

## CONVEYANCING PROBLEMS RAISED BY TOWN PLANNING

By ROSEMARY NORRIS\*

Many of the problems raised, for an intending purchaser of land, by the Victorian town planning controls, are discussed by the other contributors to this symposium. However, there are certain points which it may be convenient to examine further in this context, and this is the purpose of this note.

Recent decided cases have discussed the question of whether a restriction imposed by or under town planning legislation on the use to which land may be put, can be regarded as a defect in the title to that land.

The first of these cases was *Dean v. Gibson*,<sup>1</sup> in which the vendor of land contracted to erect a house on the land 'in conformity with local government and uniform building regulations'. A large part of the land was reserved for main road purposes under the Melbourne Metropolitan Planning Scheme 1954 and subject to the Board of Works Interim Development Order. This meant that it could be used only for a road, or for such purposes as the Board might permit. However, the vendor did not apply to the Board for a permit before building the house. The true position was not discovered until eighteen months later, when the purchasers' application for a loan was investigated by the War Service Homes Division. The purchasers then brought proceedings for rescission and damages. The court found for the purchasers on the claim for damages on the ground that the failure to obtain a permit was a breach of the vendor's contractual obligation 'to erect a house according to local government regulations'. It was thus not necessary to refer to the question of title, and in fact the transfer to the purchasers had been completed before the question arose.

This case was followed by *Yammouni v. Condidorio*.<sup>2</sup> Here the subject-matter of the sale was land on which stood an existing house, but which was similarly reserved for main road purposes. However, the reservation did not prohibit the continuing use of the land for a house. The position was discovered after the exchange of contracts and prior to completion and the purchaser purported to rescind the contract and brought an action for the recovery of the deposit. The contract was rescinded by the vendor. The court held that there was

\* LL.B. (Melb.); Solicitor of the Supreme Court of Victoria; Independent Lecturer in Conveyancing, University of Melbourne.

<sup>1</sup> [1958] V.R. 563.

<sup>2</sup> [1959] V.R. 479.

no such material defect in title as would entitle the purchaser to rescind. However, on the facts in this case he was entitled to the recovery of his deposit in the exercise of the court's discretion under section 49 (2) of the Property Law Act 1958, despite the rescission by the vendor.

J. W. Every-Burns, in an article entitled 'Town and Country Planning and Title to Land',<sup>3</sup> examining the position in New South Wales, concludes 'Although the question has not yet come before the courts either in England or in Australia it is difficult to see upon what principle it could be held in the absence of fraud that any provision of the ordinance would amount to a defect in title or in the land contracted to be sold which would support an objection to title'.

This conclusion is borne out by the Victorian cases cited above and by the New Zealand case of *Dell v. Beasley*.<sup>4</sup> In that case premises required by the purchaser for commercial purposes were found to be zoned as residential. McCarthy J. said, '... the restriction here pointed to is one imposed not by covenant but by the general law and relates to the area generally. Defects of title are often within the exclusive knowledge of the vendor, but where the restriction arises by reason of the general law it does not amount to a defect of title.'

It seems clear, therefore, that a town planning restriction cannot of itself be regarded as a defect in title sufficient to give ground for rescission of a contract of sale by a purchaser. This being so, an intending purchaser must take care to ascertain the full extent to which the property is affected by town planning controls before entering into a contract. Here is his difficulty.

Section 23 (1) of the Town and Country Planning Act 1958 provides that upon receipt of an application in the appropriate form in respect of any land, a responsible authority must give a certificate stating 'whether at the date of the certificate any such land is or is not land to which an interim development order or planning scheme applies' and 'any other matter prescribed by regulations under this Act'. No such other matter has been prescribed. Under section 23 (2) such a certificate is to be conclusive proof of the correctness of its contents and any person acting in pursuance of such a certificate who suffers loss or damage by reason of any error or misstatement therein may recover compensation from the responsible authority.

This section is of little assistance to a purchaser. If the land is in the Melbourne Metropolitan area he knows that it is affected by the Board of Works Interim Development Order; and the existence of a Council planning scheme or interim development order is normally a matter of common knowledge in the locality affected. It is the practice of the Board of Works to include in such a certificate a statement as

<sup>3</sup> (1950) 23 *Australian Law Journal* 541.    <sup>4</sup> [1959] N.Z.L.R. 89.

to how the land is zoned or reserved; but whether sub-section (2) applies in the case of information thus volunteered may be doubted and in fact the form in which the information is included would seem to show that it is intended to exclude any possible operation of that sub-section. A purchaser, however, has no alternative, short of perusing the scheme personally, but to rely on information so obtained; with no statutory redress against the Board should it be incorrect. And it is not unknown for an incorrect certificate to be issued. Municipal councils vary in the form of certificate issued, some providing only the minimum information laid down by the section, others adding further information as to how the land is affected.

Further, when the purchaser has satisfied himself as to the manner in which the town planning legislation affects his land, he may discover that the use to which he intends to put the land is one for which a permit must be obtained from the responsible authority. He may try to discover whether the appropriate permit has been obtained by the vendor or any predecessor in title. It may be difficult to ascertain whether a permit has been granted; and if so, the permit may be subject to conditions of which the purchaser is not aware. There is no statutory obligation on a responsible authority to keep a public register of permits issued, although the Board of Works does, as a matter of practice, keep a register and supply information as to whether a particular permit has been granted and the conditions to which it is subject.

If no permit to use the land for the purpose he intends has been issued, the purchaser may, in circumstances where a permit is required, insist that the sale be conditional on its being obtained. This, in turn, may delay the transaction, as some time commonly elapses between the lodging of an application and the receipt of a permit. In circumstances where an appeal against the refusal of a permit is available, the lodging of an appeal may delay the matter for many months while the appeal is heard and considered.

From a purchaser's point of view, these are the major problems flowing from the imposition of town planning controls in Victoria. This is, of course, not the full picture. The knowledge of restrictions imposed on the use of neighbouring land is of great assistance to an intending purchaser; the benefits which flow from town planning generally need no mention here. The difficulties and inconveniences referred to are basically administrative, and it is to be assumed that in due course they will be overcome to the satisfaction of all concerned. It would seem desirable, in particular, to amend section 23 so as to compel the insertion of more information in certificates, and to increase accordingly the responsibility of the authority for the accuracy of such information.