A NEW LOOK AT SUBDIVISION: FALC PTY LTD V STATE PLANNING COMMISSION

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In *Falc Pty Ltd v State Planning Commission* ("*Falc*"),[1] the Full Court of the Supreme Court of Western Australia decided several related issues that have particular significance for environmental planning decision-makers in Western Australia, most notably with regard to the subdivision of land. These are:

1. The weight to be given to planning policy when determining applications for planning approval;
2. The relevance of zoning to subdivision;
3. The necessity for special rural zoning to precede special rural subdivision.

An authoritative pronouncement on each of these issues was long overdue.

Falc started as an appeal to the Town Planning Appeal Tribunal ("the Tribunal") from a State Planning Commission refusal of an application to subdivide land zoned "general farming" into 35 lots ranging in area from 1 to 1.7 hectares. Lots of that size are generally regarded as "special rural". The Tribunal dismissed the appeal for the sole reason that the land was not included in a special zone in the planning scheme of the responsible local authority. In doing so, the Tribunal adopted a principle first clearly enunciated by it in 1980 in *Cotterell v Town Planning Board* ("*Cotterell*")[2] where

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1. (1992) 74 LGRA 68.
2. (Unreported) Town Planning Appeal Tribunal 20 August 1980 1/80.

it was stated that subdivision must be consistent with the zoning. This principle has been followed consistently by the Tribunal in a succession of appeals involving special rural subdivision.

1. ERROR OF LAW

Under section 54B of the Western AustralianTown Planning and Development Act 1928 ("the Planning Act") an appeal may only be taken from the Tribunal to the Supreme Court if it involves a question of law. The appellant's appeal in *Falc* to a Commissioner of the Supreme Court was rejected on the ground that it did not involve a question of law. That decision was appealed to the Full Court which considered that the improper application by the Tribunal of a State Planning Commission policy prohibiting special rural subdivision without special rural zoning did involve a question of law. The Full Court[3] unanimously decided that the Tribunal had erred in the application of the policy. Justice Pidgeon agreed with Justice Nicholson's reasons for quashing the Tribunal's decision but not with his view that the matter should be remitted to the Tribunal for determination on the evidence, preferring the proposed order of Justice Ipp that the appeal to the Tribunal be allowed and that the appellant's plan of subdivision be approved on conditions to be determined by the Tribunal. Justice Nicholson said:

> On the face of the Tribunal's reasons it was prepared to be persuaded to depart from what it regarded as the applicable policy. However, in reaching the conclusion that proper controls can only be achieved by application of the policy, the Tribunal failed to give proper, genuine and realistic consideration to the merits of the case in that it did not properly consider whether the requisite level of control could be achieved by other means. By accepting the respondent's submissions and considering that it was not possible to put the scheme zoning aside, it tied the exercise of its discretion to the existence of the policy.[4]

Justice Nicholson concluded, with regard to the Tribunal's reasons as a whole, that the Tribunal did not just use inappropriate language to describe what might truly be said to be the weighing of planning considerations. He continued:

> I cannot agree with the conclusion of the learned Commissioner that "once it is conceded that zoning is a relevant matter to take into account then ... that is the end of the matter" because, while zoning is a relevant matter, it was elevated into a determinative matter. The Tribunal is not saved from error because the respondent has a policy ("Subdivision of Rural Land Outside the Metropolitan Region") in which it is said the respondent will only create lots of a size not easily accommodated in an urban

3. Pidgeon, Nicholson and Ipp JJ.
4. Supra n 1, 74.

> zone within areas zoned special rural so they will be subject to the land use and management controls which apply within that zoning: the function of the Tribunal is to have regard to that policy but to exercise its discretion in relation to it in the light of the evidence in the particular case. Despite references to such particulars, it does not seem to me that the Tribunal regarded itself as free to exercise its discretion contrary to that policy where the particulars required it to do so. In my opinion, an error of law was therefore present.[5]

Justice Ipp adopted a similar approach in also concluding that the Tribunal had erred in law and that the Commissioner had erred in holding that there had been no error of law on the part of the Tribunal. He said:

> [Z]oning may very well, but not necessarily, involve town planning considerations. Whether zoning does have such consequences depends on the circumstances of each particular case.
>
> The views expressed in the Tribunal's remarks in *Cotterell* and *Mumme* ... seen in isolation, accord automatic town planning consequences to the fact of zoning or *de facto* rezoning ... [T]hat approach is ... erroneous. The Tribunal's approval of the remarks in question in *Cotterell* and *Mumme* implies that it adopted that approach.[6]

2. FULL COURT'S ORDERS: A DIFFERENCE OF OPINION

Explaining why he considered that special rural rezoning might not be necessary to establish the controls for special rural subdivision, Justice Ipp referred to the appellant's argument that appropriate controls could be imposed either by placing covenants on purchasers of land, or by leaving it to the local authority to change the zoning if it considered that statutory controls were required. He said:

> In the light of the Tribunal's finding that the appellants' land is suitable in every respect for sub-division save in regard to the imposition of controls, and having regard to the evidence, that the element of control that is lacking is not substantial, I consider that appropriate controls could be imposed by one or both of the methods suggested by the appellants ... [I]t is desirable that the conditions which should attach to the approval of the sub-division should be determined and imposed by the Tribunal.[7]

It was his understanding as to the ready availability of alternative controls that led Justice Ipp to conclude that the Full Court ought to allow the appeal, leaving the Tribunal only to impose appropriate conditions. Justice Pidgeon preferred Justice Ipp's approach to the proposal of Justice Nicholson that the Tribunal determination be quashed and that the appeal be remitted to the

5 Ibid, 75.
6. Ibid, 84, 85.
7. Ibid, 85.

Tribunal so that it could consider whether the land could be subject to appropriate controls even though it was not zoned "special rural". Justice Nicholson considered that such a decision was essentially of a planning nature upon which, in the absence of evidence, the Full Court should not enter lightly.

3. SOME SIGNIFICANT ISSUES SETTLED

Three important issues were settled by the Court:

1. While a planning decision-maker should properly have regard to a planning policy, it should not treat the policy as binding, but should exercise its discretion in the light of the totality of the evidence and should regard itself as free to exercise its discretion contrary to the policy where the facts of the case require it to do so.
2. There is no necessary relationship between zoning and subdivision. In the absence of positive law to the contrary, zoning should not be treated as determinative of subdivision, though it may be relevant.
3. There is no necessity for special rural zoning to precede special rural subdivision if it is possible that the controls required for special rural subdivision might be achieved by restrictive covenant or some other means.

4. PLANNING POLICY APPRAISED

Justices Nicholson and Ipp also differed in their approach to previous Tribunal decisions where the Town Planning Board's ("TPB") policy on special rural subdivision had been applied as a reason for refusing a subdivision appeal. They were moved to reappraise the earlier cases by the comment in the *Falc* appeal that "[t]he Tribunal has consistently upheld the general policy not to permit rural subdivisions into small holdings unless within an area designated special rural".[8] The Tribunal went on to consider four representative appeals extending over the period from 1980 to 1986, but dealing specifically with the Tribunal's decisions in *Cotterell*[9] and *Mumme v TPB* ("*Mumme*").[10]

8. Ibid, 73.
9. Supra n 2.
10. (Unreported) Town Planning Appeal Tribunal 12 July 1983 2/83.

Justice Nicholson thought it necessary, in order to understand what the Tribunal in *Falc* was doing, to examine the four prior representative decisions. He concluded:

> [T]he decisions do not support rigid adherence to a policy adopted by the Tribunal in relation to the policy of the zoning authority as reflected in the zoning requirements applicable to special rural zoning in each case. The effect of the language used in the reasons of the Tribunal in these cases leads me to conclude that the approach of the Tribunal has been to give great weight to zoning but not to do so to the point of preclusion of other matters properly to be considered in the exercise of its discretion.[11]

In that way, Justice Nicholson sought to distinguish the approach adopted by the Tribunal in *Falc* from the approach adopted by the Tribunal in the other four cases commencing with *Cotterell*. That is a surprising distinction which is difficult to reconcile with the quite resolute application by the Tribunal over the years of the principle first clearly stated in *Cotterell*. In fact the reasons of the Tribunal in that case tend to deny the distinction. In *Cotterell*, the Tribunal said:

> Counsel for the Appellant also submitted that there was no legislative provision which allowed the TPB or the Minister to refuse a subdivision on the ground that it was first necessary to rezone the land. This is a correct statement in point of fact but the absence of a legislative provision is irrelevant. In considering an application of subdivision it is basic that regard should be had to the zoning of the land. Subdivision must be consistent with the zoning. In this respect, we refer to what the tribunal said recently in *Eversden v TPB*....[12]

In saying that "subdivision must be consistent with the zoning", the Tribunal could not have stated more clearly that it regarded zoning as determinative of the appeal. That is the error of law which the Full Court identified in the Tribunal's decision in *Falc*.

Justice Ipp considered that the Tribunal had adopted the same erroneous approach in *Cotterell* and *Mumme* as had been adopted in *Falc*. He referred to passages from the Tribunal's reasons which, seen in isolation, accorded automatic town planning consequences to the fact of zoning or de facto rezoning. On Justice Ipp's appraisal of the prior cases, the Tribunal's decision in *Falc* was typical of a consistent approach adopted since 1980, and in that light, the Full Court's decision in *Falc* takes on a far greater significance.

11. Supra n 1, 74.
12. Supra n 2, 11. *Eversden v TPB* (unreported) Town Planning Appeal Tribunal 6 August 1980 7/80.

5. THE IMPORTANCE OF PLANNING POLICY IN TRIBUNAL DECISION-MAKING

To place the Full Court's decision in *Falc* in a proper perspective, it is necessary to consider the background to the TPB's policy on special rural subdivision, and the reasons for the weight given to it on numerous occasions by the Tribunal. Such an examination necessitates a brief consideration of the application of planning policy by the Tribunal.

The need for flexibility in planning has often led environmental planners to favour policy over positive law when framing planning guidelines. The trend towards policy planning grew in Western Australia in the mid-1970s, and by 1976 the TPB was establishing a body of policies principally aimed at strictly controlling the subdivision of rural zoned land. The Town Planning Court which preceded the Tribunal, and dealt with planning appeals initiated between 1974 and the commencement of the Tribunal jurisdiction on 1 July 1979, was not subjected to arguments against subdivision of rural land based on planning policies until the late 1970's, and the Town Planning Court's decisions reflect that fact. References to TPB policies, and decisions based upon them, began to appear from 1978 onwards.

On the other hand, the Tribunal at all times has been forced to come to terms with planning policy. Reflecting the emphasis on planning policy, the 1976 amendments to the Planning Act which established the Tribunal also introduced in section 5AA the "approved statement of planning policy" to which the Tribunal under section 53 was required to have "due regard" in determining any appeal. Although approved statements of planning policy were not produced quickly, the provision for them in the Planning Act in 1976 discloses the way the town planning bureaucrats and professionals were thinking. It therefore may not seem surprising that, from the time of its earliest substantive decisions, the Tribunal was at pains to recognise a significant role for planning policy in town planning decision-making in Western Australia.

The Tribunal's first recognition of policy came in *Dawe v TPB*,[13] which was the first occasion on which the Tribunal made a decision on substantive issues. The Tribunal set a clear course for the future by considering and

13. (Unreported) Town Planning Appeal Tribunal 17 December 1979 5/79.

applying the TPB's Rural Small Holdings Policy, notwithstanding that the policy had not been published prior to the hearing of the appeal, and notwithstanding that it had not been processed under section 5AA of the Western Australian Planning Act as a statement of approved planning policy. The Tribunal, in explaining its decision to apply the TPB's minimum lot size policy contained in the Rural Small Holdings Policy, said:

> While it is true that the adoption of a formula is no substitute for the exercise of a discretion in any particular case, it is in the nature of town planning that policy should be formulated and fairly and objectively applied to individual cases. A minimum lot size could be prescribed as a matter of law under clause 5(a) of the First Schedule to the Act. Prescription by law could unduly inhibit the development and application of the policy in future cases. So long as the minimum lot size remains a matter of policy there will be an element of flexibility which may allow for exceptions in proper cases consistent with sound planning principles and also allow for the development and modification of the policy in the light of experience.[14]

The Tribunal clearly regarded planning policy as an appropriate means to guide decision-making by reason of its flexibility. Perhaps the leading statement on the Tribunal's approach to policy planning is contained in its reasons in *Agnew Clough Ltd v TPB*.[15] Amongst other significant comments the Tribunal said:

> 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.[16]

The Tribunal has continued, to a greater or lesser extent, to adhere to the notion that, in Western Australia, planning proceeds "upon the more flexible instrument of planning policy". Against that background, it can be seen that the Full Court's decision in *Falc* will have a considerable impact.

14. Ibid, 14-15.
15. (Unreported) Town Planning Appeal Tribunal 1 May 1980 1/79.
16. Ibid, 34.

6. CONTROLS ON SPECIAL RURAL SUBDIVISION

A final comment should be made about the issue central to *Falc*, namely, the appropriateness of controls on special rural subdivisions other than through special rural zoning.

Special rural zoning was created as a response to the pressure for hobby farm and small holding subdivision which gathered momentum in Western Australia during the 1970's. The expression "special rural zoning" is a shorthand way of referring to a package of scheme provisions aimed at ensuring that special rural subdivisions do not damage existing rural environments and activities. Certain provisions were designed by the TPB, in effect as model provisions for all special rural zones, with allowance for controls to be "tailor-made" to ensure that the objectives of any specific subdivision are met. For instance, for reasons of landscape interest, individual fire-breaks on lots may be prohibited; or for pollution control reasons, keeping of stock may be limited or prohibited.

Against that background the TPB, with local authority support, promoted the idea in the late 1970's that small holding subdivision of rural land should not occur unless appropriate controls were in place in the relevant local authority scheme. Those controls are associated with and compendiously referred to as "special rural zoning". It may be seen then that special rural zoning is different from other more conventional zoning which generally does not attempt to meet the control requirements of individual developments.

What controls then could do the same job as special rural zoning? From the time of *Cotterell*, the most frequently proposed alternatives have been the two favoured by Justice Ipp in *Falc* namely:

(a) Covenants imposed on purchasers of lots in the special rural subdivision; and

(b) Reliance upon the responsible local authority to introduce appropriate controls by a scheme amendment after the subdivision has been allowed.

The Tribunal has only accepted the first alternative where the responsible local authority was supportive of the appeal and prepared to co-operate in the imposition and enforcement of the covenants.[17]

17. Eg *Nirimba Nominees Pty Ltd v TPB* ("*Nirimba*") (unreported) Town Planning Appeal Tribunal 26 September 1980 31/79; *Ballajura Pty Ltd v TPB* (unreported) Town Planning Appeal Tribunal 12 February 1985 41/83. There is a detailed explanation in *Nirimba* of the matters considered by the Tribunal in concluding that restrictive covenants with the

The Tribunal has never accepted the second solution, considering that if a scheme amendment is necessary to achieve effective control over a subdivision, then to rely upon a local authority doing the right thing in response to a Tribunal approval of special rural subdivision would be tantamount to allowing a Tribunal appeal against a refusal of a scheme amendment.[18] The Tribunal has always thought that should not occur. Justice Ipp was prepared to take a bolder view, and many practitioners involved in environmental planning law from a variety of disciplines will be pleased he did so.

responsible local authority as a party would be binding, effective and satisfactory as a solution to the control problem. It should be noted that there was no such local authority co-operation in *Cotterell* and *Falc*.

18. Given that only a local authority can initiate an amendment to its scheme, and that there is no right of appeal against a refusal of a scheme amendment.