THE VICTORIAN TOWN PLANNING APPEALS TRIBUNAL

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In Victoria, the regulation and restriction of the use and development of land is subject to the overriding planning requirement of state control. This control is exercised through a series of regional and local planning authorities pursuant to the *Town and Country Planning Act* 1961. These authorities[1] are empowered under the Act to prepare planning schemes for an area, and to prescribe the use of land within that area and then achieve planning control by a two tiered process. First, an interim development order is placed over the proposed planning scheme area which places a blanket prohibition on development. The purpose of the interim development order is to control development for the period during which a responsible authority is preparing a planning scheme. This is preparatory to the second stage, the implementation of the operative scheme. As the period between the two stages may be considerable, the order may provide that a permit from the appropriate responsible authority is required prior to any development being commenced. This is designed to ensure that developments commenced in the area are not incompatible with the uses in the proposed planning scheme. The second stage is reached when the proposed planning scheme is adopted and becomes operative. Because it is not possible to anticipate in detail the final planning scheme, permits are the means whereby broad restrictions are placed on the use of land, and of course these may be relaxed if circumstances so require. Thus, permits allow variation from the operative scheme or interim development order. The required planning permit may be granted or refused by the responsible authority and, in addition maybe issued subject to certain conditions. Under the *Town and Country Planning Act* 1961, appeals against the determination by responsible authorities to grant or refuse a planning permit or in respect of conditions imposed therein are to the Victorian Town Planning Appeals Tribunal.

In this article, it is proposed firstly to survey the general administrative law principles governing appeal to, and review by, such tribunals, and secondly to examine the procedures and workings of the Victorian Town Planning Appeals Tribunal.

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1 Known as responsible authorities: *Town and Country Planning Act* 1961 s. 3(1).

A. APPEAL AND REVIEW

A person aggrieved by the exercise or non-exercise of a discretionary power under general administrative law principles has two general avenues of legal redress. Firstly, he may attempt to have the determination reviewed in a superior court of law by way of proceedings for a prerogative writ or other equitable relief. Secondly, the statute itself may provide the applicant with a form of statutory appeal, the procedure for which is normally contained in the enabling legislation. On the face of it, both alternatives are available in respect of a decision made in relation to a town planning matter. For example, a person aggrieved by the granting or refusal of a permit has the right to proceed by way of prerogative writ or equitable relief, or alternatively to proceed by way of appeal in accordance with the statutory appeal procedures provided in the *Town and Country Planning Act* 1961. Whilst a statute may expressly exclude the common law remedies,[2] where it does not do so, it has been held that the existence of a statutory right of appeal under planning legislation does not, at common law, necessarily exclude a party from commencing other related proceedings in a court of law.[3] This was indicated in *Vowell* v. *Shire of Hastings*,[4] where the Supreme Court of Victoria held that the existence of a statutory right of appeal did not prevent that court from granting a Writ of Certiorari to overrule the determination of the local authority.

The superior court may not accede to an application for a Writ of Certiorari where clearly, on the facts, the statutory appeal system under the planning legislation is more appropriate.[5] In this area of the law, the most common form of equitable relief is a declaration, which may be sought notwithstanding the fact that there may be a remedy available by way of prerogative writ. Prerogative writs and equitable relief are available to a party even when he has already instituted proceedings by way of statutory appeal.[6] The two forms of relief may proceed concurrently, as the area of investigation in each instance is different.

The discretion of a court in reviewing the determination of an administrative body is not as wide as the power of the Tribunal to do so on appeal. The reviewing court is restricted to matters of law and cannot examine the merits of a decision made within the discretionary power of

2 *Twist* v. *Randwick Municipal Council* 51 A.L.J.R. 193.

3 *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, where it was held that the court had jurisdiction to grant declaratory relief unless the Act clearly excluded the jurisdiction of the court. See also *Kent County Council* v. *Kingsway Investments Ltd.* [1971] A.C. 72; *Salmar Holdings Pty. Ltd.* v. *Hornsby Shire Council* [1971] 1 N.S.W.L.R. 192. (On appeal to the High Court this aspect of the case was not raised: *Hornsby Shire Council* v. *Salmar Holdings Pty. Ltd.* (1972) 126 C.L.R. 52.)

4 [1970] V.R. 764, 766; see also *R.* v. *Hillingdon London Borough Council ex parte Royco Homes Ltd.* [1974] 2 W.L.R. 805.

5 *R.* v. *Hillingdon London Borough Council ex parte Royco Homes Ltd.* ibid. p. 811-2; cf. *Vowell* v. *Shire of Hastings* [1970] V.R. 764, 766.

6 *Vowell* v. *Shire of Hastings* [1970] V.R. 764, 766.

the authority. The court may, for example, quash the decision by certiorari, declare the decision to be invalid, or by mandamus direct the authority to reconsider the matter according to law.

The responsible authorities under planning legislation in Victoria are granted, and exercise, a wide range of discretionary powers. Because of the nature of these powers and the effect which a decision may have on an applicant, it is essential that there should be some form of appellate procedure available, not only to the applicant, but also to persons who are affected in some material way by the responsible authority's determination. The statutory right of appeal against the determination of a responsible authority, whether it be to the Minister[7] or to a tribunal, is a necessary and integral part of the planning structure.

An appeal to the Tribunal is usually to be preferred to an application for review of the determination by the Supreme Court for two reasons. First, it provides persons affected by the determination with a procedure whereby they are able to have their grievance heard on its merits by a statutory tribunal which has wider powers than those of the Supreme Court in hearing matters by way of review. Secondly, the purpose of the legislation in establishing the Appeals Tribunal is an attempt to provide aggrieved persons with the opportunity of having a re-hearing of an application before individuals with special knowledge in the field of town planning. The obvious purpose of the *Town and Country Planning Act* 1961 is for members of the Tribunal to draw upon such expert knowledge to assist in reaching a fair and impartial decision on any matter raised before them in accordance with the guidelines in the Act. They are regarded as a body of experts who use their skills of interpreting and applying planning principles to correct errors made by responsible authorities.

B. POWERS AND DUTIES OF THE VICTORIAN TOWN PLANNING APPEALS TRIBUNAL

In Victoria, the *Town and Country Planning Act* 1961 prescribes that appeals shall be to the Town Planning Appeals Tribunal.[9] It should be noted that prior to the establishment of that tribunal in 1968, appeals were heard by the Minister for Local Government whose decision was final.[10]

[7] Under the English town planning legislation the appeal is to the Secretary of State: *Town and Country Planning Act* 1971 s. 36.

[8] In Victoria the appeal is to the Town Planning Appeals Tribunal: *Town and Country Planning Act* 1961 s. 19. In N.S.W. the appeal was, under the *Local Government Act,* to the Land and Valuation Court prior to 1972. Appeals are now heard by a Local Government Appeals Tribunal pursuant to *Local Government (Appeals) Amendment Act* 1971 s. 342N(2).

[9] S. 19. Substitution for the Minister was effected by *Town and Country Planning (Amendment) Act* 1968 s. 13.

[10] *Town and Country Planning Act* 1958 s. 14(3). The Minister still has power under s. 22E to hear appeals in relation to certain matters.

The Minister exercised his power to appoint delegates to hear the appeals, and he considered the report of the hearing before giving his decision. The Act was silent in relation to the procedural aspects of appeals, rendering it unsatisfactory and unworkable because it did not provide the basic procedural requirements for a fair and impartial hearing. As a consequence, an appeal to the Minister was not necessarily directed to an impartial person or body, because the Minister was almost invariably involved in questions of policy related to the hearings before him. The delegates appointed by the Minister to hear the appeals did not decide the appeal, but the Minister received their recommendations which he could accept or reject. The party to the appeal was not informed of the recommendations or reasons accepted by the Minister in his decision. The delegates appointed by the Minister to hear the appeal did not have any qualifications in town planning or local government.[11] Having regard to the rise in importance of town planning, with the direct consequence of an increase in the volume of appeals, it was seen to be necessary that a statutory appeals tribunal should be created. In 1967 recommendations were made for the establishment of an Appeals Tribunal and the legislation to this effect was passed in 1968.

1. *Composition of the Victorian Town Planning Appeals Tribunal*

The members of the Appeals Tribunal are appointed by the Governor in Council. The Act does not prescribe the maximum number to be appointed.[12] At present the Tribunal is composed of nine members. Prior to an amendment to the Act in 1970, the Tribunal consisted of three members. The appointment of additional members to the Tribunal was found necessary because of the increased number of appeals being heard by it. The Tribunal is an independent body which sits in four divisions, each of which consists of three members.[13] The Tribunal sits only in Melbourne, and does not sit in regional areas. The qualifications of the three members of each division of the Tribunal are prescribed by statute, which requires that one shall be a barrister and solicitor, the second a person experienced in town and country planning, and the third member having knowledge and experience in public administration, commerce or industry. All members are appointed for a renewable term of three years.[14] Thus, each division of the Tribunal is now composed of persons of similar experience and qualifications, which was not the case with the original Tribunal. The chairman of each division of the Tribunal is the barrister and solicitor. In Victoria, there has never been any substantial criticism

[11] For a more detailed account of the appeal procedure prior to 1968 see D. Derham, "Interim Development Appeals" (1960) 2 *Melbourne University Law Review* 218.
[12] *Town and Country Planning Act* 1961 s. 19A(2).
[13] *Town and Country Planning Act* 1961 s. 19A(7A).
[14] *Town and Country Planning Act* 1961 s. 19A(3).

of the composition of the Appeals Tribunal. In England, the Franks Committee discussed at length the composition of administrative tribunals.[15] The Committee recommended that the chairman of an appellate tribunal should have legal qualifications, and the *Town and Country Planning Act* 1961 follows this principle by requiring that the Chairman of the Victorian Town Planning Appeals Tribunal be a barrister and solicitor.

As the Tribunal is designed as a body of experts having special skills and knowledge which the legislation clearly intends them to employ in coming to a determination, to what extent are they entitled to rely on their expertise? In *Spurling* v. *Development Underwriting (Vict.) Pty. Ltd.*,[16] Stephen J. said

> "Its composition indicates that it is an expert tribunal (s. 19A) the members of which are no doubt expected to bring to their task of adjudication those qualities which have qualified them for membership."[17]

But conflicts may arise between information acquired by them as experts and evidence presented to them in a particular case. The issue in *Spurling's* case was whether the Tribunal was relying upon its own experience or on the evidence presented before it, in deciding the effect of the proposed establishment of a regional shopping centre in the vicinity of existing shopping facilities. In this particular case, the Court held that in coming to its determination, the Tribunal had in fact not acted on its own expertise but on the evidence before it. The Court discussed the question of the use of expert knowledge and Stephen J., in his judgment, referred to the extent to which an expert tribunal can use its own knowledge, and when the fact that such knowledge has been used must be disclosed to the parties to the appeal. For instance, where the Tribunal refers in its reasons to its own experience or to specific sources of information, the Tribunal may have to disclose to the parties to the appeal the precise nature of its member's experience, or the specific source of the information. Although the question did not arise directly, Stephen J. indicated that a tribunal may rely upon its own expert knowledge in reaching a decision, and such decision will not be assailable provided the decision is a responsible one on the evidence.

It is submitted that the Appeals Tribunal must, as it often does, use its general expert knowledge in coming to a determination. It would be difficult for it to formulate the use made of this general knowledge, and it is clearly not the intention of the Act that it should do so. It is probably neither of assistance to the parties nor desirable to require disclosure of

[15] *Report of the Committee on Administrative Tribunals and Enquiries* Cmnd. 218, H.M.S.O., 1957 para. 55.
[16] [1973] V.R. 1.
[17] Ibid. p. 11.

general knowledge or subjective reasoning upon which decisions are based. On the other hand, where the Tribunal uses knowledge which can be identified, for example statistics compiled by a municipal council, such material should be disclosed to the parties to the appeal to give them the opportunity of calling evidence or presenting argument in rebuttal. In many cases, it will not be clear whether the Tribunal is using its general knowledge or specific information it has acquired. In these instances it would invariably be a mixture of both, and it would be difficult to decide whether or not there should be a disclosure. The point has not been reported as having been argued in any hearing before the Victorian Appeals Tribunal and, as Smillie has commented

> "Due to the endless variety of fact situations which arise in this area, no hard and fast rules can be laid down in regard to the manner in which disclosure should be made and the form of rebuttal which should be allowed."[18]

2. *Right of Appeal*

The classes of persons who may appeal from a determination of a responsible authority are prescribed by section 19 of the *Town and Country Planning Act* 1961. The right of appeal can be exercised by a person, or group of persons, who is of a class referred to in section 19 of the Act and who feels aggrieved by the responsible authority's determination. In *Shire of Lillydale* v. *Albion Reid,*[19] it was decided that a "person aggrieved" is a person who has a real and direct interest in the decision, or is a person who has a genuine grievance because of an order that has been made which prejudicially affects his interest.[20] The appeal may be against the refusal of a planning authority to issue a permit,[21] the failure of the planning authority to make a decision within two months,[22] or against any condition specified in the permit.[23] There is also a right of appeal against the planning authority's decision to grant a permit with or without conditions.[24]

The right of appeal to the Tribunal is a statutory right and does not extend to situations not contemplated by the Act. In *Phillipou* v. *Housing Commission of Victoria,*[25] the Supreme Court of Victoria held that

> "Where a new statutory jurisdiction is created, any right of appeal therefrom must be given by express enactment and any such right

[18] "The Problem of 'Official Notice'. Reliance by Administrative Tribunals on the Personal Knowledge of their Members" [1975] *Public Law Journal* 64, 86.
[19] [1966] V.R. 481; also see *Howes* v. *Victorian Railway Commissioners* [1972] V.R. 103.
[20] *Attorney General of Gambia* v. *Pierre Sarr N'jie* [1961] 2 W.L.R. 845, 853.
[21] *Town and Country Planning Act* 1961 s. 19(1)(a)(i).
[22] *Town and Country Planning Act* 1961 s. 19(1)(a)(ii).
[23] *Town and Country Planning Act* 1961 s. 19(1)(b).
[24] *Town and Country Planning Act* 1961 s. 19(1)(d).
[25] (1969) 18 L.G.R.A. 254. A similar situation exists in N.S.W., e.g. *Ampol Petroleum Ltd.* v. *Warringah Shire Council* (1956) 1 L.G.R.A. 276.

cannot be extended by an equitable construction to cases not distinctly enumerated . . ."[26]

For instance, the power of the Tribunal does not cover the supervision of the preparation of a planning scheme.[27]

The right of appeal is a right which accrues at the time the determination is made by the responsible authority. In *Shire of Lillydale* v. *Albion Reid,*[28] a planning permit was refused by the responsible authority under an interim development order in force over the area. Before the appeal against this refusal was heard, the interim development order was replaced by a planning scheme which prohibited the use proposed in the application. It was held that the Minister for Local Government (to whom the appeal was made, it being prior to 1968) had the jurisdiction to hear the appeal, as the right of appeal accrued on the date the determination was made by the responsible authority.

3. *Jurisdiction of the Appeals Tribunal*

The Appeals Tribunal is given power to hear appeals against the determinations of responsible authorities *de novo.*[29] This may include a situation where the responsible authority refuses to reach a determination on an application because there is some unusual or difficult town planning question raised. In New South Wales, prior to the establishment of the Local Government Appeals Tribunal in 1972, the Land and Valuation Court had expressed the view in several decisions that a responsible authority could, where there was some unusual or difficult town planning concept involved, refuse to reach a determination[30] and thus attempt to force the applicant to invoke the appellate procedures.[31] The effect of this was that the applicant obtained a decision from the Court, and the responsible authority was able to relieve itself of the obligation of reaching a reasoned determination. It is not clear whether the New South Wales Local Government Appeals Tribunal will adopt this approach. It should be noted that the Land and Valuation Court was a division of the Supreme Court of New South Wales and had wide powers on appeal, whereas the Tribunals in New South Wales and Victoria are administrative tribunals designed for a particular purpose. Theoretically, a responsible authority in Victoria can, by the failure to grant a permit within two months, force

[26] Ibid. p. 257.
[27] *Ampol Petroleum Ltd.* v. *Warringah Shire Council* (1956) 1 L.G.R.A. 276. Mr Justice Sugerman, in referring to the court's jurisdiction, stated: "The jurisdiction does not extend to a review of, or supervision over, the exercise by a council of its functions as a planning authority preparing a local scheme."
[28] [1966] V.R. 481.
[29] *Wajnberg* v. *Raynor and M.M.B.W.* [1971] V.R. 665, 681.
[30] Where the planning authority declines to give a decision on an application within a period of 40 days, the applicant could institute an appeal on this ground pursuant to s. 341 of the *Local Government Act.*
[31] *Woollahra Municipal Council* v. *Sydney City Council* (1966) 12 L.G.R.A. 175, 188.

the applicant to appeal to the Tribunal, not because of an adverse determination but because no decision was made. It is submitted that the Appeals Tribunal should not be placed in the position of the responsible authority in deciding a matter at first instance.[32] Its role is to rectify errors made by a responsible authority in coming to a determination, and not to make a decision on a permit as a substitute for the responsible authority.

The legislation makes the Appeals Tribunal the final body of appeal on all matters except questions of law; appeals to the Supreme Court on questions of law are dealt with subsequently.[33] The Tribunal has no greater power than the respective responsible authorities,[34] and consequently has no right to make a determination which the responsible authority had no power to make.[35] The Tribunal, when sitting on appeal, is bound to apply the same principles which govern the responsible authority[36] at the time of the determination subject to the following qualifications.

(a) EQUITY AND GOOD CONSCIENCE

The Tribunal is, by virtue of section 21(1) of the Act, required on the hearing of an appeal to "act according to equity and good conscience and the substantial merits of the case". The words "equity and good conscience" are more than a restatement that the Tribunal must act lawfully. The Tribunal has acknowledged that by this provision it is bound by these words to take into account the equitable and moral aspects of the case. The inclusion of the concept of equity and good conscience appears to be an attempt, where possible, to avoid hardship which may be suffered by an applicant if the Tribunal were to apply strict planning principles.

It is curious that the Act does not require this doctrine, which is not really a planning concept, to be taken into account by a responsible authority, but expects it to be taken into account by the Tribunal. The reason the Act makes the distinction is not apparent, except insofar as the intention may be to completely unfetter the Tribunal's discretion in reaching its determination. Thus the Tribunal has a wider scope than the responsible authority for reaching its determination and, accordingly, it may come to a different decision on the basis of these additional considerations. For example, in the case of *Gala Homes and Sales Pty. Ltd.* v. *M.M.B.W.*,[37] the Tribunal upheld an appeal against the refusal of the Board of Works to grant a permit for a plan of subdivision. The Tribunal

[32] Indeed the Tribunal is given specific power by s. 22(1)(aa) to direct the responsible authority to consider the application as made.
[33] See p. 227 ff.
[34] *L'Estrange* v. *City of Hawthorn* [1972] V.P.A. 5, 8. *George Ward Distributors Ltd.* v. *Cumberland County Council* (1958) 5 L.G.R.A. 24.
[35] *L'Estrange* v. *City of Hawthorn* [1972] V.P.A. 5, 8.
[36] See also 219 ff.
[37] [1970] V.P.A. 259.

held that it was entitled to do so, having regard to the unusual circumstances of the case and because of its power under section 21(1) to "act according to equity and good conscience". This doctrine is also invoked in relation to the transitional cases.[38]

However correct these decisions of the Tribunal may be, the same result may or may not have been reached by the responsible authority if it had the same power as the Appeals Tribunal. It is submitted that the anomaly which exists in the legislation is not justified, and should be resolved by eliminating the distinction. The requirement of acting according to equity and good conscience should govern the decisions of both the responsible authorities and the Tribunal.

(b) CONSIDERATION OF STATEMENTS OF PLANNING POLICY

The Tribunal alone is required by section 20(7) of the Act to consider and give effect to statements of planning policy. Again, there is nothing in the Act requiring responsible authorities to have regard to such statements in considering a permit application, but section 8E of the Act does require the responsible authority to have due regard to these statements in preparing or amending any planning scheme. It would be difficult to see how the responsible authority could have regard to statements of planning policy in relation to the preparation of a planning scheme, yet not have regard to them in considering a permit application. Moreover, it is likely that the responsible authority would anticipate the Tribunal's consideration of statements of planning policy. As the Tribunal commented in *Kirkham* v. *Westernport Regional Planning Authority*[39]

> "The Act does not specifically oblige a responsible authority to have regard to a statement of planning policy when considering an application for a permit under an interim development order, but it would be unreal to suggest that a responsible authority should not do so in the light of the provisions of s. 8E and of s. 20(7) which requires this Tribunal, in determining an appeal (including, of course an appeal in respect of an application under an interim development order) to take account of and give effect to such statements with respect to any matter relating to town planning."[40]

Nevertheless, the law is clear that strictly only the Tribunal must take into account statements of planning policy in considering permit applications.

It is difficult to assess the effects of this anomaly. Frequently it is open to an appellate body to take a different view of the facts, and thus allow an appeal when ostensibly acting on the same criteria as the responsible authority dealing with the original application. But, as with the Town

[38] See infra p. 217.
[39] [1972] V.P.A. 24.
[40] Ibid. p. 25.

Planning Appeals Tribunal, when additional criteria are introduced for the first time at the appellate hearing, it is virtually impossible to know, in the absence of an express explanation by the appellate body, whether such appellate body relied, and if so to what degree, on the additional criteria. As submitted earlier, the difference in the criteria governing decisions made by the responsible authority and the Appeals Tribunal serve no useful purpose.

(c) THE TIME AT WHICH THE APPLICATION IS CONSIDERED ON APPEAL

(i) *General rule*

As a general rule, on appeal the Tribunal is required to apply the same principles as the responsible authority did at the original hearing. It need not, however, consider the circumstances as they were when the matter was considered by the responsible authority, and the Tribunal can take into account matters which occurred between the time of the determination by the responsible authority and the time the matter was heard on appeal.

The Tribunal may take a different approach on appeal because there is often a significant lapse of time following the responsible authority's determination. The Tribunal normally considers the application some months after the responsible authority has made its determination. This passage of time may be material because the Tribunal considers the application having regard to all relevant facts at the date of the hearing of the appeal.[41] Thus it is not limited to the factors considered by the responsible authority at the date of its determination, or existing at the date the appeal was lodged. The length of time elapsing can be important if, for example, there is a change in planning standards, or the nature of the locality, or the nature of the proposed use. In looking at relevant facts at the date of the hearing of the appeal, the Tribunal will consider matters such as planning proposals which have not been fully implemented and the provisions of a draft planning scheme for the area. In *Balgowlah Rex Hotels Pty. Ltd.* v. *Manly Municipal Council*,[42] the court stated

> "it is the Court's duty to treat any draft scheme as ambulatory and to look at its provisions in the form they take at the time of the hearing of an appeal."[43]

The Land and Valuation Court held that the provisions of the draft scheme were relevant to the exercise of the court's discretion. In New South Wales, the Land and Valuation Court has held that this principle will apply with more force where there has been a substantial lapse of time between the date of the determination by the responsible authority

41 *Gala Homes & Sales Pty. Ltd.* v. *M.M.B.W.* [1970] V.P.A. 259.
42 (1965) 12 L.G.R.A. 56.
43 Ibid. p. 61.

and the date of the hearing of the appeal.[44] In New South Wales, pursuant to section 342N of the *Local Government Act* an appeal may be lodged with the Local Government Appeals Tribunal against the determination of a responsible authority within forty days of service of the application upon the responsible authority. In Victoria, although appeals against a responsible authority's determination must be lodged within two months from the date of the determination,[45] the issue may arise because of the effluxion of time between the lodging of the appeal and the actual hearing of the appeal by the Tribunal.

(ii) *The transitional case argument*

Although the Tribunal takes into account the facts as they are at the time of the hearing before it, an exception to this principle has evolved with regard to municipal planning codes. These codes or standards are formulated by municipal councils as self-promulgated policy rules which lack statutory basis. The Tribunal laid down in a number of decisions[46] that where these codes or standards are varied between the time of the responsible authority's determination and the hearing of the appeal, the Tribunal will determine the appeal in accordance with the code existing at the date of the application, and not on the basis of the code applicable at the time of the appeal. However, the cases are not uniform and there are contradictory decisions where, on the one hand, the transitional case argument has prevailed, and on the other hand where it has been ignored. Therefore, it cannot be said that this argument has crystallized into a rule, which is why it is referred to as the "transitional case" argument or doctrine. As the cases illustrate, it is also an argument which can be over-ridden by other considerations.

In the *City of Keilor* v. *M.M.B.W. and Symal Pty. Ltd.*,[47] the Tribunal held that planning standards introduced by a municipality subsequent to the application should not be given retrospective effect. As opposed to this, the Tribunal decided in *Roth* v. *City of Kew*[48] that the standard existing at the date of the application was the one to be considered, but the Tribunal has further held that it will proceed to consider other relevant planning matters. In effect, it indicated that planning standards current

[44] *Wright* v. *Campbelltown City Council* (1971) 22 L.G.R.A. 17, 18 where the appeal from a determination of the responsible authority in 1967 was heard in 1971. The court held that the relevant facts were those existing at the time of the hearing and not those prevailing in 1967.

[45] *Town Planning Permits and Appeals Regulations* 1973 reg. 12(2).

[46] For example *City of Oakleigh* v. *M.M.B.W. & Dean Constructions Pty. Ltd.* (No. 1) [1969] V.P.A. 31; *City of Keilor* v. *M.M.B.W. & Symal Pty. Ltd.* [1969] V.P.A. 32.

[47] [1969] V.P.A. 32.

[48] [1969] V.P.A. 34. The Tribunal held that non-compliance with the standards applicable at the date of the application was not of itself sufficient to justify the upholding of an appeal if the site was otherwise suitable for the proposed development.

at the time of the application may be outweighed by other factors including subsequent variations. This proposition is supported by the above two cases where the Tribunal allowed the appeal although at the time of application the appellant had not complied with the local authority's code. In *Macys* v. *Westernport Regional Planning Authority,*[49] the Tribunal said

> "Although transitional cases may be weighed in favour of the appellant under the equity and good conscience provisions of s. 21(1) of the *Town and Country Planning Act 1961,* such equitable considerations must, in our opinion, be subordinate to the community interest."[50]

In *Gala Homes & Sales Pty. Ltd.* v. *M.M.B.W.,*[51] the Tribunal provided a possible explanation for the apparent inconsistency of these transitional cases. The Tribunal said, when referring to the notion of "equity and good conscience" in section 21(1) of the Act

> "We construe them as enabling us to give some consideration and weight to the equitable and moral aspect of a case without of course throwing pure planning considerations to the wind or bending them in any substantial degree to accord with what we might feel to be natural justice. The overriding interests of the public must always be kept in mind. We feel that this view is the basis for past decisions of this Tribunal in what may be called 'transitional cases'."[52]

In more recent decisions the Tribunal has suggested that the "transitional case" argument has lost much of its force. In *Shallay Holdings* v. *City of Hawthorn,*[53] the Tribunal expressed the above view in deciding that the proposed development was too intense for the particular site, although at the time of the application such development was not contrary to the local residential code. Despite the above view, in 1975 the Appeals Tribunal applied the "transitional case" doctrine in *National Bank of Australasia* v. *City of Melbourne*[54] and in *Almonte Nominees Pty. Ltd.* v. *Shire of Diamond Valley.*[55] In the former case, the Appeals Tribunal concluded that there were very strong transitional aspects to the case and held that the permit should be granted having regard to the plot ratio in existence under the 1964 planning scheme rather than the plot ratio adopted by the Council in 1973. The Appeals Tribunal cited and followed the decision in *Gala Homes & Sales Pty. Ltd.* v. *M.M.B.W.*[56] The case of *Almonte Nominees Pty. Ltd.* v. *Shire of Diamond Valley* differed in some respects from the *Gala Homes* case as the responsible authority had not warned the applicant of an impending change in the residential development code. The Appeals Tribunal held that, as the applicant had not been informed

[49] [1973] V.P.A. 94.
[50] Ibid. p. 95.
[51] [1970] V.P.A. 259.
[52] Ibid. p. 261.
[53] [1974] V.P.A. 19.
[54] (1975) 1 V.P.A. 207.
[55] (1975) 1 V.P.A. 78.
[56] [1970] V.P.A. 259.

of the contemplated change, the new code should not be applied to the application. It further held that a permit would be granted although the development did not comply with the 1973 code, because the Tribunal was of the opinion that the code went beyond what was reasonably necessary to safeguard the interests of the municipality and the persons who lived therein.

The inconsistency of the Appeals Tribunal decisions in the transitional cases has led to much confusion. It appears from the two most recent decisions that the "transitional case" doctrine is still a valid argument to be placed before the Tribunal. However, it is clear that such an argument may be outweighed by other planning considerations. The views expressed by the Tribunal in these cases are partly due to the fact that a dramatic change in a residential code may take place between the date of the application and the time of the appeal. These decisions also vary because the Tribunal feels that it should and does act "according to equity and good conscience" in addition to taking other considerations into account. It is submitted that it is unfair for an applicant, who complies with the code at the time of his application for a permit, to have his appeal to the Tribunal determined by reference to an amended code.

(d) THE CONSIDERATION OF SUBSTANTIALLY DIFFERENT PROPOSALS FROM THOSE IN THE ORIGINAL APPLICATION

Despite the exception to the general principle provided by the transitional cases, and the fact that the Tribunal may take into account matters not contained in the Notice of Appeal,[57] it cannot entertain any planning proposal contained in an application which is substantially different from those initially considered by the responsible authority. In *Hooker Projects Pty. Ltd.* v. *M.M.B.W.*[58] the Tribunal treated a discount store as being different in character from a junior department store. The Tribunal refused to consider a proposal that a permit be granted for a discount store when, for the first time at the hearing of the appeal, an attempt was made to do so. The Tribunal said

> "we feel that neither the responsible authority nor the Council was afforded an adequate opportunity to set up a case against the discount store . . ."[59]

In *Grant* v. *Sutherland Shire Council,*[60] the Land and Valuation Court of New South Wales stated that it would not consider an alternative scheme which had not previously been presented to the municipal council. It was held that to permit this would enable the court to substitute its own discretion for that of the Council. This would result in holding an original

[57] *Town and Country Planning Act* 1961 s. 21(5).
[58] [1972] V.P.A. 152.
[59] Ibid. p. 155.
[60] (1959) 5 L.G.R.A. 66, 71.

hearing rather than functioning as an appellate body. From the authorities it is not clear what should be regarded as a substantial variation from the original proposal contained in the application. For example, in *Gishen* v. *City of Broadmeadows*,[61] the Supreme Court of Victoria held that although a Magistrate can consider alterations to a plan of subdivision on appeal under s. 570(2) of the *Local Government Act*, it does not authorize him to confirm substantial alterations which would in effect amount to a new plan of subdivision. However, in *Scholz and Cellanti* v. *Shire of Healesville*[62] it was held that an alternative plan of subdivision submitted at the hearing of the appeal was not substantially different from the original application, and the plan was given consideration by the Tribunal. A further comparison may be made between the decision in *Terrigal Grosvenor Lodge Pty. Ltd.* v. *Gosford Shire Council*[63] and *Hooker Home Units Pty. Ltd.* v. *North Sydney Council*.[64] In the former case, there was an attempt on appeal to amend an application for the development of twenty-four town houses and flats to one for eighteen town houses. This was rejected by the court on the basis that there was a substantial variation between the two applications, whereas in the latter case a proposed reduction from fifteen to thirteen floors of flats was held not to be substantial. The court accordingly found that the application could be amended and later considered by it.

It is submitted that the above cases seem to suggest that, on appeal, the appellate body may allow some variation of the application, but the nature of the proposed development may only be altered to a small degree.

(e) AGREEMENTS BETWEEN A RESPONSIBLE AUTHORITY AND AN APPLICANT PRIOR TO THE HEARING OF THE APPEAL

In some cases, there come before the Tribunal appeals in which the applicant and the responsible authority have reached agreement subsequent to the application but prior to the appeal. As a result of that agreement, the responsible authority has issued a conditional permit. The Tribunal is normally prepared to sanction such agreements reached subsequent to the determination notwithstanding the fact that the Tribunal may have arrived at a different conclusion had it heard the appeal.[65] In *Sacks* v. *M.M.B.W.*,[66] the Tribunal was prepared to embody the heads of agreement as conditions in the permit, although some were relevant only to matters between the applicant and an objector and were not matters for the consideration of the responsible authority. The Tribunal stressed that it would only make such an offer provided that the interests of the objector

[61] [1966] V.R. 83, 88.
[62] [1970] V.P.A. 132.
[63] (1972) 25 L.G.R.A. 450.
[64] (1971) 21 L.G.R.A. 101.
[65] *City of Malvern and Dunham* v. *M.M.B.W.* [1969] V.P.A. 68.
[66] [1969] V.P.A. 22.

were not adversely affected. A similar view was taken in *Christou* v. *City of Benalla*[67] where the Tribunal was requested to make an order, by consent, including the terms of an agreement between the planning authority and the appellant. The Tribunal would only act with an assurance that the objector's rights were not prejudiced by the agreement.

It is not clear whether the Tribunal has power to embody in its determination heads of an agreement which have not been argued, or at least discussed, at the hearing of the appeal. However, it is submitted that this sanctioning by the Tribunal is no different from the approach taken by appellate courts when they enter judgment on an appeal which simply ratifies a compromise. It is further submitted that the Tribunal should have this power. Where agreement has been reached and differences resolved prior to the hearing, the matter is no longer in dispute and it seems pointless to require a determination by the Tribunal. To date, the above decisions have not been challenged, and it is submitted that the principle ought to be maintained unless one takes the view that the sole function of the Tribunal is to provide guidelines for planning generally. In this case, it could be argued that the Tribunal should not consent to these agreements if this would unduly misdirect such guidelines.

After hearing an appeal, if the Tribunal decides that a permit is to be issued, the Tribunal does not itself issue the permit but directs the responsible authority to do so in accordance with the terms of the decision of the Tribunal.[68] The responsible authority must give effect to the determination of the Tribunal,[69] and if it does not do so, proceedings may be taken against it by Writ of Mandamus.

4. *Conduct of Proceedings before the Tribunal*

The Tribunal is empowered to conduct the hearing of appeals without regard to technicalities or legal forms and is subject only to the requirement that it act according to "equity and good conscience and the substantial merit of the case . . . but, subject to the requirements of justice".[70] The scope and effect of s. 21(1) was considered by the Supreme Court of Victoria in *Wajnberg* v. *Raynor and the M.M.B.W.*[71] The Court was of the opinion that the powers and duties of the Tribunal were to determine issues of fact in accordance with the evidentiary material before it. The Tribunal, unlike the responsible authorities, is given the power to reject, amend or otherwise deal with applications which

[67] [1970] V.P.A. 4.
[68] *Town and Country Planning Act* 1961 s. 22(1).
[69] *Town and Country Planning Act* 1961 s. 22(3); *Victorian Rental Properties Pty. Ltd.* v. *City of Footscray* [1970] V.P.A. 243. The Tribunal held that the permit must be issued in accordance with its decision which cannot be varied in any way by the responsible authority.
[70] *Town and Country Planning Act* 1961 s. 21(1).
[71] [1971] V.R. 665. This interpretation of "equity and good conscience" was referred to and applied in *Dinn* v. *M.M.B.W.* [1971] V.P.A. 19, 22.

have proceeded on a defective form of application notice or statement.[72] The purpose of s. 21A(1) is to enable the Tribunal to remedy defects in the form or contents of the application. The Act states that non-compliance does not render the document void but empowers the Tribunal to reject, amend or otherwise deal with it as it thinks fit. An example might include, in appropriate circumstances, the absence of the owners certificate of approval of the application.[73] It is submitted that this power is an extension of the principle stated in s. 21(1), namely that the Tribunal conduct its proceedings with "equity and good conscience and concern itself with the substantial merits of the case without regard to technicalities or legal forms. . . ." These provisions are designed to overcome procedural defects and, unlike s. 21(1), do not relate directly to the substantive matters which may be taken into consideration by the Appeals Tribunal in coming to a determination.

Section 21(1) of the *Town and Country Planning Act* states that the Tribunal "shall not be bound by the rules of evidence but, subject to the requirements of justice. . . ." Therefore the Tribunal must, by statute, observe the rules of natural justice. In relation to hearings before the Tribunal, the Supreme Court of Victoria has held that this provision may require an objector to deliver to an applicant a statement of the grounds of objection. If necessary, an adjournment may be granted to allow the applicant time to consider such a statement. In *Wajnberg* v. *Raynor and the M.M.B.W.*[74] it was held that a departure from the regular procedure (of ascertaining the registered proprietor of the subject land from whom the applicant Raynor had derived title) may constitute a contravention or non-observance of the requirements of justice. In *Spurling* v. *Development Underwriting (Vict.) Pty. Ltd.*[75] the court held that there had been no denial of natural justice when the Tribunal did not act on its own knowledge and experience of other regional shopping centres but on the evidence before it.

Proceedings before the Tribunal are designed to be informal, the principal aim being to enable the Tribunal to inform itself and deal with appeals expeditiously. Anderson J., in *Pentland Park Amusements Pty. Ltd.* v. *M.M.B.W.*,[76] referred to the conduct of proceedings by the Tribunal when he stated

> "the Tribunal proceeds in a very informal manner, it is not bound by the rules of evidence and such 'evidence' as the Tribunal receives is given not on oath but is comprised in statements by representatives of

[72] *Town and Country Planning Act* 1961 s. 21A(1). Prior to the enactment of this section, appeals lapsed if notices etc. were defective under s. 18(2) of the Act. See for example the *Shire of Lillydale* v. *Albion Reid* [1966] V.R. 481.

[73] *G.B. & G. Consolidated Pty. Ltd.* v. *M.M.B.W.* [1972] V.R. 641, where the court directed the Tribunal to consider whether s. 21(1) would permit it to ignore the technical defect.

[74] [1971] V.R. 665.

[75] [1973] V.R. 1.

[76] [1972] V.R. 540.

the interested parties; sometimes correspondence is tendered; counsel make submissions and sometimes give an abundance of 'evidence' from the Bar table and the Tribunal informs itself in such manner as it thinks fit . . ."[77]

In *Ramage* v. *Shire of Berwick*[78] it was held that the requirement of s. 20(5) of the Act, namely that the respondent (in that case the objector) should lodge and deliver to the appellant a short statement of the grounds upon which he intended to rely at the hearing, was mandatory. Furthermore, failure to do so would deprive him of his right to appear at the appeal, unless such delivery was waived by the appellant. The court held that these requirements were necessary to ensure that the appellant received notice of material arguments to be placed before the Tribunal, thus giving the appellant the opportunity of considering these statements prior to the hearing. However, the Tribunal may, pursuant to the requirement of s. 21(1) that it "act according to equity and good conscience . . . and may inform itself on any matter in such manner as it thinks fit", grant leave to any person to appear and place material before it. The Court indicated that s. 21(1) should only be invoked where a reasonable explanation has been given for non-compliance with the procedural provisions of the Act. It should be noted that in each of the above two cases the court held that the appeal should be heard. The basis of the reasoning was that in most instances the Tribunal should exercise its power to hear appeals, although in the latter case it was stated categorically that failure to comply with the obligation may cause an objector to lose his right to be heard at the appeal.

It is submitted that a Tribunal exercising the power to hear appeals should be extremely reluctant to reach a decision on any technical ground. Therefore it is not surprising that s. 20(5A) was inserted in the Act in 1971 giving the Tribunal the power to adjourn the hearing and consider the views of persons wishing to contest an appeal where they have not complied with s. 20(5) of the Act. Because the system of appeals in town planning involves the hearing and consideration of evidence, and the power to confer rights or privileges, and impose obligations, it is essential that some procedural requirements be set down in legislation to facilitate the workings of the Tribunal. However it is submitted that the Tribunal would not best serve its function if it acted like a court of law and placed excessive emphasis on the technical and procedural requirements of the appeal.

5. *Onus of Proof*

On the hearing of an appeal, a question arises regarding the weight the Appeals Tribunal should place upon the determination made by the responsible authority. In New South Wales, there are several reported

[77] Ibid. p. 552.
[78] [1970] V.R. 644.

decisions which indicate that, although there is no presumption in favour of the correctness of a responsible authority's decision, there may be good reason, on a policy basis, for the appellate body to endorse the decision of the local authority.[79] An example of such reasoning appeared in *C.G.M.B. Company Pty. Ltd.* v. *Hornsby Shire Council,*[80] wherein Else-Mitchell J. stated

> "in any field of public interest where there may be a sharp division or cleavage of opinion, no wiser course can be adopted than to follow the considered judgment of the democratically elected local authority which is charged with the determination of so many questions of public interest. A council under the *Local Government Act* is representative of its electors—and they include the whole adult populace of the area—and it is responsive to community pressure in the long, if not also in the short run. . . . In these circumstances, it would be most improper for this Court to substitute its opinion on a matter of such vital interest for that of an elected and responsible council."[81]

The Supreme Court of New Zealand has held that there is no presumption in favour of the decision of the responsible authority,[82] without adding any rider concerning the desirability of endorsing the decision of the responsible authority. In Victoria, in many decisions the Town Planning Appeals Tribunal has specifically endorsed a determination made by a responsible authority. For example, in *Slough Estates Australia Pty. Ltd.* v. *M.M.B.W.*[83] the Tribunal refused to alter a restrictive condition imposed by the responsible authority because it found that the appellant had not shown "compelling" reasons for doing so.

The present position in Victoria is that, at law, there is no presumption in favour of the correctness of the decision of a responsible authority. As appeals before the Tribunal are heard *de novo,* it can ignore proceedings conducted before the responsible authority. Therefore, there is no onus on any party to the appeal to show that the determination by the responsible authority was wrong. This situation arises because the Tribunal is not bound by the rules of evidence, nor is there any provision in the *Town and Country Planning Act* 1961 or the Regulations which either expressly states, or impliedly indicates, that such a presumption exists. The burden thus rests on the party seeking to establish the fact.[84]

[79] *Summers* v. *Hornsby Shire Council* (1946) 16 L.G.R. (N.S.W.) 40; *Balgowlah Investments Pty. Ltd.* v. *Manly Municipal Council* (1954) 19 L.G.R. (N.S.W.) 377.

[80] (1974) 24 L.G.R.A. 414.

[81] Ibid. p. 418-9.

[82] *Straven Services Ltd.* v. *Waimairi County* [1966] N.Z.L.R. 996, 1005. Macarthur J. stated, at 1005 "there is no legal basis for the view that in the present appeal there was an onus resting upon the plaintiff to satisfy the Appeal Board that the decision of the county council was wrong".

[83] [1969] V.P.A. 9.

[84] *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] A.C. 636; *Straven Services Ltd.* v. *Waimairi County* [1966] N.Z.L.R. 996; *L.U. Simons Pty. Ltd.* v. *M.M.B.W.* [1972] V.P.A. 44, where the objectors to a proposed hospital failed to satisfy the Tribunal that the permit ought not have been granted.

It is submitted that the Appeals Tribunal is more likely to give weight to a decision of the responsible authority where local issues are involved, but this does not mean that the Tribunal will automatically uphold the decision.

6. *Reasons for the Determination*

There is no obligation on the Tribunal, under any principle of natural law, to give reasons for its decision. However, the Tribunal is required by s. 22(2) of the Act to furnish a statement of the reasons for a determination if so requested by a party to an appeal. It has been held that where a party seeks reasons, these must be given and they must be full and complete.[85] If the Tribunal fails to give reasons for its determination when requested by a party to an appeal, its decision is liable to be set aside as being in error at law.[86] However, where the Tribunal refuses to give reasons for conditions which have been attached to a permit, this refusal alone will not invalidate the permit and does not render the condition a nullity[87] provided that the decision is, in general terms, supported by reasons. Unfortunately, reasons given are often very brief and at times of no assistance to future applicants.

7. *Precedent*

In so far as the Tribunal is not bound by its own decisions, strictly speaking it does not have a system of precedent. The Tribunal is, of course, bound by the enabling legislation which sets out its powers and duties, and also by the decisions of the Supreme Court. Although the Tribunal is not bound to follow its own decisions, in several cases it has expressed its opinion regarding the procedure it will adopt and the basis upon which it will arrive at determinations on appeal. It appears, therefore, that the Tribunal is attempting to provide some continuity in the procedures by which it resolves substantive issues of fact. The question arises as to whether these pronouncements by the Tribunal have any binding effect or persuasive value when it subsequently determines similar cases. In *Ashfield Industries Pty. Ltd.* v. *M.M.B.W.*[88] the Tribunal stated

> "There is no doubt that any court or tribunal (of a judicial or semi-judicial character) is (if it is not a court of final appeal) bound by the

[85] *Hamilton* v. *West Sussex County Council* [1958] 2 Q.B. 286; *Wajnberg* v. *Raynor and M.M.B.W.* [1971] V.R. 665, 677-8.

[86] *Pettitt* v. *Dunkley* [1971] 1 N.S.W.L.R. 376. The failure of the trial judge to give reasons for his decision constitutes an error of law because such failure makes it impossible for the appellate court to determine whether or not the verdict was based on an error of law and so give effect to the plaintiff's statutory right of appeal.

[87] *Parramatta City Council* v. *Kriticos* [1971] 1 N.S.W.L.R. 140, 145 wherein the court referred to and accepted the view of Lord Denning in *Kingsway Investments (Kent) Ltd.* v. *Kent County Council* [1969] 2 Q.B. 332, 352 where he said "I am quite clear that non-compliance with this rule does not render the condition a nullity. If no reason is given, the condition is not thereby invalidated."

[88] [1971] V.P.A. 91.

> decisions on law of a court or tribunal of co-ordinate jurisdiction. While the Tribunal is, in a sense, a court of final appeal on matters of planning principle (subject of course to review if it were decided that a particular planning principle enunciated by it was contrary to law) the same principle should, in our opinion, apply (in the particular circumstances of this Tribunal) to decisions on matters of planning principle except where changing circumstances or ideas render a previous decision no longer valid or appropriate."[89]

This statement by the Tribunal demonstrates that planning principles will, as far as possible, be applied consistently. In the above case, the Tribunal held that it was not bound to follow a previous decision as it was in respect of a set of circumstances which were distinguishable from the case before the Tribunal. In view of the above statement by the Tribunal, it may follow that there will be some consistency of decisions and this is more likely to be achieved by reporting the decisions. In Victoria, the Victorian Town Planning Tribunal's decisions have been reported since 1969 and appear in the *Victorian Town Planning Appeal Reports.* In New South Wales, the decisions of the Land and Valuation Court are reported in the *Local Government Reports of Australia.* Ideally, there will be consistency between the decisions of the Tribunal as well as between the different divisions of the Tribunal.[90] However, in the past there has been a tendency for the decisions of the divisions to differ, which may be illustrated by reference to *H.C. Sleigh Ltd.* v. *City of Williamstown*[91] and *Stan* v. *City of Fitzroy.*[92] In the former case, the Tribunal declined to consider whether or not the particular use to which the appeal related was prohibited in the relevant zone. On the other hand, in the latter case the Tribunal, presided over by a different chairman, decided that if the use to which the appeal related was prohibited in the relevant zone, no permit could be granted by the Tribunal. In *St. John of God Hospital* v. *City of Brighton*[93] the Tribunal, chaired by the same chairman as in *Stan* v. *City of Fitzroy,* declined to take into consideration the effect of a local by-law or the Uniform Building Regulations. This decision may be reconciled with *Stan* v. *City of Fitzroy* on the basis that there the defect referred to could not be rectified, whereas in *St. John of God Hospital* v. *City of Brighton* it related to a prohibition which could be overcome by appropriate action. On the basis of the above cases, the approach of the division chaired by the first chairman cannot be reconciled with that of the division chaired by the second chairman.

An improved system of reporting decisions could lead to a reduction of expense for an appellant, and may also lead to more consistency between the four divisions of the Tribunal.

[89] Ibid. p. 97.
[90] The Tribunal sits in four divisions: *Town and Country Planning Act* 1961 s. 19A(7A).
[91] [1970] V.P.A. 176.
[92] [1970] V.P.A. 157.
[93] [1970] V.P.A. 156.

Despite some inconsistencies referred to above, it was inevitable, as with any appellate system, that general principles of town planning would emerge from the decided cases. This is partly owing to the fact that lawyers and persons seeking development consent under the Act demand predictability. Therefore, it is not surprising that in Victoria an informal de facto system of precedent exists although knowledge of it may not be widespread. However, the Tribunal is at pains to point out that the decided cases are not to be regarded as a series of specific legal rules, but rather as principles of general application to be treated more as guidelines for persons mindful of pursuing a matter before the Tribunal.

C. APPEALS TO THE MINISTER

The Minister for Planning may determine appeals in the following instances:

(i) Where all parties to an appeal inform the Registrar that they do not desire to be heard or to make a written submission, the Minister may decide the issue instead of the Tribunal.[94]

(ii) Where a planning scheme or interim development order specifies, or a permit contains a condition, that everything is "to be done to the satisfaction of the responsible authority", and a dispute arises, either party may appeal to the Minister, whose decision replaces that of the responsible authority.[95]

The Minister may also play a role in normal appeal hearings as he may, if requested by the Tribunal or upon his own initiative, make a submission to the Tribunal. The Minister is also able to make a submission if, in his opinion, the outcome of the appeal may have a "substantial effect on the future planning of the subject area".[96]

D. APPEALS TO THE SUPREME COURT

The Tribunal may, of its own volition, refer any question of law to the Supreme Court for its opinion.[97] Furthermore, any party to an appeal may in turn appeal to the Supreme Court from a decision of the Tribunal, but only where a question of law is involved.[98]

E. CONCLUSION

Appeals against the exercise of discretionary powers by responsible authorities and, in particular, against such authorities granting or refusing

[94] *Town and Country Planning Act* 1961 s. 20(9).
[95] *Town and Country Planning Act* 1961 s. 22E.
[96] *Town and Country Planning Act* 1961 s. 21(4B).
[97] *Town and Country Planning Act* 1961 s. 22B(1). This subsection also authorizes such reference upon the application of any party.
[98] *Town and Country Planning Act* 1961 s. 22B(3).

to grant permits with or without conditions, are an essential part of planning legislation. There are two methods of challenging a permit granting authority: one is by way of judicial review by a court and the other is by way of appeal to a statutory tribunal. Review by the Supreme Court does not provide a full rehearing on the merits—it operates only in a limited way to control the more outrageous departures from reasonable practice. Thus the court will not interfere with the exercise of discretion if there has been no recognizable excess or abuse of the power granted. Although it is desirable to retain this review power it must be accepted that, because of its limitations, it will continue to play only a minor role in the control of permit granting discretion. The alternative statutory method of appeal is to the Victorian Town Planning Appeals Tribunal which considers the matter *do novo* on its merits. This right of appeal constitutes the major means of controlling determinations made by responsible authorities, and it is before the panel of experts constituting the Tribunal that the issues are most fully and openly ventilated. This is significant because the reported decisions of the Tribunal generate planning policy and criteria for the benefit of the responsible authorities. There are, however, two aspects of its functioning calling for improvement. As has been pointed out earlier in this article, the criteria which the Appeals Tribunal applies in considering appeals relating to permits, is wider than the criteria utilized by the permit granting authorities themselves. This difference is unnecessary and should be eliminated, and the responsible authority should operate on the same standards as the Tribunal.

The remaining inadequacy in present Victorian review procedure relates to delays in hearing appeals, particularly as such delays may operate to adversely affect the financial dealings and contractual relationships of the parties before the Tribunal. The number of appeals to the Tribunal is steadily increasing and some delays may be attributable to this increase, but the problem can be substantially overcome if certain prehearing procedures existing in New South Wales are adopted in Victoria. The New South Wales Local Government Appeals Tribunal offers facilities for a preliminary conference to be held in the presence of a member of the Tribunal or the Registrar of the Tribunal prior to the hearing of an appeal. The purpose of this conference is to enable parties an opportunity to settle their differences by agreement. If this procedure were adopted in Victoria, it would reduce the number of appeals listed for hearing and appeals before the Tribunal would, in effect, be limited to matters which could not be resolved by agreement.

The original aim of the Tribunal was to allow parties disputing permit decisions to appear personally for a speedy rehearing of the matter. With the passing of time, cases before the Tribunal have become more numerous, requiring the establishment of additional divisions of the Tribunal;

the issues have become more technical and complex, and the financial considerations at stake more substantial. Litigation in person before the Tribunal is now rare, and vigorously defended cases have become the norm. Although the suggested pretrial conference may reduce delays, it is most probably too late to return to the days of uncomplicated and expeditious hearings.