CONDITIONAL TOWN PLANNING PERMITS

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[In the control of the use and development of land, town planning authorities exercise the important discretionary power of attaching conditions to the planning permits which they issue. In this article Ms Bryant analyses the criteria that the courts have developed to determine if this power has been properly exercised and goes on to examine the severability of conditions which have been found invalid.]

Under the Victorian Town and Country Planning Act 1961 numerous discretionary powers are bestowed upon a variety of planning authorities,[1] who are responsible at different stages in the planning process for decisions regarding such matters as the initial preparation of planning schemes, the making of interim development orders and the issuing of town planning permits with or without conditions. The exercise of broad discretionary power is an integral and necessary feature in all town planning schemes and the most frequently exercised discretion is the power to grant or refuse planning permits, with or without conditions.

Planning permits may be issued by a responsible authority while an interim development order is operating over the area or under an operative planning scheme. During the preparation of a scheme the interim development order places a blanket prohibition on development in the proposed area. The purpose of an interim development order is to control development for the period during which a responsible authority is preparing a planning scheme and is preparatory to the implementation of the operative scheme. Since the time period between the preparation and implementation of a planning scheme may be considerable the interim development order may provide that any development proposed in the planning area requires a planning permit from the appropriate responsible authority. This is designed to ensure that developments commenced in the area are not incompatible with the uses in the proposed planning scheme. Once the proposed planning scheme is adopted it becomes the operative scheme for the area. As it is neither possible nor plausible to anticipate in the final planning scheme all uses or developments of land, permits are thus the means whereby broad restrictions placed on the use of land may be relaxed in certain circumstances.

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[1] These authorities are classified under s. 3(1) of the Town and Country Planning Act 1961 as responsible authorities, *e.g.* the Melbourne and Metropolitan Board of Works, municipal councils, the Town and Country Planning Board and regional planning authorities. For a general outline of the Victorian planning process see Ricketson S., 'Legal Controls over Planning the Use of Land in Victoria' (1974) 9 *M.U.L.R.* 691.

The discretion being exercised by an authority when considering an application for a permit is whether or not to relax the restrictions placed upon the use of the land by an existing planning scheme or interim development order. This article will examine the limits placed on a responsible authority in exercising its discretionary power to attach conditions to a planning permit.

A responsible authority is empowered by the Act to grant a town planning permit subject to such conditions, either directive or restrictive, as it thinks proper. The power to grant a conditional permit under an interim development order is contained in section 18(2A) of the Town and Country Planning Act 1961 and in relation to an operative scheme in section 27(2). Under an operative scheme section 27(2) of the Act does not directly grant to the responsible authority discretionary power to impose conditions in a permit but provides that

> permit[s] may be granted subject to such conditions (if any) as are specified in the scheme and, where the scheme so provides, to such conditions as the responsible authority may in its discretion include in the permit.

The same is not true of the power to grant a conditional permit under section 18(2A) of the Act, which cannot be restricted by the terms of the interim development order. The discretionary power to impose conditions in a permit under an operative scheme must be specifically granted and contained in the terms of the planning scheme. Thus, in *Bundoora Industrial Park Pty Ltd v. Melbourne and Metropolitan Board of Works*[2] the Tribunal held that clause 20 of the Melbourne and Metropolitan Planning Scheme Ordinance[3] only empowered the Board of Works to grant or refuse a permit for a subdivision of land, and clearly did not authorize it to impose conditions in a permit issued under this clause. The conditions imposed were therefore found to be invalid.

Planning schemes normally empower the responsible authority to impose conditions in a permit. For example, clause 7(2) of the Melbourne and Metropolitan Planning Scheme Ordinance provides that the responsible authority

> may grant a permit subject to such conditions as may be imposed in this Ordinance or if the responsible authority so determines subject to such conditions having a like purpose but being not less stringent than those so imposed and to *such other additional conditions as the responsible authority may deem fit* [emphasis added].

There are no provisions within the Act which specifically limit the type of condition that may be imposed. However, the responsible authority is bound to implement the purpose of the Act and exercise its discretion according to town planning considerations.[4]

The administrative guidelines developed with regard to the proper exercise of a discretionary power are equally applicable to the exercise of

[2] [1972] V.P.A. 27.
[3] Approved by the Governor in Council on 30 April 1968.
[4] *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 (H.L. (E.)).

the power to impose conditions in a permit. The courts have, however, approached the exercise of this discretionary power somewhat differently from the exercise of the power to grant or refuse a planning permit. Although the authority should give reasons for the imposition of conditions in a permit, the failure to do so, unlike the failure to give reasons for the refusal to grant a permit, will not render the condition a nullity.[5]

The tribunals and courts have established certain criteria for determining whether a responsible authority has properly exercised its right to impose conditions. These consider whether the condition is fairly and reasonably related to the permitted development, whether it is reasonable, whether the condition is reasonably certain and whether the condition involves excessive delegation.

1 *Is the condition fairly and reasonably related to the permitted development?*

The meaning of this phrase has recently been discussed by Harris J. in *271 William Street Pty Ltd v. City of Melbourne*.[6] The question before the Court was whether a condition regarding access to a building was 'fairly and reasonably related to the permitted development'. The appellant argued that in order to be valid the condition had to be closely tied to the particular development or site and would be invalid if imposed to achieve some ulterior purpose, either not related to the building or too remotely connected with the development. In particular, it was argued that the condition imposed was not designed to achieve a legitimate purpose associated with the development in question but the condition was related to the respondent's general policy of facilitating pedestrian traffic within the central business district. More specifically, it was argued that the condition concerned anticipated future increases in pedestrian traffic consequent upon the opening of the nearby underground railway loop station. The appellant relied on Denning L.J.'s judgment in *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government*[7] where, in speaking of a similar power to attach conditions to a permit under the Town and Country Planning Act 1947 (Eng.), he said:

> Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must 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 that object may seem to them to be in the public interest.[8]

[5] *Brayhead (Ascot) Ltd v. Berkshire County Council* [1964] 2 Q.B. 303; *Parramatta City Council v. Kriticos* [1971] 1 N.S.W.L.R. 140 (C.A.).

[6] [1975] V.R. 156. The condition in this case related to a pedestrian thoroughfare which was not used solely by the occupants of the building.

[7] [1958] 1 Q.B. 554 (C.A.). The condition imposed in this case restricted the hours of use of certain established crushing and screening machinery and required the land to be tidied when the operation ended. The Court held that the conditions imposed by the Minister were valid, being fairly and reasonably related to the permitted development.

[8] *Ibid.* 572.

The appellant's contention was that the council was pursuing an ulterior and unauthorized object in imposing the access condition.

The respondents, on the other hand, relied upon the test formulated by Walsh J. in the High Court decision of *Allen Commercial Constructions Pty Ltd v. The Council of the Municipality of North Sydney*,[9] namely that the discretion of the permit-granting authority to impose conditions is limited to those conditions

> which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made. This purpose may be conveniently described, in accordance with the expression used by Lord Jenkins in *Fawcett Properties Ltd v. Buckingham County Council*,[10] as being 'the implementation of planning policy', provided that it is borne in mind that it is from the Act and from any relevant provisions of the Ordinance, and not from some preconceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained.[11]

In formulating his judgment Harris J. adopted the latter test, observing that the real issue to be determined was not whether the condition reasonably related to the permitted development but whether it was 'reasonably capable of being related to the implementation of planning policy'.[12] His Honour went on to say that the scope of such policy was however to be ascertained from the Town and Country Planning Act 1961 and the interim development order. The legitimacy of a condition will depend on whether or not it is consistent with the policy of the Act. Thus, while the restrictions and regulations which the planning scheme may contain must be applied to particular properties they do not necessarily have to relate solely to the development or use of those particular sites or properties, but may relate to the planning objective for the whole area.

In accepting and applying the wider Walsh test stated in *Allen Commercial Constructions Pty Ltd v. The Council of the Municipality of North Sydney*, Harris J. was correctly giving effect to a development in town planning law exhibited in all the English cases[13] which examined and expanded the Denning test to allow greater flexibility for the authorities responsible for town planning.

Although the English principles have been adopted by the New South Wales Land and Valuation Court, the Victorian Town Planning Appeals Tribunal and the Supreme Court of Victoria, difficulties have arisen between the two States in their application of the principles, particularly in cases concerning the requirement, in a permit, that contributions

[9] (1970) 123 C.L.R. 490.
[10] [1961] A.C. 636, 684 (H.L. (E.)).
[11] (1970) 123 C.L.R. 490, 499 f.
[12] [1975] V.R. 156, 163.
[13] *E.g., Mixnam's Properties Ltd v. Chertsey Urban District Council* [1964] 1 Q.B. 214 (C.A.); *Hall and Co. Ltd v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240 (C.A.); *Kent County Council v. Kingsway Investments (Kent) Ltd* [1971] A.C. 72 (H.L. (E.)).

towards the cost of general public works be made to the responsible authority.

In the New South Wales case of *Woolworths Properties Pty Ltd v. Ku-Ring-Gai Municipal Council*[14] a developer had applied for a permit to erect a supermarket. Else-Mitchell J. held that it was beyond the power of the local council to impose a condition upon the developer that he contribute $5,000 towards the cost of providing parking facilities for the general shopping area. His Honour ruled that such a condition would be valid only if it was connected in some way with the supermarket complex itself and this was not shown to be true in the case at hand. But in the subsequent decision of *Gillot v. Hornsby Shire Council*[15] the same judge expressed the view that a condition requiring a contribution to road works could be validly imposed if the road actually served the applicant's site. In Victoria, on the other hand, the Town Planning Appeals Tribunal adopts the view that a permit containing any condition which requires the applicant to make a financial contribution is invalid, being unrelated to planning. It makes no difference whether or not the condition is generally or specifically related to the applicant's land use and furthermore such a contribution would constitute an illegal tax. In *Land and Hume v. Melbourne and Metropolitan Board of Works*[16] the permit contained a condition requiring the applicant to pay to the Board of Works a sewerage levy of $700 per acre. Although this payment was required to be paid to the Board in its capacity as the Local Drainage and Sewerage Authority it was also held to be invalid as an unauthorized impost or tax. Similarly, in *R. & A.W. Pty Ltd v. City of Collingwood*[17] the condition in the permit requiring the applicant to pay five per cent of the unimproved capital value of the site to the local planning authority prior to the issue of a building permit was held invalid by the Appeals Tribunal.

Some examples of conditions which have been held valid include the following: limitation of the period within which the development must be commenced,[18] restrictions preventing any nuisance by the proposed use, *e.g.* hours of operation,[19] number of animals and the period for which they should be kept on the site,[20] sewerage and pollution controls,[21] landscaping of an area, including preservation of trees, shrubs, construction and colour

[14] (1964) 10 L.G.R.A. 177 (N.S.W. Land and Valuation Ct).
[15] (1964) 10 L.G.R.A. 285 (N.S.W. Land and Valuation Ct).
[16] [1972] V.P.A. 106.
[17] (1975) 1 V.P.A. 24.
[18] *Di Manno v. City of Oakleigh* [1969] V.P.A. 46.
[19] *Allen Commercial Constructions Pty Ltd v. The Council of the Municipality of North Sydney* (1970) 123 C.L.R. 490.
[20] *Smethurst v. State Planning Authority* [1972] S.A.P.R. 1 (S.A. Planning Appeal Board); *Mercieca v. Shire of Eltham* [1971] V.P.A. 186.
[21] *Bundoora Industrial Park Pty Ltd v. Melbourne and Metropolitan Board of Works* [1972] V.P.A. 27; *Bancroft v. Melbourne and Metropolitan Board of Works* [1971] V.P.A. 101 (that the cooking system in a takeaway food restaurant be provided with an activated carbon filter).

of buildings *etc.*[22] and preservation of the character of the neighbourhood.[23]

These cases reflect and illustrate the test adopted by Harris J. in *271 William Street Pty Ltd v. City of Melbourne*,[24] where the conditions imposed did not relate solely to that particular development but they were held capable of being related to the overall implementation of planning policy for that area.

The absence of a sufficient relation between the condition and the permitted development is often coupled with the question of the reasonableness of the condition imposed.

2 *Reasonableness of conditions imposed*

The concept of reasonableness of conditions attached to planning permits has been borrowed from administrative law. In Australia unreasonableness is one of the possible components of the *ultra vires* doctrine,[25] whereas the courts in England have attributed to unreasonableness the function of a separate and distinct head of invalidity.[26] The Australian approach is on the basis that the word unreasonableness does not amount to a separate implied limit on the exercise of statutory power. This view was expressed by Dixon J. in *Williams v. City of Melbourne*[27] where he said:

> Although in some jurisdictions the unreasonableness of a by-law made under statutory powers by a local governing body is still considered a separate ground of invalidity, in this Court it is not so treated.[28]

Although in England unreasonableness is a separate ground for invalidity there has been some diversity of meaning given by the courts to the word unreasonableness. On the one hand the court will apply the ordinary standard of proof to determine the reasonableness of the by-law or condition imposed and, if it thinks that it is unreasonable although within the scope of power, to declare it invalid.[29] On the other hand there is the narrow standard of reasonableness which was formulated by Lord Greene M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*[30] where he said:

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere

[22] *Rode v. Melbourne and Metropolitan Board of Works* [1974] V.P.A. 55.
[23] *L.U. Simon Pty Ltd v. Melbourne and Metropolitan Board of Works* [1972] V.P.A. 44.
[24] [1975] V.R. 156, 163.
[25] *Williams v. Melbourne Corporation* (1933) 49 C.L.R. 142, 154, *per* Dixon J.; Aronson M. I. and Whitmore H., *Review of Administrative Action* (1978) 225.
[26] *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223 (C.A.); de Smith S. A., *Judicial Review of Administrative Action* (3rd ed. 1973) 309.
[27] (1933) 49 C.L.R. 142.
[28] *Ibid.* 154.
[29] *Roberts v. Hopwood* [1925] A.C. 578 (H.L. (E.)); *Prescott v. Birmingham Corporation* [1955] Ch. 210 (C.A.).
[30] [1948] 1 K.B. 223 (C.A.).

. . .; but to prove a case of that kind would require something overwhelming. . . .[31]

The appropriateness of this approach was recently approved by the House of Lords in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council.*[32]

A test similar to Lord Greene's test of unreasonableness has been applied to determine the validity of by-laws. This was expounded in *Kruse v. Johnson,*[33] which held that by-laws need not be struck down as unreasonable unless they are oppressively so. This formulation indicates that the courts will tolerate all but unreasonable conduct on the basis that they are dealing with an elected representative body, and that form of control has to be taken into account before the court will impose its own control.

Although in Australia unreasonableness is not a separate head of invalidity the courts do refer to unreasonableness in the sense that the legislature could not have contemplated a decision of this kind.[34] It can be argued that this approach to unreasonableness does not differ substantially from the narrow test of reasonableness formulated by Lord Greene in *Wednesbury Corporation* and the similar *Kruse v. Johnson* approach to determine the validity of by-laws.

The courts have extended the *Wednesbury Corporation* and *Kruse v. Johnson* tests to the exercise of discretion in the planning context, in particular in determining the validity of conditions attached to permits. The *Wednesbury Corporation* test, in the opinion of de Smith, gives planning authorities considerable room to move and he suggests that a planning authority would not 'be held to have acted *ultra vires* because of unreasonableness unless its conduct has been oppressive or palpably absurd'.[35] Lord Greene's test was adopted in *Hall and Co. Ltd v. Shoreham-by-Sea Urban District Council,*[36] where a condition in a planning permit required the developer to construct a road over its land and to give the public free access over it. This would, in effect, have dedicated the road to the public without compensation. This condition was held to be 'unreasonable'[37] in the Lord Greene sense and thus invalid because no reasonable authority could have imposed such a condition. The Court held that as the condition was fundamental to the planning permission it was not severable[38] and the entire permit was void. The Court incidentally observed that the purpose of the condition could have been achieved under the provisions of the Highways Act 1959 (Eng.). In Victoria the situation could

[31] *Ibid.* 230.
[32] [1977] A.C. 1014.
[33] [1898] 2 Q.B. 91 (D.C.).
[34] *Carter v. The Egg and Egg Pulp Marketing Board for the State of Victoria* (1942) 66 C.L.R. 557; *Proud v. City of Box Hill* [1949] V.L.R. 208, 210.
[35] de Smith, *op. cit.* 310.
[36] [1964] 1 W.L.R. 240 (C.A.).
[37] In the sense described by Willmer L.J.: *ibid.* 248 f.; Harman L.J.: *ibid.* 255; Pearson L.J.: *ibid.* 261.
[38] The question of severability of conditions will be discussed below.

have been dealt with under provisions relating to subdivisions in the Local Government Act 1958 empowering municipal councils to impose conditions in subdivisions requiring land to be set aside without compensation.[39] However, the Victorian Town Planning Appeals Tribunal has consistently held that such conditions attached to planning permits are *ultra vires* the responsible authority. For example, in *Normand v. City of Camberwell*[40] it was held that a condition in a permit requiring the transfer of land without compensation to the responsible authority for road widening purposes was invalid. The condition was held to be invalid not because it was unreasonable but because the purpose of the condition was to achieve an object extraneous to the Act. That is, it was a condition which was not based on proper planning principles or objectives not related to them. The Tribunal also disallowed a condition which required the applicant to reserve part of his land as public open space without compensation,[41] and held that a condition requiring dedication of land as a bird-life sanctuary upon completion of an extractive industry was, quite apart from the issue of power, unnecessary and inappropriate. The condition was disallowed on the grounds of improper purposes, not unreasonableness.[42]

By contrast, the New South Wales Land and Valuation Court in *Jumal Developments Pty Ltd v. Parramatta City Council*[43] held a condition requiring land to be set aside for road widening purposes to be valid. The views of the Victorian Tribunal should also be compared with the decision of the High Court in *Lloyd v. Robinson*,[44] in which it was held that a condition requiring the applicant to transfer twenty acres of land to the Crown without monetary compensation was validly imposed. The Court was of the opinion that by complying with the conditions of the permit the developer was being granted the right to subdivide, so that it could not be said that the land was to be transferred to the Crown without compensation. The Court conceded that the compensation might be inadequate, but as long as the purpose of the condition was not extraneous to the Act, this was a choice to be made by the landowner. *Jumal Developments v. Parramatta City Council* is in line with the decision of *Lloyd v. Robinson*, which was cited by Pape J. in *Weigall Constructions Pty Ltd v. Melbourne and Metropolitan Board of Works*[45] when upholding the validity of a permit containing the common condition that the applicant provide water and sewerage facilities to the subject land. In *Housing*

[39] *E.g. Shire of Mornington v. Ramsay* [1964] V.R. 169; *Gishen v. City of Broadmeadows* [1966] V.R. 83 (F.C.).

[40] [1972] V.P.A. 156.

[41] *Reilly v. Shire of Rodney* [1970] V.P.A. 186; *Kaydee Builders v. Shire of Diamond Valley* [1970] V.P.A. 174 (where a condition requiring the payment of money in lieu of the provision of public open space was held to be invalid).

[42] *Farrow v. Shire of Berwick* [1972] V.P.A. 178.

[43] (1969) 17 L.G.R.A. 111.

[44] (1962) 107 C.L.R. 142.

[45] [1972] V.R. 781, 802.

Commission of Victoria v. Shire of Werribee[46] the decision in *Lloyd v. Robinson* was referred to in argument by the planning authority. The Appeals Tribunal reasoned however that '[t]his case was . . . decided under Western Australian legislation which is not, in our opinion, really comparable with the *Town and Country Planning Act* [1961]'.[47] The Tribunal went on to hold that a condition requiring land to be set aside for public open space without compensation was invalid. This is in line with its decision in *Normand v. City of Camberwell*,[48] where the Tribunal held that *Lloyd v. Robinson* was not applicable because the Victorian Town and Country Planning Act 1961 provided adequate provision for compensation.

There appears to be no conflict between the decision of the Victorian Appeals Tribunal and that of the High Court in *Lloyd v. Robinson*, since the relevant test is not whether adequate compensation is payable but simply whether the conditions in the permit, however unreasonable, are based upon proper planning considerations. If so, they are simply the 'price' the developer must pay for his permit and there is no obligation on the responsible authority to set a reasonable 'price'.

In a number of cases the courts have applied the *Kruse v. Johnson* test in interpreting the validity of conditions attached to planning permits. For example, in England it was applied in *Mixnam's Properties Ltd v. Chertsey Urban District Council*[49] and in *Kent County Council v. Kingsway Investment (Kent) Ltd.*[50] In Victoria it appears that this approach has also been adopted. Pape J. in *Weigall Constructions Pty Ltd v. Melbourne and Metropolitan Board of Works*,[51] although reiterating that unreasonableness was only relevant to power, referred to and accepted the relevance of the benevolent construction of by-laws in determining the validity of conditions attached to planning permits. This approach would seem correct, as the principles enunciated with regard to by-laws are properly applicable in the planning context, where discretionary powers are invariably exercised by elected representative bodies.

The wider test of unreasonableness does not appear to have been accepted in Australia.[52] Many cases where the judges have spoken of unreasonableness in this sense turn, on closer examination, on improper

[46] (1975) 1 V.P.A. 176.
[47] *Ibid.* 183.
[48] [1972] V.P.A. 156; *cf. 271 William Street Pty Ltd v. City of Melbourne* [1975] V.R. 156, 165. Mr Justice Harris referred to and applied the principles enunciated in *Lloyd v. Robinson.*
[49] [1965] A.C. 735, 753, 764 (H.L. (E.)).
[50] [1971] A.C. 72, 109 (H.L. (E.)).
[51] [1972] V.R. 781.
[52] In New Zealand the courts have adopted both the wide and narrow test of unreasonableness: see Paterson D. E., 'Aspects of Unreasonableness in New Zealand Administrative Law' (1968) 3 *New Zealand Universities Law Review* 52.

purpose or irrelevant considerations.[53] It is submitted that this test would be inappropriate in the planning context, because many of the determinations made and the conditions attached to planning permits often have a particular meaning to planners yet may appear to be unreasonable to persons who are not familiar with planning concepts.

The validity of conditions attached to planning permits also draws strength with the by-law analogy in another sense; in particular the general principle that the by-law should not be interpreted so as to deprive the subject of his common law rights. For example, Diplock L.J. in *Mixnam's Properties Ltd v. Chertsey Urban District Council*[54] said that a planning condition would be invalid for unreasonableness if it demonstrated 'manifest arbitrariness, injustice or partiality'.[55] It is submitted that this approach is incorrect in that the imposition of conditions on a permit is not similar to a by-law, because planning conditions do not operate generally and they do not always affect the whole community; a condition is rather the price of the permit and will be valid so long as it is based on planning considerations. The High Court in *Lloyd v. Robinson*[56] made it clear that planning conditions can interfere with people's common law rights, in particular their property rights.

In *271 William Street Pty Ltd v. City of Melbourne*[57] one of the appellant's submissions was that the condition in the permit was unreasonable in that the land was to be dedicated to the public without compensation. This contention was rejected by Harris J. The appellant relied on the English decision of *Hall and Co. Ltd v. Shoreham-by-Sea Urban District Council*,[58] whilst the respondent argued that the case could be distinguished from *Hall's* case and relied instead on the High Court decision in *Lloyd v. Robinson.*

His Honour held that the facts before him were more in line with those in *Lloyd v. Robinson* than *Hall's* case and that restrictions and requirements imposed by conditions, such as the condition before him, were not to be classified according to concepts of real property law but according to concepts peculiar to town planning law, and that in any event the said condition did not confer any public proprietary right. His Honour was clearly correct, since the condition in the permit did not give the public as such any right in law to the use of the walkway. If the owners were in breach of the condition in the permit and excluded the public, only the permit-granting authority could have applied to the Supreme Court,

[53] See, for example, *Roberts v. Hopwood* [1925] A.C. 578 (H.L. (E.)); Taylor G. D., 'Judicial Review of Improper Purposes and Irrelevant Considerations' [1976] *Cambridge Law Journal* 272.
[54] [1964] 1 Q.B. 214 (C.A.).
[55] *Ibid.* 237.
[56] (1962) 107 C.L.R. 142.
[57] [1975] V.R. 156.
[58] [1964] 1 W.L.R. 240 (C.A.).

pursuant to section 49(2) of the Act, for an injunction restraining the owners of the building from contravening the conditions in the permit.[59]

3 *Uncertainty of conditions imposed*

The problem of uncertainty of conditions imposed in planning permits is the same as that of unreasonableness. The House of Lords was faced with this problem in *Fawcett Properties Ltd v. Buckingham County Council*[60] where they accepted that planning conditions like by-laws may be void for uncertainty if, in the words of Lord Denning, 'it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results'.[61] S. A. de Smith has attacked this test of uncertainty as being itself uncertain.[62] It may be argued that the test in *Fawcett's* case abolishes uncertainty as a separate ground of challenge because of Lord Denning's assertion that the only situation in which a court could say a provision was invalid for uncertainty was where it was totally meaningless, not simply vague or ambiguous. The dictum of Lord Denning has, however, been affirmed and followed in subsequent cases such as *Mixnam's Properties Ltd v. Chertsey Urban District Council*[63] and *Hall and Co. Pty Ltd v. Shoreham-by-sea Urban District Council.*[64]

In Australia the problem again arises whether uncertainty is a distinct head of invalidity or merely evidence which tends to suggest invalidity under the broader doctrine of *ultra vires.* The High Court in *King Gee Clothing Company Pty Ltd v. The Commonwealth*[65] held that whilst the uncertain wording of an administrative instrument might suggest invalidity on the grounds of uncertainty it is not an independent ground of attack. Dixon J. said:

> I am not prepared to subscribe to the doctrine that certainty is a separate requirement which all forms of subordinate legislation must fulfil, so that an instrument made under a statutory power of a legislative nature, though it is directed to the objects of the power, deals only with the subject of the power and observes its limitations, will yet be invalid unless it is certain. The doctrine appears to me to be an innovation and to have come from a generalization from, or transfer of, a rule or supposed rule for determining the validity of by-laws.[66]

In discussing the origins of the requirements of reasonableness and certainty Dixon J. added:

> I should think that uncertainty, as a test of validity, arose from the nature of the power. On this footing, in the end, the question comes back to *ultra vires.*[67]

[59] The owners of the building would also be committing an offence under s. 49(1) of the Town and Country Planning Act 1961 and be liable to a penalty.
[60] [1961] A.C. 636.
[61] *Ibid.* 678.
[62] de Smith points out that '[h]ow this test of uncertainty ought to be formulated is not altogether clear', *op. cit.* 313.
[63] [1964] 1 Q.B. 214 (C.A.).
[64] [1964] 1 W.L.R. 240 (C.A.).
[65] (1945) 71 C.L.R. 184.
[66] *Ibid.* 194.
[67] *Ibid.* 195 f.

These views were approved in subsequent cases including one related to town planning.[68] There are however some important dicta to the contrary. In *Television Corporation Limited v. The Commonwealth*[69] the question arose whether the Postmaster-General had properly exercised his power whereby he was able to grant a commercial television licence upon such conditions as he determined. Notice of the intention to impose conditions had been given to the plaintiffs, who applied to the Court questioning the validity of the proposed conditions. One of the conditions in question stated that if there was a breach of any of the conditions then the licence could be revoked. Although Kitto J. expressed approval of the decision in *King Gee* and although he set his comments in the context of the *ultra vires* doctrine he seemed to indicate that certainty was always required in attaching conditions to television licences. He said:

> In this context it seems to me a necessary conclusion that what the [Broadcasting and Television Act 1942-60 (Cth)] means by a 'condition' is a specification of acts to be done or abstained from by the licensee company — a specification telling the company what it is to do or refrain from doing, and thus on the one hand enabling it in regulating its conduct to know whether it is imperilling the licence or not, and on the other hand making clear to the Minister for the time being what test he is to apply in order that any judgment he may form as to compliance or non-compliance may not be vitiated by error of law. A specification cannot, I think, fulfil this dual function if it is so vaguely expressed that either its meaning or its application is a matter of real uncertainty; and for that reason it seems to me that on the proper construction of the Act the Minister's power to impose conditions is to be understood as limited to the imposition of conditions that are reasonably certain. . . .[70]

It would seem that his Honour's remarks are equally applicable to conditions attached to planning permits. Taylor, Windeyer and Owen JJ. in a joint judgment found it unnecessary to consider the argument based on uncertainty. Menzies J., who dissented, said:

> Precision and freedom from ambiguity in matters of this sort are no doubt highly desirable so that the licensee will know where it stands in deciding what course it will follow, but provided that a condition is so expressed that it can be ascertained whether or not it is bona fide for the purposes of the Act and is consistent with law, I regard considerations of this sort as beyond the concern of a court of law determining the validity of what is, in truth, subordinate legislation.[71]

The requirement of certainty in planning conditions was directly dealt with by Pape J. in *Weigall Constructions Pty Ltd v. Melbourne and Metropolitan Board of Works*.[72] The condition in *Weigall's* case was that water supply and sewerage be provided or made available to the land to the satisfaction of the Melbourne and Metropolitan Board of Works in its capacity as a water supply and sewerage authority. Pape J. came to the conclusion that the condition that water and sewerage facilities were to be made available, in accordance with the provisions in the Melbourne and Metropolitan Board of Works Act 1958, was not invalid for uncertainty.

[68] *Cann's Pty Ltd v. The Commonwealth* (1947) 71 C.L.R. 210; *Pearse v. City of South Perth* (1967) 16 L.G.R.A. 71 (W.A. Sup. Ct). See also Sugerman B., K.C., 'Uncertainty in Delegated Legislation' (1945) 18 *Australian Law Journal* 330.
[69] (1963) 109 C.L.R. 59.
[70] *Ibid.* 70.
[71] *Ibid.* 83.
[72] [1972] V.R. 781.

His Honour did not refer to either *King Gee* or the *Television Corporation* cases in his judgment but applied the dicta of Lord Denning in *Fawcett's* case.[73] The *Fawcett* test is narrower than Kitto J.'s view that if a condition is so vaguely expressed that either its meaning or application is a matter of real uncertainty then it may be invalid. It is submitted that Kitto J.'s formulation may be inappropriate in the planning context because planning conditions must often of necessity be expressed in vague terms because they must be able to cope with unforeseeable events. For example, in *Baulkham Hills Shire Council v. A.V. Walsh Pty Ltd*[74] a condition was attached which required 'the provision of proper and satisfactory means of disposal of offal, feathers and waste water'. This condition is not certain but it does have a meaning. Else-Mitchell J., in referring to *King Gee*, said:

> There must be a myriad of regulations and bylaws [*sic*] which in the interests of public health or safety impose obligations in similar terms, such as to keep premises clean or to make them safe, and provided that the determination of the question of cleanliness or safety is not removed from review by a court I can see no ground for objection to their validity. In like fashion it seems to me that the condition under attack, in its penal application, should be construed so as to leave to the decision of a court the propriety or satisfaction of the means adopted to dispose of offal or other specified material.[75]

In the Victorian case of *Pentland Park Amusements Pty Ltd v. Melbourne and Metropolitan Board of Works*[76] it was argued unsuccessfully that a condition, 'such plan to be generally in accordance with the plan submitted', was void for uncertainty as what it was purporting to do was to refer to a requirement that it comply to standards set by other authorities. Similarly it has been held by the Tribunal that a condition imposed by a responsible authority that a shop be designed and constructed in such a manner as not to detract from the residential character of the area was invalid on the basis that it was too indefinite and consequently incapable of any real meaning.[77]

Thus the courts will only hold a condition void for uncertainty if it remains without meaning after consideration of any extraneous matters that may aid or guide the court or the Tribunal in interpreting it. In Victoria it is clear that a condition will not be held invalid merely because it is imprecise and cannot be interpreted with certainty. However, where the condition is expressed in terms which are so wide or vague that there is real doubt as to their meaning, the condition may be held to be invalid.

[73] The Court held that the condition in the case before it meant that water supply and sewerage facilities were to be made available in accordance with the relevant statutory provisions contained in the Melbourne and Metropolitan Board of Works Act 1958.
[74] (1968) 15 L.G.R.A. 338 (N.S.W. Sup. Ct (Eq.)).
[75] *Ibid.* 354.
[76] [1972] V.R. 540.
[77] *Karlis v. Melbourne and Metropolitan Board of Works* [1972] V.P.A. 76.

4 *Does the condition involve excessive delegation of power?*

Another ground for declaring a condition invalid may arise where the responsible authority, by the terms of the conditions contained in the permit, delegates to another person or body the power to direct or control the manner in which the condition is to be performed or complied with by the applicant. Whether this will be regarded in Victoria as sufficient ground for declaring such a condition void depends on the degree of delegation in question.

In *Turner v. Allison*[78] the responsible authority imposed conditions in the permit requiring, firstly, that external appearance, landscaping and planting of the site were to be carried out to the satisfaction of a named town planning consultant and, secondly, that the consultant should have power to make the final and binding decision if any dispute arose. It was held by the New Zealand Court of Appeal that the first condition was a valid delegation of power to the consultant:

> There is nothing in s. 35 [of the Town and Country Planning Act 1953 (N.Z.), which gave power to attach 'such conditions as the Board thinks fit'] or elsewhere in the Act which requires the Board to settle every last detail of the conditions which it seeks to impose and in my view . . . the Board neither abrogated its own functions nor delegated to Miss Northcroft a judicial function.[79]

The Court compared the condition to those frequently found in commercial or building contracts, where it is normal to find a requirement conditional upon the approval of a third party, for example an architect or engineer. However the second condition was held to be invalid, as the consultant had been given the power to act as arbitrator:

> I am accordingly much inclined to the view that the final words . . . go beyond the power of the Board to impose conditions. They purport to appoint an arbitrator whose decision would in effect oust the ordinary jurisdiction of the Courts to determine the question of compliance or non-compliance with a condition properly imposed by the Board.[80]

The reasoning in *Turner v. Allison* would appear contrary to that in *Conroy v. Shire of Springvale and Noble Park*.[81] That case concerned a council by-law relating to the keeping of certain types of dogs, which provided that, except with the written permission of the council, the keeping of greyhounds, whippets or other types of racing dogs was prohibited. The by-law further stated that any application to the council for permission to keep such a dog had to be accompanied by the approval in writing of the Dog Racing Control Board of Victoria. The entire by-law was held to be invalid. Gavan Duffy J. was of the opinion that the power given to the council could not be justified, being subject to the condition precedent of Board approval, as the decision of the outside body would, in effect, be the decision of the council. Sholl J. found the condition to be *ultra vires*

[78] [1971] N.Z.L.R. 833 (C.A.).
[79] *Ibid.* 857, *per* Richmond J.
[80] *Ibid.*
[81] [1959] V.R. 737 (F.C.).

on the basis that the council would have no control over how the outside body considered an application and how it made its decision.[82]

It is submitted that the courts, in accepting the proposition that the responsible authority can delegate some of its power to direct and control the manner in which a condition is to be performed or complied with, should nevertheless be anxious to prevent any attempt to delegate full control over such matters. A condition is more likely to be struck down for uncertainty where performance of matters contained in the condition is required to be simply to the satisfaction of a third party. Normally the courts will invoke the maxim *delegatus non potest delegare* where there are no standards offered to guide the exercise of the discretion. If the *Conroy* situation had related to a town planning decision and the delegation had been held valid, following the authority of *Turner v. Allison* it would have been open to the delegates to have exercised the power arbitrarily and without regard to town planning considerations.[83]

Despite these doubts,[84] the decision in *Turner v. Allison* has been referred to and approved in the Victorian case of *Pentland Park Amusements Pty Ltd v. Melbourne and Metropolitan Board of Works.*[85] There the condition required that a plan should be submitted and approved by the Country Roads Board before the permit was issued. Strictly, the Court did not have to consider whether or not there had been an improper delegation of power but, in referring to *Turner v. Allison*, Anderson J. was of the opinion that the reference to the Country Roads Board by the responsible authority did not, as a matter of law, amount to a delegation and was not an abdication by the Board of its statutory power. It is clear that if the principle in *Conroy's* case had been adopted, his Honour may well have reached the opposite conclusion.

In *Spurling v. Development Underwriting (Vic.) Pty Ltd*[86] it was held by the Supreme Court of Victoria that the Melbourne and Metropolitan Board of Works had no power to make the issue of a permit conditional upon some event — here before the permit would issue section 236(1) of the Local Government Act 1958 required the consent of the Governor in Council to the sale of land — and that the Board of Works could not achieve this result indirectly. This case was referred to and distinguished by Harris J. in *A.-G. for Victoria v. Parkin*,[87] where the granting of the permit was conditional upon the 'submission and approval of the landscape plan for open areas'. He distinguished this case from *Spurling's* case because

[82] *Ibid.* 758.
[83] See Kilbride P. E., 'Regulation, Prohibition and Subdelegation' (1965-68) 1 *Otago Law Review* 97, 105, 107.
[84] See Gifford K. H., *The Town Planning and Local Government Guide* (1972) para. 27 f.
[85] [1972] V.R. 540.
[86] [1973] V.R. 1.
[87] [1975] V.R. 942.

> I do not regard the terms of the resolution in this case as making the issue of the permit conditional upon the happening of some event. I regard the whole decision on the application as being a decision of the authority. The approval of the contents of the landscape plan was still part of the decision of the authority, committed as an administrative matter to its officers. It was not the happening of some external event.[88]

The landscape plan was submitted and approved by the officers of the council. It was argued by the plaintiff that the approval of the plan by the officers was an improper delegation of the power of decision-making by the council. Harris J. stated the rule with regard to delegation:

> The responsible authority in Council must itself make the decision on the application, but the actual issue of the permit is an administrative matter to be carried out by the appropriate officers of the authority. The authority cannot delegate to anyone else its duty to make the decision on the application, and that goes both as to the application and as to any conditions to which the permit is to be subject; but it may leave matters of administrative detail to its officers.[89]

He went on to hold that the approval of the landscape plan was an administrative act which could properly be left by the council to its officers.

It is arguable that delegation of supervision of conditions is not possible at all in permits granted under an interim development order. The wording of section 18(2A) of the Act may prevent this:

> A permit may be granted subject to such conditions as the responsible authority thinks proper including a condition that specified matters or things be done to the satisfaction of the responsible authority.

The last part of this section is open to the interpretation that it excludes conditions depending entirely on the satisfaction of a third party. Power to attach conditions in relation to operative schemes is contained in section 27(2) of the Town and Country Planning Act 1961, which refers to conditions specified in the scheme. The Melbourne Metropolitan Planning Scheme itself refers to clause 7(2) of the Ordinance, which allows imposition of 'such other additional conditions as the responsible authority may deem fit'.[90] Whether or not the dicta of Anderson J. in *Pentland Park* are correct, the wording of clause 7(2) may be wide enough to support some conditions which depend on the satisfaction of third parties. However, the cases so far seem to be limited to delegation to qualified persons or bodies.

SEVERANCE OF INVALID CONDITIONS

If a permit contains an invalid condition, is the permit itself invalidated or can the offending condition be severed? This question has not been satisfactorily resolved by the courts. The earliest decisions seem to indicate

[88] *Ibid.* 947.
[89] *Ibid.* 946 f.
[90] Copies of the documents comprising the planning scheme as amended or varied by any subsequent planning scheme or amendment made by the Governor in Council are available for inspection at the office of the Board of Works and the office of the Town and Country Planning Board.

that the invalidity of a condition rendered the whole of the planning permit void. Gradually the view was developed that under some circumstances the condition could be severed, particularly where the conditions were trivial or unimportant.

The first discussion of severance of invalid conditions was in *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government*,[91] where the dictum of Hodson L.J.[92] seems to indicate that where the condition is fundamental to the whole permit or closely interwoven with the other conditions there can be no severance. This view was approved and adopted by the Court of Appeal in *Hall and Co. Ltd v. Shoreham-by-Sea Urban District Council*.[93] The Court found that a condition *ultra vires* the responsible authority[94] was fundamental to the whole planning permission and therefore the permit could not be issued free of the condition. Willmer L.J. stated:

> [W]e have been referred to the dictum of Hodson L.J. in *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government* to the effect that, if conditions are held to be ultra vires, the whole planning permission must fail. For it must be assumed that without the conditions the permission would never have been granted.[95]

Pearson L.J. agreed with Willmer L.J. but added '[t]here might be other cases in which severance would be possible if the invalid conditions were trivial or at least unimportant'.[96]

In *Kent County Council v. Kingsway Investment (Kent) Ltd*[97] the House of Lords took the view that severance of an *ultra vires* condition was permissible if the condition was trivial, unimportant or incidental.[98] Lord Reid and Lord Upjohn, for example, stated the test of severability. Lord Reid explained:

> Suppose that a planning authority purports to impose a condition which has nothing whatever to do with planning considerations but is only calculated to achieve some ulterior object thought to be in the public interest. Clearly, in my view, the condition should be severed and the permission should stand. But suppose, on the other hand, that a condition, though invalid because *ultra vires* or unreasonable, limits the manner in which the land can be developed, then the condition would not be severable, for if it were simply struck out the result would be that the owner could do things on his land for which he never in fact obtained permission, and that would be contrary to the intention of the statute [Town and Country Planning Act 1947 (Eng.)]. So I am of the opinion that *Hall and Co. Ltd v. Shoreham-by-Sea Urban District Council* was rightly decided. And I think that the observations of Hodson L.J. (as he then was) in *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government* . . . were made with this kind of case in view.

[91] [1958] 1 Q.B. 554 (C.A.).
[92] *Ibid.* 579.
[93] [1964] 1 W.L.R. 240.
[94] The condition required the applicant to dedicate a road to the public use without providing compensation.
[95] [1964] 1 W.L.R. 240, 251.
[96] *Ibid.* 261.
[97] [1971] A.C. 72.
[98] Only Lords Reid and Upjohn held the condition to be *ultra vires* but severable. Lords Morris and Guest held the condition to be valid, but (Lord Donovan agreeing with Lord Morris) went on to hold that had it been void, it would not have been severable.

> But the present case [a condition imposing time limits on development] does not fall within either of these classes. It does not fall within the first because these conditions were related to planning considerations. And it does not fall within the second because severing these time conditions would not enable the owners to do anything on their land of a kind which the planning authority did not intend them to do. It would only extend the time during which the owner could act.[99]

Lord Upjohn stated further:

> [A] condition as to time does not go to the root of the permission itself; it is purely collateral and could be altered without affecting the actual grant of the permission. In complete contrast to the *Pyx Granite* and *Shoreham* cases, the condition as to time in this case formed no component part of the permission itself.[1]

Lord Reid and Lord Upjohn seem to be rejecting the 'triviality' test in favour of a broader formulation. Where the invalid condition is collateral to the planning permission it is capable of severance, irrespective of its importance. Thus the invalid condition as to time, though important, was severable since it did not alter the effect of the planning permission. The test of severability which Lord Morris and Lord Donovan appear to formulate is whether permission would have been granted without the invalid condition.

Despite the different approaches by their Lordships to the question of severability it appears that whatever view is adopted a similar question must be asked, namely, are the invalid conditions fundamental, or are they trivial, unimportant or incidental?

Kent County Council v. Kingsway Investment (Kent) Ltd was approved and followed in two recent Victorian decisions. In *Spurling v. Development Underwriting (Vic.) Pty Ltd*[2] Stephen J. reiterated the tests of severability expounded by their Lordships in the *Kent County Council* case[3] and applied the tests to the case before him. He held that the condition precedent sought to be imposed by the Tribunal was invalid. The condition requiring the approval of the sale by the Governor in Council was concerned entirely with the vesting of land and was unrelated to the proposed land use or other planning considerations. The condition could therefore be severed from the remainder of the determination, leaving the direction as to the issue of the permit otherwise unaffected.

In *Pentland Park Amusements Pty Ltd v. Melbourne and Metropolitan Board of Works*[4] Anderson J., after referring to *Kent County Council* and *Spurling*, severed an invalid condition on the basis that '[t]he requirement that the Country Roads Board be satisfied with the plan is in the circumstances the most trivial of requirements'.[5] His Honour distinguished *Spurling's* case on the ground that the condition in the case before him was a matter relevant to planning,[6] whereas in *Spurling* the condition

[99] [1971] A.C. 72, 90.
[1] *Ibid.* 113.
[2] [1973] V.R. 1.
[3] *Ibid.* 4 f.
[4] [1972] V.R. 540.
[5] *Ibid.* 548.
[6] The condition related to the Country Roads Board being satisfied with the plan of proposed works.

clearly was not a planning matter. His Honour added that severability of invalid conditions need not be restricted to non-planning matters.

Although the Victorian courts have not clearly identified which test of severability they prefer, it is submitted that the broader test allowing severance of 'collateral' conditions rather than 'unimportant or trivial' conditions is to be preferred. Moreover, the suggestion by Anderson J. that severability need not be restricted to conditions that go to non-planning matters should be adopted.

The discretionary power to attach conditions to a permit is and will continue to be an important means whereby planning authorities control the use and development of land. The imposition of conditions is subject to the limitations imposed by the principles of administrative law. In the town planning context uncertainties remain including the degree to which a condition is to be fairly and reasonably related to the permitted development, the extent of the power an authority has to delegate to another person or body supervision of the implementation of conditions and finally the severance of invalid conditions from a permit. Nevertheless the imposition of directive and restrictive conditions provides the desired flexibility which is an essential feature in town planning.