DOMA PTY. LTD. *v.* THE CITY OF HOBART

[FC 80/1981]

1983. Supreme Court: (Full Court): Green C.J., Nettlefold and Cosgrove J.J.

Nov. 3-5, 1982, Aug. 15, 1983.

Building Control and Town Planning — Town planning and subdivision of land — Town and country planning schemes — Interim development — Municipal power to control — To impose conditions — Conditions of building permit to pay money to municipality — In lieu of providing off-street parking — Validity of condition — Relation of payment to planning — Local Government Act 1962, *s.*734*.

Building Control and Town Planning — Control and regulation of erection, etc. of buildings — Consent and approval of council — Conditional approval — Effect of condition's invalidity — Local Government Act 1962.

Local Government — The municipal fund — Inpayments for specific purposes — Reserve funds — Whether purpose enforceable — Hobart Corporation Act 1963, *ss.*76,77.

**Local Government Act* 1962, s.734 — (1) A municipality which —

(*a*) is by this Part under an obligation to prepare a planning scheme; or

(*b*) not being under such an obligation has resolved pursuant to section 724 to prepare a scheme,

may at any time before the scheme has been sealed by the Commissioner exercise the powers set forth in subsections (2) and (4).

. . .

(4) For the purpose of subsection (1), in the cases set to in subsection (5), a municipality may—

(*a*) refuse or grant conditionally its consent to—

(i) the erection of a building;

(ii) the carrying out of a work: or

(iii) an alteration of the purposes for which land used,

within the area to be subject to the scheme; or

(*b*) prohibit the erection of a building or the carrying out a work within that area.

(5) The cases in which the powers mentioned in subsection (4) may be used are where it appears to the council that the erection of the building, the carrying out of the work, or the alternation of the purposes for which land is used would —

(Continued overleaf)

The Local Government Act 1962, by s.734, provides that, while a planning scheme is a preparing, the corporation may, in the area to be covered by it, refuse or grant conditionally its consent to certain forms of development or prohibit them, if the development would be in contravention of town and country planning principles or the inchoate scheme or would interfere with the amenities of the neighbourhood.

A developer sought a building permit for development to which s.734 applied and could not provide as much off-street parking as the corporation thought necessary and its inchoate scheme provided. It granted the permit conditionally on the developer's paying it so much per parking space not provided. The developer paid up, did the permitted work and sued for the payment as money had and received, contending that s.734 did not authorize a financial levy and there was insufficient connection between it and off-street parking to justify it if lawful. The payment had gone into the municipal fund and was described along with other such payments as a reserve for 'contributions in lieu of car parking spaces'. There was no provision for the application of such contributions. the developer contended that there had to be a trust for their application for the impost to be lawful.

Held, Nettlefold J. *dissentiente,* that —

(*a*) s.734 empowered the corporation to impose the condition;

(*b*) the application of the payment was governed by the Act and was not a matter of private right; and

(*c*) as the Act made the payment part of the municipal fund, no trust could arise

Per Green C.J. If the payment had become subject to a trust to provide off-street parking, the plaintiff could not touch it.

Per Nettlefold J. The connection between the payment and provision of off-street parking was too slight to justify the condition.

Per Cosgrove J. If the condition were void, the whole building permit was probably void too.

APPEAL from Everett J.

In 1977 Doma Pty. Ltd. proposed to the City of Hobart the redevelopment of two properties, one at 59 Harrington Street, on which was built a pair of semi-detached houses. The two properties had a common boundary so that in the absence of buildings it would be possible to walk through to the other property in Davey Street. The development of the two properties was seen as one operation although they were separate in ownership and were intended to be separately let, and when completed there would be one building fronting on Harrington Street, and another fronting on Davey Street. The building on Davey Street was of such a nature that no vehicular entrance

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*(Continued)

(*a*) be in contravention of —

(i) town and country planning principles; or

(ii) a planning scheme or an alteration of a planning scheme prepared or being prepared by the corporation; or

(*b*) interfere with the amenities of the neighbourhood.

. . .

was possible from that street. Prior to development the houses in Davey Street were derelict and vacant and the land behind them, which was vacant, was proposed to be built on for the purposes of extending the solicitors' office.

At this time a planning scheme covering the two properties was being prepared by the Corporation and had progressed to a draft which provided that with new buildings should be prepared off-street parking according to a scale, with which the proposal did not comply.

When the proposal came before the council it was pointed out to the developer that the car-parking spaces shown on the plan (all of which were on the Harrington Street property) were insufficient, in the opinion of the Corporation's officers, for the proposed development. After negotiations the council approved the development of the buildings on certain conditions. One of those conditions (numbered 1) was that the developer should pay to the Corporation the sum of $6,000.00 calculated at $750.00 per vehicle in lieu of providing the total number of spaces required by the council. Condition numbered 3 required the reservation of some spaces for the occupants of the Davey Street building. The developer objected to the imposition of condition 1, but the council refused to issue a building permit until the money was paid. On 7th February, 1979, the developer paid the sum of $6,000.00 to the Corporation and obtained a building permit. The payment of the $6,000.00 was said to be "under protest". The developer went on and completed the development of the two properties, and then issued a writ against the Corporation claiming "return of the sum of $6,000.00 as money had received by the Defendant to the use of the Plaintiff". At the hearing of the plaintiff's action the defendant's City Treasure gave evidence as to the receipt and banking of the sum of $6,000.00 and of the fact that $6,000.00 had not been expended towards the provision of car-parking in the vicinity of the palintiff's development. This evidence is referred to in detail in the reasons for judgment of Nettlefold and Cosgrove J.J. Judgment was given for the defendant.

The plaintiff appealed to the Full Court on the ground that to impose the condition numbered 1 was beyond the Corporation's power.

Damian Bugg for the appellant.

Peter Underwood for the respondent.

Bugg. The condition was inherently invalid because the *Local Government Act* 1962, s.734, did not authorise such an imposition. A fiscal levy can only be made with express statutory authority. Alternatively, if the Corporation has power to impose the condition then that power is limited and the imposition would be *ultra vires* if the Corporation did not establish alternative car-parking proximate to the development with the monies so levied. If the condition was not inherently invalid its imposition was still invalid because the monies paid to the Corporation were not impressed with a trust creating an obligation to expend the monies on car-parking: *Rockdale Municipal Council v. Tandel Corporation Pty. Ltd.* (1975) 34 L.G.R.A. 196, at p.206, per Glass J.A.

Underwood. The imposition was a justified use by the Corporation of its town planning powers under the *Local Government Act* 1962, s.734. Whilst no express limitations are imposed on the exercise by it of the powers granted by s.734 some must be implied. Those implied limitations do not invalidate the Corporation's actions in this instance.

Cur. adv. vult.

AUGUST 15.

GREEN C.J.: The appellent wished to develop its property which was situated on the periphery of the central area of the City of Hobart, in a way which would have involved the carrying out of alterations to a building. By virtue of the *Building Regulations* 1965, reg. 8, the appellant was prohibited from proceeding with the development unless the respondent Corporation approved the drawings, plans and specifications of the proposed works. The authority to make such regulation was conferred by s.425 of the *Local Government Act* 1962, which empowered the Governor to make regulations providing for, *inter alia,* the matters set out in Schedule 6 of the Act, par. 1 of which reads:—

> "That except as otherwise provided in this Act no person shall erect, alter, or repair any building or structure or commence, carry on, or complete any such work or other building operations except in compliance with the Building Regulations and with a building permit issued thereunder."

The respondent granted its approval subject to a number of conditons. The two conditons which are material to this case were as follows:

> "1. The payment by the developer of $6,000 calculated at $750 per vehicle space in lieu of providing 8 car parking spaces required under the Draft Planning Scheme provisons.
>
> "3. The reservation of 8 of the 17 car parking spaces provided, for the use of occupants of 53/55 Davey Street."

The appellant paid the sum of $6,000 to the respondent "under protest". The appellant sought repayment of that money on the ground that the condition was invalid. This is an appeal against the dismissal of that claim.

It may well be that the appellant's claim has been flawed from the beginning. A conclusion by this Court that the imposition of the condition was *ultra vires* the respondent would not necessarily entail the result that the building approval without the condition should stand. The imposition of the conditions was an integral part of the exercise of the respondent's administrative discretion to grant the building approval from which, it is arguable, it cannot be severed. It follows that the effect of invalidating the condition may be to invalidate the whole approval. See *Greek Australian Finance Corporation Pty. Ltd. v. Sydney City Council* (1974) 29 L.G.R.A. 130. However, I do not find it necessary to express a concluded view about the matter.

The respondent did not purport to rely upon the *Building Regulations* as the source of its authority to impose conditions, but claimed that it was authorised to do so by virtue of the *Local Government Act* 1962, s.734 [which his Honour set forth].

It is either not disputed, or was the subject of findings made by the learned trial judge, that the respondent had resolved to prepare a planning scheme, that pursuant to that resolution it had prepared a draft planning scheme and that it appeared to the respondent that the carrying out of the work would be in contravention of those parts of the scheme requiring the provision of a minimum number of vehicle parking spaces.

The express statutory conditions for the exercise of the power to impose the condition the subject of those proceedings having been met, the essential issue is whether the imposition of that condition was *ultra vires* the respondent by virtue of implied limitations which must be placed upon the exercise of that power. Counsel for the respondent properly conceded that although there are no express limitations upon the scope or nature of the conditons which the respondent could have imposed, nevertheless some must be implied. General guidance as to the nature of those limitations can be found in the following judgements:

> "The power to impose conditions though expressed in language apt to confer an absolute discretion on a local planning authority to impose any condition of any kind they may think fit is, however, conferred as an aid to the performance of the functions assigned to them by the Act as the local planning authority thereby constitued for the area in question. Accordingly the power must be construed as limited to the imposition of conditions with respect to matters relevant, or reasonably capable of being regarded as relevant, to the implementation of planning policy. This accords with the concluding pasaage in section 36 above referred to. As was said by Lord Denning in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 Q.B.554,572: 'The principles to be applied are not, I think, in doubt. 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.'"

Per Lord Jenkins, *Fawcett Properties Ltd. v. Buckingham County Council* [1961] A.C. 636, at pp. 684, 685.

That passage from the judgment of Lord Denning in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* (*supra*) was also cited with approval by Lord Reid in *Mixnam's Properties Ltd. v. Chertsey Urban District Council* [1965] A.C. 735, at p. 751:

> "In accordance with a well-recognized rule, cl. 40(1) ought to be understood (quite apart from the limitation contained in its opening words) not as giving an unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose 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."

Per Walsh J. in *Allen Commercial Constructions Pty. Ltd. v. North Sydney Muncipal, Council* (1970) 20 L.G.R.A. 208. at p.216.

I do not accept the appellant's submission that any condition imposed by the respondent under s. 734 which required the payment of money would necessarily be *ultra vires*. There is nothing in the *Local Government Act* 1962 nor in the general statements of principle made in the cases cited above which lead to such a conclusion. With respect, I agree with the view expressed in *Rockdale Municipal Council v. Tandel Corporation Pty. Ltd.* (1975) 34 L.G.R.A. 196, at p.206, by Glass J. A. in whose judgment Samuels J.A. agreed, when he said that "it is not possible . . . to state a priori that all conditions involving a money payment lack validity". See also *Gillott v. Hornsby Shire Council* (1964) 10 L.G.R.A. 285 and *Granville Developments Pty.Ltd. v. Holroyd Municipal Council* (1969) 18 L.G.R.A. 34, in which it was held that such a condition was capable of being valid. It may well be the case that as Else Mitchell J. observed in *Jumal Developments Pty. Ltd. v. Paramatta City Council* (1969) 17 L.G.R.A. 111, at p.113, "The levy of money as a condition of the exercise of a statutory discretion has always been regarded as suspect because it need not necessarily be related to the lawful exercise of the power conferred so that it assumes the character of an exaction or tax". But that is not to say such a condition is necessarily invalid and in the end the same principles are applicable to the determination of the validity of conditions involving the payment of money as are applicable to the determination of the validity of any other conditions.

Counsel, for the appellant also contended that even if the condition was not inherently invalid, its imposition was not valid in this case because the moneys paid by the appellant were not impressed with a trust which had the effect of imposing an obligation upon the respondent to expend those moneys on the provision of car parking. Counsel placed particular reliance upon the decision of the N.S.W. Court of Appeal in *Rockdale Municipal Council v. Tandel Corporation Pty. Ltd.* (*supra*) and the following passage from the judgment of Glass J. A. at p.206:

> "The test of validity having been expressed in such wide terms it is not possible in my opinion to state a priori that all conditions involving a money payment lack validity. It will no doubt be impossible to justify the collection of money with which the Council intends merely to augment its revenue or which it proposes to spend on certain purposes without any obligation to do so. But I consider that a council may arguably claim that it has imposed a valid condition in circumstances where residential development in a given area will create a need for additonal open space if the amenities of the neighbourhood are to be preserved, the provision of open space on the development site is not commercially feasible, money collected from each developer is to be expended on the provision of such open space, the money is impressed with a trust which would prevent its expenditure for any other purpose and the space to be provided is proximate enough to the site to present a reasonable connexion with the needs generated by development on it. It goes without saying that the relationship between the proposed development and the proposed facility raises questions of degree and therefore of fact which the trial judge will determine by applying to his findings on the evidence the appropriate measure of validity expressed, as it must be, in the general language adopted by the High Court."

However, it must be observed that those remarks were *obiter dicta* as the question before the Court in that case whether the trial judge was entitled to find a verdict without making a finding as to whether the Council had the power to impose the conditions which required the payment which was the subject of the action. The Court of Appeal was not required to determine what that finding should have been. In any event, it does not appear that Glass J. A. was purporting to exhaustively state the conditions under which a condition requiring the payment of money would be valid. Further, the appellant's submission is not supported by the decision of the High Court in *Lloyd v. Robinson* (1962) 107 C.L.R. 142. That was an appeal against a decision that a condition which requird an applicant for the approval of a subdivision to transfer an area of land to the Crown for park and recreational pruposes was invalid. At pp.154 and 155 Kitto, Menzies and Owen JJ. said:

"If the Board has performed its statutory duty by giving approval to the subdivision subject only to conditions imposed in good faith and not with a view of acheiving ends or objects extraneous to the purpose for which the discretion exists, the inescapable effect of the Act is that the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions. The question in the case seemed to *Virtue* J. to be 'whether the Board can expropriate for the benefit of the Crown and without any right to compensation substantial portions of the plaintiffs' land as a condition of their being able to use the balance remaining'. With respect, this is not an accurate way of stating the question. There is no expropriation for the benefit of the Crown in any real sense of the expression. True it is that if the land required for open space reserves is transferred to the Crown for park and recreation purposes as the conditions require, the beneficial title to it will pass to or be vested in the Crown without legal fetter. There will be a moral obligation on the Government to keep it reserved for the purposes mentioned, but no legally enforceable obligation. The ultimate sanction must be political only. But the fact remains that the Board has stipulated for the transfer solely in order to serve purposes which it is justified in serving by an exercise of its power to impose conditions, and has done so because a reliance upon the continuing good faith of the Administration provides the only available means by which the fulfilment of those purposes may be practically secured."

I can see little distinction in fact, and none in principle, between the nature of the detriment suffered by a landowner who is required to transfer land worth $X to a public authority and the detriment which is suffered by a landowner who is required to pay $X in cash to a public authority and it therefore follows that those observations are equally applicable to the case before us.

The evidence in this case shows that the money paid by the appellant was credited to an account described in the respondent's balance sheet as:

"Reserves

. . .

Contributions in lieu of car parking spaces

. . ."

Although it appears that the moneys paid by the appellant were not impressed with a trust, it may be the case that an attempt by the respondent to use the money in the Reserve Account for a purpose other than the provision of car parking space would be *ultra vires* or in breach of its duty as a public authority. But the actual use to which the money paid by the appellant was put cannot retroactively affect the validity of the condition under which it was paid. The validity of the condition is to be resolved by an examination of the purpose for which the condition was imposed and, as the High Court's decision in *Lloyd v. Robinson* (*supra*) shows, the fact that the moneys were not thereafter impressed with a trust which had the effect of casting a legally enforceable obligation upon the respondent to effectuate that purpose, does not necessarily invalidate the condition.

In considering the validity of the condition it is important to remember that it is not this Court's function to review the way in which the respondent exercised the discretion reposed in it. We are only concerned with the question of the respondent's power to act as it did and the appellant bears the burden of showing that notwithstanding that its decision to impose the condition complained of was, on the face of it, authorised by s.734, it was *ultra vires* by virtue of an implied limitation upon that power confered by that section. In my view, the appellant has not discharged that burden of persuasion.

As I understood his reasons for judgment, the learned trial judge was satisfied that the respondent's purpose in imposing the condition with which we are concerned was "in order to generate funds to assist the (respondent) to provide (parking) space for public use" in the city area and that the respondent took the view that in the absence of such a condition the appellant's proposed development would contravene the Draft Planning Scheme. I am not persuaded that there is any justification for disturbing those findings. I am not persuaded that the appellant has demonstrated that the conditions imposed by the respondents were not reasonably capable of being regarded as related to the purpose for which the respondent was exercising its function, namely to assist in the provision of public parking with a view to compensating for the effect of the appellant's failure to provide the minimum number of vehicle parking spaces required by the Draft Planning Scheme. Nor am I persuaded that the condition imposed was of a class which was not in the contemplation of Parliament when it enacted s.734, or that the decision which led to the imposition of the condition was not made *bona fide*, or was otherwise unreasonable. In my view, the imposition of the condition was not *ultra vires* the respondent.

The appeal should be dismissed.

NETTLEFOLD J., after referring to the *Local Government Act* 1962, s.734, continued:

The power to grant its consent to the carrying out of a work etc. is not given to a municipality in unqualified terms. Section 734(4) vests in the municipality a discretion to attach conditions to consent subject to two qualifications, namely:

(a) The discretion must be exercised for the purposes of subs. (1); and

(b) it can be exercised only in the cases set forth in subs. (5).

A decision to grant conditionally its consent to the carrying out of work is "for the purposes of subsection (1)", when it is made in order to give effect to some rule which it is intended the planning scheme, adverted to in subs. (1), will contain when it it has been sealed by the Commissioner, the intended rule, of course being one which the scheme may lawfully contain.

Confining the description of them to what is relevant to this case, the cases set forth in subs. (5) are cases where it appears to the council that the carrying out of the work would be in contravention of town and country planning principles or a planning scheme being prepared by the council. On the facts of this case, the proposed work did not appear to be work in respect of which could reasonably be said that it may interfere with the amenities of the neighbourhood. It may not have added to a particular amenity of the neighbourhood, namely off street parking, to the desired degree but that is another matter.

It is clear that subss. (4) and (5) gave to the council a discretion to impose conditions when granting consent which was also confined by the requirement that any condition imposed must be reasonably capable of being regarded as related to the purpose for which the function of the council was being exercised as ascertained from a consideration of the Act (*Allen Commercial Constructions Pty. Ltd. v. North Sydney M.C.* (1970) 20 L.G.R.A. 200, at p.216).

A consideration of s.734 makes it clear that, in a case like the present one, any condition attached to a consent must be one which the council reasonably considers relates to the contravention and mitigates it. I say mitigates it because the council could have refused consent in which event no contravention would have occurred. It did not choose to do that.

The contravention in question here was that the development did not provide the minimum number of vehicle parking spaces specified in the council's draft planning scheme. That draft scheme also provided that the council may require payment in lieu of the provision of parking spaces, in a case like the present one, at a rate set forth in the draft scheme. The rate of payment was to be $750 "for each deficient parking space", which I take to mean that the liability was $750 multiplied by the number which represents the difference between the number of spaces actually provided and the prescribed minimum number.

The condition which the council attached to its consent, and which is now attached, was as follows:

> "The payment by the developer of $6,000 calculated at $750 per vehicle space in lieu of providing 8 car parking spaces required under the Draft Planning Scheme provisions."

It is clear that the fulfilment of that condition by the developer, of itself, did not do anything at all to mitigate the effects of the contravention. When the work was completed the development was in contravention and the effects of that contravention, presumbably, continue to this day. It is only by an expenditure of the money by the council that anything could be done to mitigate the effects of the contravention. But it is surely not any expenditure of the moneys which will mitigate the effects of this contravention. Attention must be paid to what this contravention is. It is a failure to provide adequate on-site parking for this development. Surely, the effects of that contravention cannot be mitigated by an expenditure of the money at a place remote from this site. The inadequacy of on-site parking in this development is unaffected by the provision of parking at a place remote from this site. Logic appears to me to support that proposition. But, in addition to that, that proposition, I believe, has the support of the High Court of Australia in a case where the High Court was dealing with a comparable situation, namely, a requirement for the provision of adequate open space in a large residential subdivision proposal. In that case the Court said:

> "The assumption may be accepted that the statutory power to annexe conditions to an approval of a subdivision does not extend to requiring the setting aside for public recreation of land *which is so unrelated to the land to be subdivided, because of remoteness from it or some other circumstance, that there is no real connexion between the provision of the open space and the contemplated development of the area to be subdivided.*" (*Lloyd v. Robinson* (1962) 107 C.L.R. 142, at p.153).

[His Honour's emphasis]

In the case of the legislation in question here that proposition has even clearer application. For, on the face of the legislation, it is clear that a condition cannot be valid unless a reasonable body of councillors could reasonably see the condition as one bearing on the contravention and mitigating its effects. It is clear on the face of the legislation that Parliament did not intend that councils could use s.734 as a mere revenue raising provision. If money is to be extracted from a developer it is only because that is a means of dealing with the contravention in a realistic way.

It should be noted at this stage that the draft planning scheme did not make any attempt to lay down rules governing the control and expenditure of money paid in lieu of parking spaces. And, of course, by operation of law, those payments would simply go into the municipal fund: *Hobart Corporation Act* 1963, s.76. Of course, moneys in that fund are subject to the control of the council, a body which by nature changes in composition from time to time.

The respondent's treasurer gave evidence that the $6,000 was paid into the council's general current account at the Commonwealth

Trading Bank. There is only one bank account for the whole of the council's activities. That account would have been in debt from time to time but, when that occurred, it would be because money was invested in interest bearing securities.

The treasurer said that the $6,000 was not "allowed to attract interest". It was simply being used for the council's general purposes. Interest earned from moneys extracted from the general account and invested was also used for the council's general purposes.

That evidence appears to accord with the provisions of the *Hobart Corporation Act* 1963 which, by s.77, provides that the municipal fund shall, subject to the provisions of the Act, be applied by the corporation, in effect, in meeting the expenses incurred in discharging its lawful functions and duties.

However, the treasurer also said that he gave a direction that a ledger account should be opened with the title "Contribution in Lieu of Car Parking Space". The balance shown in that ledger appeared in the council's statement of affairs under the heading "reserves". The treasurer said that he gave a direction that that entry appear in the statement of affairs and he gave that direction because that money was to be used for the provision of car parking "in the vicinity of where the contributions came from". Therefore, they would need to be able to identify it when the time came to make the expenditure.

He emphasised that any individual contribution was to be used for the provision of car parking in the "vicinity" of the development of the contributor. He admitted that where the demarcation line is is "very difficult to say at times". He gave an example that a contribution from the Sandy Bay area would not be used towards a car park in North Hobart. He said that in discussions between senior officers of the council and at committee meetings there was "tacit agreement", or it was "understood", that individual contributions would be spent in the "vicinity" of their source. But he could not point to any resolution to that effect.

He said that if the council gave him a direction to use the appellant's money in another area, for example, Sandy Bay, he would allow the Auditor-General to know that he objected. However, it is difficult to see that his objection would carry any weight as the *Hobart Corporation Act* 1963 permits the council to expend the money in that way, it being part of the municipal fund and not subject to any legal restriction on its expenditure by way of an enforceable trust or otherwise. It is simply part of general funds of the council and may be expended for the general purposes of the council. Consequently, any "understanding" or "tacit agreement"has no foundation in law.

It is material to look at this ledger account. It opens with a credit of $3,600 received on 31st October, 1978. The appellant's payment was entered as received on 28th February, 1979. Ignoring an immaterial debit, the only debit against the account has been $15,303.43 for the building of a car park at Beach Road, Sandy Bay. At 1st July, 1981, the balance to the account was a credit of $44,224.21. That was the figure at that date for the whole area under the jurisdiction of the council. It is difficult to take seriously a suggestion that any substantial amount of car parking could be provided with such a sum of money, particularly if regard is had to this self limiting "understanding" that contributions are to be spent only in the "vicinity" of their source which makes such a small fund even less useful than it otherwise would be.

This case was tried almost exactly two years after the payment by the appellant. On the evidence presented at the trial the only reasonable inference was that, at the time of the trial, the respondent did not have any firm proposal for the supply of off-street parking to compensate for the shortage of on-site parking in the appellant's development. The firm basis for that inference is, of course, that if such a firm proposal existed one would expect that evidence would have been given about it. The only reasonable inference open was that, at the time of the trial, the respondent intended to go on doing what it had been doing for the previous two years, namely, using this contribution by the appellant as part of the municipal fund and, as such, available for use in pursuit of any of the lawful purposes of the council. Further, it was clear that the intention of the respondent was that at some unknown time in the future it would supply some unknown amount of off-street parking at a place unknown, save that it would be in "the vicinity". It was also clear that even that intention could not be put into effect except on the vote of the council and, as the time the vote would be taken could not be known, the composition of the council at the time of the vote could not be known.

A further inference which should have been drawn was that the Council did not intend that this appellant should have any rights in relation to any off-street parking which may be supplied which were not possessed by any other member of the public.

It is also beyond dispute that the council is not and has not at any time been subject to any obligation to provide of-street parking in the "vicinity" of this development. Whether any is provided at some time in the future will depend on a number of factors including, no doubt, considerations of local politics.

On the evidence the inference was that the council may not provide off-street parking "in the vicinity" to compensate for the shortage of on-site parking at the appellant's premises for years after the payment by the appellant. And the only inference open was that, at the time the payment was demanded, it did not have any definite proposal involving the provision of such parking.

On the evidence the conclusion was that the imposition of the condition had not mitigated the contravention to any degree at all during a period of two years after the payment by the appellant.

In addition it was not likely that any mitigation would take place for at least a substantial period of time after the trial. If the appellant's premises are burnt down and not rebuilt the shortage of off-street parking will cease and the council will have a "windfall" of $6,000.

Having regard to all the factors mentioned above the court ought to have affirmed that the imposition of this condition was beyond the power of the council and void on the following specific grounds:

(1) the discretion to impose the condition was not exercised for the purposes of s.734(1) because the council, even after the sealing of a scheme, could not validly impose a condition having only such a speculative and remote bearing on the relevant contravention;

(2) the condition could not reasonably be seen as having a sufficiently definite and proximate effect on the contravention; and

(3) the condition was not reasonably capable of being regarded as sufficiently related to the purposes for which the function of the council was being exercised as ascertained from a consideration of the Act. That purpose was to see that works conformed to town planning principles and, if this were not the case, the adverse effects of any departure from what those principles required were substantially reduced.

There can be no doubt that that imposition of this condition was a revenue raising exercise. It was nonetheless so because the decision to impose it was accompanied by the hope, even the expectation, that at some quite indefinite stage an equivalent or greater sum would be spent form the council's funds in the vicinity on providing a public facility, namely, off-street parking. That being so the decision should have been treated with suspicion (*Jumal Developments Pty. Ltd. v. Parramatta City Council* (1969) 17 L.G.R.A. 111, at p.113) and the question of the power to make it should have been approached in a very critical way.

No doubt Glass J.A. was right in *Rockdale Municipal Council v. Tandel Corporation Pty. Ltd.* (1975) 34 L.G.R.A. 196, at p.206, when he said that the test of validity of conditions of this type having been expressed in such wide terms it is not possible to state *a priori* that all conditions involving a money payment lack validity. In each case questions of degree, and hence of fact, and characterisation inevitably arise. A proper approach to those questions in this case should have led to the conclusion that this revenue raising decision dealt too indefinitely, too remotely and too speculatively with the contravention to be characterised as within power.

The appeal should have been upheld.

COSGROVE J., after stating the facts, continued:

The central issue posed by the statement of claim appears from the following two paragraphs:

"Paragraph 9 — Conditions 1 and 3 were beyond the power and authority of the defendant to impose.

"Paragraph 12 — The defendant had no statutory or other authority to require any such payment and no legal justification for making any such demand."

The matter came on for trial before Everett J. and after hearing evidence and argument his Honour dismissed the appellant's claim. From that decision stems this appeal.

The respondent council justified the imposition of the disputed condition as an exercise of its town planning powers conferred by Pt.XVIII, Div.2, of the *Local Government Act* 1962, and in particular as an exercise of the power granted by s.734 of that Act (which his Honour set forth).

The appellant did not dispute that the council was in a position to exercise the powers granted by s. 734(4), but it contends that those powers do not permit the imposition of a fiscal condition or monetary levy. The Corporation, it argues, could only acquire such a power by virtue of an express statutory grant. The appellant says, in effect, that there is no distinction between a fiscal condition and a monetary levy. Each is of such a nature as to require a specific express statutory authorisation.

Secondly, it argues that if the Corporation does have a power to impose a fiscal condition of this nature, then that power is circumscribed and can only be exercised within narrow limits. For the purposes of this case it says that if the Corporation has power to demand money from a developer who has supplied insufficient parking space on the property to be developed, then the demand would be illegal unless accompanied by the establishment of proper machinery for the reservation of the fund so generated for the sole purpose of providing alternative parking space which would serve the lot to be developed and no other.

Thirdly, the appellant argued that any sums so raised by the council

> ". . .were impressed with a specific Trust to be expended towards the provision of car parking facilities in the vicinity of the proposed development."

This argument appears to me to be misconceived because if the funds were so impressed with a trust it would not be possible for the appellant to get its money back. In any event the imposition of a trust on the monies would be a consequence of a legal demand. I think that counsel for the appellant in putting this argument was really endeavouring in some way to put the argument that the council could not make the demand unless it intended, and could be seen to have intended, the reservation of the funds for the purpose of providing car parking space, as outlined in my statement of the second argument above.

Perhaps because of the confusion surrounding the third argument the second argument was never definitely outlined, but I do not think that I have done it less than justice in the compendious statement of it herein.

It was not in dispute that the council had resolved to prepare a planning scheme and that in fact had under review a draft planning scheme; and it is not in dispute that the council acted, or purported to act, in pursuance of its town planning powers, and that the actual requirement of the council was "the payment by the developer of $600.00 calculated at $750.00 per vehicle space in lieu of providing 8 car parking spaces required under the Draft Planning Scheme provisions." It seems also to have been conceded that the council had not formally made any special provision or set up any special machinery for the reservation of funds generated by the imposition of conditions of this nature. But the City Treasurer gave evidence that he directed the opening of an account named "Contributions in lieu of car parking space." He produced the published accounts of the Corporation, including the balance sheet as at 30th June,1980, signed by the Lord Mayor and five aldermen, which showed item (5):

> "*Reserves*
>
> Sundry debtors, Metropolitan Water Board
> Sundry debtors, Finance
> Store Finance
> Contributions to open spaces
> *Contributions in lieu of car parking*
> Realisation of assets." [His Honour's emphasis]

each of which had a separate sum set alongside it. The income and expenditure account showed the income from rating in one section and expenditure appropriate to that income; and in a quite separate section, the income from parking meters and off-street parking, with the expenditure appropriate to that income noted in the same section. He also tendered a copy of the general ledger showing the amounts received by way of contribuion in lieu of car-parking spaces, and the origin of each of those funds. He said that he had directed the opening of the account, and said that the figure in the published accounts headed "Reserves", and noted as contributions in lieu of car-parking spaces, came directly from that ledger. He said it was his direction that the monies received from contributions in lieu of car-parking spaces were placed under the heading "Reserves". He said that he directed it to be put in the reserves column because it would be "for that specific purpose and to be used for the provision of car parking in the vicinity of where the contributions came from". He had not, he said, been directed by a resolution of council to create that reserve, but the committees of council knew of his action (and the accounts show that the council as a corporation knew and approved it). He said that if the funds generated by contributions were insufficient to carry out the construction of the necessary public car park, funds would be transferred from the general parking revenue account to compensate for it. If there was a surplus of funds provided by way of contributions over expenditure for the construction of a public car park, the surplus would be held for further car parking in the area. There was no precise definition of the area. He also said that the funds generated as contributions were paid into the general current account of the council. No separate bank account was maintained for the purpose. A large amount of the Council's funds was invested on the short term money market, and it was possible for the bank account to go into overdraft from time to time. He said that there was no credit of interest to the contributions account. He said he had received no specific direction from the council as to the expenditure of the contributions, but if the council were to direct him to take money from the contributions account for other purpose he would object, and would make sure that the Auditor-General was aware of his objection. He agreed that while he may have his own notion of the geographical area to which a contribution might reasonably be thought to relate, the alderman could well have a different notion of it. So too with the area to be benefited by any public park. The limits of these areas had not been defined by the council.

I have consulted several accounting textbooks as to the precise effect of the creation of this reserve and its publication. They confirm my own pre-conceived lay view of the matter, which is that the sums so noted as being "reserves" are not separate from the general funds of the council as trust funds, or "reserve funds" are. They remain in the general funds, but notice is given to those interested (e.g., shareholders in joint stock companies; ratepayers in the case of municipal corporations) that they are not to be taken into account in calculating profit or loss, and that any transfer from those reserves into the profit and loss account must be publicly declared (see *R. v. Lord Kylsant* (1931) 101 L.J.K.B. 97, [1932] 1 K.B. 442, noted in Sir Ronald Irish's *"Auditing Practice and Theory"*,pp185 ff., partic. at p.187). No particular right or benefit ensures to any person or property because of its creation; but persons who could demonstrate an interest could object to a proposal to spend the funds in a manner contrary to that interest. Whether the right to object would be sufficient to give a *locus standi* in litigation would depend on the circumstances of the case in which the standing was claimed. The case is not the same as that of beneficiaries of a residuary trust — see *Gartside v. Inland Revenue Commissioners* [1968] A.C. 553, at p.607; and *Benjamin v. Perpetual Trustees and National Executors of Tasmania Ltd. and Ors.* Serial No. 22/1978. It is probably a case of a public right rather than an individual legal right.

When a planning scheme has been sealed, the municipality concerned is under a duty to give effect to the scheme in respect of all new works; and it cannot modify the scheme without the consent in writing of the Commissioner. (s.731). In the interim period between resolution to prepare a scheme and the sealing of it, the council is equipped with the powers listed in s.734(4). Any person injuriously affected by the exercise of those powers may appeal to the Planning Appeal Board (s. 734(6)). The Board's decision is conclusive and binds the municipality and all other parties to the appeal (s.734(15)).

The temporal limits upon the exercise of the power, the purposive provision of subs.(5), and the appeal provisions clearly indicate that the council is given almost unrestricted power to control development in the interests of town planning until the scheme is finalised settled. Its powers in the interim period may be exercised flexibly and with varying force and direction whereas once the scheme is sealed, the council is as much a prisoner of it as is the developer.

Once the powers under s.734(4) spring into existence, the property owner's much vaunted, but inaccurately described, absolute right to do with his own land as he wishes is gone. That right is subject to the council's consent, conditional or unconditional. The council's imposition of a condition unacceptable to the developer is no more outside the council's power than is the expressed power to prohibit. There are no expressed limitations on the nature of the conditions which the council may attach to its consent. Any challenge to the attachment of a condition must be based on the assertion of an implied limitation, i.e., on an assertion either that Parliament must have intended a limitation to apply, or that the courts will impose one.

One such limitation which the courts must read into the grant of power here being reviewed is that the power must be used only in the cases set out in subs. (5). However, the appellant does not dispute that the planned development, being deficient in car parking space, appeared to the council to contravene town planning principles, and the scheme being prepared. I can understand the concession as to contravention of town planning principles; and I can see that a development deficient in parking space would interfere with the amenities of the neighbourhood; and I agree that the number of spaces was less than the tentative plan required; but I doubt that the proposal contravened that plan, which envisaged monetary contributions. But that is by the way. the appellant virtually conceded that the development was unsatisfactory, a concession confirmed by its decision not to appeal to the Board. It is not the imposition of a condition which it apposes, but the monetary character of the condition. That leads one to reflect on what its attitude may have been if the council had simply rejected its proposal. And it could be said that the conditional consent was only the other face of a conditional prohibiion. But such thoughts cannot obviate the need to examine the council's power.

On what ground, then, could the court hold that the attachment of this condition was *ultra vires*? In *Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R.240, at p.247, Willmer L.J. suggested these three grounds:

"(1) The conditions must not be such as to effect a fundamental alteration in the general law relating to the rights of persons on whom they are imposed unless the power to effect such an alteration is expressed in the clearest possible terms.

(2) The conditions imposed must fairly and reasonably relate to the permitted development.

(3) The conditions imposed must not be so unreasonable that it can be said that Parliament clearly cannot have intended that they should be imposed."

The nature of the conditions here reviewed effected no fundamental alteration in the general law. It was not a tax. It did not require payment. The appellant had no right to develop without consent. It need not develop in the particular (apparently unsatisfactoy) way which it proposed. To quote Willmer L.J. again (p.248):

"The statute in question here does to my mind clearly and unambiguously authorise the imposition of conditions which will necessarily interfere with an owner's right of property."

The condition effectuated less interference with those rights than a prohibition which was clearly within power.

The application of this decision to the present case may well rest in the second and third of Willmer L. J.'s propositions. Did this condition fairly and reasonably relate to the permitted development? Was it so unreasonable as to be beyond the contemplation of a reasonable Parliament?

These questions cannot be answered without some general consideration of the problems which city councils face in controlling development. It is obvious that a city cannot live without car parking. It is equally obvious that, as a general rule, development increases the demand for car-parking space. If that increased space is not provided, the commercial and professional attractiveness of the city will suffer and its capacity to serve the public, which it needs as well as serves, will dwindle. But not every development is reasonably capable of providing space equivalent to that which it generates.

The council, as the governing body of the city, must provide general public car space to serve the city as a whole, thereby doing what it can to make up the individual deficiencies of supply in each city building. Some of these deficiencies will be created by the use of old buildings continuing to generate increases in demand. Some deficiencies will arise in new developments like this one. The provision of the general public spaces will cost money. There is no easy, and certainly no uniquely right, way of apportioning the cost.

The council sought to recoup some of the cost from developers in some sort of relation to the need which they created. The method which it employed was obviously not perfect nor was it equitable in any more than a rough, almost token, sense. The contributions of developers are added to the profit from parking meters to provide, at a loss, general off-street parking. But the whole operation was accounted for as one, and the public made aware of it. With all its defects, it seems generally speaking, to be a not unreasonable method of dealing with the problem.

Another decision to which reference must be made is that of the High Court of Australia in *Lloyd v. Robinson* (1962) 107 C.L.R. 142. That appeal arose from the attachment to the approval of development of a condition requiring the expenditure of money on a service road and the transfer to the Crown of land for parks or recreation. The developers claimed that the conditions were invalid. The High Court, composed of Kitto, Menzies and Owen JJ., delivered a joint judgment rejecting that claim.

The argument for the developers is set out at pp.152-3 in this passage:

> "The first and second must be considered together, because the effect of the Minister's decision was to vary the Board's condition as to the areas to be transferred to the Crown for park and recreation purposes by confining it to the two areas of 10 acres and 15 acres respectively. This condition was attacked as being beyond power, the substantial contentions being, first, that the two areas concerned lay outside the land which was the immediate subject of the application and therefore were being insisted upon, not as reserves to be set apart in the subdivision for which the approval was sought, but for purposes extraneous to that subdivision and therefore outside the purposes to which the Board was legally entitled to have regard; and secondly that to impose any condition requiring a transfer of land to the Crown free of cost was outside the contemplation of the Act, because in the absence of any provision for compensation the Act should not be construed as intending to authorize what would amount to the confiscation of private property."

As to the first argument, their Honours said (at p.153):

> "At what stages this should be done, what proportion of open space should be required, and where the open spaces should be, were questions within the discretionary judgment of the Board and, on appeal, of the Minister; and unless they were answered so unreasonably or improperly that the discretion could be said to have miscarried, there could be no ground upon which the courts would have authority to interfere."

As to second argument, their Honours said (at pp. 154, 155):

> "Given the necessary relevance of the conditions to the particular step which the Board is asked to approve, there is no foothold for any argument based on the general principle against construing statutes as enabling private property to be expropriated without compensation. The Act at its commencement took away the proprietary right to sub-divide without approval, and it gave no compensation for the loss. But it enabled landowners to obtain approval by complying with any conditions which might be imposed, that is to say which might be imposed bona fide within limits which, though not specified in the Act, were indicated by the nature of the purposes for which the Board was entrusted with the relevant discretion; see *Swan Hill Corporation v. Bradbury* (1937) 56 C.L.R. 746, at pp. 757, 758; *Water Conservation and Irrigation Commission (N.S.W.) v. Browning* (1947) 74 C.L.R. 492. If approval is obtained for the subdivision of one area of land by complying with a condition which requires the giving up of another area of land for purposes relevant to the subdivision of the first, it is a misuse of terms to sya that there has been confiscation of the second. For the giving up of the second a *quid pro quo* is received, namely the restored right to subdivide the first. It may be that the *quid pro quo* is inadequate, and that the landowner, though under no legal compulsion to give up the second area of land if he chooses to forego the idea of subdividing the first, is nevertheless under some real compulsion, in a practical sense, to submit to the loss of it because of the importance to him of obtaining the approval. But there is no room for reading the Act down in some fashion by appealing to a principle of construction that has to do with confiscation. If the Board has performed its statutory duty by giving approval to the subdivision subject only to conditions imposed in good faith and not with a view to achieving ends or objects extraneous to the purposes for which the discretion exists, the inescapable effect of the Act is that the landowner must decide for himself whether the right to subdivide will be bought too dearly at the price of complying with the conditions. The question in the case seemed to Virtue J. to be 'whether the Board can expropriate for the benefit of the Crown and without any right to compensation substantial portions of the plaintiffs' land as a condition of their being able to use the balance remaining'. With respect, this is not an accurate way of stating the question. There is here no expropriation for the benefit of the Crown in any real sense of the expression. True it is that if the land required for open space reserves is transferred to the Crown for park and recreation purposes as the conditions require, the beneficial title to it will pass to or be vested in the Crown

without legal fetter. There will be a moral obligation on the Government to keep it reserved for the purposes mentioned, but no legally enforceable obligation. The ultimate sanction must be political only. But the fact remains that the Board has stipulated for the transfer solely in order to serve purposes which it is justified in serving by an exercise of its power to impose conditions, and has done so because a reliance upon the continuing good faith of the Administration provides the only available means by which the fulfilment of those purposes may be secured."

It seems to me that this decision when applied to the present case, sounds the death-knell of the appellant's primary argument that the conditions imposed by the council were invalid because they constituted an unauthorised monetary levy. It was not a levy, as the learned justices point out; and there can be no distinction in principle between a condition requiring the disposition of land or the expenditure of money on land *and* a condition which requires the payment of a sum of money.

The decision is also significant for the way in which it diverts attention away from the machinery for the future use of the dedicated land (or money) and towards the purpose of the condition.

Further, an analogy may be drawn between the political sanction attaching to the use of the dedicated land and the political sanction attaching to the use of money paid into a council "reserve".

We were referred to a number of N.S.W. decisions, most of them by Else-Mitchell J., sitting in the Land and Valuation Court. His Honour has held that:

"...any power to require a contribution of money towards the provision of parking space, whether by the imposition of a condition or otherwise, cannot in my view be exercise unless the facilities, actual or proposed, are so situated, and defined in such a fashion, as to enable a decision to be reached that they are capable of being identified with or restricted to use in connection with the proposed development." (*Woolworths Properties Pty. Ltd. v. Ku-Ring- Gai Municipal Council* (1965) 10 L.G.R.A. 177, at p.181).

It has to be remembered that, when sitting in that court, Else-Mitchell J. was charged with a different task from that which confronts us. He sat to review the council's decision (see p. 179). I regard these decisions as decisions of fact of local import, and not necessarily any guide to the resolution of the present dispute. I sympathize with Holland J. of the Equity Division who said in *Greek Australian Finance Corporation Pty. Ltd. v. Sydney City Council* (1974) 29 L.G.R.A. 130, at p.141:

"I must say that if the matter had been free of authority I would, with great respect to Else-Mitchell J., have been inclined to accept the submissions made on behalf of the council, that the imposition of a condition requiring from a developer, who did not propose to provide any parking space, a contribution towards the provision by the council of parking stations in the city area in accordance with the policies and codes which have been adopted by the council in the present case was within the powers conferred by the legislation. The view espoused by the plaintiff requires a piecemeal approach to the parking problems produced by new development which, in my opinion, could be inconsistent with and destructive of an efficient approach to planning control in respect of the parking of vehicles in this busy city. In my opinion, the council's application of its policy to the present case is reasonably capable of being regarded as related to the purpose for which its power was being exercised."

It must also be remembered in analysing these decisions, that Sydney and Hobart are very different places.

I return to the appellant's contentions and summarise my conclusions:—

1. The council has power to impose as a condition of development the payment to it of a sum of money, provided that it does so *bona fide* and for purpose reasonably seen to be contemplated by the statute.

2. The council did act *bona fide*.

3. The condition imposed was for a purpose, namely to assist in the provision in the general area of the appellant's business of public off-street parking, which, in general terms, related to the proposed development.

4. The condition is not so unreasonable as to be outside the contemplation of the enacting Parliament.

5. The almost total lack of precision in defining the area to be benefited by the money paid is regrettable, but it is not a fault which invalidates the council's decision. Because of it, the purpose of the condition presents a somewhat blurred picture, but one is nevertheless identifiable. It seems to me that:— the council, seeing (a) an existing need for public off-street parking, and (b) the inhibiting effect of requiring each new development to be self-fulfilling in terms of parking, determined upon a compromise whereby developers would be permitted some shortfall in the provision of parking if they made a special contribution to the cost of public parking in the general area of the development. The purpose may perhaps be formally stated as that of offering developers a compromise which would enable them to proceed with a development which left a shortfall in the provision of parking space on their land if they were prepared to make a special contribution to the provision of public space in that general area.

6. The accounting provisions, although also imprecise, are not such as to invalidate the council's decision.

It follows that, in my opinion, Everett J.'s decision was correct and the appeal should be dismissed.

It is probably not necessary to discuss the appellant's claim any further, but I wish to add this: I have the gravest doubts whether the appellant could unilaterally sever the council's approval by accepting the building permit while arguing that the condition was void. It may well be that the council's decision is properly read as a prohibition on development unless the condition is met.

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D.J.B.