *Tang* v. *City of Stirling*[23] the Tribunal referred to its own reasons in *Agnew Clough Ltd* v. *Town Planning Board* where it said:

> 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 Board, and to this tribunal on appeal, to make a decision on the merits of the application having regard to the existing planning controls applicable to the land. Where an amended planning scheme has been 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* (1957) 2 LGRA 117; *Stelling* v. *Melbourne and Metropolitan Board of Works* (1977) VPA243... A planning proposal 'seriously entertained' is one that has a real likelihood of being adopted, although in Western Australia where planning procedure 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.

In the *Agnew Clough Case* the Tribunal also observed that "where a document is put forward as a statement of policy, the question will arise whether that policy is consistent with sound town planning principles."

The Coty principle, or its Western Australian equivalent, is eminently sensible. Nonetheless, it carries with it the potential evil that planning approval authorities may, in some cases, rely more on future possibilities than examine with some degree of particularity the circumstances

22. Coty (England) Pty Ltd v Sydney City Council (1957) 2 L G.R A. 117, at 125 per Hardie J.
23 (1982) 5 A P A D. 161, at 172

of the proposal before them on the basis of the policy expressed in an existing planning instrument.[24]

(c) Public Opinion

In an age where public participation in many aspects of policy formulation and implementation is great, it is pertinent to ask what should be the appropriate influence of public opinion in the appeal process.

There may be some who think that the Tribunal should simply implement the strongly held view of the public on any particular planning controversy. Should not the Tribunal simply conduct an opinion poll, or some other form of public survey or have regard to petitions presented by groups of rate-payers or other bodies representing the public?

Of course, it is not always easy to identify "the public". Even if the most that can be said is that particular community groups represent merely a section of the public surely some weight should be given to petitions, polls and surveys. Do they not represent something?

In *Tang* v. *City of Stirling*, the Tribunal adopted the attitude of the former Victorian Town Planning Appeals Tribunal to public opinion in holding that whilst a petition is some evidence of the attitude of those who sign it, it is not particularly impressive as evidence, for four reasons. First, there is no way of checking the authenticity of the signatures. Second, it is certain that the signatories have been presented with a one sided, and often thoroughly misleading view of the proposed application. Third, the signatories are never presented with any arguments in favour of the proposal against which they were asked to sign. Fourth, signatories often do not live in the area affected by the proposal.

The same comments may generally be made about opinion polls and other community surveys. They may produce results which are interesting but usually no more than that. They are not generally to be treated as well-thought out responses based on sound evidence. They perhaps indicate a "gut" feeling of the community, but is that a proper town planning consideration?

Nevertheless, as noted earlier, in the *Tang Case* the Tribunal was prepared to consider the public view insofar as it formed the basis of amenity considerations which may have influenced the local approval authority in its determination of a development application.

Perhaps the best example of considerable community reaction to a proposal, and the influence it had on the Tribunal, is to be found in *Rajneesh Foundation of Australia* v. *Shire of Manjimup*.[25] The Tribunal, in this

24 See, eg , Claude Neon Ltd V City of South Perth (Appeal No 9 of 1985) in which the Tribunal overruled the planning authority's concern at establishing a precedent in an area under planning study and decided the appeal "on its merits"

25 Appeal No 10 of 1985

well-known appeal involving a proposal by the "Orange People" to establish a school on land in the South West of Western Australia, adopted the following general principle:

> [I]n assessing the views of residents it is not merely the weight of numbers but the reasons given for their views which are relevant.... On this basis the views of the residents are a particular relevance where the development proposed would substantially alter the character of the area.

In the *Rajneesh Foundation* appeal evidence of public meetings, petitions, and the general view of residents was before the Tribunal. There was considerable feeling against the proposal, which clearly had activated the rejection by the approval authority of the development application.

Some of the allegations concerning the "Orange People" were sensational and surrounded by a general air of media-hype.

The Tribunal found that a combination of media publicity, public statements and the behaviour of certain "Orange People" had been the principal ingredients in fueling the overwhelming and unprecedented opposition generated by the appellant's proposal. The Tribunal was not surprised in the circumstances at the "undoubtly genuine and sincere concern of residents". But the Tribunal held that on the evidence the reason most people signed petitions opposing the application was the concern about an Oregon-style takeover of the town of Pemberton: that Pemberton and the region would become Orange-Town. Additionally, the Tribunal found that many in the community were also concerned at the possibility that a school founded on a morally unacceptable philosophy would be established and likely to corrupt the children at the school and in the area.

It was in these circumstances that the Tribunal concluded that the views of the community reflected at public meetings and in letters and petitions, should not influence it. It held that both of the reasons motivating the community reaction were not supported by evidence.

As to the Oregon-style takeover of the town of Pemberton Chairman of the Tribunal noted that "In the absence of any such evidence I cannot find that the concern expressed has been based upon reasonable grounds."

In relation to the alleged moral bankruptcy of the philosophy of the Rajneesh, the Chairman noted:

> As to the second reason ... the questions whether the moral values which are likely to be imparted to the children attending the school would be unacceptable to the community at large or at Pemberton in particular, or whether the treatment the children are likely to receive will involve contravention of the United Nations Declaration of the Rights of the Child or would be otherwise unacceptable in the public interest, are not in themselves appropriate questions

for a Town Planning Appeal Tribunal. They may well be questions relevant to the grant or refusal of certification as 'an efficient school' (under education legislation) but it is not for this Tribunal to deal with them'.

The Tribunal thus held that:

To the extent that the decision of the Shire was influenced by the two reasons mentioned it follows from these findings that the decision was to that extent based on extraneous considerations. This affects the weight which should be accorded to that decision in all the circumstances.

(d) Amenity

Related to the foregoing discussion is the primary issue of amenity.

Amenity considerations loom large in planning law. The term "amenity" goes back to the modern roots of town planning legislation. The *English Housing, Town Planning Act, 1909* required planning schemes to be made having regard to the amenity of the neighbourhood. All early planning schemes in Australia appear to have required planning approval authorities to take into account amenity when considering a development application.

Sir Desmond Heap, the celebrated English planning lawyer, has expressed it well:[26]

Once upon a time there was a learned judge who was not quite sure what was the meaning of 'Amenity'. 'It appears to mean', he said, 'pleasant circumstances, features, advantages'...

That was way back in 1920 when statutory town planning control, and the development of land were in their infancy - they were in fact only nine years old at that time. Since then the word 'amenity' has come a long way. It has become better known and more frequently used. It has dragged into the forum of parliamentary and local government disputation other words to buttress and advance its own meaning. Such words are 'ambience', 'environment', 'quality of life'.

As another well-known English academic writer has observed[27], "like the proverbial elephant, amenity is easier to recognise than to define". The Town Planning Appeal Tribunal, however, has developed an amenity definition widely quoted in local planning circles. The *Rajneesh Foundation* decision provides a good example of the concept and its application:

The meaning which has been adopted for planning purposes is that

26 (1973) *Journal of Planning and Environment Law* 201, quoted in L A Stein, *Urban Legal Problems* (1974) at 524-5

27 Cullingworth, *Town and Country Planning in Britain* 4th ed (1972), 163

> the amenity of a given area is an expression of the sum of the expectations of the residents concerning the character and the quality of their residential environment: see *Cipriano* v. *City of Perth* (1979) unreported TPAT No. 20/1979; *Camfield Nominees Pty Ltd* v. *City of Claremont* (1980) unreported TPAT No. 22/1979; *Aboriginal Hostels Ltd* v. *the Shire of Swan* No. 26/1979; *Aboriginal Boomerang Council* v. *Town of Geraldton* (1982) unreported TPAT No. 47/1981, also 5 APAD 1 and *Islamic Association of Canning* v. *City of Canning* (1984) unreported TPAT No. 18/1984. Amenity is therefore a relative concept which will vary according to time, place and other circumstances. In many cases it is easy to determine that a proposed use will have a detrimental effect on the amenity of the area. It would be readily apparent for example, that the conversion of the private residence in an attractive and desirable residential area into a factory for the manufacture of noxious chemicals would substantially defeat the expectations of residents. In my view, however, the conversion of a hotel or guest house into a school does not have an inherent likelihood of being detrimental. One reason for this is that a school is not likely to be any more disruptive than a hotel.

In its decision in the *Rajneesh Foundation* appeal the Tribunal considered a further aspect of the problem of assessing affect on amenity, namely, identification of the particular locality in which a development is proposed. Often it is possible to define a locality and make an attempt to measure the noise and traffic considerations likely to effect the locality. In the Rajneesh decision the proposed development was in an isolated position and noise and traffic problems would not obviously flow. The Shire, therefore, contended that the actual activities likely to be carried on would be detrimental to the amenity of the locality because of the effect of interaction between the activities of the Rajneesh on the one hand and of the local residents on the other. As noted above, however, in relation to the community reaction to the developed proposal, the Tribunal was not satisfied on the evidence that these amenity considerations were endangered by the development proposal.

It may be observed, then, that the concept of "amenity" truly is "elusive", as noted by the Chairman in the *Rajneesh Foundation* decision. Often, the amenity considerations can better be identified by reference to the specific effect or impact a proposed use will or will be likely to have in a locality, such as traffic and noise.

Nonetheless, the more intangible expectations that a particular community, whether in the larger locality or the smaller neighbourhood, has in respect of that locality or neighbourhood, may itself be perceived as a valid planning consideration. A proposal which would tend to defeat those expectations might properly be termed one which is detrimental

to amenity.

It must be borne in mind, of course, that all that is being said here is that the amenity factor is a relevant consideration, not a determinative one.

(e) Orderly and Proper Planning

It will be noted that in many planning appeals before the Tribunal the claim is made, for or against a particular proposal, that it enhances or puts at risk orderly and proper planning. Most planning schemes including the metropolitan Region Scheme require consideration of this factor.

If a particular proposal offends the approval authority, it will ultimately assert that the proposal is contrary to orderly and proper planning. If a developer has had a proposal rejected by an approval authority, it will assert that its proposal is consistent with orderly and proper planning. In short, it is obvious that the expression is not dissimilar to the term "amenity". It is elusive and will carry a different meaning, or produce a different result, depending upon the time, place and circumstances in which it is relied upon.

Essentially, each appeal depends upon its own facts. If expert evidence shows that orderly and proper planning requires a certain result, then that evidence will be influential in the Tribunal. To the extent that a developer's proposal simply fails to conform with expert and accepted evidence, the proposal will be said to offend the principle of orderly and proper planning.

As a result, the best that can be said of this matter is that the Town Planning Appeal Tribunal is influenced by the principles of orderly and proper planning, whatever they may be. Their formulation and application depends very much on the circumstances of each case.

Again the *Rajneesh Foundation* decision provides a good example of the influence of orderly and proper planning in the Tribunal. One crucial issue on the appeal was whether the former use of the land and premises in question as short-term residential and tourist accommodation was a better planning objective than the proposed use of the premises as a school. The Tribunal concluded that:

> The identification, creation and preservation of sites for short-term residential and tourist accommodation which incorporate facilities which also benefit members of the local community is a desirable planning objective. The difficulty in obtaining suitable alternative sites, the fragmentation of the existing complex and the strong views of residents concerning the loss of the Hopshed Lodge facility will support reasonable planning action calculated to preserve or reinstate the former use of the Hopshed Lodge as a short term residential and tourist accommodation.

> It follows that the exercise by the Tribunal of the discretion ... to refuse approval of the change of use would be orderly and proper planning of the locality.

(f) Morality

A matter of considerable importance is the extent to which the Tribunal should engage in an evaluation of the morality, or social worth, of a development proposal. Should the Tribunal reject an application for development approval because the proposal offends common standards of morality, or the like?

In the main, tribunals elsewhere have answered these questions by saying that matters of morality and social acceptability of proposals are not relevant town planning considerations. Often, however, the line between an issue of morality and a relevant town planning consideration is a fine one.

As noted above, in the *Rajneesh Foundation* appeal the Tribunal was not concerned with the residents unfounded concerns that the philosophy of the Rajneesh Foundation was thoroughly bankrupt, or likely to corrupt children in the area. The fear presumably was that the 'disease' of free love would infect a stoic community. Interestingly, thus far the only result of any significance arising out of the Rajneesh philosophy, would appear to be the (alleged) attempted murder of the leader of the sect by some of his followers.

The issue of morality or social worth creeps into various types of planning decisions. For example, in *Australian Mutual Providence Society* v. *City of Melville,*[28] the Tribunal was asked to approve an amusement centre at the Booragoon Shopping Centre. It was clear that the City of Melville, and certain residents, considered that an amusement centre would attract an "undesirable element". The Tribunal did not simply reject this complaint but asked whether the fears were "reasonably entertained". The Tribunal stated:

> The question is not whether the responsible authority, in this case the Tribunal, considers that amusement centers incorporating video games are desirable or undesirable...
>
> [I]t is not for us to determine whether amusement machines are or are not a desirable form of entertainment from a moral or social point of view.

Thus the City of Melville was obliged to argue that the proposed development was not compatible with the expectations of the adjoining landholders and would detrimentally effect the amenity of the adjoining area. The Tribunal found however that, subject to appropriate conditions, an

28 Appeal No 8 of 1983.

amusement centre was an appropriate use of the land in question.

(g) Economic Factors

It is a feature of growing communities that additional commercial facilities, especially shopping facilities, are needed to serve the community.

It is obvious, to say the least, that the establishment of a new shopping centre in a locality is likely to have an effect on existing shopping centres in that locality and possibly further afield.

In an age of the regional or district shopping centre, which attract customers from a large catchment area, the impact of such a proposed shopping centre on existing facilities can be great.

The issue arises, therefore, whether it is a proper planning consideration for the primary approval authority or the Town Planning Appeal Tribunal to consider the effect a proposed commercial enterprise will have on existing commercial enterprises. If a proposed development is likely to provide competition to such an extent that it will detrimentally affect an existing enterprise, is it permissible for the approval authority to reject the proposal?

The decision of the High Court in *Kentucky Fried Chicken Pty Ltd v. Gantidis,*[29] dealing with the Victorian legislation, has now been followed by the Tribunal in a number of decisions including its recent decision in *Jennings Industries (W.A.) Pty Ltd* v. *Shire of Mandurah.*[30]

In *Gantidis,* Stephen J. made the following general comments about the relevance of the factor of economic competition:

> 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 or 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 properly 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 new competition afforded by that new development. However a mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse affect upon the extent and adequacy of the facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration.

The result is that the Town Planning Appeal Tribunal will not permit the rejection of a development application simply on the ground that it

29 (1979) 140 C L R 675
30 (1985) 14 A P A D 40

threatens increased competition to existing commercial enterprises.

Where, however, a proposed commercial development will result in a reduction of business for existing shopping centres, including local centres, to such an extent that those facilities may go out of business and thus cease to provide a service to local residents, and possibly create unwanted and empty premises in the neighbourhood, then the amenity factors so involved may be relied upon by the planning approval authority in rejecting an application.

In its decision in *Jenning Industries*, it was the Tribunal's view that both the approval authority and the Tribunal were entitled to refuse the proposed district shopping centre development either because there was no need for further development on the scale proposed or because such development would have an adverse effect on the amenity of the area and the physical facilities presently available in the town centre could be put in jeopardy.

Again, there is a fine line between relevant and irrelevant planning considerations in such cases.

An interesting postscript to this decision is that over twelve months elapsed from the hearing of the appeal and the handing down of the judgment. The Tribunal decided that, as at the time of the hearing, it would have considered the proposed development premature, but at the time of handing down judgment the circumstances had so changed that it would grant approval!

(h) Flexibility of the Application of Building Table and other Developments Standards set out in a Scheme

In the typical Town Planning Scheme, development standards are set out in a Building or Development Table. Often the Scheme will provide that the standards can be relaxed but only if the Council by an absolute majority determines to do so.

If a Scheme does not provide for relaxation of the standards it would seem that they must be rigidly complied with, since the provisions of a Scheme have the full force and effect of law. Where however the Council of the local authority is empowered by the Scheme to relax the standards by "absolute majority" the question remains whether the Tribunal has a similar power on an appeal.

An appeal may, of course, be made in respect of matters which involve the exercise of a discretionary power under a Town Planning Scheme. Where the Council has either refused, or has exercised in an unfavourable way, its power to relax a standard, then it is possible to categorise its inaction or action as one "in respect of" a discretionary power.

In *Kirov v. City of Bayswater,*[31] the Tribunal tentatively took the view

31 Appeal No 5 of 1984.

that it could relax a standard where the approval authority might have done so but did not. *The City of Perth* v. *Fairway Heights Pty Ltd*[32] was cited in support of this view. The Tribunal considered that it would be desirable when this issue is raised on appeal, for three members to constitute the Tribunal rather than two.

The matter is further complicated however by the provision in many Schemes that the resolution to relax the standards be confirmed within six months by a second resolution passed by an absolute majority of the Council. The Tribunal adopted the tentative view that in such cases, if the Tribunal determined to relax a development standard, it would still be necessary for the Council to reconsider the decision of the Tribunal within six months. If the Council met and failed to confirm the relaxation the matter could be brought back to Tribunal as the subject of a further appeal by an appellant.

It surely would be more practical for the Tribunal to adopt the view that once it has set a development standard on appeal, the powers of the Council are thereby spent. Such a view would require that the Council's two-step relaxation power be treated as a single approval power rather than two discrete discretionary powers. Perhaps logic is not on my side!

Conditional Approval

(a) General Principles

Planning lawyers no doubt are all brought up in the understanding that the power of the primary approval authority and of the Town Planning Appeal Tribunal includes the power to reject an application for development approval, to approve it, or to approve it subject to such conditions as it thinks appropriate.

Where a Town Planning Scheme sets out a list of the factors which the Authority should take into account when exercising its discretionary power, the proper view must be that any conditions attached to approval must relate to one or another of those factors.

It is traditional in this regard to refer to the judgment of Lord Denning in *Pyx Granite Co. Ltd* v. *The Minister of Housing and Local Government,*[33] where he said:

> Although the Planning Authority is given very wide powers to impose 'such conditions as they think fit', nevertheless the laws says that those conditions to be valid, must be fairly and reasonably relate to the permitted development. The Planning Authority are not at liberty to use their powers for an ulterior object, however desirable

32 [1981] W A R 51, 53 per Burt C J.
33 [1958] 1 Q B 554, at 572

that object may seem to them to be in the public interests.

In a similar vein, although dealing with the power of the former Town Planning Board of Western Australia to approve the subdivision of land, the High Court in *Lloyd v. Robinson,*[34] similarly observed that conditions could be attached to subdivision approval which related to the development and were imposed in pursuance of town planning principles. In that case the Town Planning Board had imposed an open space requirement which resulted in a certain area of foreshore land being transferred to the Crown free of cost.

In a more recent decision of the English House of Lords, *Newbury District Council* v. *Secretary of State for the Environment,*[35] it was confirmed that:

(a) conditions must be imposed for a planning purpose and not for any ulterior purpose;
(b) conditions must fairly and reasonably relate to the permitted development;
(c) conditions must not be so unreasonable that a reasonable planning authority could not impose them.

Although it is appropriate always to have regard to the particular discretionary power created by a Town Planning Scheme, these general principles would appear relevant to the exercise of the development approval power under most, if not all, Town Planning Schemes in Western Australia.

The general observation might thereby be made, that it will not be often that a condition imposed by the primary planning authority or the Tribunal on appeal will be found to be invalid, as distinct from unnecessary on the merits of the case.

The area in which most attempts are likely to be made to invalidate a condition will be those involving the dedication or other giving up of an interest in land. In the well-known case *Hall & Co. Ltd* v. *Shoreham-by-Sea UDC,*[36] a condition which required the developer to construct a service road at its own expense and give up a right of way to the public in respect of it, was held to be invalid by the English Court of Appeal. The Court took the view that an attempt had been made to provide through planning legislation something which should have been done by other means. Willmer LJ, for example, was of the opinion that the condition sought to be imposed was not authorised by any provision of the Act. He considered that the authority should have acted under the Highways Act which gave compensation to land owners in such circumstances.

By contrast, in *Westminster Bank Ltd* v. *Beverley Borough Council*[37] the

34 (1962) 107 C L R 142
35 (1981) A C 578
36 (1964) 1 W L R 240
37 [1969] 1 Q B 499

Court of Appeal held that planning legislation, in quite unambiguous terms, evinced an intention to take away property rights without compensation in some circumstances. Thus the Court distinguished Hall's case on its facts. Lord Justice Salmon, dissenting, considered that property rights could not be taken without compensation.

(b) The Ocean Reef Decision

In *Ocean Reef (W.A.) Pty Ltd* v. *Town Planning Board*[38] the Tribunal, in dealing with the subdivision approval power, took the opportunity to review many of the decisions referred to above relating to the power of a planning authority to impose conditional approval. The Tribunal recognised that:

> There are important and legitimate policy considerations on either side of the argument as to the proprietary of imposing such conditions. It cannot, in the view of the Tribunal, be said at the threshold of that argument these conditions are ex facie so far beyond the pale that they must beyond power.

The conditions in question provided:

15. The Hodges Drive road alignment, as shown on Plan No. SP59/1 (attached) being transferred free of cost to the Crown for road purposes.
16. The cost of one carriageway and full earth works of the proposed Hodges Drive alignment being met by the applicant.

This decision, although relating to subdivision approval, is a good example of how difficult it will be to convince the Tribunal that a condition is invalid, as opposed to being burdensome and inappropriate in the circumstances of the particular development.

Where a condition - for example one requiring an appellant to grant an easement to neighbouring landowners to provide them with access to their land to alleviate a severe parking problem or to create a service road serving other land to alleviate parking and traffic problems in the vicinity - has some relation to the permitted development, it will usually be considered valid.

It is clear, however, that the over-use of conditional approval to force landowners and developers to provide a resource to the community, at the expense of the landowner or developer, must inevitably force government to reconsider the "fairness" of the practice.

At one extreme the view can be taken that land is a community resource, that planning legislation has taken away the development right of landowners, and that planning approval is a privilege which may properly be accompanied by, sometimes, excessive financial burdens.

38 Appeal No 27 of 1983

That the burden is simply the cost of obtaining a significant financial advantage.

On the other hand, another extreme, the view can be taken that ownership of land carries with it the right to reasonable development potential and that any attempt to require the land owner to shoulder heavy financial burdens in the so-called public interest, is detrimental to a viable development industry and blatantly unfair in a capitalist society.

There must be some acceptable position between these extremes. There is no doubt that planning legislation has effectively taken away the development potential of all land in the State. It does not seem unreasonable in most cases to expect a landowner to provide what is in essence a community resource at his or her own expense in return for the grant of a right to develop. But there will be occasions when the community, through local government authorities or state government authorities, should properly meet or share the cost of the resource to be provided for community benefit.

In the *Ocean Reef* decision the Tribunal decided that Hodges Drive would serve a traffic demand arising out of the development in question, and would benefit the residents of the subdivision in the immediate vicinity. But it also found that residents in nearby areas outside the instant subdivision would also benefit from the road.

The Tribunal considered that the type of road required by the condition of approval was too large to be justified by the immediate subdivision, and that the projected traffic flow was attributable in large measure to sources other than local subdivision.

This confirmed the Tribunal in its view that the proposed conditions ought not to be imposed. It allowed the appeal and varied the decision of the Town Planning Board by deleting conditions 15 and 16 from the approval of subdivision.

In coming to that decision the Tribunal explicitly recognised, however, that although Parliament has created laws which allow the possibility of two different ways of effecting the development of road systems, the mere fact that one involves the payment of compensation and the other does not, does not of itself make it unreasonable or wrong to use one of those methods and not the other.

This decision does, however, seem to rest on the view that the burden imposed by the conditions was so great, that the conditions could not be said reasonably to relate to the permitted development.

Other Issues

Although outside the scope of the present paper a number of other interesting developments merit discussion. Of them, the attitude of the Tribunal to subdivision appeals is perhaps the most important, particu-

larly rural subdivisions where issues have arisen concerning the expectations of the landowners induced by official action, hardship considerations, and the relevance of the rural subdivision policy of the former Metropolitan Regional Planning Authority. This is a topic requiring separate consideration on another occasion.