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IN THE PRIVY COUNCIL No. 35 of 1975

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

IN THE MATTER OF THE SUPREME COURT ACT 1935-1972 AND THE RULES OF THE SUPREME COURT MADE THEREUNDER

AND

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 1966-1973

AND

IN THE MATTER OF THE CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (AS AMENDED)

AND

IN THE MATTER OF AN APPLICATION FOR APPROVAL OF A PLAN OF SUBDIVISION MADE ON THE 29th DAY OF SEPTEMBER 1970

B E T W E E N

GLADYS SARAH BECKER (Appellant)

AND

THE CORPORATION OF THE CITY OF MARION AND THE DIRECTOR OF PLANNING (Respondents)

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No. 35 of 1975

ON APPEAL
FROM THE FULL COURT OF THE SUPREME COURT
OF SOUTH AUSTRALIA

BETWEEN :

GLADYS SARAH BECKER Appellant

- and -

THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING Respondents

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

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THE CORPORATION OF THE CITY OF MARION AND THE DIRECTOR OF PLANNING (Respondents)

RECORD OF PROCEEDINGS

No. 1

JUDGMENT of the Honourable Mr. Justice Wells

DELIVERED 28th February 1973

THE CORPORATION OF THE CITY OF MARION v. LADY GLADYS SARAH BECKER THE DIRECTOR OF PLANNING AND THE STATE PLANNING AUTHORITY

LVD No. 137 of 1972

For the Appellant: Mr. S.J. Jacobs, Q.C. with Mr. B.M. Debelle

For the Respondent: Mr. F.R.Fisher, Q.C., with Mr. R.L. Proud

In the Supreme Court of South Australia Land & Valuation Division LVD.No.137 of 1972

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(continued)

For the Director of Planning: Mr. M.L.W. Bowering

Judgment No. 1535

THE CORPORATION OF THE CITY OF MARION v. LADY GLADYS SARAH BECKER THE DIRECTOR OF PLANNING AND THE STATE PLANNING AUTHORITY

Wells J.

The proceedings leading up to the determination of the Planning Appeal Board from which the present appeal has been brought to this Court had, by the time they concluded, worked themselves into a state of extraordinary complexity; the steps by which they reached that state bear the indicia of a Greek Tragedy.

Counsel before me presented arguments of equal complexity some of which, in their intricacy and concentration upon procedural technicality, would not have suffered by comparison with pre-Judicature Act pleadings in their most sophisticated form.

The grounds of appeal were numerous, but all appear to stem from two basic flaws in the hearing before the Board which I shall attempt to isolate and examine.

I have considerable sympathy for the members of the Board. It seems to me that they were exposed to the pressure of forceful arguments in consequence of which the true structure of the contest before them became irremediably distorted. It is essential, before I can deal with a matter of such procedural complexity, to extract from the mass of material the nature of the proceedings, the real issues, and the relevant rules and principles.

On 29 September, 1970, Lady Becker lodged with the Director of Planning, for approval pursuant to Division I of Part II of the Control of Land ~~Sub-division~~ Division Regulations 1967 (which I shall refer to as "the Regulations"), a proposal plan of subdivision of the subject land, part of which lies within the Hills Face Zone (established pursuant to sub-s. (5) of s. 42 of the Planning and Development Act 1966-67 (as amended) and Regulation 6 of Metropolitan Development Plan

Corporation of the City of Marion Planning Regulations - Zoning 1971.

On 5 November, 1970, the Director forwarded a copy of the proposal plan to the State Planning Authority, and a day later he forwarded a copy to the City of Marion (which I shall refer to as "the Council"). By doing so, the Director, pro tanto, fulfilled the requirements of Reg. 6 of the Regulations; copies were also sent to the Director and Engineer in Chief, the Commissioner of Highways, and the Surveyor General.

For reasons which it is unnecessary to repeat or to evaluate, the Council failed, within the period of two months prescribed by Reg. 7, to report to the Director whether it had decided to approve, or to refuse approval to, the proposal plan or to approve it subject to specified conditions. In those circumstances sub-reg. (4) of reg. 7 applied: that sub-reg. reads:

> "7. (4) Where a council has failed to comply with the provisions of sub regulations (1) or (2) that council shall be deemed to have reported to the Director that it has decided to refuse approval".

On 3 May, 1971, the Deputy Director wrote to the Surveyors who were then representing Lady Becker's interests a letter which is important enough to justify being set out in full. It reads:

"

SOUTH AUSTRALIA
STATE PLANNING OFFICE

POLICE BUILDING
1 ANGAS STREET
ADELAIDE.

Messrs. Todd & Co.,
20 Franklin Street,
ADELAIDE. S.A. 5000.

3rd May, 1971.

Dear Sir,

Re: Subdivision Part Sections 189, 190 and 191 Hundred of Noarlunga, Seaview Downs for Lady G.S.Becker, City of Marion Amended Plan dated 21st September, 1970.

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You are advised that as the above proposed subdivision lies within a prescribed locality as defined by Section 42 of the Planning and Development Act, 1966-1969 namely, the Hills Face Zone, it was submitted to the State Planning Authority which resolved:

1. that in the opinion of the Authority portion of the land contained within the application lies within a prescribed locality.

2. that the plan does not conform to the purposes, aims and objectives of the Metropolitan Development Plan in that -

   (a) it would destroy, change and affect the general character of portion of the Hills Face Zone and Hills sky-line as viewed from the Living Area to the north of the proposed sub division

   (b) it would be a small scale development of a type which would spoil the natural character of portion of the Hills Face Zone.

   (c) it would destroy and impair the generally open rural and natural character of portion of the Hills Face Zone as viewed from the abutting roads.

   (d) the proposed allotments are all less than 10 acres in area and have frontages less than 300 ft.

As a result of this resolution, I have refused approval to this application pursuant to Section 42(2). In addition, I have refused approval pursuant to Section 49, subsections (f), (g) and (i) and Section 52(1)(e) of the Planning and Development Act 1966-1969.

You are further advised that to date the City of Marion has not in accordance with Regulation 7 (1) of the Control of Land Subdivision Regulations given a decision on

the proposal plan which was forwarded to it on the 6th November, 1970. Consequently by virtue of Regulation 7(4) of the said regulations it can be deemed that the Council has reported to the Director that it has decided to refuse approval of the said proposal plan.

Enclosed are copies of reports from the following -

(1) Director and Engineer-in-Chief dated 3rd March, 1971

(2) Surveyor-General dated 7th December, 1970

(3) City of Marion dated 16th December, 1970

(4) Commissioner of Highways dated 11th February, 1971

(5) Director of Mines dated 11th November, 1970

(6) Secretary, State Planning Authority dated 15th April, 1971.

Your attention is drawn to Sections 26 and 27 of the Planning and Development Act, 1966-1969 regarding the question of appeal against the above refusals.

Yours faithfully,

(Sgd.) D.A. Speechley,
DEPUTY DIRECTOR OF PLANNING."

This letter displays some curious features to which I shall refer seriatim.

1. The letter is written by the Deputy Director in the first person. The Regulations confer a discretion, with respect to a proposal plan, upon the Director. I know of no law in virtue of which the Deputy Director is empowerd to exercise the Director's discretion (see Reg. 7 of the Regulations): cp. Hinton Demolitions Pty. Ltd. v. Lower [1968] S.A.S.R. 370. For the purpose of the comments that follow, I assume that the Deputy Director was, in writing the above letter, acting simply as nuntius.

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2. The letter states: "As a result of this resolution, I have refused approval to this application pursuant to Section 42(2)."

Section 42 of the Planning and Development Act (which I shall refer to as "the Act") reads:

"42. (1) Where -

(a) a person makes an application to the Director for approval of a plan of subdivision relating to any land within the Metropolitan Planning Area to which Part VI of this Act applies; and

(b) the Director is of opinion that the whole or any part of the land lies within a prescribed locality,

the Director shall refer the plan of subdivision to the Authority for report and the Authority shall examine the plan and make a report to the Director in writing stating whether in its opinion the land or any part thereof lies within a prescribed locality and whether the plan conforms to the purposes, aims and objectives of the Metropolitan Development Plan and to the planning regulations (if any) relating to that plan.

(2) If the report of the Authority states that, in the opinion of the Authority, the land or any part thereof lies within a prescribed locality and that the plan does not conform to the purposes, aims and objectives of the Metropolitan Development Plan or to the planning regulations (if any) relating to that plan the Director shall refuse to approve of the plan of subdivision.

(3) The Director shall thereupon send to the applicant notice of his decision to refuse to approve the plan of subdivision together with a copy of the report of the Authority.

(4) There shall be a right of appeal to the board against such decision of the Director and the board may, before determining the appeal, review the matters contained in the report of the Authority.

(5) In this section -

'prescribed locality' -

(a) means any zone indicated in the Metropolitan Development Plan as a General Industrial Zone, Light Industrial Zone, Extractive Industrial Zone, Special Industrial Zone, Hills Face Zone or Rural Zone; and

(b) where any such zone has been expressly superseded by a zone or locality defined for specified purposes by a planning regulation relating to the Metropolitan Development Plan, means the zone or locality so defined."

It cannot be too strongly emphasised that the authorities concerned and the Board, were at no stage dealing with a plan (that is, a final plan) but with a proposal plan. The Director was in error in stating that he was acting under s. 42. That section, in my opinion, relates to a final plan and not to a proposal plan. But the Director was not alone in his error; it was repeated by counsel and the Board. Mr. Fisher (for Lady Becker) strongly urged me to read the word "plan" in s.42 as including "proposal plan". He pointed out that the Act's definition of the word "plan" was inclusory in form (as it is), and that no-where did the Act differentiate between a proposal, or provisional, plan and a final plan. It followed (so his argument ran) that wherever, without doing violence to the context, the word "plan" could be read so as to apply to a proposal plan as well as to a final plan, it should be so read. He supported his contention by pointing out that certain alleged inconveniences would be caused if the word "plan" were to receive a more restricted interpretation. I am unable to accept that argument. There is not a single passage in the whole Act, in which a plan of subdivision or of re-subdivision is referred to, from which an allusion to a provisional or proposal plan can be coaxed. I may be pardoned for borrowing a facon de parler from Gertrude Stein and saying, a plan is a plan is a plan. A plan ordinarily denotes an unconditional plan. Such a plan may provide for

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alternative courses of action, resort to which will depend on how events fall out. But the very essence of a plan is that it represents the accumulated wisdom of one or more proposals that has been cast into definitive form by someone with the power and authority to do so. The phrases "plan of action", "plan of battle" "plan of attack" "plan of entry" "building plan" "ground plan" all carry the same implication. Section after section in the Act testifies to the final and unconditional character of a plan of subdivision. It would be contrary to every precept of contemporaneous drafting to suppose that, within the confines of a part of an Act, so closely integrated as Part VI, the word "plan" has been used with the two senses of "provisional plan" and "final plan" without finding some clear warrant for the suggested duality. But I can find none, and cannot but observe that unless the word "plan" is confined to the meaning of "final plan" sections such as s. 45, s. 46, s. 47, s. 48 and s. 49 would, in my view, be unworkable.

But although orderly development cannot take place unless those who undertake the subdivision and resubdivision of urban areas are required to commit themselves to a definite course of action so that State and Local Government authorities know precisely what they are being asked to approve, the business of subdivision is so costly and complex that circumstances will frequently occur when it will be unreasonable to expect a subdivider to lay out large sums of money in the preparation of a final plan unless he is reasonably sure that that plan will be accepted (see Santin v. Woodville Corporation (1971) 1 S.A.S.R. 336, 341). Accordingly, it was not surprising to find the Governor in Council making regulations that would enable the intending subdivider to obtain from all authorities concerned advance notice of the reception that would be accorded to a particular form of subdivision if it were incorporated into, and presented formally as, the subdivider's final plan.

To my mind, the fallacy in Mr. Fisher's argument lies in the assumption, which he made sub silentio, that it was inevitable that the draftsman of the Regulations would use the word "plan" to denote that which was provisionally submitted to the Director of Planning. The

draftsman could, without in any way disrupting the purpose of the Regulations, have referred throughout to a "proposal" or "provisional subdivision" or any other appropriate word or phrase, and as to such a thing the Act would have been found to have nothing to say. The crucial regulation which gives meaning and direction to the exploratory moves that have been completed is Regulation 13 which reads:

> "13. On receiving notifications of approval of the proposal plan and acceptance of the outer boundary tracing, the applicant may, subject to regulation 21, submit to the Director a final plan for deposit, together with six copies of the final plan or with such number of copies of the final plan, exceeding six but not exceeding ten, as the Director may require and the fee prescribed by the first schedule."

The final plan, by definition (Reg. 3), is a plan of subdivision made, in conformity with Part II, for the purpose of being deposited in the Lands Title Regulation office. Upon the deposit of a final plan the Act becomes, subject to administrative details covered by Regulations 14 to 21, inclusive, the governing instrument.

The appeal to the Board, therefore, could only have been instituted against a refusal by the Director to approve the original <u>proposal</u> plan pursuant to Regulation 9.

The arguments and the transcripts in this case reveal some misconceptions as to how such an appeal could be held properly to lie under the Act. The correct basis is to be found, in my opinion, by tracing the right of appeal through the following statutory provisions.

1. Sub-section (1) of s. 26 of the Act reads:

> "26. (1) Any person who applies for the consent, permission or approval of the Authority, the Director or a council under any provision of this Act that provides for the granting of that consent, permission or approval may, if he is aggrieved by the decision of the Authority, the Director or the council to refuse that consent, permission

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or approval or to grant that consent permission or approval subject to conditions, appeal to the Board;"

2. Section 4 of the Acts Interpretation Act provides:

"In this Act, and in every other Act whenever passed unless the contrary intention appears -
.....
"this Act" includes regulations, rules, and by-laws made under the Act wherein the expression occurs."

I can find no evidence of a contrary intention in the Act, and it therefore seems to me that the passage "under this Act" includes the meaning "under regulations made under this Act". Once that extended meaning is given to that passage, the meanings of the words "decision" and "approval" (inter alia) are correspondingly enlarged and a right of appeal against a decision of the Director is created.

But a conclusion that such an appeal is competent, renders it necessary to keep clearly in mind what functions and powers a Director is expected to exercise under the Regulations, and, in particular, what town planning standards he is to apply. Where a final plan is under consideration, the Director's special concerns lie principally - not, of course, exclusively - within the grounds set forth in ss. 49 to 53 inclusive. But plainly, when a proposal plan is before him, he does not apply any of those sections specifically and directly; he acts, in truth, at one remove from them. If he invokes the substance of one of those grounds as a reason for refusing approval to a proposal plan, he is not acting <u>under the section</u> in which the ground appears; he is impliedly asserting that if a final plan in identical form were lodged, he would then refuse approval pursuant to the Act. In the face of such a refusal, the intending subdivider would then have a choice of alternatives if he wished to press the view that he was right, and the Director was wrong; he could (as here) appeal against the Director's decision under the Regulations, or he could, without more ado, lodge a final plan in the form already disapproved (as to which Reg. 13 would have nothing to say) and appeal against the Director's refusal

under the Act: compare Santin's Case (supra) at page 340.

Accordingly when the letter dated 3 May 1971 asserts that approval has been refused "pursuant to Section 49, sub-sections (f), (g) and (i) and section 52(1)(c)" of the Act, it should be understood, secundum subjectam materiam, as meaning that in refusing approval to the proposal plan the Director has had in mind the substance of the grounds contained in the statutory provisions referred to.

The discussion just concluded is not directed to pursuing a barren technicality. It will be observed, for example, that when the Director acts under s. 42, sub-s. (2) of that section places him under a positive duty to refuse in the circumstances there referred to. When he is acting under the Regulations, however, the Director is called on to determine (in the words of Regulation 8) whether there are any reasons why he should refuse approval to the proposal plan or whether he should decide to approve the proposal plan either unconditionally or subject to conditions. Furthermore, s. 42 singles out a special area of investigation which may lead to the Director's being placed under a duty to refuse, while the Regulations leave the matters for investigation and the consequences of reports at large. Of course, each authority would, in practice, evaluate a proposal plan with its own particular responsibilities in mind.

On 1 July, 1971, Lady Becker appealed to the Board against the Council's and the Director's refusals. The notice of appeal included grounds relating to each.

From the outset of the hearing before me, Mr. Fisher maintained that there had been two separate appeals before the Board, and much of his argument as to the extent to which, at various stages and for various purposes, the Council should have been allowed to participate in the proceedings before the Board was founded on that premise.

It is true that, read literally and without regard to the Acts Interpretation Act, ss. 26 and 27 seem to imply that the subject matter of each appeal must be confined to a single decision by

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which the appellant is aggrieved: for example, sub-s. (2) of s. 26 refers to the Board's power to "confirm or reverse the decision appealed against", and sub.s. (2) if s. 27 requires the notice of appeal to be lodged with the Secretary "within two months after the date of the notice of the decision appealed against being given .....". But the sections giving the right of appeal must be construed, not in isolation, but against the background of the whole scheme of the Act. It cannot be denied that an important class of matters in respect of which a consent, permission or approval may be given or withheld comprise both plans of subdivision, and proposals for the specified uses of land that have been, or are capable of being, brought under planning control. It is equally clear that in many cases the Act has conferred, and, I should add, regulations under the Act may confer, upon more than one authority the power to grant or refuse a consent permission or approval (as the case may require - see Quarry Industries Limited v. The Corporation of the City of Marion /1971/ S.A.S.R. 55) in relation to one plan, one proposed use, or one proposed work. (Indeed, the man in the street is becoming accustomed to the spectacle of a single undertaking's being subject to the control of more than one authority). It seems to me to follow that it would be consistent with the general scheme of the Act to apply paragraph (b) of s. 26 of the Acts Interpretation Act (by which, unless the contrary intention sufficiently appears, the singular number shall be construed as including the plural number) and to read "decision" to include "decisions". I desire to emphasize that even if the word "decision" is so read, it does not thereby authorize the bringing of one appeal against "decisions" as to more than one plan, proposal or other subject matter. The Board may, of course, decide, for good and sufficient reasons, to consolidate the hearing of more than one appeal, but that is an entirely different thing. Two essentially separate matters may raise the same question of principle, and it may be convenient to have them argued together; but such a course would not be directly authorized by s. 26.

Accordingly, in my opinion, one appeal can be brought against two or more decisions, provided they both relate to the one subject matter - in the case at Bar, the proposal plan. In any given

case, however, the Board may, for the sake of convenience or in the interests of justice, and without being bound to take such a course, direct the hearing of the appeal to proceed in such manner as it thinks fit.

On 21 July 1971, the appeal came on for hearing before the Board for the first time. It is important to bear in mind that the sole subject matter of the appeal was the proposal plan A2, The Board considered certain preliminary matters and reserved its decision upon a question of law (which was not further debated before me). On 4 August, 1971, the Board gave its decision on the preliminary question of law. The appeal was further adjourned.

On 3 November 1971 the appeal was further heard: counsel for Lady Becker, for the Director and for the Council were present. At this stage counsel for Lady Becker introduced (I purposely use a colourless word) a second proposal plan, identified as A3, which until then had not been formally considered. The circumstances leading up to the introduction of A3, I gather, were these. Between 4 August 1971 and 3 November 1971, Lady Becker and her advisors had conferred and had produced a second proposal plan, different from A2. This was presented informally to the Director who, after discussion with the advisors, intimated that he would "approve" the plan subject to conditions which were particularised. His willingness to approve, and the conditions, were tendered to the Board. It is a strange feature of this informal colloquy that the Council was not informed of what was taking place, and did not learn of it or of its outcome until A3 was introduced formally. It is hardly surprising that counsel immediately embarked on a discussion of the roles that the parties would play, respectively, in the examination and assessment of the new plan, and that the Council sought, and obtained, an adjournment to consider the new plan.

During the argument before me, I enquired from counsel how A3 could properly be considered by the Board when the appeal at that stage concerned only A2. Mr. Bowering (for the State Planning Authority and for the Director) was fervent in support of the procedure adopted, which he justified in this way. He first referred to

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sub-s. (2) of s. 26 which runs:

> "(2) The board may, by its determination, confirm or reverse the decision appealed against or give to any party to the appeal such directions as the board thinks fit, and all parties to the appeal shall, as soon as practicable after receiving notice of the determination, to the extent that such directions apply to them, comply therewith and give effect thereto."

If (Mr. Bowering submitted) the Board may vary a plan, which it does not wish wholly to confirm, by "giv/ing/ to any party to the appeal such directions as the board thinks fit", it is entirely proper, and it is also convenient, that it should receive another plan, or other plans, upon the basis that it or they would be treated rather as minutes of order, or as a convenient summary of the "directions" that the party introducing the plan submits should be given by the Board in its determination. Mr. Bowering stated that if I were to disapprove the practice, which had been adopted by the Board on many occasions, that disapproval could lead to great inconvenience, expense and delay.

I have no wish to play the role of a judicial iconoclast. Provided a procedure has a secure foundation in law and justice, the more convenient, expeditious, and cheap it is, the readier I shall be, speaking generally, to approve or adopt it. But the procedure adopted hereby the Board, and commended by Mr. Bowering, carries its own dangers which, with respect to all who support or accept it, seem, in this case, to have been overlooked. In Santin's Case (supra) at page 339, I expressed the view that I should "be slow to interfere .... with decisions on more or less arcane matters of town planning, where plainly, in order to reach those decisions, the special abilities of the members of the Board have been brought into play". I reaffirm what I there said from which, in my opinion, an important corollary follows: that where the material before the Board raises or may raise questions fit for consideration by its members, as specialist town planners, it is usually essential that that material should be carefully appraised, more especially when the Board's discretion is engaged.

I agree with Mr. Bowering that the

legislature's purpose, in bestowing on the Board, by sub,-s. (2) of s. 26 of the Act, the power to give directions, was to enable the Board both to direct an authority to approve a plan in its original form, and to direct its approval subject to variations or conditions embodied in the determination. The Board is authorised to give such directions "as /it/ thinks fit" in the discharge of its duty to "determine each appeal in such manner as it thinks proper having regard to all relevant matters ....." (see sub-s. (6) of s.27). The power to give those directions is, therefore, plainly discretionary and must be reasonably exercised within the ambit of the discretion. One very important fact that governs its exercise is the character of the subject matter - in this case the proposal plan - in respect of which the appeal is brought. It is, I apprehend, manifest that the Board would not have the power to approve a plan that was fundamentally different in character from that which originally gave rise to the appeal. Similarly, it seems to me that if such a plan is introduced, and the Board is invited to approve it and to give directions to the authorities accordingly, the Board is really being invited to do something that would not, in truth, be the hearing and determination of the appeal, but would be some tertium quid authorised neither by the Act nor by the Regulations. Whether, in such circumstances, further proceedings in relation to a subsequently introduced plan can be characterised as the continuation of the appeal or as some unauthorised departure from proper and lawful appeal procedures, will be a question of fact and degree. If the Board take the view that the original plan cannot be approved unless it is susbjected to modification to such a degree that it becomes no longer, in essence, the same plan, then the proper course to adopt is to dismiss the appeal, and confirm the original decision or decisions. In contrast to the sort of situation just alluded to, where a fresh plan is introduced that is, in truth, merely the old one with some ancillary or minor variations, the Board would, in my opinion, be justified in giving directions to the Authorities to accept it.

In the case at Bar, a new plan (A3) was introduced with respect to an area of land a substantial portion of which, as with the original plan (A2), fell within the Hills Face Zone. The number of allotments in A3 was reduced from 145 to

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121; the total area was 65 acres (approximately) in each case.

I have scrutinized the transcript of the appeal before the Board, and nowhere can I find the slightest reference to the possibility that what was being then examined was not a plan that, in the particular circumstances of the case, could be reasonably regarded as the original plan with only minor and immaterial variations. It may be - although I very much doubt it - that A3 could have been so classified. But so far as I can see neither the Board nor counsel applied their minds to this cardinal question. The confusion and conflict that followed the reception of A3, therefore, do not come as a surprise. That confusion and conflict were but signs that the whole basis upon which the parties were anticipating was misconceived. It must be borne steadily in mind that a fresh plan, introduced as A3 was, has not previously been considered in due and lawful course of administration, and its reception as the basis for a continuation of a part-heard appeal carries the real danger that the plan has not been subjected to the thorough examination required by the relevant legislation.

In my opinion, therefore, the course of the hearing before the Board miscarried in a material respect; it follows that this appeal must be allowed.

What I have said is sufficient to dispose of the appeal, but amongst the several matters canvassed by counsel before me, two should be specially referred to because of their practical importance in the hearing of appeals before the Board. They also, in my opinion, constitute a further ground for allowing the appeal.

The first relates to the consequences of the Council's having failed to render a report as required by Reg. 7, in consequence of which (by virtue of sub-reg. (4) of that regulation) it was "deemed to have reported to the Director that it has decided to refuse approval" to the proposal plan.

Where the other authorities mentioned in Reg. 6 have returned an actual report, and subsequently appear as respondents to an appeal, the appellant will know what objections to the proposal

plan he has to meet. Obviously, therefore, a respondent who is deemed to have refused will not ordinarily, when the appeal is first called on before the Board, have made known to the Board or the appellant what objections (if any) are to be relied on by it (or him) unless he has taken special steps to do so. The question was debated before me whether such a respondent is entitled to be heard at all in the resulting appeal, or, if he is to be heard, then upon what topics and in support of what objections.

I can see how the supposed difficulty arises, but with all respect, the circumstances posed seem to me not to give rise to any real controversy.

If I may anticipate, I am of the opinion that, speaking generally, and subject to such procedural directions that the Board may give for the fair and expeditious disposal of business, every party to an appeal is entitled to participate in it, and to be heard on all relevant matters falling within the scope of the Board's enquiry as defined by sub.s. (6) of s. 27 of the Act. Of course, a respondent who is deemed to have refused would disrupt the hearing and cause hardship or embarrassment to the other parties if he was permitted, without warning, to launch into objections to the proposal plan. If the Board had the power to award costs, and a respondent attended a hearing intending to raise matters of substance, but without having given fair notice of what those matters would be, he would probably be compelled to pay the costs in any event of an adjournment unless he advanced good reasons for his failure. In the circumstances, therefore, I am of the opinion that every authority which finds itself, or himself, deemed by Reg. 7 to have to have refused should treat itself or himself as being under a stringent duty to give early notice to the Board and to the other parties of those matters it or he intends to raise upon the hearing. Such a duty should be discharged punctilliously because every authority mentioned in Reg. 6 is a responsible authority called upon at all times to act in accordance with the highest standards of justice: it should not, and, I am sure, will not, need the threat of being mulcted in costs to induce an adherence to those standards. The appearance before the Board of a respondent who is deemed to have refused approval need give no cause for concern because the due performance of its or his duties

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should obviate the possibility of any party's being caught unawares by a defaulting respondent.

I am led now to consider the wider problem of which the question just discussed forms only a facet.

As already appears from this judgment, an appeal may be brought by a person aggrieved (in the circumstances contemplated by sub-s. (1) of s. 26 of the Act) against a decision of the Authority, the Director or a Council made under the Act or under the Regulations.

If the Act stopped there one would naturally conclude that, mutatis mutandis, the ordinary principles by which Courts of Appeal act would, speaking generally, apply to the approach adopted by, and the powers conferred on, the Board. But, in my opinion, the legislature has made it clear that no such conclusion should be drawn. Sub.-s. (6) of s. 27 runs:

> "27. (6) The board may determine each appeal in such manner as it thinks proper having regard to all relevant matters and, in particular, to -
>
> (a) the provisions of any authorised development plan, the law (whether general or special) applicable or having effect in relation to the locality in which the land, the subject of the appeal, is situated and the grounds upon which the decision appealed against is made;
>
> (b) the health, safety and convenience of the community;
>
> (c) the economic and other advantages and disadvantages (if any) to the community of developing the locality within which the land, the subject of the appeal, is situated; and
>
> (d) any factors -
>
> (i) tending to promote or detract from the amenity of the locality in which the land is situated, the conservation of native fauna and flora in

the locality or the preservation of the nature, features and general character of the locality;

or

(ii) tending to increase or reduce pollution in, or arising from the locality in which the land is situated."

It is to be particularly observed that nowhere does the subsection say, or even suggest, that the Board is confined in its deliberations to grounds of appeal, or to grounds of objection raised by an authority. The passage "having regard to all relevant matters" means, in my opinion, all matters, at large, relevant to the original subject matter in respect of which the appeal was instituted. No doubt, in practice, the Board will, when hearing appeals, find most of its time occupied by matters and questions raised by the parties which in turn will probably be closely connected with reasons for disapproval or rejection signified in the course of administration. But its hearings and determinations will not be shackled to grounds, pleadings, or issues. It seems to me that an absurd situation would be created if the parties were held to be strictly limited to those specific matters with which they were, in rerum natura, closely concerned, while the Board was directing or, at all events, likely to direct its enquiries to the wider range of matters denoted by sub.-s.(6). I cannot believe that Parliament would have intended to produce such a curious state of procedural schizophrenia.

In construing general Acts of the kind now under review, especially when new tribunals are being set up, it seems to me that, if proper effect is to be given to s. 22 of the Acts Interpretation Act, a Court should not allow its interpretations to become illiberal and unduly strict. In my opinion, sub-s. (6) of s. 27 plainly means that once the Board becomes duly seised of a matter, it embarks, de novo, upon an enquiry whose terms of reference are laid down by the sub-section, and the parties then and there properly before it are justified, subject to directions given by the Board in any case in the interests of a fair and orderly hearing, in

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submitting such material, in playing such part in the examination of witnesses, and in tendering such arguments, as will be most conducive to a full and proper discharge by the Board of the responsibilities entrusted to it by ss. 26 and 27 of the Act.

I am of the opinion that there was no warrant for the proposition that the Board was compelled to restrict the Council's participation in the Board's enquiry. The Board would no doubt have been justified in inviting from the parties contributions to the hearing that were associated primarily with their respective points of view; to my mind, there must plainly be conceded to the Board ample discretionary powers to control its own proceedings in this sort of way. But I see nothing in the Act or regulations, in principles of natural justice, or in the public interest in expeditious and orderly hearings, that places the Board under an obligation in law strictly to limit a party's participation in appeals under ss. 26 and 27 to his or its area of responsibility in town planning administration, or in any other such way.

Accordingly, I am of the opinion that the Board, in a measure, misconceived its own powers. It would have been well justified in insisting that the Council, which was deemed to have refused approval to the proposal plan, should give notice, with reasonable particularity, of the matters (if any) it intended to urge in opposition to Lady Becker's proposal plan. To do so would have been merely to abide by ordinary rules of fairness. But if the Council wished to advance facts or submissions beyond the purview of such notice, the Board was not, in my opinion, bound to reject them, but was entitled, bearing in mind the course the hearing had already taken and was likely to take, to receive them insofar as they reasonably bore on the statutory issues declared by s. 27 of the Act, as related to the subject matter.

Other points were debated by counsel but I say nothing about them; I have dealt with the two fundamental questions that appear to me to be raised by the appeal.

By sub-s. (3) of s. 27 I am obliged to make such order and give to the Board and to any party to the appeal such directions touching the matter

in dispute as I think just. In all the circumstances, I make the following orders and give the following directions:

(1) The appeal is allowed with costs on the full Supreme Court scale.

(2) If Lady Becker wishes the appeal to proceed before the Planning Appeal Board on the basis of A2, I direct that she may do so, upon 21 days' notice, before a differently constituted Board. She has 14 days within which to elect.

(3) If, upon the hearing of such an appeal, A3 is tendered, I direct that it shall not be received and considered as the basis of a plan sought to be approved and implemented by consequential directions by the Board, unless the Board, in its discretion, is clearly of opinion that A3 should be regarded as A2 with only minor and immaterial variations.

(4) If the Board seised of the appeal is of the opinion that A3 cannot be so regarded, or if Lady Becker does not wish to proceed directly to a rehearing before the Board, then she must, if she wishes to proceed with subdivisional plans, begin again by submitting A3 (or such other plan as she selects) to the Director in the proper manner.

Dates of hearing - 7 and 8 November, 1972

No. 2

Judgment of Bray C.J.

DELIVERED 13th AUGUST 1973

LADY BECKER v. THE DIRECTOR OF PLANNING AND THE CORPORATION OF THE CITY OF MARION

L.V.D. No. 137 of 1972

Dates of Hearing: 12, 13, 14 & 15th June 1973

In the Supreme Court of South Australia Land & Valuation Division LVD No. 137 of 1972

No. 2

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13th August 1973

IN THE FULL COURT

Coram: Bray C.J., Hogarth and Zelling JJ.

JUDGMENT of the Honourable the Chief Justice

(on appeal from the Planning Appeal Board on appeal from an order of the Hon. Mr. Justice Wells)

Counsel for the Appellant: Mr. F.R.Fisher, Q.C. with him Mr. D.J.Bleby

Solicitors for the Appellant: Baker, McEwin & Co.

Counsel for the Respondent The Director of Planning: Mr. M.L.W. Bowering

Solicitors for the Respondent The Director of Planning: Mr. L.K. Gordon, Crown Solicitor

Counsel for the Respondent The Corporation of the City of Marion: Mr. B.M. Debelle

Solicitors for the Respondent The Corporation of the City of Marion: Stevens, Mellor & Bollen

Judgment No. 1690

LADY BECKER v. THE DIRECTOR OF PLANNING AND THE CORPORATION OF THE CITY OF MARION

Full Court

Bray C.J.

This is an appeal by Lady Becker, hereinafter sometimes referred to as 'the appellant', against an order of Wells J. dated 28th February 1973, whereby he allowed an appeal by the respondent the Corporation of the City of Marion, (hereinafter referred to as 'Marion'), against a determination of the Planning Appeal Board dated 27th July 1972. The Board had allowed an appeal by the appellant against the refusal of the respondent the Director of Planning, hereinafter called 'the Director', and of Marion to approve a plan of subdivision lodged by her on the 29th September 1970 and had directed that the Director and Marion approve an amended plan of subdivision subject to certain conditions.

The learned judge at the beginning of his reasons said that the proceedings by the time the Planning Appeal Board had made its determination had worked themselves into a state of extraordinary complexity and that the steps by which they got there bore the indicia of a Greek tragedy. The argument before us further complicated the complexities and I must confess that the literary analogy which suggested itself to me during the hearing was with the works of the late Franz Kafka.

The Planning and Development Act 1967, at least for some purposes and to some extent, expressly validates and adopts the regulations made under the previous legislation, (sec. 3(2)(a) and (c)), and particularly for the present purposes the Control of Land Subdivision Regulations made on the 30th September 1965. These regulations were, however, revoked by the Control of Land Subdivision Regulations dated the 9th November 1967, (except for the purposes of sec.3(2)(c) of the Act, see regulation 2), and a new set substituted, which does not differ greatly in substance from the old. The Act of 1967 has itself been amended, once each in 1969 and 1971 and no less than four times in 1972, by a series of Acts numbered 1 (inferentially), 2, 3 and 4, but which in some cases were assented to and brought into operation in a different order. The regulations of 1967 have also been amended on more than one occasion and two other sets of regulations were regarded by counsel as possibly relevant and brought to our notice, the Planning Appeal Board Regulations dated the 24th August, 1967, as amended from time to time, and the Metropolitan Development Plan Hills Face Zone Regulations dated the 16th December 1971.

The luxuriant growth of this legislative jungle abounds in ambiguities, inconsistencies, incoherences and lacunae and it is too much to hope that every judge who has had to consider these proceedings would choose to enter the jungle at the same point, still less to emerge from it by the same route.

I propose to set out in as little detail as possible what seem to me to be the relevant facts, provisions and issues.

On the 29th September 1970 the appellant lodged with the Director for approval what is

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called a proposal plan of subdivision of the land in question, part of which lies within the Hills Face Zone referred to in sec.42(5)(a) of the Act as that zone was defined at the relevant time. The Act prohibits dealings with land, other than allotments, without the approval of the Director, sec. 44 'Allotment' is defined so as to exclude broad acres intended to be developed and subdivided. Section 45 prohibits the acceptance of any plan of subdivision by the Registrar-General unless it has been approved by the Director and the relevant council or councils. The phrase 'plan of subdivision' is defined in sec. 5 of the Act. The Act specifies certain grounds on which the Director or a council may refuse approval. I will refer in more detail to these provisions later.

The scheme of the regulations of 1967 in force at the time the plan was lodged, as, indeed, broadly speaking of the previous regulations, is that an applicant for approval of a plan of subdivision submits to the Director what is called a proposal plan (regulation 5). The Director forwards a copy to various authorities, including the relevant councils, (Regulation 6). The recipients are directed to examine the proposal plan and report on it to the Director within 2 months of receipt or such extended time as the Director on application may allow (regulation 7(1)). The council's report is to state whether the council has decided to approve or to refuse to approve the proposal plan or to approve it subject to conditions specified in its report, regulation 7(2). Regulations 7(3) and (4) are important and I set them out in full:

> "7.(3) Where a council decides to refuse approval to a proposal plan, the council shall in its report to the Director, state, by reference to the Act or the regulations, the reasons for which the council has so decided.
>
> (4) Where a council has failed to comply with the provisions of subregulations (1) or (2) that council shall be deemed to have reported to the Director that it has decided to refuse approval."

When the council has reported, the Director

has to decide his attitude. When the council has reported that it has decided to refuse approval, the Director is to notify the applicant of that and of the council's reasons. He must also, if he desires to refuse approval, notify the applicant of his decision and his reasons. If both the council and the Director have decided to approve, he notifies the applicant by letter in the form of Form A in the schedule to the regulations, but he and the council may approve conditionally. All this is in regulations 8 and 9. Form A refers to approval of 'the proposal plan submitted by you for the subdivision of land situated at . . .' and when the approval is conditional it sets out the conditions.

With these provisions about approval should be read sec. 54 of the Act:

> "54. Where the Director or a council refuses approval to a plan, the Director or council, as the case may be, shall, when notifying the applicant of the refusal of such approval, inform him of the reasons for refusing such approval."

Once a proposal plan has received the blessing of Form A the way is clear to turn it into what the regulations call a final plan. Regulations 12 to 20 deal with the procedure for this purpose. Provision is made for an outer boundary tracing of the area to be submitted to enable the adequacy of the survey of that boundary to be checked, (regulation 12). Regulation 13 says that the applicant, after receiving notification of approval of the proposal plan and acceptance of the outer boundary tracing, may submit a final plan to the Director. Regulation 15 provides that he shall examine the final plan and 'if, in his opinion, it does not differ materially from the proposal plan as approved and incorporates any alterations specified, as conditions, on Letter Form A he shall forward it to the Registrar-General and send a copy to the relevant council and to any of the authorities mentioned in regulation 6 and concerned with any conditions stated in Form A. The Registrar-General is to satisfy himself that the survey is adequate and accurate and that the plan is fit for depositing in the Lands Titles Office. This means, in my view, fit from the point of view of survey, format and the like.

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Regulation 17 reads:

"17. If each council concerned informs the Director that the final plan meets their requirements and if the Director is satisfied that the conditions, if any, specified in the Letter Form A and all other requirements of the Act and regulations have been complied with, the Director shall certify his approval and the date of that approval on the final plan."

It is to be noted that this is mandatory. It says the Director shall certify his approval. What is meant by the requirements of the council may be a matter of some doubt.

It is plain enough to my mind that this scheme of things contemplates that any real contest about the acceptability of the subdivision should be fought out at the proposal plan stage. Once the proposal plan has been approved the Final plan will be automatically approved, subject to formal matters and to compliance with the conditions, if any, specified in Form A. The only possible suggestion in the regulations that there should be any re-examination on the merits of the final plan stage arises from the reference to the council's requirements in regulation 17.

When we turn to the Act, however, the sections which speak of the approval of the Director and the council refer only to a plan of subdivision, (secs. 42, 45, 49, 50, 51 and 52), without making any distinction between proposal plans and final plans. Indeed the Act and its amendments are silent about the whole distinction, except in so far as assistance can be gained from references to the regulations, express or implied, as in sec.3(2)(a) and (c) and sec.27(2) (as amended in 1971), and one of the matters most hotly debated before us was whether the sections in question relating to approval refer to proposal plans or to final plans or to both.

So far in referring to the scheme of the Act relating to approval I have been, with one exception, referring to sections of the Act contained in Part VI headed 'Control of Land Subdivision' and comprising secs. 43 to 62. But before turning to the fate of Lady Becker's

application, it is convenient here to refer to sec.42, which is contained in Part V headed, in the original Act, 'Interim Development Control within the Metropolitan Planning Area' and sec.42 in that Part provides that where a person makes an application to the Director for approval of a plan of subdivision relating to land within the metropolitan planning area and the Director is of opinion that the whole or any part of the land lies within a prescribed locality, (and the Hills Face Zone is such a locality), he shall refer it to the State Planning Authority, (hereinafter called 'the Authority'), for a report and that the Authority shall examine the plan and report to the Director in writing stating whether in its opinion any part of the land lies within a prescribed locality and whether the plan conforms to the purposes, aims and objectives of the Metropolitan Development Plan and to the planning regulations (if any) relating to that plan. If the report states that in the opinion of the Authority any part of the land lies within a prescribed locality and that the plan does not conform as just mentioned, the Director 'shall refuse to approve of the plan of subdivision' and notify the applicant of his decision and forward a copy of the report of the Authority. Subsec.(4) reads as follows:

> "(4) There shall be a right of appeal to the board against such decision of the Director and the board may, before determining the appeal, review the matters contained in the report of the Authority."

I now return to the fate of Lady Becker's application. On the 5th November 1970 the Director forwarded a copy of the proposal plan to the Authority and on the 6th November 1970 to Marion. Marion failed to report within 2 months as required by the regulations. On the 6th January 1971, then, it was deemed, if regulation 7(4) is valid, to have reported that it had decided to refuse approval. It was argued before us that it was not valid. It is fair to say that by letter dated 16th December 1970 Marion had asked the Director to obtain further information from the appellant and had said that in the meantime it would defer further consideration of the matter. The same day it wrote to the Authority asking it not to approve

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the plan 'as the plan does not conform to the purposes, aims and objectives of the Metropolitan Development Plan and in the opinion of the Council it would impair the generally open rural and natural character of the Hills Face Zone in the City of Marion'.

On the 19th April 1971 the Authority wrote to the Director stating that in its opinion part of the land lay within a prescribed locality, obviously the Hills Face Zone, and that it did not conform to the purposes, aims and objectives of the Metropolitan Development Plan in certain respects. On the 3rd May 1971 the Director wrote to the appellant's agent reporting these matters and enclosing copies of the relevant reports and stating that he refused approval pursuant to sec.42(2), as he was bound to do after receiving the report of the Authority. He said, however, that in addition he refused approval pursuant to secs.49(f), (g) and (i) and 52(1)(e). The letter further stated that as Marion had not replied it was deemed, pursuant to regulation 7(4), that it had reported to the Director that it had decided to refuse approval of the proposal plan. The learned judge refers to the signature of that letter by the Deputy Director instead of the Director and the use of the first person singular, but no point was made by anyone about this before us.

The appellant then, by notice of appeal dated the 1st July 1971, appealed to the Planning Appeal Board. The respondents named were the Director and Marion. The notice of appeal is a voluminous document of 12 pages. It segregates the grounds of appeal against the Director and the grounds of appeal against Marion. As against the Director it was claimed, apart from matters no longer relevant, that in as much as the Director refused approval under sec.42(2) the Board should review the matters contained in the Authority's report and determine that, although part of the land lay within a prescribed locality, the Hills Face Zone, the Authority was wrong in forming the opinion that the plan did not conform to the standards mentioned in sec.42. It gave particulars. It further claimed that in so far as the Director had refused approval under secs. 49(f), (g) and (i) and 52(1)(e), he had failed to give reasons and it denied that any of those subsections applied to the case. As against Marion, it said that no good

cause had been shown why Marion should not approve the plan, that Marion was in breach of its obligations under sec.54 and regulation 7(3) to give reasons and that the plan complied with all statutory and other requirements and should be approved. In both cases the appellant asked that if there was any relevant non-compliance she should be allowed to amend the plan and that the plan as amended should be approved.

The notice further asked that the Director should be ordered to give further and better particulars of its refusal to approve. No such order was asked for in the notice against Marion, (though at one stage it seems as if the Board thought that it had been), possibly because it had given no particulars at all and it might have been thought that further and better particulars cannot be given of nothing.

The Planning Appeal Board is set up by secs. 19 to 27 of the Act, including the extensive amendments made in 1971. It will be necessary later to refer in more detail to these provisions and to the relevant provisions of the regulations.

It is not easy from the mass of material before us to discover precisely what happened with regard to relevant matters at various stages of the hearing. I hope that the ensuing recital contains no material error.

The appeal came on for hearing before the Board on several occasions. First of all the request for particulars against the Director was dealt with and particulars were finally ordered on the 4th August 1971. On the first day of hearing Mr. Debelle for Marion seemed to indicate that he did not wish to participate in the appeal under sec.42. On the 3rd November 1971 it was intimated that if the plan was amended in certain respects the Director was prepared to approve it. Mr. Debelle on behalf of Marion said that his client had not had sufficient opportunity to consider the amendment and asked for time to do so. Accordingly there was an adjournment. On the 17th November 1971 the appeal came on for hearing again. Marion was now prepared to agree to the amended plan on further conditions, to which the applicant also agreed. On the request of Mr. Bowering for the Director, it was ordered that the Authority be

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added as a party and Mr. Bowering appeared for it also. No doubt this was because of the amendment, (if I may so call it at this stage without prejudice to any question of law), of the plan. The Board, however, thought that it ought to see the land and come to some opinion of its own. On the 27th January 1972 the Board intimated that its members were divided and their respective current views were submitted to the parties. They were given an opportunity to study them and to put any further material if so desired.

On the 5th June 1972 the appeal came on again and the hearing continued over several days. On the 5th June Mr. Debelle intimated that he thought the appeal should have been dismissed in accordance with the tentative views expressed by two of the members. He said that Marion had been prepared to consent to the amended plan on conditions, but that the Board had apparently not seen fit to impose those conditions. I repeat that the appellant had agreed to all of them. The Board said that it would deal first with the appeal against the Director's refusal under sec.42 and that if it decided to allow that it would then consider the appeal against the notional refusal of approval by Marion and, presumably, also against the Director's refusal on the grounds mentioned in secs.49 and 52. Mr. Debelle did not assent to that course. The appellant's counsel, Mr. Fisher Q.C., called evidence. Mr. Debelle applied to cross-examine. This was refused, but he was told that it might be that the witnesses could be recalled for cross-examination by him when the appeal against the notional refusal of his client came to be considered. Mr. Debelle protested and when the most important witness, Mr. Hignett, a town planner, was still in the box he repeated his request for cross-examination. It was refused. He applied to be joined as a party under sec.27a to the sec.42 appeal. That section gives the Board power to direct that any person who in its opinion ought to be bound by or to have the benefit of its determination should be joined. Mr.Bowering supported that application. Mr. Debelle contended that if the Board came to the conclusion on the sec.42 appeal that approval ought to be given to the plan, notwithstanding that part of the land was in the Hills Face Zone, he would have little chance of persuading it to the contrary when the appeal against Marion came on, assuming, of course,

that the questions of the Hills Face Zone and the Metropolitan Development Plan were relevant to that appeal. The applications that Marion be joined were refused by a majority, but again it was said by the Chairman that nothing was then before the Board for determination in a form which 'would necessarily preclude the council from being concerned or involved in assisting the Board at arriving at a proper decision in relation to the application for the subdivision of the land, save with respect to the matter as to whether the State Planning Authority in its report to the Director had reached a proper conclusion on the basis of that report'. At the conclusion of the evidence Mr. Debelle made an application to address the Board, that is, of course, on the sec.42 appeal. Again his application was refused by a majority.

On the 13th June 1972 the Board intimated that it did not agree with the decision of the Director under sec.42. Mr. Bowering on behalf of the Director and the Authority intimated that no evidence would be called by him on any other aspect of the matter. He said that he would be asking the Board to direct the approval of the proposal plan subject to certain conditions agreed between the Director and the appellant. On the 14th June 1972 the conditions were discussed. Mr. Debelle recapitulated his stand. He repeated his contention that there was only one appeal and that he should have been allowed to cross-examine the appellant's witnesses. He said that he thought he could not now change the Board's mind about the matters involved in the sec.42 appeal and that Marion, therefore, did not propose to call any evidence or make any address, except that if approval was to be granted it should be on certain conditions, which he discussed. The Chairman of the Board repeated that it was not the intention of the Board to exclude Marion from any participation in any issue with which it was, in the Board's opinion, concerned. On the 17th July 1972 the Board said that it would like the views of the parties on certain conditions set out by it which it might impose if it decided to allow all the appeals and direct the Director and Marion to approve the altered plan, which had received the number A6, (the learned judge refers to A3, but this is apparently an error and refers to an earlier plan). On the 20th July the conditions drafted by the Board were discussed.

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On the 27th July the Board delivered its judgment. It directed the Director and Marion to approve of a plan in the form of A6, subject in each case to conditions set out.

Marion then appealed to the Land and Valuation Division of this court by notice of appeal dated the 24th August 1972. It claimed that the Board should have dismissed the appeal after what the notice called its interim decision of the 27th January and that the Board was in error in deciding that there were two separate appeals and in limiting Marion's participation in the proceedings and in deciding that the Metropolitan Development Plan did not warrant the confirmation of the original refusal of the Director.

The learned judge allowed the appeal. He held that secs. 42, 49 and 52 related to final plans, not to proposal plans. There was, therefore, no valid appeal under sec.42. Instead there was an appeal under sec.26 which gives a right of appeal to the Board against any refusal of any consent, permission or approval by the Director or a council under any provisions of the Act. He called in aid the provision of sec.4 of the Acts Interpretation Act 1915-1972 and held that the appeal under sec.26 extended to refusals under any provisions of the regulations as well as under those of the Act. And, indeed, regulation 69 gives a direct right of appeal against a refusal to approve a proposal plan and says for that purpose approval subject to conditions shall be deemed to be a refusal.

His Honour further held that the Board had no power to approve the altered or amended plan A6, unless that was the same as the original plan A2 'with only minor and immaterial variations', and that the Board did not appear to have considered whether that was so or not. He therefore held that the appeal before the Board had miscarried.

He further held that one appeal could be brought against two or more decisions, whether by the same authority or not, relating to the same proposal plan, but that it was for the Board within its wide limits of judicial discretion to direct the course of the hearing of the appeal or appeals as it thought fit. He thought, too, that the Board was not bound to restrict the participation of

Marion in the hearing of the appeal, though, as I read his judgment, he did not deny the power of the Board to do so in the exercise of a judicial discretion. He thought that the appeal before the Board was a hearing de novo and that the parties properly before it 'are justified, subject to directions given by the Board in any case in the interests of a fair and orderly hearing, in submitting such material, in playing such part in the examination of witnesses, and in tendering such arguments, as will be most conducive to a full and proper discharge by the Board of the responsibilities entrusted to it by sections 26 and 27 of the Act'.

His order allowed the appeal and gave the appellant an election to proceed with her appeal as regards the original proposal plan A2 before a differently constituted Board. He directed that A6 should not be received or accepted on such an appeal 'unless the Board, in its discretion, is clearly of opinion that the said exhibit A3 (read A6) should be regarded as A2 with only minor and immaterial variations'. If the Board held that A6 could not be so regarded, or if the appellant elected not to proceed with the appeal to the Board under those conditions, she would have to start de novo with A6 or any other plan she wanted to present as an original proposal plan.

The notice of appeal to us specified many grounds, but the argument centred around six points which, I think, cover the present controversy.

1. Do secs. 42, 49, 51, 52, 54 and any other relevant sections of the Act, when they refer to a plan of subdivision or a plan, relate to final plans only or to proposal plans only or to both?

2. Is regulation 7(4) valid: if not, what are the consequences?

3. Did the Board have power on an appeal or appeals based on a refusal to approve A2 to direct the approval of A6 subject to the conditions it imposed?

4. Was there only one appeal before the Board or more than one, and, if so, how many?

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5. What rights did Marion have to participate in the appeal?

6. Were those rights wrongly restricted or denied?

I proceed to apply myself to these questions. Before doing so I would stress that the appellant and the Director and the Authority were all agreed that A6 should be approved subject to the conditions imposed by the Board. The Board itself, which is a body of town planning experts, saw fit so to approve it and to issue appropriate directions. In the final result Marion alone dissented. If it has been deprived of or restricted in the exercise of the rights given to it by the law, if an injustice has been done to it, then, of course, this court must intervene. But if Marion has had the full measure of whatever rights the law gives it, then it would, in my view, be highly unfortunate if this court were forced to disturb a situation reached with the full concurrence of all the other parties, including those charged with the duty of overseeing and protecting the public interests involved in the Planning and Development Act. Nevertheless, the court would, of course, have to do that if the proceedings were vitiated by some fundamental legal flaw which could not be cured by consent of the parties so that in effect the order of the Board was made in excess of its power or jurisdiction.

The matter does not rest there. As I have intimated, the law has been altered from time to time during the history of this case. The boundaries of the Hills Face Zone have been extended by the Hills Face Zone regulations of 16th December 1971. By the amending Act 133 of 1972 sec.45b was added. That section says that no plan shall be lodged or deposited with or accepted by the Director or a council if it purports to create an allotment any part of which lies within the Hills Face Zone, subject to certain exceptions, unless the allotment has a frontage to a public road of at least 100 metres and an area of at least 4 hectares. It came into force on the 1st December 1972 after the decision of the Board. If there had been no appeal to this court, the final plan might well have been approved before then. As it is, if we allow the appeal and restore the determination of the Board, the appellant will be faced

with it in her efforts to get the final plan passed. I express no opinion on its application in such circumstances. It is obvious, however, that if she has to start de novo with a new proposal plan, the section will present her with a formidable and, it may well be, an insurmountable barrier. If she has to commence the hearing of the appeal again, she will probably have to face arguments which were not open at the time of the hearing before the Board. Mr. Bowering, who appeared before us for the Director - and I assume the Authority too, since it was a party to the proceedings before the Board and the original appeal to this court - told us that, while not recanting the attitude his clients had taken at the time of the hearing before the Board, they would not undertake to adopt the same attitude if the appeal to the Board were reheard. None of this, of course, is any reason for departing from the true legal construction of the Act and regulations as they apply to the issues in the case. These things, in my view, do supply reasons, in justice to the appellant, for the most anxious care and scrutiny before we are forced to conclusions which could lead to such disastrous consequences to her in terms of wasted time, effort and money by reason of intervening changes in the law, which she could not be expected to foresee, and for which she is in no way responsible.

1. Proposal plans and final plans

The definition of 'plan of subdivision' in sec.5 is as follows:

> "(a) any plan which divides the land delineated therein into more than five allotments, any one of which is twenty acres or less in extent;
>
> (b) any plan which divides the land delineated therein into an allotment which, or into allotments any one of which, is twenty acres or less in extent and shows or makes, provision for any proposed road, street, thoroughfare, reserve or other space for public use; or
>
> (c) any other plan which the Director requires pursuant to section 57 of this Act to be dealt with as a plan of subdivision:"

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It was urged that 'divided' here means legally divided and reference was made to sec.101 of the Real Property Act 1886-1972. In my view, however, the word cannot possibly mean this. The definition cannot, as I see it, possibly refer exclusively to plans which by their own force affect a legal division into allotments, because the plans of subdivision referred to in Parts V and VI are plans which need approval before they can be clothed with legal validity. I think that the definition refers to plans which purport physically to split up the land in the manner specified on the paper or other material on which the plan is drawn. So construed the definition is wide enough to include both proposal plans and final plans.

It is true, however, that sections 42, 45, 49, 51 and 52 seem to contemplate one submission and one approval, not two different submissions and two different approvals at various stages of the plan's history. It is literally true also, or almost so, that if the Act is read alone without reference to the regulations there is, as the learned judge says:

> " ..... not a single passage in the whole Act, in which a plan of subdivision or of resubdivision is referred to, from which an allusion to a provisional or proposal plan can be coaxed."

It is also true, of course, that an Act cannot be construed by reference to regulations subsequently made in the absence of anything in the Act itself to warrant such a course. And if the concepts of proposal plans and final plans were discoveries adumbrated for the first time in the regulations of 1967 made after the Act, there would probably be no effective answer to the point made by the learned judge that it was not inevitable that the draftsman of the regulations would use the word 'plan' to describe the initial proposition submitted to the Director and that he could have used some other word such as 'proposal', and omitted the word 'plan' so that it would be impossible to contend that that initial proposition was a plan of subdivision within the meaning of the Act.

But this reasoning ignores the existence of the previous regulations and their validation by the Act. The regulations of 1965 provides for the

submission of a proposal plan to the relevant officer, this time the Town Planner, the forwarding of it to various authorities, including the relevant councils, notification to the applicant after receipt of reports from the recipients of the plan, and the issue of Form A. They provide also for a deemed refusal when the council fails to report in time, although not in the precise language of the present regulation 7(4). They provide for a boundary tracing and the submission, examination and approval of the final plan broadly along the same lines as do the existing regulations.

Section 3(2)(a) and (c) of the Act of 1967 read, where relevant, as follows:

> "(2) Notwithstanding such repeal (i.e. of the previous litigation) -
>
> (a) all regulations made under the repealed Act and in force immediately before the commencement of this Act shall be deemed to have been made under this Act and to have effect as if the necessary power to make them had been enacted by this Act and as if any reference to the Town Planner therein were a reference to the Director and any reference to the Town Planning Committee therein were a reference to the board: ....
>
> (c) ..... every application made under the repealed Act to the Town Planner or a council for approval of a plan of subdivision (which has received the approval of the Town Planner by letter in the form known as letter form "A") .... not finally disposed of at the commencement of this Act shall be dealt with and disposed of as if this Act had not come into operation ....."

The previous regulations therefore are expressly validated as if specific power to make them had been given by the Act.

Moreover, when sec.3(2)(c) refers to Form A, it refers to the approval of a proposal plan. The old Form A is like the present one. It refers to

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'approval .. to the proposal plan submitted by you for the subdivision of land situated at ....'. The phrase 'plan of subdivision' in sec.3(2)(c) can, in my view, only mean a proposal plan, for it is only a proposal plan which can receive approval by Form A, and I do not think it matters whether the antecedent of the pronoun 'which' in the phrase 'which has received the approval of the Town Planner' is 'application' or 'plan'.

The Act must be read against the background of a scheme of proposal plans and final plans which is approved and, as far as necessary, validated by the Act. Looked at in this light the phrase 'plan of subdivision' takes on a different meaning and becomes capable, in my view, of at least including in an appropriate context a proposal plan. A proposal plan is not the creature of regulations passed subsequently to the Act, but a concept which was in existence before the Act and is impliedly recognised by it.

This is not to give to the phrase 'plan of subdivision' in the definition clause two different meanings. It is to give it one broad inclusive meaning which covers both proposal plan and final plan, and in construing any particular section where the word appears it may, and probably does unless the context otherwise demands, include both, or where it does otherwise demand it may mean one and not the other. To hold that it can only mean a final plan is, in my view, to hold that the legislature in the Act was denying the scheme of the regulations which by the Act it expressly validates and impliedly adopts. If it did that, it would indeed merit the reproach of schizophrenia.

I approach the relevant sections of the Act in that sense and with that background in mind. In sec.45(1) 'plan of subdivision' obviously means the final plan. It is only the final plan which will reach the Registrar-General. In sec.45(2), however, I think that both proposal plan and final plan are covered and that the Director could refuse to act under regulation 6 until the land had been brought under the Real Property Act. I think that secs. 49 and 52 have to be read with the regulations validated by sec.3(2)(a). The scheme of the regulations, in my view, is that all questions of approval on the merits are normally canvassed at the proposal

plan stage. I think that the Director and the relevant council refuse approval within the meaning of those sections when they refuse approval under the present regulations 7, 8 and 9, or their equivalent in the old ones, i.e. to the proposal plan. The language of the sections is discretionary - approval may be refused. This corresponds with the language of the proposal plan regulations I have mentioned, whereas regulation 17, dealing with the approval of final plans by the Director, is mandatory, provided that he is satisfied that the conditions specified in Form A and the other requirements of the Act and regulations - which, as I have said, I think means formal requirements - have been met.

Mr. Debelle indeed argued that regulation 17 was invalid, but a regulation in very similar terms (regulation 17) was contained in the old regulations and, for the reasons I have already given, must be deemed to have been validated by the Act. I will deal later with the problems of validity involved in the revocation of the old regulations and the substitution of the new ones.

It is true that under regulation 17 it is also necessary that the relevant council should have informed the Director that the final plan meets their requirements. I think that means in the first place, requirements contained in any condition subject to which the council approved. It would normally be for the council to decide whether what the applicant had done or undertaken to do was a compliance with those conditions. I think also that the council may at the final plan stage refuse consent under sec.51, which relates to the proper construction of roadways and the like. It empowers the council to refuse approval if the roadways etc. as formed do not comply with proper standards or unless the applicant has made binding arrangements satisfactory to the council for the proper carrying out or completion of the work. Normally I should think that the applicant would not do this roadwork at all before the final plan had been approved and passed, though we were told that on some occasions he had done so, nor would he bind himself to have it done until the proposal plan had been approved.

In my view sec.42 stands, for this and other purposes, in a class by itself. It is proclaimed

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in a different Part of the Act with different purposes. But I do not think it requires the Director to submit the same plan to the Authority more than once: and I think that it contemplates that normally it will be submitted at the proposal plan stage. If it were necessary for the Director to delay submission of the plan to the Authority until the final plan stage had been reached, much unnecessary expense and delay might be involved.

I cannot, then, hold that the whole scheme of proposal plans and final plans, worked out under the provisions both of the previous regulations and the existing ones, is alien to the Act itself, and it follows that I cannot agree with the learned judge that the Director in refusing approval by his letter of the 3rd May 1971 was not acting under the sections mentioned in that letter (i.e. secs. 42, 49 and 52), but at one remove from them. I think that his refusal to approve was a refusal within the meaning of those sections.

I think, therefore, that the appeal to the Board was, so far as regards the refusal of the Director to approve under sec.42 an appeal under the provisions of sec.42(4) and, so far as regards his refusal to approve pursuant to sec.49(f), (g) and (i) and 52(1)(e), an appeal within the meaning of sec.26.

2. The validity of regulation 7(4)

It is suggested that this is invalid because it is not authorised by the regulation-making power. The Act, it was said, contemplates an appeal from a refusal to approve or an approval subject to conditions. It is silent as to what is to happen when there is mere silence and a failure to signify any attitude towards the plan on the part of the council. True it is, that the concept of deemed refusal arising by failure on the part of the council to report its attitude to the Town Planner within a specified time was part of the old regulation 7, though not quite in the same form, and by sec.3(2)(a) that regulation took effect after the Act of 1967 came into force as if express power to make it had been given by the Act; but the Act contains no power to make new regulations in the same terms. If, according to this argument, the old regulations had merely been amended where necessary, leaving the deemed refusal provisions

intact, all would have been well: but since the old regulations were revoked in toto and the new ones substituted, albeit in similar terms, the deemed refusal concept falls to the ground because it is outside the regulation-making power contained in the Act.

But the oddities of this argument do not stop there. Section 27(2), as substituted by the amending Act of 1971, specifies two months as the time within which appeals must be lodged with the Board and the two months' period is to run from various events, one of which is 'after the application ..... has been deemed to have been refused'. There is nothing anywhere in the Act about deemed refusals. On the other hand there are two such hybrids in the regulations, one under 7(4) as a result of failure on the part of the council to report within the specified time with which we are at present concerned, and the other under regulation 69(2) which says that an approval subject to conditions shall be deemed a refusal. Section 27(2), it was suggested, refers only to the latter and sec.36(8) was invoked with regard to this, though that does not speak of deemed refusals. There is nothing in the language of sec.27(2) to indicate such a restriction and, in my view, it must be taken to refer to deemed refusals under the regulations, because there is nothing else to which it can refer, and to both types of deemed refusal. Be it so, is the rejoinder, but the Act of 1971 was assented to on 22nd April 1971 while Marion's deemed refusal, when the two months ran out, was on the 6th January 1971 and even if sec.27(2) validates regulation 7(4) as from April 1971 it does not do so retrospectively.

Another line of argument is based on sec.54. This, as I have said, requires the council to give reasons when it refuses approval. But obviously it gives no reasons by merely remaining silent. Hence, it may be said, the regulation is invalid because it creates an artificial breach of sec.54 and, indeed, of regulation 7(3) as well.

In my view the whole question should be approached in another way. The regulation-making power is contained in secs. 62 and 79. Section 62(1) reads as follows:

"62(1). In addition to the other powers to

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make regulations conferred by this Act, the Governor may make such regulations as are necessary or expedient for the purpose of giving effect to the provisions and objects of this Part."

Section 79(1) reads as follows:

"79(1) In addition to the other powers to make regulations conferred by this Act, the Governor may make such regulations as are necessary or expedient for the purpose of giving effect to the provisions and objects of this Act."

The duplication is curious and prompts reflections on draftsmanship which are better repressed. It is true that 62 refers to Part VI only, whereas sec.79 refers to the whole Act. However, secs. 62(2) and 79(2) both begin with the following words, 'Without limiting the generality of the provisions of sub-section (1) of this section, such regulations may prescribe', and then follows a list of specific powers. Legislation in this form, I think, means that the words 'necessary or expedient for the purpose of giving effect to the provision and objects' of the legislation are not to be cut down by any eiusdem generis rule or any expressio unius rule, Ex parte Provera 69 W.N. (N.S.W.) 242 at p.245.

I accept, of course, the principle laid down by the High Court in Shanahan v. Scott 96 C.L.R. 245 at p.250 as follows:

"The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."

I accept, too, that the regulation-making power will not extend to the making of regulations

inconsistent with the Act or having the effect of altering its provisions, even, perhaps, where the regulations are deemed to be part of the Act, Cheadle v. Higginson 36 W.N. (N.S.W.) 58 at p.59.

But once again I return to sec.3(2)(a) which specifically validates the old regulations and the scheme of proposal plan submitted to the chief town planning official, despatch of a copy of the council, report by the council with reasons within a specified time and a deemed refusal of approval arising from failure so to report. It is surely difficult to contend that a deemed refusal by reason of failure to report is inconsistent with or not authorised by the Act when it was validated by the Act at one remove.

I agree that a validation of the old regulations is not equivalent to a grant of power to make new ones in the same terms, though I think it could be argued that sec.27(2) impliedly recognises the validity of the new regulations ab initio. But the validation of the old regulations leads me to approach the regulation-making power with the assumption that new regulations, revoking the old but in substantially the same terms for relevant purposes, will not be inconsistent, with or unauthorised by the Act.

So doing, I think that regulation 7(4) could reasonably have been regarded by the Governor as necessary and expedient for the purpose of giving effect to the objects and provisions of the Act in general and of Part VI in particular, and this even though sec.62(2)(b) only refers to regulations prescribing the procedure to be followed when the Director or a council approves any plan, not when he or it refuses approval. I repeat that there can be no expressio unius application because of the words about the generality of sub-sec.(1) not being limited.

The scheme of proposal plans and final plans involves a report by the council expressing approval or refusal to approve. It is both necessary and expedient for the completion of the scheme that some provision should be made for the event of a council failing to do either. Whether regulation 7(4) is the happiest way of resolving that situation is neither here nor there. It would have been easier for us if the regulations

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had provided that silence gave consent. It might have been more comprehensive if the regulation had provided that failure to report was deemed to be a refusal by the council on all the grounds open to it. But I think that regulation 7(4) could reasonably have been regarded as necessary and expedient for the carrying out of the proposal plan scheme validated by the Act

I think that it can be supported on another ground too. The Act gives wide powers of appeal to the Board, see sec.26. Section 27(2), in my view, recognises the validity of deemed refusals. Something has to be done to resolve in the interests of applicants the deadlock which would otherwise be created by the failure of a council to do anything. No doubt mandamus would lie against it in such circumstances. But this is an expensive and, at times, a dilatory remedy. It could have been regarded as more equitable to give the applicant a right to approach the Board as soon as he was told that the council had failed to report within the specified time.

However, I do not found so much on that consideration as on what seems to me the logical absurdity of holding that a power to make regulations about deemed refusals is denied or not authorised by an Act which recognises deemed refusals created by regulation as part of its general scheme, as I think this Act does by reason of sec.3(2)(a).

Undoubtedly difficulty is caused by the absence of reasons, but, on the view I take, the Board has full power to deal with that. As to sec.54, any strain caused by its co-existence with regulation 7(4) was also present when sec.54 co-existed with the original regulation 7(3), as it certainly did between the coming into operation of the Act and the repeal of the old regulations.

Since compiling my draft of these reasons I have seen in draft form the reasons for judgment of Hogarth J. and I acknowledge the force of his arguments for holding that the change of wording from the old regulation 7(3) to the present regulation 7 (4) means that the only effect now of a failure by the council to report within 2 months is that the Director is free to proceed under regulation 8 and that it does not have the same

effect as a genuine refusal of approval by the council.

I find the change in language puzzling, but I cannot, with respect, think that such a drastic departure from the previous procedure was intended. What would be the position if the council actually reported to the Director that it refused consent without giving any reasons? Surely the applicant could still appeal to the Board from the council's refusal notwithstanding the absence of reasons and the breach of sec.54. If so, it seems no great extension to give him a similar right of appeal if the council fails to report any decision at all within a reasonable time. As I have said, I think the present sec.27(2) recognises such a right of appeal. It may be that the change from a deemed refusal to a deemed report of a refusal was prompted by some vague and, as I see it, vain desire to give the right of appeal without involving the council in a breach of sec.54, but sec.54 seems to have no penal sanction anyhow. I cannot reconcile myself to a deemed report of a refusal which is not also a deemed refusal and, with respect, if the phrase 'where a council has reported' in regulation 9 refers only to an actual refusal and not to a deemed report of a refusal I cannot see why the phrase 'when every council concerned has reported' in regulation 8 should not be similarly restricted.

I think, then, that regulation 7(4) is valid. If I had held otherwise, the consequences would have been that no valid appeal had ever been instituted against Marion and the direction to it by the Board could not stand, but even in that event I would see no reason because of that to disturb the order of the Board with regard to the Director.

3. A2 and A6

On this I can be briefer. I agree with the learned judge that the Board 'would not have the power to approve a plan that was fundamentally different in character from that which originally gave rise to the appeal'. I prefer that positive formulation to the negative one that found its way into the learned judge's order that there is no power to approve a plan which differs from the one which gave rise to the appeal, unless the one is the same as the other 'with only minor and

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immaterial variations'. The learned judge's order says 'and', but I assume that he meant 'or'. I do not think that he meant that any variation had to be both minor and immaterial, for if so the word 'minor' would seem to add nothing.

However, I see no reason to think that the Board thought that it did have power to approve a plan fundamentally different from the original one, or that it thought that this one was so different. True it does not appear to have spelled this out specifically. But I observe that Commissioner Fordham, in his tentative reasons dated the 27th January 1972, speaks of the new plan in its then form as 'a slight variation from the original'. The plan finally approved, A6, was accepted by the Director and the Authority. Presumably, they did not think that it was so different from the original as to require a new start.

Power is given to the Town Planning Authority to approve the original plan subject to conditions, (sec.36 sub-sec.(8)), and that implies a possible alteration to the plan, and regulation 15 speaks of the final plan as incorporating any alterations specified in conditions in Form A. The Board has power to affirm the decision appealed against, or give to any party to the appeal such directions as it thinks fit, sec.26 sub-sec.(2), and, as this includes a direction to the Director or a council to approve the plan, so it includes a direction to approve it subject to conditions. It has the widest power to determine every appeal in such manner as it thinks proper having regard to certain specified considerations, sec.27(6), and that must include power over the details and the form of its order.

Of course the power must be exercised judicially and it would perhaps not be a judicial exercise of the Board's discretion if it gave its blessing to a fundamental alteration of the plan such as, in effect, to turn it into another plan, instead of an alteration which left it fundamentally the same plan. As I have said, I do not think the Board should be deemed to have overlooked this distinction: courts appealed from are presumed to have acted on proper criteria unless there is some reason to think that they have not, cf. Watts v. Welch 1950 S.A.S.R. 289.

Not only that, a perusal of the two plans indicates to me that the differences are not fundamental. The same piece of land is involved. The acreage is the same. The number of allotments is reduced from 145 to 121, but this obviously is prejudicial only to the appellant. There are other minor changes, but none, in my view, of sufficient significance for the present purpose.

I agree that sec.42 must always be borne in mind and, no doubt, in the case of any alteration which could conceivably affect the opinion of the Authority with regard to the matters mentioned in that section, the Board would be astute to see that the Authority's views were sought. The point does not arise here. The Authority was a party to the proceedings and assented to A6.

I have not overlooked that regulations 10 and 11 refer to amended plans and give the applicant the right, in effect, to substitute an amended plan for the proposal plan and instruct the Director to forward copies of the amended plan to the relevant councils and the other authorities mentioned in regulation 6. Those regulations refer to an amendment of the proposal plan before it has been approved, or approved subject to conditions, and, in my view, have nothing to say about any alteration or amendment to the plan resulting from conditional approval by the Director or a council or resulting from any order of the Board. I think, therefore, that the Board was entitled on this appeal to direct that A6 be approved by the Director subject to the conditions it imposed and by Marion also, unless Marion's rights during the course of the hearing were infringed.

4. One appeal or none

In one sense I think this is largely a formal question, because I do not doubt that the Board's powers extend to ordering, if there is more than one appeal relating to the same proposal plan, that they all be heard together, and, if there is only one appeal, that any of the issues arising out of it be tried separately. I agree with the learned judge about this. However, as a matter of form I think the appeal under sec.42 is a separate appeal from the appeal against the refusal of approval by the Director under secs.49 and 52 and the deemed refusal of the council, and indeed that even the

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two latter ones are separate from each other.

As I have pointed out before, sec.42 is in Part V of the Act, secs. 49 and 52 are in Part VI. Under sec.42 the action of the Director is automatic: under the other sections he has to exercise his own judgment. The appeal under sec.42 is really against the Authority and only nominally against the Director. The contest is between the applicant and the Director and the Director as the mouthpiece of the Authority. The real issue is whether the Board will review the matters contained in the Authority's report. If the appellant had appealed only against the refusal under sec.42 the Director would have been the only respondent, though, of course, the Board could have directed that Marion, or any other relevant authority, be joined.

Similarly, I think she could have appealed in one proceeding against the refusal of the Director under secs.49 and 52 and in another against the deemed refusal of Marion. Nor was she bound to appeal against both, though if she had only appealed against one the Board could of its own motion have directed the joinder of the other. In any of these events, it would not, in my view, have been possible to hold that the appeal was legally incompetent by reason of the non-joinder of all necessary parties.

I see no objection to the appellant's joinder of all three appeals in one document, but as a matter of legal theory I think that there were really three appeals. I think this is supported by the language of secs. 26 and 27, particularly sec.26(1) and, with respect, I do not see that the Acts Interpretation Act compels any different conclusion.

No doubt, as a matter of convenience, all appeals in relation to the same proposal plan will normally be heard together.

5. The rights of Marion

It follows from what I have said that, in my view, Marion had no legal right to be made a party to the appeal against the Director's refusal under sec.42, or, indeed, his refusal under secs. 49 and 52, though it could have been made such a party

if the Board had so directed.

Assuming the validity of sec.7(4), it was deemed to have reported to the Director that it had refused approval to the plan. It must follow, I think, that an appeal lay to the Board, both under sec.26(1) and under regulation 69, against such a deemed report of a refusal just as much as if the regulation had remained in the old form and made failure to report a deemed refusal simpliciter. The main object of regulation 7(4) must surely be to give to the applicant a right to get the Board's opinion on his proposal plan, notwithstanding a dilatory council. I refer again to sec.27(2).

But, of course, though the council is deemed to have reported its refusal, it is not deemed to have given any reasons. It is, presumably, on the view I take, deemed to have reported in breach of its obligations under sec.54 and regulation 7(3).

What, then, is to be the lis in the appeal as between the appellant and such a council? Normally, I should think, the first step any appellant would take under such circumstances would be to ask for particulars, and I should think that if they were refused the Board would order them. I do not think that any difficulty is created by the wording of regulation 19 of the Planning Regulations which authorises the Board to direct a respondent, including a council, to give further and better particulars of the reasons for its decision. I construe this as including a power to order particulars where none have been given at all as well as where some but insufficient particulars have been given. For some reason that was not asked for by the appellant.

In the absence of particularity, I should think that it was open to Marion on the hearing of the appeal against its deemed refusal to endeavour to establish any ground on which a council is entitled to refuse its approval. What are those grounds? Section 49 sets out a number of grounds on which the Director or a council may refuse approval. Section 51 sets out additional grounds on which a council, and sec. 52 additional grounds on which the Director, may refuse. Are those lists exhaustive? In my opinion they are, together with any further grounds added by regulation. Sec. 62(2)(c) empowers the Governor to make regulations

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prescribing the grounds in addition to those set out in the Act upon which the Director or a council may refuse approval to a plan. Such regulations have been made in regulation 68 of the regulations, but that applies only to the Director. I think that sec.62(2)(c) just cited makes it plain that the only grounds on which a council may refuse approval are those set out either in the Act or in the regulations.

Section 49(f) empowers a council to refuse approval if the land or any part thereof is unsuitable for the purpose for which it is to be subdivided, whether because of the proximity of the land to an airport or otherwise.

Section 49(i) gives a power to refuse approval if the proposed mode of subdivision would be unsuitable having regard to the use to which the land may be put under the Act, or any regulation made thereunder, or under the Building Act 1923-1965, or any by-law or regulation made thereunder.

Nowhere is there a power given to the council to refuse approval on the ground that the proposed subdivision does not conform to the purposes etc. of the Metropolitan Development Plan or any planning regulation relating thereto. That question, as I see it, is one between the appellant and the Director (and behind him the Authority) exclusively.

Of course, a council may regard a subdivision as unsuitable under sec.49(f) or (i) by reason of some matter which could also put the subdivision out of conformity with the Metropolitan Development Plan. A council, as I see it, could act on such a matter under sec.49(f) or (i) and canvass it on the hearing of the appeal. But it would have to do so on the unsuitability of that matter on its own merits, or perhaps I should say demerits, not simply on the ground of non-conformity with the Metropolitan Development Plan.

On the hearing, then, of these appeals I think that Marion was entitled to contest the appeal against its deemed refusal on the ground of the unsuitability of the proposal plan under sec.49(f) or (i), or, indeed, to raise any other ground of refusal under sec.49 or 51. It could do so none

the less that such unsuitability, if established, might also lead to the conclusion that the proposal plan did not conform to the purposes of the Metropolitan Development Plan. But the question of such non-conformity in itself, as I see it, was irrelevant to the lis between Marion and the appellant, and it was no necessary party to the lis between the Director and the appellant.

It was vigorously contended by Mr. Debelle that it would have been futile for Marion to canvass any alleged unsuitability of this kind before the Board once the Board had decided that the alleged unsuitability did not put the proposal plan out of conformity with the Metropolitan Development Plan, and therefore it had a right to be heard on the sec.42 appeal. But in my view there are two answers to that.

The first is that tribunals not infrequently have to consider whether the facts found by them comply with each of two different sets of criteria and when it is necessary to do so they have no difficulty in finding that those facts comply with one set but not with the other.

The second is that if he thought that the decision of the Board on the sec.42 appeal was likely to prejudice his chances on his client's own appeal, he could have asked for the latter to be heard before a differently constituted Board. I refer to sec.22 as contained in the amendment of 1971, which was in force at the time of the hearing. He did not do so.

I hold, then, that the right of Marion on the hearing of these appeals, (as opposed to any additional participation which the Board in its discretion might allow it), was to canvass on the appellant's appeal against its deemed refusal any ground on which under the Act and regulations it could have refused approval, but that right did not include a right to argue that the subdivision should not be approved simply because it failed to comply with the purposes etc. of the Metropolitan Development Plan as opposed to any unsuitability in fact within the meaning of sec.49.

I repeat that the Board could have joined Marion in the Sec.42 appeal. It could have invited or permitted the expression of Marion's views on

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any matter arising in any of the appeals or any matter which of its own motion it desired to explore. These things were in its discretion. Marion, as I see it, had no absolute rights except in connection with its own appeal.

Of course, the question of whether A6 was a fundamental departure from A2 so as to necessitate a fresh start was a question which conerned Marion as much as any other party and on which it had a right to be heard.

6. Were Marion's rights violated?

It follows from what I have said that, in my view, they were not. To begin with Marion by its counsel excluded itself from participation in the sec.42 appeal and obviously it cannot complain about that exclusion up to the stage at which it made it clear that it had changed its mind and wanted to be heard on that appeal. The Board could have joined it as a party to that appeal: perhaps, as things have turned out, it is unfortunate that it did not: it could have invited or permitted Marion's participation in that appeal without joining it as a party. But in the exercise of its discretion it refused to do any of these things and, in my view, it has not been shown that in so doing it exceeded the bounds of a judicial discretion.

As to the appeal against its deemed refusal, the Board, as it seems to me, was at pains to assure Mr. Debelle that his client would be heard when that came to be dealt with, and even intimated that it would consider having the witnesses who had already given evidence recalled for cross-examination on that appeal if so desired. It said, indeed, that it would not hear Mr. Debelle or allow him to call evidence or cross-examine on the question of whether the plan failed to conform to the purposes of the Metropolitan Development Plan, but, as I have said, in my view he had no mandatory right to any of these things since his client was not a party to the sec.42 appeal. I think the Board made it plain that it was prepared to approach any issue arising under the Marion appeal with an open mind irrespective of its decision on the sec.42 appeal, and that would include, as I see it, any question of unsuitability of the subdivision under 49(f) or (i), but

Mr. Debelle thought it useless to tender evidence or to argue any such issue.

No doubt he was also entitled to be heard on the question of the difference between A2 and A6. He was, in my view, given a sufficient opportunity to be heard on this. One of the adjournments was for the purpose of giving Marion an opportunity to examine the new plan. Mr. Debelle discussed the conditions which he desired the Board to impose.

I realise that Mr. Debelle feels that he and his client have been hardly treated. I would, however, make two comments. The first is that Marion largely has itself to blame for what has occurred. It failed to report within the time specified or to ask for any extension. At no stage did it supply its reasons for refusing approval to the plan. It is true that it was not asked to do this, but it could have done so of its own accord. If it had specified the grounds relied on with particularity, the factual issues could have been pinpointed and the Board would have had an opportunity to consider how far Marion's real objections turned on mere non-conformity with the Metropolitan Development Plan and how far they could be legitimately urged apart from that on their own merits, and perhaps its decision about the joinder of Marion in the sec.42 appeal or allowing its participation therein might have been different. And as I have said, if Marion really thought that its case on its own appeal was hopeless before the Board as then constituted, it could have asked for a hearing before a different Board. If that had been asked and denied, the position might have been different.

The other comment I would make is that Marion was at one stage prepared to consent to the approval of A6 subject to certain conditions set out in Exh.4. I have compared that list with the conditions finally imposed by the Board on the approval by Marion which it directed. It seems to me that when the two documents are read together, and also with Mr. Debelle's comments in his last address on the conditions upon which Marion, subject to its protest about its exclusion from the sec.42 appeal, was prepared to raise no further objection, it seems to me that the Board has given the council everything it was asking for with two, or possibly three, exceptions. It refused to order

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the land to be encumbered so that it could not be subdivided or re-subdivided in the future by the owner for the time being into more allotments than those shown in Exh.A6, and it refused to order that the land should be developed as if it had been zoned R.I.B. under the council's planning regulations. And it failed to order that the street names be as determined by the council, but it seems to me that Mr. Debelle finally did not press this. None of these matters, it seems to me, has anything to do with the unsuitability of the subdivision, but I might be wrong about this. However, the Chairman at least, as indicated in his interim reasons, thought that the use of the land in future should be controlled by the Authority rather than by Marion and that the encumbrance sought might hamper the Director in the future in the exercise of the discretions and powers given to him by the law. We have heard no argument on the matter, but prima facie the learned Chairman's views seem to me, with respect, to be well founded. All this makes me think, as indeed was half admitted at the hearing before us, that the present attitude of Marion is not due to its failure to get all the conditions it originally asked for, but is rather due to a change of heart and that it has repented of its earlier consent. That is not a reason for depriving it of any of its legal rights. It may be relevant to the exercise of discretions.

It follows, I think, that the appeal should be allowed.

Before departing with the case I would protract these reasons, already perhaps unduly prolix, by suggesting that the present deplorable and chaotic state of the legislation should be drawn to the attention of Parliament. In so doing I would venture to make the following suggestions and comments:

1. The Act should be consolidated.

2. The validity of the regulations should be placed beyond doubt one way or the other, and the validity of any possible amendments to them in the future secured within the limits desired.

3. Attention should be directed to the time at

which it is intended that various amendments, past and future, should take effect. From the submission of a proposal plan to the approval of a final plan is a long process. There can be no doubt as to the operation of any amendment on transactions where that process has been completed before the amendment comes into operation or has not begun until after that date. But it may well be exceedingly doubtful what is, as it were, the cut-off point for the application of an amendment when the process has begun but has not yet been concluded at the date of the amendment.

4. If deemed refusals are to survive, some machinery should be devised for the procuring of reasons or the artificial ascription of reasons for the refusal. Section 54 and regulation 7(3) should be married with regulation 7(4).

5. It may be worth while considering more detailed regulation of the preliminaries to the hearing of an appeal in the way of notices, replies and the like. I agree that the Board should have the widest possible powers of dispensation and there should be no rigid technicalities, but it might be an advantage if the normal course of procedure were more clearly laid down so that the parties would know what they and their opponents are expected to do as a matter of normal practice and where dispensations from normal practice are required.

6. It was assumed at the bar that the Board has no power to order costs. Even if it is thought as a matter of policy that the losing party before the Board should not have to pay the winning party's general costs, it might be worth while giving it power to order costs on adjournments, failure to comply with rules or to supply particulars, and the like. Otherwise there is really no sanction for the ensuring of an orderly and expeditious hearing. I agree that responsible authorities can be expected to behave responsibly and justly, but there is not always agreement about what is just and responsible behaviour in any given set of circumstances.

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In my opinion the appeal should be allowed and the order of the learned judge set aside and in lieu thereof it should be ordered that the appeal of the Corporation of the City of Marion from the determination of the Planning Appeal Board be dismissed.

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DELIVERED 13th AUGUST 1973

LADY BECKER v. THE DIRECTOR OF PLANNING AND THE CORPORATION OF THE CITY OF MARION

L.V.D. No. 137 of 1972

Dates of Hearing: 12th, 13th, 14th and 15th June 1973

IN THE FULL COURT

Coram: Bray C.J., Hogarth and Zelling JJ.

J U D G M E N T of the Honourable Mr. Justice Hogarth

(On appeal from the Planning Appeal Board on appeal from an order of the Hon. Mr. Justice Wells)

Counsel for the Appellant: Mr. F.R.Fisher, Q.C. with him Mr.D.J.Bleby

Solicitors for the Appellant: Baker, McEwin & Co.

Counsel for the Respondent The Director of Planning: Mr. M.L.W. Bowering

Solicitors for the Respondent The Director of Planning: Mr. L.K. Gordon, Crown Solicitor

Counsel for the Respondent The Corporation of the City of Marion: Mr. B.M. Debelle

Solicitors for the Respondent The Corporation of the City of Marion: Stevens, Mellor & Bollen

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BECKER v. THE DIRECTOR OF PLANNING AND THE CORPORATION OF THE CITY OF MARION

Full Court

Hogarth J.

The appellant in the appeal to the Full Court was one of the respondents in the appeal to the Land and Valuation Court. To avoid confusion I will call her by her name, Lady Becker. She is the owner of land in the form of broadacres within the City of Marion and partly within the Hills Face Zone created by the Metropolitan Development Plan. In September 1970 Lady Becker made application in the appropriate form for the approval of a proposed subdivision of the land. At this time the legislation governing such applications consisted of the Planning and Development Act 1966-1967, and regulations made under that Act, the most important of which are the Control of Land Subdivision Regulations 1967 as amended by regulations made on the 18th June 1970 (which I will henceforth call simply "the 1967 regulations"). Both the principal Act and the regulations have been subsequently amended, and I will refer to such subsequent amendments, where relevant, in the appropriate places. There are separate regulations under the Act, the Planning Appeal Board Regulations; and a further set of regulations, the Metropolitan Development Plan Hills Face Zone Planning Regulations 1971, which were enacted on the 16th of December 1971. These latter regulations, of course, were not in force at the time of the making of the application, and this appeal is to be determined without regard to them.

The general scheme of the Planning and Development Act 1966-1967 was to prohibit the subdivision of land unless a plan of the subdivision had first been approved by the Director of Planning and by the council in whose area the land was situated (sec.45). The provisions relating to the obtaining

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of approval to these plans were contained in two separate Parts: Part V ("Interim Development Control Within Metropolitan Planning Area"); and Part VI ("Control of Land Subdivision"). Sec. 45 is contained in Part VI, but the approval required by that section could not be obtained unless the requirements of both Parts had been satisfied.

At the time of the application Part V contained sec. 42 which made special provision for the reference of applications to the State Planning Authority when the land concerned was within certain prescribed localities, including the Hills Face Zone. The section provided that on receipt of an application for approval, the Director was to refer the plan of subdivision to the Authority for its report; and the Authority was required to examine and consider the application and report to the Director. If the report of the Authority was to the effect that the plan did not conform to the purposes, aims and objectives of the Metropolitan Development Plan or to the planning regulations relating to that Plan, the Director was required to refuse the plan of subdivision. Under sub-section (4) it was provided that there should be a right of appeal against the decision of the Director to the Planning Appeal Board. It will be observed that the section does not require the intervention of the council, nor is its opinion made relevant to the decision of the questions which arise for decision under sec. 42. Sec. 42 has now been repealed, and its substance has been re-enacted as sec. 45a, that is to say as part of Part VI. The repeal of sec. 42 and its substantial re-enactment in Part VI, however, is irrelevant for the purposes of the decision of this appeal.

Part VI itself contained further provisions authorising refusal of the approval both by the Director and by the council to applications for approval to a plan of subdivision. Secs. 49 and 50 specify grounds upon which both the Director and a council may refuse approval. Sec. 51 specifies certain further grounds upon which a council only may refuse such approval; and sec. 52 specifies yet further grounds upon which the Director may refuse approval. Under sec. 26 an appeal lies to the Planning Appeal Board against any decisions to refuse approval where (inter alia) the refusal is based upon grounds specified in Part VI.

It will be seen, therefore, that at the time Lady Becker made her application, there were two sets of provisions which she was required to satisfy. First, the requirements of sec. 42, which gave the Director no discretion if the Authority expressed an opinion adverse to the application; and secondly, the requirements of Part VI under which both the Director and the council had a discretion whether to approve or refuse approval to the proposal.

Lady Becker's application for approval was lodged with the Director on the 29th of September 1970. The plan was in the form of a "proposal plan" within the meaning of the 1967 regulations. Thereupon the Director took action on the basis that sec. 42 and regulation 6 of the 1967 regulations applied, by referring the plan of subdivision to the Authority for report as required by sec. 42, and by forwarding a copy of the proposal plan to the Council of the City of Marion (which I will henceforth call simply "Marion"), as required by regulation 6. The plan was sent to Marion on the 6th November 1970. After various discussions and enquiries the Authority reported to the Director on the 19th of April 1971 that it had decided that the proposed subdivision did not conform to the purposes, aims and objectives of the Metropolitan Development Plan. Pursuant to regulation 7(1), Marion was required to report to the Director within a specified period after receipt of the proposal plan, stating whether it had decided to approve or refuse approval to the plan, or to approve it subject to conditions. The specified period was two months or such further period as the Director might allow; and there is no evidence of his having allowed any further period in the present case; but Marion did not report to the Director within the specified period. In consequence, (subject to questions of validity of the regulation) sub-regulation (4) of regulation 7 came into force. That regulation provides that where a council has failed to report on a proposed plan of subdivision as required by the regulation, "that council shall be deemed to have reported to the Director that it has decided to refuse approval".

On the 3rd of May 1971 the Deputy Director of Planning wrote a letter to Lady Becker's agents in which he told them that he had refused approval to the application pursuant to sec. 42, and also

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pursuant to sec. 49(f), (g) and (i), and to sec. 51(1)(e). He also told Lady Becker's agents that Marion had not "given a decision" on the proposal plan, and that consequently by virtue of regulation 7(4) "it can be deemed that the council has reported to the Director that it has decided to refuse approval of the said proposal plan". No point has been raised in these proceedings on the letter having been written by the Deputy Director, stating that "he", rather than the Director, had refused the approval; and my judgment is based on the assumption, which was accepted by counsel at the hearing, that the circumstances were such that sec.7(3) applied and that accordingly the Deputy Director was empowered to make the decision pursuant to sec. 7(4). Lady Becker appealed to the Planning Appeal Board by notice of appeal dated the 1st of July 1971 against the decision of the Director and (on the assumption that Marion's inaction constituted a decision to refuse its approval) also against that imputed decision. The appellate proceedings before the Board continued intermittently over a period of from the 21st of July 1971 and the 27th of July 1972 when the Board determined that both the Director and Marion should approve a proposal plan in the form of exhibit A6 which was before the Board (or a like form) subject to certain conditions. Exhibit A6 was not the same as the plan accompanying the appellant's original proposal which was identified as exhibit A2 before the Board. In some respects the layout of allotments and streets had been altered. I will refer to this aspect later.

Marion thereupon gave notice of appeal to the Land and Valuation Court. The appeal was heard by Wells J. who allowed the appeal, but directed that Lady Becker be at liberty to elect within 14 days to proceed with her appeal to the Planning Appeal Board on the plan exhibit A2. The judgment included certain consequential orders. The Act in force prior to the enactment of the Planning and Development Act 1966-1967 was the Town Planning Act 1929-1963; and there were in force regulations made under that Act in September 1965, known simply as the "Control of Land Subdivision Regulations". I will call these "the 1965 regulations". The Town Planning Act 1929-1963 provided (sec. 12) for regulations to be made to prescribe the mode in which plans were to be

prepared generally, and the procedure to be followed by an applicant in order to obtain the approval of the Town Planner or of a council to any plan; the procedure to be followed by the Town Planner and the council before approving a plan; and the grounds other than those set out in the Act, upon which the Town Planner or a council might withhold approval to any plan. Accordingly, the 1965 regulations contain a comprehensive code of procedure for the submission of plans and the obtaining of approval. It seems to me that the regulations were clearly within the wide regulation-making powers given by the Act of 1929. When the Act was repealed by the Planning and Development Act 1966-1967, the 1965 regulations were expressly validated (until revoked by regulations made under that Act), by sec. 3(2)(a). The 1965 regulations therefore continued to be the regulations in force in relation to applications for approval made under the Planning and Development Act 1966-1967, until the 1967 regulations came into force on the 9th of November 1967. But it seems to me that the marriage of the 1965 regulations with the Act of 1966-1967 was an unhappy one. Whereas the Act of 1929 had left it to regulatims to make most of the detailed provisions relating to applications for approval, the Act of 1966-1967 itself went into far greater detail on matters of procedure of this nature, and covered much of the ground which was already covered by the 1965 regulations. In view of the express validation of the regulations by sec. 3 of the Act of 1966-1967, it follows that there were in fact two codes of procedure in force at the same time; that provided by the 1965 regulations, and that provided by the Act of 1966-1967. But whereas the regulations were well adapted for use in conjunction with the old Act, they fitted uneasily into the scheme apparently contemplated by the legislature when it enacted the new Act. When the 1965 regulations were revoked by the 1967 regulations, it might have been expected that the new regulations would have fitted more appropriately into the scheme of the Act. But they do not. In many instances they follow the pattern of the 1965 regulations, with amplifications and variations.

I have already referred to regulation 7(4). I emphasize that sub-regulation (4) provides that where a council has failed to report to the Director within the specified time, "that council

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shall be deemed to have reported to the Director that it has decided to refuse approval". The sub-regulation does not say that the council shall be deemed to have refused its approval. This is to be contrasted with the phraseology of regulation 69(2) which provides that an approval to a proposal plan subject to a condition or conditions "shall be deemed to be a refusal thereof" for the purpose of enabling the applicant to appeal against the decision; and with that of regulation 7(3) of the 1965 regulations which provided that failure by a council to report its decision should be deemed a refusal of its approval. These are in the full sense of the words cases of a "deemed refusal". But what of regulation 7(4)?

At first sight the regulation would seem to contemplate that for all purposes the council shall be treated as if it had in fact decided to refuse its approval to the proposed sub-division, and as a consequence thereof to have reported to that effect to the Director. But is this its real effect? It is unfortunate that in modern legislation of such far reaching importance to the community, ambiguities of this nature should abound. If this is its correct interpretation the sub-regulation would seem to conflict with sec.54, which requires notification of a refusal of approval to be accompanied by the reasons therefor. What reasons can there be for mere inaction? It well may be asked how can the requirements of sec. 54 be satisfied when a council has not, in reality, refused its approval but is merely deemed to have done so? If sec. 54 stood alone, in my opinion, it would seem to imply that there should be an actual refusal, an actual refusal which is capable of being rationalized. But it is necessary to remember the express legislative approval of regulation 7(3) of the 1965 regulations by the Act which includes sec. 54. Until their revocation, the 1965 regulations had the same legislative force as if they had been expressly enacted as a part of the Act of 1966-1967. And so some interpretation reconciling them with the express provisions of the Act must be found.

The validation of the 1965 regulations does not of itself amount to the granting of a power under the 1966-1967 Act to make new regulations in the same form. But their validation implies that it is possible to reconcile them with the new Act;

and in particular, to reconcile regulation 7(3) of the 1965 regulations with sec. 54. If it is possible to reconcile those provisions, then equally, in my opinion, it is possible to reconcile the current regulation 7(4) with sec. 54, even if the regulation creates a "deemed refusal" in the full sense; and that the regulation-making powers contained in secs. 62 and 79 must be broad enough to authorise the making of the current regulation 7. I therefore do not find it necessary to consider the extent to which an amending Act, passed on the assumption that a particular interpretation of a principal Act is true, is relevant in determining the true intention of Parliament as expressed in the principal Act at the time of its enactment; and, of course, the amending Act of 1971 was passed after any "deemed refusal" of Marion in the present case. It may be that if the true interpretation of the legislation prior to the passage of the amending Act of 1971 had been to invalidate regulation 7(4) as being ultra vires, then the passage of any later amending Act passed on the contrary assumption would not act retrospectively to validate the regulation from its inception, whatever might be the effect on the regulation following the passage of the amending Act. But my decision is based upon the provisions of the principal Act of 1966-1967, without having recourse to the amending Act of 1971. It seems to me that a court is bound to say that sec. 7(3) of the 1965 regulations was not inconsistent with sec. 54; and it follows that even if regulation 7(4) is interpreted as providing for a "deemed refusal", it, also, is not inconsistent with the section. I would therefore hold (contrary to the opinion which I had tentatively formed before I became aware of the existence of regulation 7(3) of the 1965 regulations) that regulation 7(4) is valid.

But there is a further complication. As I have already pointed out, regulatin 7(3) of the 1965 regulations provided that a council's failure to report to the Town Planner within the stated time should be deemed to be "a refusal of approval". The consequence of failure by a council to report within the time allowed by regulation 7 of the 1967 regulations is that the council "shall be deemed to have reported to the Director that it has decided to refuse the approval". Does this change of language mean that sub-regulation (4) is not to be construed for all purposes as if the council has refused its approval?

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Regulation 7 is to be considered along with regulations 8 and 9. Regulation 8 provides that when every council concerned has reported to the Director pursuant to regulation 7 (and presuably this includes a deemed report pursuant to sub-regulation (4)), the Director shall determine whether there are any reasons why he should decide to refuse approval to the proposal plan, or whether he should decide to approve it either unconditionally or subject to conditions. Regulation 9 provides that where a council has reported that it has decided to refuse approval, "the Director shall, in writing, notify the applicant of the decision of the council and of the reason for its refusal"; and at the same time he is to notify his own decision.

In an effort to reconcile the various provisions which prima facie would seem to be irreconcilable, I have come to the conclusion that where the Act or the regulations speak of notification to the applicant of a refusal to consent together with reasons for that refusal, the Act and the regulations are speaking of an actual, and not merely a notional refusal. The requirement for the stating of reasons seems to me to exclude the possibility that the refusal there under consideration is merely a notional refusal. My interpretation may be a strained one, but I think it leads to less straining in the reconcilation of the various provisions of the Act and regulations as a whole than any other interpretation. Hence it seems to me that regulation 7(4) is to be interpreted as meaning just what it says, no more, and no less; namely that failure by a council to comply with the earlier provisions of the section means that the council is deemed to have reported to the Director a decision to refuse its approval. Such a deemed report then brings regulation 8 into operation. It means that after the expiration of the prescribed period, the Director is in a position to consider his own attitude towards the proposed subdivision. If he has heard nothing from a council, then he assumes that it has decided to refuse its approval. This is a fact which he will take into account in determining his own attitude. It seems to me that regulation 7(4) has no purpose other than to enable the Director to act in this way pursuant to regulation 8. But when we come to regulation 9, the requirement that the Director shall notify the applicant not only of the decision

of the council, but also of the reasons for its refusal, clearly indicates that the report of the council referred to in that regulation is an actual and not merely a notional report.

In the present case, therefore, it seems to me that Marion, although it has been deemed to have reported its refusal to the Director pursuant to sec. 7(4) for the purposes of regulation 8, has never decided to refuse, nor is it to be deemed to have decided to refuse its approval for the purposes of the Act and regulations in general.

I have come to the conclusion, therefore, that when the appeal was instituted Marion had not made any decision, nor was it deemed to have made any decision, which could be the subject of an appeal by Lady Becker to the Planning Appeal Board. It follows, in my opinion, that the Planning Appeal Board was without jurisdiction to make any order against Marion. Marion is still under a duty to give positive consideration to Lady Becker's proposal and to give its decision thereon. If the decision is not satisfactory to her, then she will have a right of appeal. If Marion does not come to a decision one way or the other, then it would seem that the proper remedy is mandamus.

I would add that, as at present advised, I think that the word "plan" as used in the Act is to be interpreted (according to the circumstances) as applying both to proposal and final plans. It would seem that the attention of Wells J. was not directed to the 1965 regulations which provide a procedure involving plans of both types. The validation of those regulations by sec. 3(2) of the Act of 1966-1967 implies that the word "plan" as used in the Act must be interpreted broadly so as to apply to both types of plan referred to in the regulations, and that the regulation-making power in the Act must be wide enough to cover the making of regulations with similar provisions; and it seems to me that, speaking generally, the provisions to that effect in the 1967 regulations must be held valid. This being so, I think that the Act and regulations when read together must be understood as providing a code which contemplates that the proposal plan as originally submitted may be subject to some variation in the course of the proceedings and consideration both by the Director, the council, and where there is an appeal, by the

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Planning Appeal Board. The question whether a plan in its final form is so different from the plan as originally submitted as to lose its identity and become a new plan seems to me to be one of degree: and I think that this court should pay great heed to the decision of the expert tribunal which has already looked at the plans; the Planning Appeal Board. In the present case the outer boundaries of the land concerned have not been varied, as between plan exhibit A2 and plan exhibit A6, but there has been some alteration in the naming and layout of a few streets and in the division of the land into fewer and larger allotments in some areas. I think that the decision of the Planning Appeal Board entails the finding that the plan shown in exhibit A6 is not so different from the proposal plan, exhibit A2, as to involve a change of identity. Speaking for myself, I would not be disposed to interfere with the decision of the Planning Appeal Board, to be implied from their allowing Lady Becker's appeal, to the effect that the plan in its final form, as shown in exhibit A6, is no more than a development of the proposal plan, exhibit A2, and not such a departure from exhibit A2 as to constitute an entirely new plan. I think, therefore, that it was open to the Planning Appeal Board to uphold the appeal of Lady Becker against the Director and the Authority in relation to the plan embodied in exhibit A6; and there is no appeal against that part of the Board's decision.

I am of opinion that Marion had no locus standi before the Board in connection with the appeal against the decision of the Director under sec. 42. At most, Marion might have sought to be represented as amicus curiae; but this did not happen. I think that the Board was correct in not permitting Marion to take part in the issues arising under sec. 42. Similarly, Marion was not a party to the issues between Lady Becker and the Director on his refusal in the exercise of his discretion under secs. 49 and 52. Again, the only standing which Marion could have had would have been as amicus curiae; but leave to appear in this capacity was not sought.

I have seen the reasons for judgment of my colleague Zelling J. I agree with Zelling J. that the order of Wells J. should be varied so as to delete paragraphs 2, 3, 4 and 5 and that in lieu

thereof it should be declared that no valid appeal has been instituted to the Board against the respondent Corporation. Although I have come to the conclusion by a different route, I agree with him that in so far as the evidence discloses, Marion has never made a decision which is capable of being the subject of appeal. I think that the proposal plan (exhibit A2) should be amended to conform with the decision of the Planning Appeal Board, and should be submitted to Marion as provided in regulation 11(1) and 11(2)(a); and the further consideration of the matter should proceed as envisaged by regulation 7 and sec. 54.

In the Supreme Court of South Australia Land and Valuation Division LVD No. 137 of 1972

No. 3

Judgment of Hogarth J.

13th August 1973

(continued)

No. 4

Judgment of Zelling J.

13th August 1973

No. 4

Judgment of Zelling J.

DELIVERED 13 AUG 1973

LADY BECKER v. THE DIRECTOR OF PLANNING AND THE CORPORATION OF THE CITY OF MARION

L.V.D. No. 137 of 1972

Dates of Hearing: 12, 13, 14 & 15 June, 1973

IN THE FULL COURT

Coram:- Bray, C.J., Hogarth and Zelling JJ.

J U D G M E N T of the Honourable Mr. Justice Zelling

(on appeal from the Planning Appeal Board on appeal from an order of the Hon. Mr. Justice Wells)

Counsel for the Appellant:	Mr. F.R. Fisher, Q.C. with Mr. L.J. Bleby
Solicitors for the Appellant:	Baker, McEwin & Co.
Counsel for the Respondent The Director of Planning	Mr. M.L.W. Bowring
Solicitor for the Respondent The Director of Planning:	Mr. L.K. Gordon, Crown Solicitor

In the Supreme Court of South Australia Land and Valuation Division LVD No. 137 of 1972

No. 4

Judgment of Zelling J.

13th August 1973

(continued)

Counsel for the Respondent The Corporation of the City of Marion: Mr. B.M. Debelle

Solicitors for the Respondent The Corporation of the City of Marion: Stevens, Mellor & Bollen

Judgment No. 1692

BECKER v. THE DIRECTOR OF PLANNING and THE CORPORATION OF THE CITY OF MARION

Full Court

Zelling J.

This is an appeal by Lady Becker from a judgment of Wells J., dated 28th February, 1973, allowing an appeal by the Corporation of the City of Marion from a decision of the Planning Appeal Board given on 27th July, 1972, approving a plan of subdivision lodged by the appellant. The history of the matter is shortly as follows:

On September 29, 1970, the appellant lodged with the respondent Director a proposal plan of subdivision of certain land in the Hundred of Noarlunga, County of Adelaide, which land is within the boundaries of the respondent the Corporation of the City of Marion. On November 6, 1970, the Director forwarded a copy of the plan to the Corporation pursuant to the provisions of regulation 6 of the Control of Land Subdivision Regulations, 1967, made under the Town Planning Act, 1966-1967. It would appear from the date stamp on the letter that the copy was received by the Corporation of Marion on November 9. The Corporation failed to report on the plan to the Director within a period of two months after receipt, as required by regulation 7 sub-regulations 1 and 2 of those regulations, and did not seek any extension of time within which to do so. If regulation 7(4) of those regulations is valid, a matter which will be dealt with later in this judgment, the City of Marion was deemed to have reported to the Director that it had decided to refuse approval to the plan.

On November 5, 1970, the Director forwarded a copy of the plan to the State Planning Authority.

The principal interest of the Authority in the matter is that contained in Section 42 of the

Planning and Development Act, which at the time of the submission of the plan to the Authority read as follows:

"42. (1) Where

(a) a person makes an application to the Director for approval of a plan of subdivision relating to any land within the Metropolitan Planning Area to which Part VI of this Act applies; and

(b) the Director is of opinion that the whole or any part of the land lies within a prescribed locality

the Director shall refer the plan of subdivision to the Authority for report and the Authority shall examine the plan and make a report to the Director in writing stating whether in its opinion the land or any part thereof lies within a prescribed locality and whether the plan conforms to the purposes, aims and objectives of the Metropolitan Development Plan and to the planning regulations (if any) relating to that plan

(2) If the report of the Authority states that, in the opinion of the Authority, the land or any part thereof lies within a prescribed locality and that the plan does not conform to the purposes, aims and objectives of the Metropolitan Development Plan or to the planning regulations (if any) relating to that plan the Director shall refuse to approve of the plan of subdivision.

(3) The Director shall thereupon send to the applicant notice of his decision to refuse to approve the plan of subdivision together with a copy of the report of the Authority.

(4) There shall be a right of appeal to the board against such decision of the Director and the board may, before determining the appeal, review the matters contained in the report of the Authority.

(5) In this section -

'prescribed locality' -

In the Supreme Court of South Australia Land and Valuation Division
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(continued)

(a) means any zone indicated in the Metropolitan Development Plan as a General Industrial Zone, Light Industrial Zone, Extractive Industrial Zone, Special Industrial Zone, Hills Face Zone or Rural Zone; and

(b) where any such zone has been expressly superseded by a zone or locality defined for specified purposes by a planning regulation relating to the Metropolitan Development Plan, means the zone or locality so defined."

On May 3, 1971, the Deputy Director wrote to the appellant's agents that the Authority had resolved:-

"(1) That in the opinion of the Authority portion of the land contained within the application lies within a prescribed locality.

(2) That the plan does not conform to the purposes, aims and objectives of the Metropolitan Development Plan in that -

(a) it would destroy, change and affect the general character of portion of the Hills Face Zone and Hills Skyline as viewed from the Living Area to the north of the proposed subdivision,

(b) it would be a small scale development of a type which would spoil the natural character of portion of the Hills Face Zone,

(c) it would destroy and impair the generally open rural and natural character of portion of the Hills Face Zone as viewed from the abutting roads,

(d) the proposed allotments are all less than 10 acres in area and have frontages less than 300 feet."

In that letter the Deputy Director on behalf of the Director informed the appellant that the Director had refused approval to the application pursuant to Sections 42(2), 49(f), 49(g), 49(i) and

52(1)(e) of the Act. The refusal pursuant to Section 42(2) was of course not a decision of the Director but was the necessary consequence of the resolution of the Authority set out in the letter from the Deputy Director. By the same letter the appellant was informed of the failure of the Corporation of Marion to comply with the provisions of regulations 7(1) and 7(2) of the regulations. The appellant then filed one notice of appeal to the Planning Appeal Board against the Director of Planning complaining of all the decisions refusing approval by the Director and in the same notice of appeal appealing against the deemed decision by the Corporation of the City of Marion to refuse to approve of the plan pursuant to regulation 7(4) previously referred to. It may be convenient here to set out the provisions of that regulation. It reads as follows:-

> "7. (1) The council or councils and each of the persons and authorities to whom the proposal plan is forwarded pursuant to regulation 6 shall examine the proposal plan and forward a report on it to the Director within the period of two months commencing on the date of receipt or withinsuch further period as the Director, upon the application to him in writing by the council, person or authority before the expiration of the first-mentioned period, allows.
>
> (2) A council's report shall state whether the council has decided to approve, or to refuse approval to, the proposal plan, or to approve the proposal plan subject to conditions specified in the report.
>
> (3) Where a council decides to refuse approval to a proposal plan, the council shall, in its report to the Director, state, by reference to the Act or the regulations, the reasons for which the council has so decided.
>
> (4) Where a council has failed to comply with the provisions of subregulations (1) or (2) that council shall be deemed to have reported to the Director that it has decided to refuse approval."

The relevant prescribed locality for this purpose is the Hills Face Zone which as it then stood included part but not all of the subject land.

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(continued)

By later regulations, passed on 16th December, 1971, while this matter was still before the Planning Appeal Board, regulations were promulgated under which the whole of the subject land became an area within the Hills Face Zone. I doubt whether anything turns on that in this appeal although it might be of importance if the matter is further considered by the Planning Appeal Board, as I think it will have to be.

On 4th August, 1971, the Planning Appeal Board gave an interim determination giving directions with regard to the progress of the appeal and ruling that Lady Becker's appeal as against the Council was not out of time. That ruling as to time has not been challenged in any subsequent proceedings.

On 3rd November, 1971, following discussions between the respondent Director and the appellant's advisers the Director offered to consent to an amended plan of subdivision. The amended plan was prepared and on 17th November, 1971, the respondent Director and the respondent Corporation stated that they would consent to the amended plan subject to certain conditions (which were not the same conditions in each case). On that date the Board ordered that the State Planning Authority be joined as a party to the appeal.

By its determination on 27th January, 1972, the Board, by majority, Commissioners Bulbeck and Fordham, Judge Roder dissenting, refused approval both of the original plan and the amended plan but indicated that the Board was prepared to allow the appellant to lead further evidence and purported to divide the appeal so as to deal with it in two stages: first the appeal as between the Director and Lady Becker in relation to the Director's decision in conformity with the State Planning Authority's refusal under Section 42; and secondly in relation to the Sections 26 and 27 appeal in relation to the other matters on which the Director had refused consent and in relation to the deemed refusal of the respondent Corporation. The Corporation objected to this course and pursued that objection throughout the course of the appeal.

A substituted plan which was referred to as Exhibit A3 was tendered which differed substantially from the plan A2 and in particular the number of allotments was reduced from 145 to 121 so that the

allotments were of larger size. There were other lesser amendments which I think are of no great moment, but it certainly could not be said that A3 was merely A2 with immaterial variations. It was a substantially different plan. It appeared in various guises up to A6 which was the final form in which it was approved by the Board but these further amendments of A3 contain what may properly be described as immaterial variations. The appellant called three witnesses to give oral evidence in support of the amended plan.

The City of Marion took the attitude that as the conditions which it sought to impose had not been granted by the Board the terms of its consent had not taken effect and it reverted to its original position, which had been put to the State Planning Authority within the two months' period, namely that it regarded the proposed plan as violating the objectives of the Hills Face Zone Planning and that it was not prepared to consent at all. That thenceforth was and is the attitude of the respondent Corporation.

The Corporation sought leave to cross-examine the witnesses called by the appellant in support of her contention that the proposed plan of subdivision was not contrary to the aims, purposes and objectives of the Metropolitan Development Plan. The Board later offered theCorporation the opportunity of cross-examining these witnesses but only in relation to the Section 26 and 27 appeal. The offer was declined on the basis that the Board had already made up its mind with regard to the Section 42 appeal and that it was useless for counsel for the Corporation to cross-examine at that stage. The Board ultimately granted the appellant's application to subdivide and the Corporation appealed against the Board's decision to Wells J., the Judge of the Land and Valuation Division of this Court. His Honour, as I have said, allowed the appeal and a further appeal was brought from his decision to this Court.

It may be convenient to deal with certain objections to jurisdiction in limine because in my opinion they are sufficient to dispose of the whole appeal.

The first is one which was not canvassed before Mr. Justice Wells but which was raised by

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us on the hearing of the appeal, namely whether regulation 7(4), the "deemed decision to refuse" sub-regulation, was or was not ultra vires. There is no doubt that there was a similar deemed refusal sub-regulation, but in not quite the same terms, contained in the regulations under the Town Planning Act, 1929-1963. Regulation 7(3) of those regulations reads:-

> "Where a council has failed to comply with the provisions of sub-regulation (1) such failure shall (unless the applicant agrees to an extension of time within which to report) for the purposes of Part VII be deemed to be a refusal of approval."

Those regulations were carried forward under the new Act by section 3(2)(a) of the 1966-1967 Act and were by that sub-clause deemed to have been made under the later Act and to have effect as if the necessary power to make them had been enacted by that Act. However, those regulations were repealed by the present regulations on 9th November, 1967, and regulation 7(4) as it exists in the present regulations was then enacted.

Except to the extent that it shows that the draftsman of the 1966-1967 Act must have known of the concept of a deemed refusal I do not see that Section 3(2)(a) or regulation 7(3) of the repealed regulations have any bearing on the problem which now falls for decision. Section 26(1) of the Act provides that "any person aggrieved by a decision of ..... any Council under this Act to refuse any consent .... or to grant any consent .... subject to any condition or conditions may appeal to the Board and the Board shall hear and determine such appeal and shall in every such determination take the reasons therefor. Section 49 of the Act provides that the Director or a Council may refuse approval to a plan of subdivision under certain circumstances. Section 51 provides that, without limiting the powers contained in Section 49, a Council may refuse approval to a plan of subdivision in certain further circumstances. Section 54 of the Act provides that "Where a Director of a Council refuses approval to a plan, the Director or Council as the case may be shall when notifying the applicant of the refusal of such approval inform him of the reasons for refusing such approval."

Those sections in my opinion provide:-

(a) That there shall be a decision;

(b) that that decision shall be grounded upon one or more of certain reasons which are in relation to a Council set out in great detail in Sections 49 and 51;

(c) that the applicant shall receive notice of the decision and of the reasons.

It is true that by Section 27(2) of the Act as inserted by the Planning and Development Act Amendment Act, 1971, it is providedthat the notice (i.e. the notice of appeal) shall be lodged with the Secretary of the Board within two months after the date of the notice of decision appealed against being given, or after the application in question has been deemed to be refused, or within such further time as the Board allows.

It was argued that this referred to and gave validity to the provisions of regulation 7(4). I do not think this is so for three reasons. The first is that there is another "deemed refusal" regulation contained in the Control of Land Subdivision Regulations, namely regulation 69(2) which reads:-

> "(2) for the purposes of this regulation (i.e. an appeal to the Board against a refusal by a Council to approve a proposal plan or a final plan) an approval to a proposal plan subject to a condition or conditions shall be deemed to be a refusal thereof."

Accordingly, Section 27(2) has work to do irrespective of the validity of regulation 7(4). The second answer is that even if Section 27(2) in some way amended the law with regard to deemed refusals the draftsman who drew the 1971 amending Act also repealed and re-enacted Section 26 and Section 26 still remains in its original form --

> "Any person aggrisved by a decision of ..... a Council under this Act .... to refuse any consent .... may appeal to the Board."

So Section 26(1) which is the section conferring jurisdiction to hear appeals clearly refers to an

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actual decision to refuse consent. The third answer is that there has been no amendment to Sections 49, 51 or 54 of the Act which I have set out earlier in this judgment and which clearly lay down the procedure to be followed.

Counsel for the appellant sought to draw comfort from the general provisions of Sections 62 and 79 of the Act giving power to the Govenor to make such regulations as are necessary or expedient for the purpose of giving effect to the provisions and objects of this Act. There are two answers to this contention: the first is that provisions of this sort have only the effect set out in the judgment of the Full High Court in Shanahan v. Scott 96 C.L.R. 245 at 250 where their Honours say:-

> "The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."

The second answer can be found in Section 62(2)(i) which authorizes the making of regulations to prescribe: .... "(i) such matters as are necessary or expedient to provide for or in relation to appeals to the Board against any decision of the Director or the Council under this part or under the regulations under this section." This sub-clause of Section 62 clearly envisages that a decision will be made not that some deemed decision will be made.

There is a further and it seems to me insuperable objection to the use of Sections 62 and 79 to provide a deeming clause of this kind and it is this. Regulation 7(4) says that where a Council has failed to comply with the provisions of sub-regulations (1) or (2) of Regulation 7, that Council shall be deemed to have reported to the Director that it has decided to refuse approval. Parenthically that sub-regulation in any case goes

beyond regulation 7(3) of the old regulations. Be that as it may, there is an obvious problem created by that deceptively simple word "decision" which would be apparent to the mind of anybody who is used to the workings of local government law. If regulation 7(4) is valid it has deemed all the following things to have happened:

(1) There has been a valid submission of the plan to the Council.

(2) There has been a report on it by the relevant officer or officers of the Council.

(3) Sometimes, and in this case it actually happened, consultation by the Council with other authorities, and in particular in this case with the Director and the State Planning Authority.

(4) Consideration by the relevant Committee of the Council.

(5) A report to full Council.

(6) The holding of a meeting of full Council at which a quorum is present.

(7) Proper and sufficient notice of the resolution, because this is special business.

(8) That a resolution is carried refusing consent wholly or sub modo.

(9) The formulation of reasons under Section 54.

(10) The communication to the applicant under Section 54 and to the Director under regulation 7(1) and (3) of the refusal and the reasons.

The moment one makes an analysis of what regulation 7(4) purports to do, it is obvious that it goes far beyond any general regulation making power, with the limitations on such a power which are expressed in the judgment in Shanahan v. Scott (supra).

Accordingly, in my opinion, the whole of this appellate procedure, as against the Corporation, is misconceived ab initio. The Corporation has

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never made a decision to refuse or approve of the plan and it must go back to them for that to be done. If a Council does not do its duty then the proper remedy is mandamus to consider and determine according to law. But until a decision has been given by the Council with reasons under Sections 49 or 51, or both, and a communication of that refusal and of those reasons under Section 54, there is no decision appealable under Section 26. That of itself is sufficient to dispose of the whole appeal. Since writing these reasons for judgment I have had the advantage of reading the judgment of Hogarth J. I agree with him that if my view of the validity of regulation 7(4) is incorrect, that the same result is achieved by his construction of regulations 7, 8 and 9.

However, I should deal with other grounds both formal and of substance in case the matter should fall to be considered further.

The second ground on which I think the whole of the proceedings are bad is in relation to the notice of appeal. In my opinion one notice of appeal directed to the Board and to the Council is a bad notice of appeal. I agree with Wells J. that the Acts Interpretation Act permits "decision" to be read as "decisions", but that must mean decisions of the one body or authority. In other words, I think that had there been one notice of appeal complaining of all the decisions of the Director under the various sections refusing consent that would have been a valid notice of appeal. That of course would not include the appeal under Section 42 for there the decision is not the decision of the Director but of the Authority. But it is not a valid notice of appeal to join in the one notice appeals against completely disparate decisions of the Director and of the Council and an appeal against what is in truth a decision of the Authority.

Had these two preliminary points been observed all the procedural tangle from there on would have been avoided. In my opinion the Board was right in holding that the Council had no locus standi in a Section 42 appeal. On the other hand, the Council equally clearly had an interest in implementing the provisions of the Metropolitan Development Plan in relation to the Hills Face Zone. That Plan and its proposals which are expressly

incorporated into the Act say at page 284 in relation to the Hills' Face Zone: "The Hills' Face Zone includes the land on the face of the Mount Lofty Ranges overlooking the metropolitan area. Its Western boundary along the foothills is the contour level above which water and sewerage surfaces cannot be supplied economically. The Eastern boundary is the top ridge of the Ranges visible from the plains.

The zone would be rural in character, and the minimum size of allotment proposed is 10 acres with a minimum frontage of 300 feet. It is envisaged that the only buildings or other uses of land permitted in the zone would be those which would not impair the natural character of the face of the Ranges."

Clearly the Council is interested in buildings or other uses of land and in the rural character of the zone. There should have been three notices of appeal: one by the appellant under Section 42, one against the Director's decisions on other grounds and one against the Council's refusal, after the Council had in fact refused and it had given its reasons for refusing. Clearly the Council from the correspondence which was tendered had refused consent on (among other grounds) the ground in Section 49(i) of the Act, namely that the proposed mode of subdivision would be unsuitable having regard to the use to which the land may be put under this Act, which would have clearly raised the Hills Face Zone point. At that stage the Board could have heard together the appeal under Section 42 against the Director's communication of the Authority's refusal and the appeal on the ground under section 49(i) against the Council's refusal. In that way Mr. Debelle would have been able to put whatever needed to be put on behalf of his client, the respondent Corporation, as to its views on the Hills Face Zone which clearly, fromthe letters before the Court, differed somewhat from the views of the State Planning Authority which restricted the objection on this score to what could be seen from the road whereas the Council's objection was wider in its form, and the total matter would then have been adjudicated upon without all the procedural tangle which in fact happened in this case.

However, as the objection to the notice of

In the Supreme Court of South Australia Land and Valuation Division LVD No. 137 of 1972

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(continued)

appeal was not taken at a stage when the appellant could easily have amended it, the notice should be allowed to stand insofar as it appeals against the various decisions of the Director and should be remitted to the Board for hearing on that notice of appeal either if she wishes to proceed with her appeal against the Director's decisions in relation to Exhibit A2 or with her appeal under Section 42 or with both those appeals so that she will be in no worse position than she would have been in had these objections been taken at the proper time. Nevertheless she should not be in any better position either because by allowing this to be done without giving any further direction, she could proceed with these appeals if so minded, before a valid appeal from the decision of the respondent Corporation reached the Board. Accordingly there should be a direction that the indulgence granted her in relation to the notice of appeal is granted on the condition that the Board do not proceed to hear the appeals or either of them against the decisions of the Director until they are validly seized of an appeal against the decision of the Council or until the Council consents to her application whichever first happens.

The third procedural mistake which in my opinion vitiates the whole proceedings is the submission of the plan A3 which was substially different to plan A2, without having the appellant present the plan A3 to the State Planning Authority and the Council and the Director as a new plan and commencing de novo in relation to that plan, the appeal against plan A2 having first been dismissed. It is quite true that the Board can give directions with regard to any appeal and I have no doubt that those directions include directions as to minor modifications of a plan. This, however, was no minor modification; it was a complete redrawing of the plan and in these circumstances the Board should have dismissed the appeal against A2 and the appellant could then have proceeded de novo with the plan A3 and pursued her remedies in relation to that plan, including its various minor modifications which ended in the plan A6.

For all of these reasons the proceedings have completely miscarried and the appeal must fail.

I should add a few points out of deference to the arguments which were submitted to us on other matters. I am not convinced that the word "plan" wherever it now appears in the Act, as it has been amended several times, necessarily means "final plan". I agree with Wells J. that it did mean that in the 1966-1967 Act but I am not sure that the various amendments since then have not been made by draftsmen whose preoccupation has been with the regulations rather than the Act.

I should like to reserve for further consideration the correctness of Wells J.'s decision in Santin's case A.S.A. 1971 1 S.A.S.R. 336 at 341 sic that the present regulations dividing plans into with proposal plans and final plans are valid. I am inclined to think they are the result of uncritical copying from the regulations under the previous Act, which had provisions covering a very different scheme of consideration by the Town Planner and for a while by an Appeals Committee, but it is not necessary to decide that now.

Another point argued is as to the change of heart of the Marion Corporation. In my opinion the respondent Corporation was within its rights when the conditions which it sought to attach to its consent were refused approval by the Board to say that if those conditions were not acceptable in toto that it would adhere to its original refusal and I do not think that any rights arose whether by way of estoppel or in any other way against the Corporation.

I express no opinion as to the retrospective or any other effect of Sections 45a and 45b of the Act inserted by the Planning and Development Act Amendment Act (No. 3) No. 133 of 1972 which is a matter which can be left to be dealt with if and when it ever arises.

In my opinion this appeal should be dismissed. It follows from what I have said in this judgment that an overhaul of the Act and the regulations is urgently called for in the interests both of those who have to administer this Act and those who seek to comply with it, and I would with respect suggest that it would be of great advantage for the Director, the Authority and other parties concerned to confer as speedily as possible to bring this about.

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No. 4

Judgment of Zelling J.

13th August 1973

(continued)

The order of Wells J. should be varied so as to delete paragraphs 2, 3, 4 and 5 (the directions given by him as to further hearing before the Board) as being inapposite in the light of these reasons and in lieu thereof it should be declared that no valid appeal has been instituted as against the respondent Corporation because there has been no 'refusal' by the Corporation against which an appeal could be brought.

The parties should be heard on the question of costs.

In the Supreme Court of South Australia No. 595 of 1974

No. 5

Originating Summons as amended 10th April 1974

29th March 1974

No. 5

Originating Summons

SOUTH AUSTRALIA

IN THE SUPREME COURT
No. 595 of 1974

IN THE MATTER of the SUPREME COURT ACT 1935-1972 and the Rules of the Supreme Court made thereunder

- and -

IN THE MATTER of the PLANNING AND DEVELOPMENT ACT 1966-1973

- and -

IN THE MATTER of the CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (as amended)

- and -

IN THE MATTER of an application for approval of a plan of subdivision made on the 29th day of September 1970

B E T W E E N :

GLADYS SARAH BECKER Plaintiff

- and -

THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING Defendants

In the Supreme Court of South Australia
No. 595 of 1974

No. 5

Originating Summons as amended 10th April 1974

29th March 1974

(continued)

LET THE CORPORATION OF THE CITY OF MARION of 670 Marion Road Parkholme in the State of South Australia (hereinafter called "the Corporation") and THE DIRECTOR OF PLANNING of R.D.C. Building, 61 Gawler Place Adelaide in the said State (hereinafter called "the Director") within eight days after the service of this summons on them, inclusive of the day of such service, cause an appearance to be entered for them to this summons which is issued on the application of Lady GLADYS SARAH BECKER of Blue Highway, Point Shakes, Pembroke, Bermuda, being the applicant for approval to a certain plan of subdivision pursuant to the provisions of the Planning and Development Act 1967 (as amended) (hereinafter called "the Act") and the Control of Land Subdivision Regulations 1967 (as amended) (hereinafter called "the Regulations") in respect of which application a proposal plan was lodged with the Director by the plaintiff on the 29th day of September 1970 and who claims to be entitled to the declarations sought herein, for the following relief:

1. A declaration that upon the proper interpretation of the Act and the Regulations the plaintiff is entitled to require the Corporation to examine the said proposal plan and to forward a report thereon to the Director in accordance with the provisions of Regulation 7 of the Regulations.

2. A declaration that upon the proper interpretation of the Act and the Regulations and subject to the issue of letter Form A in respect of the said proposal plan in accordance with the provisions of the Regulations -

   (a) The plaintiff is entitled to submit to the Director an outer boundary tracing pursuant to Regulation 12 of the Regulations;

   (b) The Plaintiff is entitled to require the Director to comply with the provisions of Regulation 12(2) of the Regulations in respect of the said outer boundary tracing;

   (c) The Director is not entitled to notify the plaintiff pursuant to Regulation 12(2) of the Regulations that he refuses to accept

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No. 595 of 1974

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Originating Summons as amended 10th April 1974

29th March 1974

(continued)

the plaintiff's final plan for consideration on the ground that he is precluded from doing so under the provisions of section 45b of the Act.

3. A declaration that upon the proper interpretation of the Act and the Regulations and subject to -

(i) the issue of letter Form A in respect of the said proposal plan in accordance with the provisions of the Regulations,

(ii) compliance by the plaintiff with any conditions contained in the said letter Form A,

(iii) compliance by the plaintiff with all other the provisions of the Act and the Regulations in respect of the said application,

(iv) the Director not having been notified pursuant to Regulation 68 of the Regulations that the whole or any part of the land included in the proposal plan is to be compulsorily acquired,

(v) the plaintiff being notified pursuant to Regulation 12 of the Regulations that the Director accepts the final plan for consideration, and

(vi) the acceptance referred to in Regulation 13 of the Regulations of the plaintiff's outer boundary tracing -

(a) The plaintiff is entitled to submit to the Director a final plan pursuant to Regulation 13 of the Regulations;

(b) The plaintiff is entitled to require the Director to examine the final plan and otherwise comply with the Regulations in respect thereof;

inform the Director that the final plan meets the requirements of the Council.

4. Such further or other relief as to the Court may seem just or expedient.

DATED the 29th day of March, 1974.

In the Supreme Court of South Australia No. 595 of 1974

No. 5

Originating Summons as amended 10th April 1974

29th March 1974

(continued)

THIS SUMMONS was taken out by BAKER McEWIN & CO., solicitors for the abovenamed plaintiff, whose address for service is C.M.L. Building 41-49 King William Street, Adelaide.

A defendant may appear hereto by entering appearance either personally or by solicitor at the Master's Office, Supreme Court House, Victoria Square, Adelaide.

NOTE:- If a defendant does not enter appearance within the time and at the place above-mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

No. 6

Affidavit of George Patrick Auld

Appellant's Evidence

No. 6

Affidavit of George Patrick Auld

28th March 1974

SOUTH AUSTRALIA

IN THE SUPREME COURT
No. 595 of 1974

IN THE MATTER of the SUPREME COURT ACT 1935-1972 and the Rules of the Supreme Court made thereunder

- and -

IN THE MATTER of the PLANNING AND DEVELOPMENT ACT 1966-1973

- and -

IN THE MATTER of the CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (as amended)

- and -

IN THE MATTER of an application for approval of a plan of subdivision made on the 29th day of September 1970

In the Supreme Court of South Australia

Appellant's Evidence

No. 6

Affidavit of George Patrick Auld

28th March 1974

(continued)

B E T W E E N :

GLADYS SARAH BECKER Plaintiff

- and -

THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING Defendants

I GEORGE PATRICK AULD of 116 Stanley Street North Adelaide in the State of South Australia Company Director MAKE OATH AND SAY as follows:-

1. I am the lawful attorney in the State of South Australia for the abovenamed plaintiff.

2. I am cognisant of the facts of this case and am authorised to make this affidavit on the plaintiff's behalf.

3. The plaintiff is the registered proprietor of an estate in fee simple in those pieces of land containing together 67 acres 2 roods 7 perches being portion of Sections 189, 190 and 191 of the hundred of Noarlunga County of Adelaide being the whole of the land comprised in Certificates of Title Register Book Volume 3929 Folio 179 (formerly portion of the land comprised in Certificate of Title Register Book Volume 2757 Folio 21) and Volume 2757 Folio 20.

4. On the 29th day of September 1970 the plaintiff having complied with the provision of Regulation 5 of the Control of Land sub-division Regulations 1967 (hereinafter called "the Regulations") caused to be lodged with the defendant The Director of Planning (hereinafter called "the Director") for approval pursuant to the provisions of the Planning and Development Act 1966-1973 (hereinafter called "the Act") a proposal plan of sub-division of the abovementioned land.

5. In accordance with the provisions of regulation 9 of the Regulations, on the 3rd day of May 1971 the Deputy Director of Planning wrote to Messrs. Todd & Co., the plaintiff's agents, a letter, a true copy of which (excluding the reports referred to

therein) is now produced and shown to me and marked with the letter "A".

6. By notice of appeal dated the 1st day of July 1971 the plaintiff appealed to the Planning Appeal Board against the refusal to grant approval to the said plan of sub-division. The hearing of the said appeal took place on various dates between July 1971 and July 1972, and on the 27th day of July 1972 the Planning Appeal Board made a determination, a copy of which and the reasons for which appear in the document now produced and shown to me and marked with the letter "B".

7. By notice of appeal dated the 24th day of August 1972 the defendant The Corporation of the City of Marion (hereinafter called "the Corporation") appealed to the Land and Valuation Division of this Honourable Court against the abovementioned determination of the Planning Appeal Board.

8. By order dated the 28th day of February 1972 the Land and Valuation Division of this Honourable Court comprising The Honourable Mr.Justice Wells allowed the said appeal. A true copy of the order of the Land and Valuation Division of this Honourable Court made on the 28th day of February 1973 is now produced and shown to me and marked with the letter "C".

9. By notice of appeal dated the 13th day of March 1973 the abovenamed plaintiff appealed to the Full Court of this Honourable Court against the aforesaid judgment and order of the Honourable Mr. Justice Wells.

10. By order of the said Full Court comprising the Honourable The Chief Justice, The Honourable Mr. Justice Hogarth and the Honourable Mr. Justice Zelling made on 10th day of December 1973 the said appeal was allowed. A true copy of the order of the said Full Court made on the 10th day of December 1973 is now produced and shown to me and marked with the letter "D".

11. Upon the making of the said order by the Full Court I instructed the plaintiff's solicitors, Messrs. Baker McEwin & Co., to write to the Corporation in terms of a letter dated the

In the Supreme Court of South Australia

Appellant's Evidence

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Affidavit of George Patrick Auld

28th March 1974

(continued)

19th day of December 1973 a true copy of which is now produced and shown to me and marked with the letter "E". I am informed by the said solicitors and verily believe that the said letter was duly posted to the Corporation on or about the 19th day of December 1973.

12. I am informed by the plaintiff's solicitors and verily believe that on the 4th day of March 1974 they received from Messrs. Finlayson & Co., solicitors for the Corporation, a letter dated the 1st day of March 1974, a true copy of which is now produced and shown to me and marked with the letter "F".

13. I am informed by the plaintiff's said solicitors and verily believe that on the 12th day of March 1974 they received from the State Crown Solicitor a letter dated the 11th day of March 1974 a true copy of which is now produced and shown to me and marked with the letter "G".

14. On the 29th day of September 1970 (being the date upon which the plaintiff caused the aforesaid proposal plan to be lodged with the Director) portion of the said land lay within the Hills Face Zone referred to in paragraph (a) of sub-section (5) of section 42 of the Planning and Development Act 1966-1969. The Hills Face Zone at that time had not been defined by a planning regulation relating to the Metropolitan Development Plan under the provisions of the Planning and Development Act 1966-1969 as contemplated by paragraph(b) of sub-section (5) of the said section 42.

15. On the 16th day of December 1971 the Metropolitan Development Plan Hills Face Zone Planning Regulations, 1971 were enacted under the provisions of the Act and were published in South Australian Government Gazette on the 16th day of December 1971 at pages 2513 to 2558 inclusive. By virtue of the provisions of those regulations the whole of the plaintiff's land above-described fell within the Hills Face Zone as therein defined.

16. In 1972 the parliament of the State of South Australia enacted the Planning and Development Act Amendment Act (No. 3) 1972 which Act was expressed to come into operation on a date to be fixed by proclamation. By proclamation dated the 1st day of December 1972 published in the South Australian Government Gazette on the 1st day of December 1972 at page 2531 the said Act was proclaimed to come into operation. By that Act Section 42 of the Planning and Development Act 1966-1972 was repealed and (inter alia) Section 45b of the Act was enacted.

17. None of the allotments contained in the said proposal plan or in Exhibit A6 referred to in exhibit B to this my affidavit has a frontage to a public road of 100 metres or more and each of the said allotments has an area of less than 4 hectares.

18. In the events which have happened the plaintiff claims to be entitled to the relief claimed in the originating summons herein.

19. I know the facts deposed to herein of my own knowledge except where otherwise appears.

SWORN at Adelaide by the said GEORGE PATRICK AULD the 28th day of March 1974 before me:

(Sgd.) G.P. Auld

(Sgd.) ?

THIS AFFIDAVIT is filed by BAKER McEWIN & CO. of C.M.L. Building 41-49 King William Street solicitors for the plaintiff.

In the Supreme Court of South Australia

Appellant's Evidence

No. 7

List of Exhibits

28th March 1974

No. 7

List of Exhibits

SOUTH AUSTRALIA

IN THE SUPREME COURT
No. 595 of 1974

IN THE MATTER of the SUPREME COURT ACT 1935-1972 and the Rules of the Supreme Court made thereunder

- and -

IN THE MATTER of the PLANNING AND DEVELOPMENT ACT 1966-1973

- and -

IN THE MATTER of the CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (as amended)

- and -

IN THE MATTER of an application for approval of a plan of subdivision made on the 29th day of September 1970

B E T W E E N:

GLADYS SARAH BECKER Plaintiff

- and -

THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING Defendants

Exhibits to the Affidavit of George Patrick Auld sworn the 28th day of March 1974

Exhibit No.	Affidavit paragraph	Document	Page
A	5	Letter dated 3/5/71 from Director of Planning to Messrs Todd & Co.	91

Exhibit No.	Affidavit Paragraph	Document	Page
B	6	Determination of Planning Appeal Board dated 27/2/72	93
C	8	Order of Supreme Court Land & Valuation Division made 28/2/73	109
D	10	Order of Full Court made 10/12/73	111
E	11	Letter dated 19/12/73 from plaintiff's solicitors to Corporation of the City of Marion	113
F	12	Letter dated 1/3/74 from Finlayson & Co. to plaintiff's solicitors	115
G	13	Letter dated 11/3/74 from Crown Solicitor to plaintiff's solicitors	116

No. 8

EXHIBIT "A" to the Affidavit of G.P. Auld

P.A.B. Exhibit 1

28,2350
Mr. Jones

Our Ref: SPO 1369/69

SOUTH AUSTRALIA
STATE PLANNING OFFICE

Postal Address:
Box 1815N, G.P.O.
Adelaide, S.A. 5001

Police Building
1 Angas Street
ADELAIDE

3rd May, 1971

Messrs. Todd & Co.,
20 Franklin Street,
ADELAIDE. S.A. 5000

Dear Sir,

Re: Subdivision Part Sections 189, 190 and 191
Hundred of Noarlunga, Seaview Downs
for Lady G.S. Becker, City of Marion
Amended Plan dated 21st September, 1970

In the Supreme Court of South Australia

Appellant's Evidence

No. 8

Exhibit "A" to the Affidavit of G.P. Auld

3rd May 1971

(continued)

You are advised that as the above proposed subdivision lies within a prescribed locality as defined by Section 42 of the Planning and Development Act, 1966-1969, namely, the Hills Face Zone, it was submitted to the State Planning Authority which resolved:

1. that in the opinion of the Authority portion of the land contained within the application lies within a prescribed locality.

2. that the plan does not conform to the purposes, aims and objectives of the Metropolitan Development Plan in that -

   (a) it would destroy, change and affect the general character of portion of the Hills Face Zone and Hills skyline as viewed from the Living Area to the north of the proposed subdivision.

   (b) it would be a small scale development of a type which would spoil the natural character of portion of the Hills Face Zone.

   (c) it would destroy and impair the generally open rural and natural character of portion of the Hills Face Zone as viewed from the abutting roads.

   (d) the proposed allotments are all less than 10 acres in area and have frontages less than 300 ft.

As a result of this resolution, I have refused approval to this application pursuant to Section 42(2). In addition, I have refused approval pursuant to Section 49, subsections (F), (g) and (i) and Section 52(1)(e) of the Planning and Development Act 1966-1969.

You are further advised that to date the City of Marion has not in accordance with Regulation 7(1) of the Control of Land Subdivision Regulations given a decision on the proposal plan which was forwarded to it on the 6th November, 1970. Consequently by virtue of Regulation 7(4) of the said regulations it can be deemed that the Council has reported to the Director that it has decided to refuse approval of the said proposal plan.

Enclosed are copies of reports from the following:-

(1) Director and Engineer-in-Chief dated 3rd March, 1971

(2) Surveyor-General dated 7th December, 1970

(3) City of Marion dated 16th December, 1970

(4) Commissioner of Highways dated 11th February, 1971

(5) Director of Mines dated 11th November, 1970.

(6) Secretary, State Planning Authority dated 15th April, 1971.

Your attention is drawn to Sections 26 and 27 of the Planning and Development Act, 1966-1969 regarding the question of appeal against the above refusals.

Yours faithfully,

(Sgd.) D. A. SPEECHLEY

D.A. Speechley,
DEPUTY DIRECTOR OF PLANNING.

This page and the preceding page comprise the document marked "A" referred to in the affidavit of George Patrick Auld produced and shown to him at the time of swearing the said affidavit this 27th day of March 1974

Commissioner for Oaths D.F. Wicks .....

No. 9

EXHIBIT "B" to the Affidavit of G.P. Auld

IN THE MATTER OF AN APPEAL

BETWEEN

LADY GLADYS SARAH BECKER (APPELLANT)

In the Supreme Court of South Australia

Appellant's Evidence

No. 8

Exhibit "B" to the Affidavit of G.P. Auld

27th July 1972

(continued)

AND

THE DIRECTOR OF PLANNING

AND

THE COUNCIL OF THE CITY OF MARION

AND

THE STATE PLANNING AUTHORITY (RESPONDENTS)

PLANNING APPEAL BOARD

No.20 of 1971 Metropolitan Planning Area

Adelaide	21 July, 1971
Adelaide	28 July, 1971
Adelaide	4 August, 1971
Adelaide	3 November, 1971
Adelaide	17 November, 1971
Adelaide	24 November, 1971
Adelaide	27 January, 1972
Adelaide	13 March, 1972
Adelaide	5 June, 1972
Adelaide	7 June, 1972
Adelaide	13 June, 1972
Adelaide	14 June, 1972
Adelaide	17 July, 1972
Adelaide	20 July, 1972
Adelaide	27 July, 1972

ADVOCATES:

For the Appellant:	F.R.Fisher,Q.C., of Counsel with him D.J. Bleby, of Counsel
For the Respondent Director of Planning:	M.L.W. Bowering, of Counsel
For the Respondent Council of City of Marion:	B.M. Debelle, of Counsel
For the Respondent State Planning Authority:	M.L.W. Bowering, of Counsel

P.A.B. 20/71

THE BOARD DELIVERED THE FOLLOWING DETERMINATION:

On 1st July, 1971 Lady Gladys Sarah Becker instituted an appeal to the Planning Appeal Board.

On the 29th September, 1970 she had lodged with the respondent Director of Planning a proposal plan relating to the possible subdivision of land comprising some 65 acres on the upper heights of that spur of the Mount Lofty Ranges which extends towards Gulf St. Vincent between Darlington and O'Halloran Hill. It is land with undulating faces. From its ridges and some other parts an excellent prospect exists.

The subject land, for the most part, is to the west of Morphett Road, but a portion lies in an elbow between Morphett Road and Government Road to the east. That latter portion, a steep gully, is proposed to be set aside as a reserve.

It was originally proposed to divide the land into 145 residental allotments, the greater number of which would have been less than one third of an acre in extent. Reserves, in addition to that one already referred to, and road reserves were to be provided.

During the hearing a number of plans amending the original proposal were introduced. The final proposal is contained in Exhibit A6 tendered to the Board on the 5th June, 1972.

That Exhibit proposes that the land be subdivided into 119 residential allotments, road reserves and reserves for other purposes totalling in area some 12 acres 2 roods and 35 perches.

The allotments vary in area from about 10,000 square feet to some 21,000 square feet.

Although Lady Becker lodged her proposal plan for subdivision with the Director of Planning, pursuant to the provisions of The Control of Land Subdivision Regulations, 1967, the Act requires a plan of subdivision to be approved by both the Director of Planning and the local government authority withinwhose municipality the land lies.

A third planning authority, the State Planning Authority, became perforce involved in the question of Lady Becker's application. Portion, but not the whole of the land, lay within the Hills Face Zone depicted on the Metropolitan Development Plan. In those circumstances, it became the duty of the Director of Planning, pursuant to Section 42 of the Act, to refer Lady Becker's proposal to the Authority.

In the Supreme Court of South Australia

Appellant's Evidence

No. 9

Exhibit "B" to the Affidavit of G.P. Auld

27th July 1972

(continued)

The State Planning Authority was directed by the Act to examine the plan and make a written report to the Director of Planning stating whether, in the opinion of the Authority, the plan conformed to the purposes, aims and objectives of the Metropolitan Development Plan.

A report of the Authority to the effect that the plan did not conform to the purposes, aims and objectives of the Metropolitan Development Plan had, under Section 42(2), to bring from the Director of Planning a mandatory refusal to approve the plan of subdivision.

The Authority reported to the Director that the plan did not conform to the purposes, aims and objectives of the Metropolitan Development Plan because it would provide for small scale development in the Zone, destroy the generally open and rural character of the Zone as viewed from abutting roads, destroy, change and affect the general character of the Zone and the Hills skyline, and that every proposed allotment would be less than 10 acres in area and every one of them would have a road frontage of less than 300 feet.

The Director on receipt of that report, as in duty bound, refused to approve the plan. Subsection 42(4) of the Act provides for a right of appeal to this Board against any such decision of the Director. The Board, before determining the appeal, may review the matters contained in the report of the Authority.

In other words, the Board may consider and reach its own conclusions as to whether the mandatory refusal should be upheld.

Section 42 appears in Part V of the Act. Section 40 states that the provisions of that Part do not limit the application of or derogate from any other provisions of the Act, Leverington v. The State Planning Authority and The District Council of East Torrens, (1970) S.A.S.R. 387.

The important role of the Authority and its powers and functions in respect of planning and development throughout the State are made abundantly clear by such Sections as 18, 28, 29, 30, 36 and 41.

The Authority is concerned with all aspects of planning and development. Normally its duties lie in broader aspects of planning and the implementation of development than matters of the division of land. However, within a "prescribed locality" within the Metropolitan Planning Area the legislature has directed that the Authority shall consider and report to the Director of Planning on any plan of subdivision. The Authority is not concerned with those important but more detailed aspects of the division of land which are primarily the concern of the Director of Planning and the local government authority under Part VI. The Authority is charged with considering whether the plan conforms to matters of broad and important planning and implementation principles to ensure that the concepts intended by the Metropolitan Development Plan are retained.

It is not easy to ascertain from the Metropolitan Development Plan its purposes, aims and objectives relating to any particular plan of subdivision. Some of those purposes, aims and objectives in cases involving land in the Zone have been dealt with by the Board in Lloyd v. The Director of Planning and The District Council of Meadows, Wait and Regano Industries Pty. Ltd. v. The Director of Planning, Creedy and Another v. The Director of Planning, Coulls v. The State Planning Authority, Jugovac v. The State Planning Authority, Mynhardt v. The State Planning Authority, Regano Industries Pty. Ltd. v. The Director of Planning and The District Council of Meadows, Lloyd v. The State Planning Authority and Sleeps Hill Estates Pty. Ltd. v. The Director of Planning and The Council of the City of Mitcham, all unreported. It is not necessary to canvass in this determination what has already been said in those cases.

Whilst the Authority had reported to the Director that it found that the plan submitted to it did not conform to the purposes, aims and objectives of the Metropolitan Development Plan, somewhat altered proposals for the division of the land (Exhibits A3 and A5) were put forward by the appellant during the course of the case. At that time, the Authority was not itself a party to these proceedings but counsel for the Director of Planning intimated to the Board that the Director of Planning, acting as agent for the

In the Supreme Court of South Australia

Appellant's Evidence

No. 9

Exhibit "B" to the Affidavit of G.P. Auld

27th July 1972

(continued)

Authority, had instructed counsel to inform the Board that if a plan in the form of those altered proposals had been capable of being the subject of a report by the Authority pursuant to Section 42 the Authority would have reported that such a plan conformed to the purposes, aims and objectives of the Metropolitan Development Plan. To ensure that the Authority was in a position to put to the Board everything which it might wish to put, upon the application of counsel for the Director of Planning, the Board joined the Authority as a party to the appeal pursuant to Section 27a. Subsequently counsel for the Authority confirmed what counsel for the Director had already intimated.

Neither the Director of Planning nor the Authority called any witnesses. The appellant called three. One was Lady Becker's attorney under power. Another was a licensed surveyor who vouched for the reasonable accuracy of Exhibit A6. That witness had prepared a plan of the locality indicating land uses both within and without the Zone and land in the locality acquired by the Authority. The third witness was a professional town planner. His expert evidence was to the effect that what was proposed by Exhibit A6 conformed with the purposes, aims and objectives of the Metropolitan Development Plan in relation to the subject land. In answer toquestions by a Commissioner, his evidence was that Lady Becker's proposals would not be detrimental to the concept of the buffer zone between metropolitan districts provided for in the Metropolitan Development Plan. Similarly, he opined that whether what might transpire, were the proposal to be allowed, would provide for an urban rather than a rural character depended entirely upon land-use controls which, during the course of the appeal, had become vested in the Authority. He saw no reason to believe that the rural character envisaged by the Metropolitan Development Plan (Report, page 284) could not be achieved since land-use controls now existed. As an expert planner, he found nothing in the scale of the proposed development which would, subject to the proper use of land-use controls, offend against those references in the Metropolitan Development Plan to small scale development. The Hills Face skyline seen from the plains below would not be detrimentally disrupted. He saw the proposal as being one which, subject to proper land-use controls, fell within the

planning purposes, aims and objectives of the Metropolitan Development Plan.

The Board must act judicially. On the positive evidence, all of which came from the appellant, the view and the unqualified and binding statement of counsel for the Authority that his client is of the opinion that what is represented in Exhibit A6 is a plan which conforms to the purposes, aims and objectives of the Metropolitan Development Plan, the Board can come to no other decision than that the appeal against the refusal under Section 42(2) must succeed.

The Director of Planning also refused approval of the plan originally lodged with him pursuant to Subsections 49(f), (g), (i) and Subsection 52(1)(e). The Director presented no evidence in support of his refusal under those Subsections. He made no submissions to the Board seeking to have the Board sustain his refusal under any of those grounds. What is before us leads us to the conclusion that the Director's refusal pursuant to Subsections 49(f) and (i) and 52(1)(e) cannot be sustained. As to his refusal pursuant to Section 49(g), the Director, through his counsel indicated that the Director would not rely upon that ground if an appropriate condition of approval were to be imposed.

Pursuant to Section 27(6), the Board must have regard to matters other than the grounds upon which the decision appealed against was made. The only aspects of the Metropolitan Development Plan which have any bearing on the matter, in our view, are those dealing with the Hills Face Zone and the Living Zones or Living Areas. Having regard to the conclusions at which we have arrived about the matters involving Section 42, there is nothing, (in the case involving the refusal of the proposal by the Director of Planning under his own discretionary powers), in the Metropolitan Development Plan which appears to us to warrant the confirmation of the Director's decision to refuse approval under Subsections 49(f), (g) and (i) and Subsection 52(1)(e).

There are no matters before us in respect of the appeal against the decisions reached by the Director pursuant to his discretionary powers which could lead us to confirm his decision having

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Appellant's Evidence

No. 9

Exhibit "B" to the Affidavit of G.P. Auld

27th July 1972

(continued)

regard to the provisions of placita (b) and (c) of Subsection (6) of Section 27.

The Board is also required to have regard to the amenities of the locality. The only evidence of any substance before us is that given by Mr. Hignett and by Mr. Todd. Their evidence in this respect is unchallenged. It is to the effect that, subject to the proper use of land-use controls, which now rest in the Authority, the amenities of the locality will be enhanced rather than impaired.

Consequently, the general situation in respect of the appeal against the refusal of the Director of Planning acting under his discretionary powers is one in which we must allow this apeal, subject to certain conditions.

We have already mentioned that no plan of subdivision can be deposited with the Registrar-General unless yet another planning authority, the local government Council of the area, approves it. That is provided for in Section 45 of the Act.

The Control of Land Subdivision Regulations, 1967, as varied, include Part II relating to "Procedure to Obtain Approval of Plans". An applicant for the approval of a proposal plan is to submit an application to the Director of Planning in a prescribed form together with a number of copies of the proposal plan. The Director, once he has satisfied himself that the proposal plan is "in order" is to send a copy of that proposal plan to various authorities and persons. One of those authorities and persons is the Council.

Under Regulation 7(1), the Council is to "examine the proposal plan and forward a report on it to the Director". The Council is to do this within two calendar months "commencing on the date of receipt".

If for any proper reason the Council desires to take longer than those two calendar months to report to the Director of Planning it may apply to him within those two calendar months to extend the period for report.

Regulation 7(2) makes it clear that the report from the Council to the Director of Planning

must state whether the Council has decided to approve the proposal plan unconditionally or conditionally or has refused to approve it.

In the present case the Council did not "report" within the time limited by Regulation 7(1), or at all. The effect of Regulation 7(4) is to ensure that if no report is received within the period, whether extended or not, provided for in Regulation 7(1) the Council is "deemed to have reported to the Director of Planning that it has decided to refuse its approval".

Regulation 9(1), coupled with Regulation 8, ensures that the Director of Planning is to notify the applicant, at some proper time, of his own decision and any refusal of the Council to approve a plan.

For the purposes of carrying out his duties, the Director of Planning is entitled to have regard to Regulation 7(4) and, where he has had no report, to notify the applicant that the Council has reported to him that it has refused its approval.

In the present case the Council considered that to reach a decision upon the proposal plan before it, it required more information. It did not seek it directly from the applicant but asked the Director of Planning to obtain it. The copy of the proposal plan had been received by the Council from the Director of Planning on the 6th November, 1970. On 16th December, 1970 the Town Clerk of the Council wrote to the Director of Planning informing him that the Council had deferred consideration of the proposal until the applicant gave it certain "proof". From the Town Clerk's letter to the Director it is apparent that the Town Clerk assumed that the Director would apply to the applicant on behalf of the Council for the information which the Council sought. It was suggested to us that the Director of Plann , did enter on certain inquiries relating to the matters referred to by the Council. Whatever transpired the Council failed to report in the terms of Regulation 7(1).

Having regard to the nature of the Act itself and to the Regulations, we have come to the conclusion that the effect of a failure by the Council to

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Appellant's Evidence

No. 9

Exhibit "B" to the Affidavit of G.P. Auld

27th July 1972

(continued)

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Appellant's Evidence

No. 9

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27th July 1972

(continued)

report to the Director of Planning within the time limited by and in accord with the tenor of the provisions of Regulation 7 involved a deemed refusal of the proposal plan by the Council.

During the course of this appeal, on a number of occasions the nature of the appellant's proceedings against the various planning authorities involved became a matter for consideration.

Whilst it may be that it will be desirable, for expedition and justice, that appeals relating to the same land and the same proposal made by an applicant for the division of such land should be heard together, we have found it necessary in this present case to decide whether, in the circumstances of what is presently before us, there is only one appeal and whether that appeal is against the decisions of all the planning authorities who or which have refused approval or whether there is more than one appeal. The matter has had some very practical implications.

We have come to the conclusion that the appeal against the deemed decision of the Council is a separate and distinct appeal to any appeal against the decision of the Director of Planning.

The Director of Planning and the Council each have separate and distinct duties to perform. Whilst many of the provisions of the Act upon which either planning authority may refuse approval of plans are grounds common to each, others are not. Section 26(1) of the Act gives to any person aggrieved by a decision of one of the named planning authorities a right of appeal to the Board. Subsection (2) provides that the Board may, by its determination, confirm the decision appealed against or give to any party to the appeal such directions as the Board thinks fit. The appeal is one against the decision of a particular planning authority. It sometimes happens that in respect of a particular proposal an applicant for the approval of the planning authorities wishes to appeal from the decision of each such authority. If he institutes an appeal against each decision he institutes separate appeals. It may well be that generally the notification of the separate decisions are received, pursuant to the provisions of the Control of Land Subdivision Regulations, 1967, from the Director of Planning. Nevertheless the

decision of the Director of Planning has been reached separately and independently, although in all probability with the advantage of a report of the Council referred to in Regulation 6, whilst the Council in its turn has reached its independent decision. In the present case it can be seen that the Director of Planning limited his grounds of refusal to certain specific provisions of the Act. The Council made no positive decision at all. As a matter of practical convenience the actual hearing of the appeals in such circumstances may be brought into a familial relationship for the purpose of their despatch. However there is no intention in the scheme of the Act to put an appellant in a position where (except perhaps in cases under Section 27a), having been refused approval by one planning authority upon one particular ground, because another planning authority, for other reasons, refused approval of his proposal he could be faced with meeting an attack on his planning proposal, before this Board, by a planning authority which itself had not in reaching its own decision relied on a specific ground of refusal taken by another planning authority.

What we say is not intended in any way to limit the proper presentation to the Board by any party of matters relevant within the terms of Section 27(6) to the determination of an appeal by the Board itself.

Having considered what was put to us by counsel as to the extent to which the Council might properly be involved in the hearing of the appeal against its deemed refusal we are of the opinion that the Board is entitled to have the advantage of the participation of the Council. The Board is dealing with an appeal against a deemed refusal of the appellant's application by the Council. The Board is required by Section 27(6) to have regard to all relevant matters. It may be that it would not be proper for the Board, in effect, to invite the Council to prepare and put before us a case directed specifically to grounds of refusal which the Council might have adopted but which, because of the deemed refusal, it did not. Nevertheless in relation to the matters which the Board has to decide in respect of the appeal against the deemed refusal, the Council is undoubtedly a party before the Board. To the extent that it may properly assist the Board in relation to any matters which

In the Supreme Court of South Australia

Appellant's Evidence

No. 9

Exhibit "B" to the Affidavit of G.P. Auld

27th July 1972

(continued)

fall within the competence of the Board in determining an appeal against the Council's refusal, in contra-distinction to those matters which would be the concern of the Council as a council in considering, at the appropriate time, an application under Part VI of the Act, we would expect a proper participation by the Council.

In relation to the appeal against the deemed refusal of the respondent Council, the Council subsequently indicated that it would seek from the Board a determination involving the imposition of certain conditions to the plan if the Board decided to direct its approval. The Council tendered no witnesses. The Council had not refused its approval of the plan on any specified grounds whatsoever. Consequently the Board does not have to consider the grounds upon which the Council's decision was arrived at. However the Board must also consider, in relation to the deemed refusal by the Council, the other relevant matters referred to in Section 27(6). Apart from the view and the exhibits there is little before us. However, it is possible, having regard to the conditions which the Council has asked the Board to impose, to say that there is no reason why the Board should do other than to uphold Lady Becker's appeal against the Council's deemed refusal, subject nevertheless to the imposition of appropriate conditions.

Whilst it has been said that the Council tendered no evidence, it is proper to indicate that the Council at one stage intimated that it wished to cross-examine the appellant's witnesses and might call a witness or witnesses of its own. There was some suggestion that the Board had adopted a course of action which precluded the Council doing this in relation to the appeal against the deemed refusal of the Council. Subsequently it was conceded that the evidence which might have been called by the Council and the cross-examination which the Council wished to embark upon related to the Hills Face Zone aspect of the Metropolitan Development Plan. Save for the Council's concern for the Hills Face Zone it did not seek to call evidence or to cross-examine witnesses.

Where land, which is the subject of a proposal for subdivision, lies within a prescribed locality so that the Authority itself is called

upon to form an opinion as to whether the proposal plan conforms to the purposes, aims and objectives of the Metropolitan Development Plan relating to that proposal plan, and the Authority says that there is conformity with those purposes, aims and objectives, or the Board, in a case properly before it, has reached a conclusion to the like effect in relation to a refusal by the Director of Planning under Section 42(2), whilst appreciating that the Board in reaching a decision on the appeal against the deemed refusal by a Council is directed to have regard to the authorized development plan (which here is the Metropolitan Development Plan) the Board considers that it is not concerned with the aspect particularly arising under Section 42 in the appeal against the deemed refusal of the Council, since it is not a relevant matter flowing from Section 27(6)(a).

That does not by any means preclude a Council, within whose area land in a prescribed locality lies, from undertaking a proper planning attitude in relation to the proposed subdivision in respect of any of the matters to which, under the Act and The Control of Land Subdivision Regulations, 1967 the Council is entitled to have regard, having in mind the terrestrial area the subject of the proposed subdivision.

In the case of Lady Becker's appeal against the Director of Planning counsel for the Director of Planning made an application to the Board that the respondent Council be joined pursuant to Section 27a as a party to the proceedings. An application to that effect had previously been made by counsel for the respondent Council. The Board declined both applications because they were directed to participation by the respondent Council in that part of the proceedings which involved the appeal against the refusal by the Director of Planning under Section 42(2). As has already been indicated matters flowing under Section 42 are particularly the responsibility of the State Planning Authority and the Director of Planning. The Board is unable to see how the respondent Council is a body which, in the opinion of the Board ought to be bound by or to have the benefit of its determination on matters specifically flowing from the provisions of Section 42.

In the Supreme Court of South Australia

Appellant's Evidence

No. 9

Exhibit "B" to the Affidavit of G.P. Auld

27th July

(continued)

In the case of the appeal against the Director of Planning the Board by its determination directs the Director of Planning to approve of a proposal plan in the form of Exhibit A6, or a like form, subject to the following conditions:

1. Surveyor-General's approval of permanent marks.

2. Acceptance of the outer boundary of the proposed subdivision, as being both accurate and adequate, by the Registrar-General pursuant to Regulation 12 of the Control of Land Subdivision Regulations, 1967, as varied.

3. The Geographical Names Board's approval of the name of the subdivision, or, alternatively, acceptance by the applicant for approval of such name for the subdivision as that said Board may designate.

4. The requirements of the Minister of Works for the provision of water supply and sewerage services to each allotment defined by the said proposal plan being met before approval of the final plan.

5. Sewerage easements being shown on the final plan where required by the Director and Engineer-in-Chief of the Engineering and Water Supply Department.

6. Road gradients being not steeper than 1 in 8 (12½ per centum).

7. There being at least one part of the frontage of each proposed allotment to an existing or proposed road, street or thoroughfare, (being a place of sufficient width to permit any motor vehicle reasonably likely to be taken on to or off that proposed allotment to move from that allotment at that place on to the carriageway of such existing or proposed road, street or thoroughfare), such as to ensure that with or without engineering works the gradient of the access way from that carriageway to some convenient point on the allotment is not steeper than 1 in 5 (20 per centum).

8. Corner cut-offs at the junction of Fowler Street and Morphett Road and Sunset Boulevard and Morphett Road respectively being not less than 14 feet by 14 feet.

9. The natural slope of the whole of the land in any proposed allotment being not steeper than a gradient of 1 in 4.

In the case of the appeal against the decision of the respondent Council the Board by its determination directs the respondent Council to approve the proposal plan in the form contained in Exhibit A6, or a like form, subject to the following conditions:

1. The road reserve in Davenport Terrace being not less than 66 feet wide.

2. Road gradients being not steeper than 1 in 8 (12½ per centum).

3. There being at least one part of the frontage of each proposed allotment to an existing or proposed road, street or thoroughfare, (being a place of sufficient width to permit any motor vehicle reasonably likely to be taken on to or off that proposed allotment to move from that allotment at that place on to the carriageway of such an existing or proposed road, street or thoroughfare), such as to ensure that with or without engineering works the gradient of the access way from that carriageway to some convenient point on the allotment is not steeper than 1 in 5 (20 per centum).

4. Walkways as depicted on Exhibit A6 being provided and constructed and sealed by the appellant.

5. Allcorner cut-offs at junctions of Morphett Road, Panorama Avenue, Sunset Boulevard, Inspiration Drive and Davenport Terrace being not less than 14 feet by 14 feet.

6. Such necessary drainage reserves or easements, as may reasonably be required in accordance with recognized engineering design practice and to plans and specifications approved by the respondent Council, being shown on the final plan.

The Council asked us to impose a further condition requiring the appellant to encumber the land in such a way that the land could not be sub-

In the Supreme Court of South Australia

Appellant's Evidence

No. 9

Exhibit "B" to the Affidavit of G.P. Auld

27th July 1972

(continued)

divided or re-subdivided into more in number than the number of allotments shown on Exhibit A6, that is 119. The appellant was prepared to agree to such a condition. We have considered this request. However much it may or may not be possible for a landowner to encumber his land to prevent future subdivision or re-subdivision we have reached the conclusion that it would not be a proper condition in this particular case, if at all. It would restrict not only the future discretion of the Council but also that of the Director of Planning. Moreover there are the responsibilities of the State Planning Authority, which is involved in matters of the subdivision of land within a prescribed locality. These three authorities are the appropriate authorities charged with making planning decisions on matters of the subdivision of land as and when applications for subdivision are made.

Moreover the use to which the subject land or any part of it may be put is now governed by the "Metropolitan Development Plan (Hills Face Zone) Planning Regulations 1971". Subject to those regulations, it will be for the State Planning Authority to reach conclusions as to the proper use of the subject land and every part of it. The subject land is within a special zone and it might be unfortunate if any attempt were made to formalize, at this stage of development, a perpetuating form of allotment division of the subject land. Planning and development involves, within the terms of the Act, being concerned not only with the present, but with likelihoods and possibilities in the future. Accordingly we decline to impose such a condition.

Nothing in our determination derogates from the necessity for the appellant to comply with the provisions of Section 51 of the Act.

The Board directs the repayment of $1.00, of the sum paid upon the institution of these appeals, to the appellant.

The Board by its determination in each of these cases further directs that a copy of each and every exhibit remain on file.

Solicitors for the Appellant: Fisher, Jeffries & Co., and Baker, McEwin & Co.

Solicitor for the Respondent Director of Planning: L.K. Gordon, Crown Solicitor

Solicitors for the Respondent Council: Stevens, Jacobs, Mellor & Bollen

Solicitor for the Respondent State Planning Authority: L.K. Gordon, Crown Solicitor

No. 9

Exhibit "B" to the Affidavit of G.P. Auld

27th July 1972

(continued)

This is the document marked "B" referred to in the affidavit of George Patrick Auld produced and shown to him at the time of swearing the said affidavit this 28th day of March 1974

(Sgd.) D.F. Wicks
.....
Commissioner for Oaths

No. 10

No.10

Exhibit "C" to the Affidavit of G.P. Auld

28th February 1973

EXHIBIT "C" to Affidavit of G.P.Auld

SOUTH AUSTRALIA
IN THE SUPREME COURT
LAND AND VALUATION DIVISION

L.V.D. No. 137 of 1972

IN THE MATTER of the PLANNING AND DEVELOPMENT ACT 1966-1971

- and -

IN THE MATTER of the CONTROL OF LAND SUBDIVISION REGULATIONS 1967

- and -

IN THE MATTER of a decision or determination of the Planning Appeal Board made on the 27th day of July 1972

B E T W E E N :

THE CORPORATION OF THE CITY OF MARION

Appellant

- and -

In the Supreme Court of South Australia

Appellant's Evidence

No.10

Exhibit "C" to the Affidavit of G.P. Auld

28th February 1973

(continued)

LADY GLADYS SARAH BECKER, THE DIRECTOR OF PLANNING and THE STATE PLANNING AUTHORITY Respondents

BEFORE THE HONOURABLE MR. JUSTICE WELLS
WEDNESDAY THE 28TH DAY OF FEBRUARY 1972 sic

THIS APPEAL by the abovenamed appellant from a determination of the Planning Appeal Board given and pronounced on the 27th day of July 1972 coming on for hearing on the 7th and 8th days of November 1972 UPON READING the Notice of Appeal herein dated the 24th day of August 1972 AND UPON HEARING Mr. Jacobs Q.C. and Mr. Debelle of Counsel for the appellant and Mr. Fisher Q.C. and Mr. Proud of Counsel for the respondent Lady Gladys Sarah Becker and Mr. Bowering of Counsel for the respondents the Director of Planning and the State Planning Authority THIS COURT DID RESERVE JUDGMENT and the same standing for judgment this day THIS COURT DOTH ORDER AND DIRECT as follows:-

1. That the appeal be allowed.

2. That Lady Becker be at liberty to elect within fourteen days from the date of this order whether she wishes to proceed with her appeal to the Planning Appeal Board on the plan Exhibit A2 in the Planning Appeal Board.

3. That if the respondent Lady Becker elects so to proceed the said appeal to the Planning Appeal Board shall be heard by the said Board differently constituted and upon twenty one (21) days notice to the appellant and other respondents herein.

4. That if upon the hearing of any such appeal Exhibit A3 in the Planning Appeal Board is tendered it shall not be received and considered as the basis of a plan sought to be approved and implemented by consequential directions by the said Board unless the said Board in its discretion is clearly of opinion that the said Exhibit A3 should be regarded as the said Exhibit A2 with only minor and immaterial variations.

5. If the said Board seised of the appeal is of the opinion that the said exhibit A3 cannot be regarded as the said Exhibit A2 with only

minor and immaterial variations or if the respondent Lady Becker does not elect to proceed directly to a rehearing before the said Board and wishes to proceed with sub-divisional plans the appellant Lady Becker must submit the plan the said Exhibit A3 or such other plan as she selects to the respondent Director of Planning pursuant to the provisions of the Planning and Development Act 1967-1972.

6. That the appellant's costs of and incidental to the said appeal be taxed on the full Supreme Court Scale and paid by the respondent Lady Becker.

AND IT IS ADJUDGED accordingly.

BY THE COURT

L.S. R.M. Lunn (Sgd.)

DEPUTY MASTER

In the Supreme Court of South Australia

Appellant's Evidence

No.10

Exhibit "C" to the Affidavit of G.P. Auld

28th February 1973

(continued)

This page and the preceding 2 pages comprise the document marked "C" referred to in the affidavit of George Patrick Auld produced and shown to him at the time of swearing the said affidavit this 28th day of March 1974.

(Sgd.) D.F. Wicks
.....
Commissioner for Oaths.

THIS JUDGMENT is filed by STEVENS JACOBS MELLOR & BOLLEN of 73 Pirie Street, Adelaide. Solicitors for the appellant.

No. 11

No.11

EXHIBIT "D" to the Affidavit of G.P.Auld

Exhibit "D" to the Affidavit of G.P. Auld

12th December 1973

SOUTH AUSTRALIA
IN THE SUPREME COURT
LAND AND VALUATION DIVISION

L.V.D. No. 137 of 1972

B E T W E E N

In the Supreme Court of South Australia

Appellant's Evidence

No.11

Exhibit "D" to the Affidavit of G.P. Auld

12th December 1973

(continued)

LADY GLADYS SARAH BECKER Appellant

- and -

THE CORPORATION OF THE CITY OF MARION, THE DIRECTOR OF PLANNING and THE STATE PLANNING AUTHORITY Respondents

BEFORE THE HONOURABLE THE CHIEF JUSTICE THE HONOURABLE MR JUSTICE HOGARTH AND THE HONOURABLE MR JUSTICE ZELLING
MONDAY THE 12th DAY of DECEMBER 1973

THIS APPEAL by the abovenamed appellant from the judgment of the Honourable Mr. Justice Wells given and pronounced on the 28th day of February 1973 coming on for hearing on the 12th, 13th, 14th and 15th days of June and the 13th day of August 1973 UPON READING the notice of appeal herein dated the 13th day of March 1973 AND UPON HEARING Mr. Fisher Q.C. and Mr. Bleby of counsel for the appellant Mr. Debelle of counsel for the respondent The Corporation of the City of Marion and Mr. Bowering of counsel for the respondents The Director of Planning and The State Planning Authority THE COURT DID RESERVE JUDGMENT and the same standing for judgment this day THIS COURT by a majority DOTH ORDER AND DECLARE as follows:-

1. That the said appeal be allowed.

2. That the judgment of the Honourable Mr. Justice Wells be varied by setting aside paragraphs 2 to 6 thereof inclusive.

3. That the determination of the Planning Appeal Board made on the 27th day of July 1972 whereby it directed the respondent The Director of Planning to approve of the appellant's proposal plan in the form of exhibit A6 or a like form subject to certain conditions more particularly specified therein be upheld as between the appellant on the one hand and the respondents The Director of Planning and The State Planning Authority on the other hand.

4. That no valid appeal has been instituted to the Planning Appeal Board against the respondent The Corporation of the City of Marion.

5. That there be no order as to costs in respect of the appeal before the Honourable Mr.Justice Wells and this appeal.

AND IT IS ADJUDGED accordingly.

AND the parties are at liberty to apply.

BY THE COURT

R.M. Lunn (Sgd.)

DEPUTY MASTER

L.S.

In the Supreme Court of South Australia

Appellant's Evidence

No.11

Exhibit "D" of the Affidavit of G.P. Auld

12th December 1973

(continued)

This page and the preceding page comprise the document marked "D" referred to in the affidavit of George Patrick Auld produced and shown to him at the time of swearing the said affidavit this 28th day of March 1974

(Sgd.) D.F. Wicks
.....
Commissioner for Oaths

THIS JUDGMENT is filed by BAKER McEWIN & CO., of C.M.L. Building 41-49 King William Street, Adelaide, Solicitors for the Appellant.

No. 12

EXHIBIT "E" to Affidavit of G.P. Auld

No.12

Exhibit "E" to the Affidavit of G.P. Auld

DJP/17999

19th December, 1973

19th December 1973

The Town Clerk,
Corporation of the City of Marion,
670 Marion Road,
PARKHOLES S.A.

Dear Sir,

Re: Subdivision of Part Section 189, 190 and 191, Hundred of Noarlunga, Seaview Downs for Lady G.S. Becker. Amended plan dated 21st September 1970

In the Supreme Court of South Australia

Appellant's Evidence

No.12

Exhibit "E" to the Affidavit of G.P. Auld

19th December 1973

(continued)

As you may be aware, we act for Lady G.S. Becker in connection with the abovementioned proposals for subdivision, and no doubt you have now been informed of the order of the Full Court of the Supreme Court made on the 10th December 1973.

We are informed by the Director of Planning that pursuant to Regulation 6 of the Control of the Land Subdivision Regulations 1967 a copy of our client's proposal plan in respect of the subdivision was forwarded to you on 6th November 1970. As it appears that your Council has never made a decision to approve or refuse approval to the proposal plan, we ask that the matter be given urgent consideration and that the report required by Regulation 7 be forwarded to the Director of Planning as soon as possible. If this is not done by the 31st January 1974 our client will be obliged to take further proceedings to require the necessary action to be taken.

We are instructed to indicate that our client would be prepared to agree to the plan being approved subject to being amended in the form of exhibit A6 (or like form) tendered before the Planning Appeal Board in Appeal No. 20/1971 between our client, The Director of Planning, the State Planning Authority and your Council. However, our client reserves the right to withdraw this undertaking if the Council only approves such plan subject to conditions which our client regards as unduly onerous.

Yours faithfully,
BAKER McEWIN & CO.

Per:

This is the document marked "E" referred to in the affidavit of George Patrick Auld produced and shown to him at the time of swearing the said affidavit this 28th day of March 1974.

(Sgd.) D.F. Wicks
.....
Commissioner for Oaths.

No. 13

EXHIBIT "F" to the Affidavit of G.P. Auld

In the Supreme Court of South Australia

Appellant's Evidence

No.13

Exhibit "F" to the Affidavit of G.P. Auld

1st March 1974

FINLAYSON & CO.
Barristers & Solicitors

EPWORTH BUILDING
33 PIRIE STREET
ADELAIDE
SOUTH AUSTRALIA 5001

In Reply
Please quote BMD:M.945c

1st March, 1974

Messrs. Baker, McEwin & Co.,
Solicitors,
45 King William Street,
ADELAIDE. S.A. 5000.

Dear Sirs,

Attention: Mr. Bleby
Re: City of Marion ats Lady Becker

We refer to our previous correspondence and several discussions. As you know we are now acting for the City of Marion.

We have advised our client that Section 45b prevents it from examining the proposal plan submitted by the Director of Planning to our client on 6th November 1970. We advise therefore that our client has resolved that by reasons of the provisions of Section 45b it is prevented from examining the proposal plan and reporting upon it to the Director pursuant to Regulation 7 of the Control of Land Subdivision Regulations.

We have also advised our client that even if Section 45b does not prevent it from examining the proposal plan pursuant to Regulation 7, Section 45b does prevent your client from submitting a final plan of the subdivision. It seems therefore that Section 45b has had the effect of preventing your client from proceeding with her proposal.

Yours faithfully,
FINLAYSON & CO.

This is the document marked "F" referred to in the affidavit of George Patrick Auld produced and shown to him at the time of swearing the said affidavit this 28th day of March 1974.

(Sgd.) D.F. Wicks
.....
Commissioner for Oaths

In the Supreme Court of South Australia

Appellant's Evidence

No.14

Exhibit "G" to the Affidavit of G.P. Auld

11th March 1974

No. 14

EXHIBIT "G" to the Affidavit of G.P. Auld

SOUTH AUSTRALIA
CROWN LAW DEPARTMENT

In Reply Please Quote MLWB:CMJ and address to Crown Solicitor Box 758, G.P.O., Adelaide 5001

33-37 FRANKLIN STREET
ADELAIDE
11th March, 1974

If calling please ask for Mr. Bowering Phone 228 4011

Messrs. Baker, McEwin & Co.,
C.M.L. Building,
45 King William Street,
ADELAIDE, S.A.. 5000.

Attention Mr. Bleby
DJB/28453

Dear Sirs,

re: Becker, Director of Planning and Marion Corporation

I have been instructed by the Director of Planning that, having received certain legal advice from my office, in his opinion, the provisions of Section 45b of the Planning and Development Act are such that he cannot legally accept a final plan in the form proposed by your client.

You are therefore advised that he will not accept a final plan in the form of exhibit A6 or any like form, irrespective of the conformity or otherwise of any conditions included in Letter Form A and irrespective of any consents granted by the Corporation of the City of Marion.

Yours faithfully,
L.K. GORDON
Crown Solicitor

per: M.L.W. Bowering

This is the document marked "G" referred to in the affidavit of George Patrick Auld produced and shown to him at the time of swearing the said affidavit this 28th day of March 1974.

Sgd. D.F. Wicks
.....
Commissioner for Oaths

No. 15

Affidavit of Alexander Douglas McClure

In the Supreme Court of South Australia

Respondent's Evidence

No.15

Affidavit of Alexander Douglas McClure

3rd June 1974

SOUTH AUSTRALIA
IN THE SUPREME COURT

No. 595 of 1974

IN THE MATTER of the SUPREME COURT ACT 1935-1972 and the Rules of the Supreme Court made thereunder

- and -

IN THE MATTER of the PLANNING AND DEVELOPMENT ACT 1966-1973

- and -

IN THE MATTER of the CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (as amended)

- and -

IN THE MATTER of an application for approval of a plan of sub-division made on the 29th day of September 1970

B E T W E E N :

GLADYS SARAH BECKER Plaintiff

- and -

THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING Defendants

I ALEXANDER DOUGLAS McCLURE of 32 Calum Grove, Seacombe Heights in the State of South Australia, Town Clerk, MAKE OATH AND SAY as follows:-

1. I am and at all material times have been the Town Clerk of the Corporation of the City of Marion (hereinafter called "the Corporation").

2. I refer to the affidavit of George Patrick Auld sworn herein on the 28th day of March 1974. I

In the Supreme Court of South Australia

Respondent's Evidence

No.15

Affidavit of Alexander Douglas McClure

3rd June 1974

(continued)

am cognisant of the facts relating to the application for approval to a proposal plan of sub-division of the land referred to in paragraph 4 of the said affidavit.

3. On or about the 6th day of November 1970 the Corporation received at its office a copy of the said proposal plan which plan had been sent by the Director of Planning.

4. The said proposal plan was discussed at a meeting of the By-law and Traffic Committee of the Corporation on the 14th day of December, 1970, which Committee made certain recommendations to the Corporation. The Corporation adopted the said recommendations at a subsequent meeting on the 14th day of December 1970. The document annexed hereto and marked "ADM1" is extracts from the minutes of the said meetings containing the said recommendations.

5. Pursuant to the said resolution I caused the letters now produced and shown to me marked "ADM2" and "ADM3" to be sent respectively to the Director of Planning and to the State Planning Authority.

6. The Corporation has not received a reply to its letter "ADM2".

7. The Corporation has neither approved nor refused approval to the said plan nor has it reported to the Director of Planning pursuant to Regulation 7 of the Control of Land Sub-Division Regulations.

8. The said proposal plan which proposed to divide the land into 145 residential allotments was tendered during the hearing of the appeal in the Planning Appeal Board and marked exhibit "A2".

9. On the 5th day of June 1972 during the hearing of the said appeal the plaintiff tendered an amended proposal plan sub-dividing the said land into 119 residential allotments which plan was marked exhibit "A6". The plan exhibited "A6" has not been sent by the Director of Planning to the Corporation pursuant to the Control of Land Sub-division Regulations.

10. I know the facts deposed to herein of my own knowledge except where otherwise appears.

SWORN at Adelaide by the said ALEXANDER DOUGLAS McCLURE this 3rd day of June 1974.

(Sgd.) A.D.McClure

Before me;

(Sgd.) ?

In the Supreme Court of South Australia

Respondent's Evidence

No.15

Affidavit of Alexander Douglas McClure

3rd June 1974 (continued)

This affidavit is filed by FINLAYSON & CO. of 33 Pirie Street, Adelaide, Solicitors for the Defendant, The Corporation of the City of Marion.

No. 16

No.16

Exhibit "ADM1" to the Affidavit of A.D. McClure

14th December 1970

EXHIBIT "ADM1" to affidavit of A.D.McClure

General Council Minutes 14/12/70

ADOPTION OF COMMITTEE REPORTS(Contd.)

BUILDING - 14/12/70

Moved Alderman Evans Seconded Councillor Ellis that the Building Committee Report of 14th December, 1970 be received and the recommendations contained therein be adopted. CARRIED

BY-LAWS & TRAFFIC - 14/12/70

Moved Alderman Quirke Seconded Alderman Evans that the By-Laws and Traffic Report of 14th December, 1970 be received and the recommendations contained therein be adopted. CARRIED

REPORTS BY OFFICERS

PITMAN & MOBILE LIBRARY REPORT:

(1) Pitman and Mobile Library Services - November - Librarian.

Moved Councillor Hodgson Seconded Councillor Senior that the report be received. CARRIED

ALTERATION TO MODEL BY-LAW III

(2) Alteration to Model By-Law III - Height of Fences, Hedges and Hoardings at Intersections - Town Clerk.

The Town Clerk under date 1st December, 1970 submitted the above mentioned report.

In the Supreme Court of South Australia

Respondent's Evidence

No.16

Exhibit "ADM1" to Affidavit of A.D.McClure

14th December 1970

(continued)

Moved Alderman Grey Seconded Councillor Mead that the suggested By-Law as appearing on page 3 of the Minutes of this Meeting be approved and that it be tabled again before the next meeting of the Council for final making and adopting.

CARRIED

CORRESPONDENCE

Moved Alderman Grey Seconded Alderman Basten that all correspondence be received.

NOMINATION - FIRE BRIGADE'S BOARD: Letter from the Under Secretary, Chief Secretary's Office, Adelaide giving notice that the Fire Brigade's Board, under the Fire Brigades Act, 1936-1958, will be appointed in the month of January, 1971, and that this Council is entitled to nominate a person who must be a member of a council for a seat upon such Board. Nominations to be received before 5 p.m. on 24th January, 1971.

Letter from the Town Clerk of the Corporation of the City of Unley - as follows:

"I have pleasure in advising you that the Unley City Council at its meeting held on the 7th December, 1970, unanimously resolved to nominate Alderman Lawrence Kevin Simon as a candidate for the position of representative of Local Government on the Fire Brigades Board, to fill the vacancy occasioned by the retirement of Mr. J.H. Parkinson.
Alderman Simon, who is the proprietor of Nomis Electronics, was first elected a member of this Council in 1963, representing Goodwood South Ward, and subsequently in 1970 was elected an Alderman. During his unbroken term of office he has been chairman of various Committees of the Council and is currently the Chairman of the Treeplanting and Recreation Grounds Committee.
Alderman Simon, a past President of the Rotary Club of Unley, before his election to the Council took a keen interest in community affairs, an interest which has since strengthened in parallel to his

untiring devotion

In the Supreme Court of South Australia

Respondent's Evidence

No.16

Exhibit "ADM1" to the Affidavit of A.D. McClure

14th December 1970

(continued)

By-Laws Traffic Committee Minutes 14/12/70. Page 18

APPLICATIONS FOR THE ERECTION OF HOARDINGS (Contd.)

Signwriter	Type of Hoarding	Location
	Ward 3	
Steed Signs	Advertising Hoarding	1230 South Road CLOVELLY PARK. Clem Smith Motors Pty.Ltd.

The CHIEF INSPECTOR recommended that the hoardings listed above be approved.

Recommended to Council that the Chief Inspector's recommendation be adopted.

.....

PLANS OF SUBDIVISIONS & RESUBDIVISIONS: SUBDIVISION

PT.SECS. 189,190 & 191 HD. NOARLUNGA: LADY BECKER

Director of Planning - forwarding plan of subdivision, Pt. Secs. 189, 190 and 191 Hd. Noarlunga, Seaview Downs (Fullers Plan 48) - for Lady Becker (S.P.O. Docket No. 1369/69).

Letter from the Director of Planning - as follows:-

"Sub. SEAVIEW DOWNS Hd. Noarlunga Pt. Secs. 189, 190 and 191 for Lady Becker.

With reference to the abovementioned subdivision, you are advised that your Council should be satisfied that road gradients not steeper than 1 in 8 can be achieved whilst still retaining access to allotments not steeper than 1 in 5.

Your Council's views on the following are also requested:

(1) the provision of a walkway between Inspiration Drive, Ridgefield Avenue, Greenfield Road and Fowler Street,

In the Supreme Court of South Australia

Respondent's Evidence

No.16

Exhibit "ADM1" to the Affidavit of A.D. McClure

14th December 1970

(continued)

(2) the desirability of a Reserve adjacent the Reserve between allotments 106 and 107 in L.T.O. Plan 7582.

(3) the suitability of any allotments affected by the watercourse."

The Town Clerk commented that the whole of the land in the subdivision is in an area which is currently proposed as being classified as Hills Face Zone. At this stage, however, the definition of Hills Face Zone is confined to the boundaries appearing as such on the 1962 Metropolitan Development Plan. In this Hills Face Zone 103 allotments of land in the subdivision are either wholly or partly in the Hills Face Zone. The subdivision contains 145 allotments of land with 12 acres and 21 perches (approximately) being set aside as an area for reserves, the total area of the land in the subdivision being approximately 65 acres. From enquiries made at the Planning Office it is believed that public notice of the receipt of this subdivision and the fact that it is receiving consideration has not been given in the press. This is not a legal requirement, but in the past it used to be done.

By-Laws & Traffic Committee Minutes 14/12/70. Page 19

SUBDIVISION:

PT.SECS. 189, 190 & 191 HD. NOARLUNGA LADY BECKER: (CONTD)

The TOWN CLERK recommended that the State Planning Authority be advised that:-

(1) The Council has received a plan of proposed subdivision of Part Section 189, 190 and 191 Hundred of Noarlunga (amended Plan S.P.O. Docket 1369/69) for Lady Becker

(2) The Council believes that 103 allotments of land in the proposed subdivision are either wholly or partly in the Hills Face Zone as set out in the 1962 Metropolitan Development Plan and that the whole of the land in the

subdivision is proposed in Regulations receiving consideration to be shown as Hills Face Zone.

3) No notice has, to the knowledge of the Council, been published that the subdivision is receiving consideration or has objection, if any, been invited to the proposal.

(4) The Council desires the Authority not to approve the plan as the plan does not conform to the purposes, aims and objectives of the Metropolitan Development Plan and in the opinion of the Council it would impair the generally open rural and natural character of the Hills Face Zone in the City of Marion.

The TOWN CLERK further recommended that the State Planning Office be supplied with a copy of the foregoing advice to the Authority and the State Planning Office be asked to advise the subdivider that before further considering the subdivision the Council desires him to give it proof:-

(1) that all roads can be constructed of a gradient not steeper than 12.5%

(2) that access from the proposed roads to adjoining allotments will be at a gradient not steeper than 20%.

At the same time it is recommended that the State Planning Office be requested to inform the subdivider that should the State Planning Authority only approve the subdivision of land on the subdivision which is not included in the Hills Face Zone in the 1962 Metropolitan Development Plan, then the Council would require the road pattern to be amended.

So far as the questions raised by the Director of Planning in his letter are concerned, the Town Clerk recommended that these be deferred for further

In the Supreme Court of South Australia

Respondent's Evidence

No.16

Exhibit "ADM1" to the Affidavit of A.D. McClure

14th December 1970

(continued)

consideration pending further advice from the State Planning Office.

Recommended to Council that the Town Clerk's recommendation be adopted.

No.17

Exhibit "ADM2" to the Affidavit of A.D.McClure

16th December 1970

No. 17

EXHIBIT "ADM2" to the Affidavit of A.D.McClure

CITY OF MARION

670 MARION ROAD
(OR BOX 21, P.O.)
PARK HOLME S.A.5043

Telephone 77 1077
When replying please quote Ref: ADM:EFM

16th December, 1970

Director of Planning,
State Planning Office,
Box 1815N, G.P.O.,
ADELAIDE. S.A. 5001.

Dear Sir,

re: Sub. Seaview Downs Hd. Noarlunga Pt. Secs. 189, 190 and 191 for Lady Becker (Your Ref: 1369/69)

I enclose herewith for your information a copy of a letter which the Council has forwarded to the State Planning Authority in connection with the above subdivision. This letter is, it is considered, self explanatory.

Before further considering the subdivision the Council asks that the subdivider give it proof:

1. That all roads can be constructed of a gradient not steeper than 12.5%

2. That access from the proposed roads to

adjoining allotments will be at a gradient not steeper than 20%.

When writing to the subdivider it is asked that you inform her that should the State Planning Authority approve only the subdivision of land on the subdivision which is not included in the Hills Face Zone in the 1962 Metropolitan Development Plan, the Council would require the road pattern to be amended.

So far as the questions raised by you in your letter of 6th November are concerned, the Council has deferred these for further consideration pending advice from you on the matters raised in this letter.

Yours faithfully,

(Sgd.) A.D. McClure

A.D.McClure
TOWN CLERK

In the Supreme Court of South Australia

Respondent's Evidence

No.17

Exhibit "ADM2" to the Affidavit of A.D.McClure

16th December 1970

(continued)

No. 18

No.18

EXHIBIT "ADM3" to the Affidavit of A.D.McClure

Exhibit "ADM3" to the Affidavit of A.D. McClure

16th December 1970

CITY OF MARION

Telephone 77 1077
When replying please quote Ref. ADM/EFM

670 MARION ROAD
(OR BOX 21, P.O.)
PARK HOLME S.A.5043

16th December, 1970

The Secretary,
State Planning Authority,
Box 1815N, G.P.O.,
ADELAIDE. S.A. 5001.

Dear Sir,

The Council has received from the State Planning Office a plan of proposed subdivision of Pt. Sec. 189, 190 and 191 Hundred of Noarlunga (amended Plan S.P.O. Docket 1369/69) for Lady Becker.

The Council believes that 103 allotments of land in the proposed subdivision are either wholly or partly in the Hills Face Zone as set out in the 1962 Metropolitan Development Plan and that the

In the Supreme Court of South Australia

Respondent's Evidence

No.18

Exhibit "ADM3" to the Affidavit of A.D. McClure

16th December 1970

(continued)

whole of the land in the subdivision is proposed in Regulations receiving consideration to be shown as Hills Face Zone.

No notice has, to the knowledge of the Council, been published that the subdivision is receiving consideration or has objection, if any, been invited to the proposal.

The Council desires the Authority not to approve the plan as the plan does not conform to the purposes, aims and objectives of the Metropolitan Development Plan and in the opinion of the Council it would impair the generally open rural and natural character of the Hills Face Zone in the City of Marion.

Yours faithfully,

(Sgd.) A.D. McClure

A.D. McClure
TOWN CLERK

No.19

Judgment of Hogarth J.

29th August 1974

No. 19

Judgment of Hogarth J

DELIVERED 29 AUG 1974

BECKER v. CORPORATION OF THE CITY OF MARION AND THE DIRECTOR OF PLANNING

No. 595 of 1974

Dates of Hearing: 5th and 6th June 1974

IN THE FULL COURT

Coram: Hogarth A.C.J., Mitchell and Wells JJ.

JUDGMENT of the Honourable Mr. Justice Hogarth

Counsel for the Plaintiff: Mr. F.R.Fisher,Q.C. with him Mr.D.J.Bleby

Solicitors for the Plaintiff: Baker, McEwin & Co.

Counsel for the Defendant City of Marion: Mr. B.M. Debelle

Solicitors for the above: Finlayson & Co.

Counsel for the Defendant Director of Planning: Mr. M.L.W.Bowering

Solicitor for the above: Mr. L.K. Gordon Crown Solicitor

In the Supreme Court of South Australia

No. 19

Judgment of Hogarth J.

29th August 1974

(continued)

BECKER v. CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING

Full Court

Hogarth A.C.J.

In this judgment, unless otherwise appears, all references to the Act are to be taken as references to the Planning and Development Act 1966, as amended from time to time; and all references to regulations, to the Control of Land Subdivision Regulations 1967. The history of the events out of which this application arises is set out in detail in the judgments of the Full Court delivered on the 13th August 1973 in proceedings between the same parties ((1973) 6 S.A.S.R. 13). It may be summarised as follows:

The plaintiff is the registered proprietor of land in the City of Marion (which I will call simply "Marion", which is now part of the proclaimed Hills Face Zone. On the 29th September 1970, having complied with the provisions of regulation 5, she lodged a proposal plan of subdivision of the land with the defendant, the Director of Planning (whom I will call "the Director") for approval pursuant to the provisions of the Act.

On or about the 6th November 1970 the Director forwarded a copy of the proposal plan to Marion in compliance with regulation 6. The proposal plan was discussed at a meeting of Marion's By-law and Traffic Committee on the 14th December 1970, and the Committee made certain recommendations to the Council, including:

(i) a recommendation that the council notify the State Planning Authority that it desired the Authority not to approve the plan as it did not conform to the purposes, aims and objectives of the Metropolitan Development Plan and in

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the opinion of the council could impair the generally open rural and natural character of the Hills Face Zone in Marion; and

(ii) a recommendation that the State Planning Office be asked to tell the plaintiff that should the State Planning Authority approve only the subdivision of the land which was not in the Hills Face Zone in the Metropolitan Development Plan, then the council would require the road pattern to be amended.

Later on the same day (the 14th December 1970) the council adopted the Committee's recommendations.

On the 3rd May 1971 the Deputy Director of Planning wrote a letter to the plaintiff's agents in accordance with regulation 9, stating that as the proposed subdivision lay within the Hills Face Zone it had been submitted to the State Planning Authority which had resolved that the plan did not conform to the purposes, aims and objectives of the Metropolitan Development Plan in certain specified particulars. The Deputy Director went on to say that as a result of this resolution he had refused approval to the application pursuant to sec.42(2). In addition, he said that he had refused approval pursuant to sec.49(f), (g) and (i) and sec.52(1)(e) of the Act. He said further that the proposal plan had been forwarded to Marion on the 6th November 1970 and that Marion had not given a decision on the proposal plan in accordance with regulation 7(1); and that consequently, by virtue of regulation 7(4), it could be deemed that Marion had reported to the Director that it had decided to refuse approval to the proposal plan.

The plaintiff appealed to the Planning Appeal Board against the refusal to grant approval to her plan of subdivision. The Board gave its decision on the 27th July 1972. In the course of the proceedings before the Board the plaintiff's proposal plan had been tendered as an exhibit and marked A2; and in the present proceedings that proposal plan has been referred to by the same exhibit number. Before the Board an amended proposal plan was also tendered. This plan was marked as exhibit A6, and will be so referred to in this judgment. The Board determined that in respect of the appeal against the Director, he should approve a proposal plan "in the form of exhibit A6, or a like form", subject

to certain specified conditions. In the case of the appeal against the imputed decision of Marion the Board also directed Marion to approve a proposal plan in the form in exhibit A6 or a like form subject to certain other conditions.

Marion appealed against the determination of the Board to the Land and Valuation Division of this court; and by order of the 28th February 1973 the appeal was allowed and an order was made, inter alia, that the plaintiff be at liberty to elect within 14 days from the date of the order whether she wished to proceed with her appeal to the Planning Appeal Board on plan exhibit A2.

The plaintiff did not make this election, but by notice dated the 13th March 1973 she appealed to the Full Court. The judgment of the Full Court was delivered on the 13th August 1973, when the court, by a majority, allowed the appeal and declared that no valid appeal had been instituted to the Planning Appeal Board against the respondent Marion. (The formal order of the Court was not drawn up and sealed until the 12th December 1973 after argument on the question of costs). As appears from the reasons for judgment, a majority of the members of the Court were of opinion that the failure by Marion to report to the Director within two months of receipt of the proposal plan (A2) as required by regulation 7 was not to be deemed a refusal by Marion to approve the plan; and that it still remained for Marion to consider and either positively approve or refuse approval to the plan.

On the 19th December 1973 the plaintiff's solicitors wrote to Marion and, having referred to the decision of the Full Court, asked the council to make a decision one way or the other on the question of approval to the proposal plan. On the 1st March 1974 solicitors acting for Marion replied to the plaintiff's solicitors stating that they had advised the council that sec.45b of the Act (by now, 1966-1973) prevented Marion from examining the proposal plan (A2). They said: "We advise therefore that our client has resolved that by reason of the provisions of sec. 45b it is prevented from examining the proposal plan and reporting upon it to the Director pursuant to regulation 7 of the Control of Land Subdivision Regulations". They went on to say that even if

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sec. 45b did not prevent the council from examining the proposal plan, the section did prevent the plaintiff from submitting a final plan of the subdivision. They added: "It seems therefore that sec.45b has had the effect of preventing your client from proceeding with her proposal". On the 11th March 1974 the Crown Solicitor, acting for the Director, wrote to the plaintiff's solicitors stating that in his opinion the provisions of sec. 45b prevented the Director from accepting a final plan in the form proposed by the plaintiff. Thereupon, on the 29th March 1974, the plaintiff's solicitors issued the originating summons in this matter in which she seeks various declarations.

The first declaration sought is that upon the proper interpretation of the Act and the Regulations the plaintiff is entitled to require Marion to examine the proposal plan (A2) and to forward a report thereon to the Director in accordance with the provisions of regulation 7. The second and third declarations sought are as to the rights of the plaintiff upon the proper interpretation of the Act and Regulations in relation to the acceptance of an outer boundary tracing and a final plan, assuming certain events (and in particular, approval by Marion of the proposal plan (A2) and the issue of letter Form A as provided by regulation 9) to have taken place.

The application is brought under Order 54A rule 2 which provides, in sub-rule (1), that where any person claims to be entitled to any right, and the question whether he is so entitled depends upon the proper interpretation of any statute or of any regulations, by-law, or rule made or purporting to be made under any statute, or upon the validity of any such regulations, by-law, or rule, such person may apply by originating summons for the determination of such question, and for a declaration as to the right claimed. I think that the plaintiff clearly has the right to claim a declaration with regard to the interpretation of the statute in relation to her present claim to be entitled to have her proposal plan (A2) examined and either approved or disapproved by Marion; but that she is not presently entitled to any of the other relief sought in her summons. Upon her interpretation of the statute she will become entitled to such relief only if certain conditions are fulfilled, and they may never be fulfilled. In relation to those

questions therefore I do not think that she is a person who at the present time can be said to be "entitled to any right" which depends upon the proper interpretation of the Act or the Regulations. I shall proceed to consider the interpretation of the statute in relation to her present claim to have Marion examine and rule upon her proposal plan (A2).

The difficulties which face the plaintiff arise from the enactment in 1972 of sec.45b which provides, by sub-sec.(1), that no plan shall be "lodged or deposited with or accepted by the Director or a council" in respect of land within the Hills Face Zone, if the frontages and the areas of the proposed allotments are not of or above minimum specifications set out in the section; and the frontages and areas of the allotments shown in the plaintiff's proposal plan (A2) (and for that matter, in plan A6), do not comply with these minimum requirements. Sect.45b was inserted in the principal Act by the Amending Act No. 133 of 1972 which took effect on receiving the Royal assent on the 1st December 1972; that is to say, after the plaintiff had first submitted her proposal plan (A2) to the Director; after he had forwarded it to Marion as required by the Regulations; after Marion had been deemed to have reported to him that it had refused its approval to the plan pursuant to regulation 7; and after the appeal to and the decision of the Planning Appeal Board.

The first problem is to determine the scope of the prohibition contained in sec.45b. And in limine, this involves a consideration of the sort of plan which is referred to in the section. To answer the first question asked in the summons, it is enough to determine whether the prohibition in the section includes a proposal plan of subdivision, irrespective of whether or not it includes other plans. I have no doubt that it does include a proposal plan. It would be absurd for the procedure to contemplate a proposal plan being "accepted" considered and possibly approved, and then for the final plan embodying that approval to be rejected as not complying with the requirements of sec. 45b. Indeed I see no reason to restrict the word "plan" as used in the section to any particular sort of plan. In cases where a proposal plan of subdivision is first lodged after the section was enacted, and it does not fulfil the requirements of the section,

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there will be no occasion for the prohibition to relate to anything after the proposal plan, because, ex hypothesi, the procedure will never get beyond that stage. Where a proposal plan was "accepted" before the section was enacted, but a final plan is still to be submitted, different questions arise to which I will refer later.

Prima facie, a prohibition of this nature speaks for the future and relates to future events. Such a section cannot undo what has been done, although it can alter the effect of what was done. It cannot effectively prohibit the lodging, depositing or accepting of a plan which had already taken place when it was enacted; but it could, if appropriately framed, alter the effect of a previous lodging, depositing or acceptance of a plan. Insofar as the original proposal plan (A2) is concerned, it had long been lodged, or deposited, by the plaintiff with the Director, and a copy of it forwarded by the Director to the council, before the prohibition contained in sec.45b took effect. Our problem therefore, it seems, is to answer the following questions:

1. Had Marion "accepted" the proposal plan, A2, within the meaning of sec.45b before the prohibition contained in the section came into effect?

2. If so, did the enactment of sec.45b alter the effect of that acceptance?

3. If not, has the plaintiff a right either at common law or under sec.16 of the Acts Interpretation Act 1915-1972 to have the plan considered on the basis of the law as it existed prior to the enactment of sec.45b?

The answer to the first question depends upon the proper interpretation of the word "accepted" in the section. At first sight it would appear that the lodging, depositing, or acceptance of a plan means the physical delivery and receipt of the plan by the Director or the council. The words "lodged" and "deposited" in my opinion relate to the physical act or lodging and depositing a plan. At first sight the word "accepted" would seem to relate to the same act when viewed from the position of the receiver - the Director or the council as the case may be. But there are

difficulties in the way of this interpretation. In the first place, a person who lodges or deposits a plan presumably knows whether the land concerned is within the Hills Face Zone, and if so whether the frontages and areas of the allotments comply with the requirements of sec.45b. He already knows, therefore, whether he is prohibited from lodging or depositing the plan. But this does not apply to the receiver of the plan. He cannot know the contents of the plan until he has received it. Consequently, it seems to me that where the section says that it shall not be "accepted" by him, the word "accepted" must relate to some act on the part of the Director, or the council, after the Director or the council as the case may be has had an opportunity of satisfying himself, or itself, as to the contents of the plan.

Furthermore, sec.45b was enacted after the Regulations had come into force; and in the absence of any indication to the contrary in the amending act, it is to be assumed that the provisions of that section were intended by Parliament to fit into the existing general scheme of procedure laid down by the principal Act and the Regulations. And that scheme does not envisage a lodging or depositing of a proposal plan by the subdivider himself with the council. An applicant for approval to a plan of subdivision is required by regulation 5 to submit his application, with the proposal plan and a specified number of copies, to the Director; and under regulation 6 it is the Director, and not the applicant, who forwards a copy of the proposal plan to the council. So, the prohibition in sec.45b against the acceptance of such a plan by a council must relate to some event after the plan has been received by the Director, who is forbidden to "accept" it. This also leads to the conclusion that the physical receipt of a plan by the Director is something different from the acceptance of the plan by him.

Acceptance, therefore, does not simply mean the physical act of receipt. What does it mean? In sec.45(1) the requirement to be complied with before a plan of subdivision is deposited with or accepted by the Registrar-General of Deeds is that the plan shall have been "approved" by the Director and the council concerned. The words "approve" or "approval" are used in sec.26, 45a(2) and (3), 49, 50, 50a, 51, 52 and 54 of the Act; and of these

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provisims secs.45a and 50a were enacted by the same amending act as was sec.45b. The difference in language suggests strongly that Parliament intended a meaning different from "approved" when it used the word "accepted" in that section; presumably, something less than approval.

The Regulations provide a detailed procedure to be followed where either the Director or a council refuses approval of a proposal plan, or approves it outright or subject to conditions. On approval of a proposal plan, either unconditionally or subject to conditions, it is provided by regulation 12 that the applicant shall, before submitting a final plan, submit an outer boundary tracing to the Director; and by sub-regulation (2) provision is made for the outer boundary tracing to be considered by the Registrar-General and for him to report to the Director upon the accuracy and adequacy of the survey disclosed. The sub-regulation goes on to provide: "the Director may, after a consideration of the report, notify the applicant in writing that he refuses to accept or that he accepts the final plan for consideration". The regulations which follow regulation 12 make provisions for the submission of a final plan to the Director, and for the Director to examine it and, if he is of opinion that it does not differ materially from the approved proposal plan, to forward it to the Registrar-General for examination; after the Registrar-General has satisfied himself as to the adequacy of the plan, for him to return it to the Director with a notification to that effect; but if the Director is not so satisfied he is to notify the applicant accordingly, and he is prohibited from proceeding further under the Regulations until the plan has been amended or corrected to the satisfaction of the Registrar-General. After the council has informed the Director that the final plan meets with its requirements, and if the Director is satisfied that the conditions (if any) subject to which approval was given have been complied with, he is required to certify his approval to the final plan. From a consideration of the Regulations as a whole, and regulation 21 in particular, I have come to the conclusion that it is this certification of approval which is to constitute approval within the meaning of sec.45(1).

It will be seen from the foregoing that the

acceptance of the outer boundary tracing by the Director or his refusal to accept it is at a stage after he has received it, and after it has been considered by the Registrar-General, but before the Director receives the final plan. If he signifies his assent it is a notification that he "accepts the final plan for consideration". Although the present tense is used, clearly it relates to an event in the future because sub-regulation(1) of regulation 12 makes it mandatory for the applicant to provide the outer boundary tracing "before submitting a final plan". But the regulations subsequent to regulation 12 make it clear that his intimation that he "accepts" the final plan for consideration is not the same thing as his certification of his approval of the final plan which takes place later.

I realise fully that, in general, an Act is not to be interpreted by regulations made under it; but in the present case we have existing regulations, and an addition to the principal Act made with the knowledge imputed to Parliament of what is contained in those regulations; and with a word used in the amending Act which accords with a usage of the same word in the Regulations. In the absence of any indication to the contrary, therefore, I am of opinion that the word "accepted" in sec.45b means at least an acceptance for consideration, as in regulation 12(2). If the plan is received, but on examination is found not to comply with the requirements of the section, there is no need for the question of its approval to be considered further. It is to be rejected out of hand, and not accepted for further consideration. But if it complies with the section, the question whether it is to be approved arises for consideration; and once this situation is reached I think the plan must be regarded as having been accepted. On this interpretation, the mere physical receipt of a plan does not constitute its acceptance within sec.45b. A person who lodges or deposits a plan in contravention of sec.45b will normally find that the Director will refuse to accept it for consideration. In such a case the Director himself is prohibited from lodging or depositing the plan with the council; but, perhaps ex abundanti cautela, the Act provides also for the council not to accept such a plan. It may be that there would be a border-line case in which the Director is of opinion that the plan complies with

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the requirements as to frontages and area of sec. 45b, and consequently forwards the proposal plan to the council, but in that case the council still has a duty of refusing to accept it for consideration if it is of opinion that it does not comply in any of these respects with sec.45b.

But what of a plan already accepted for consideration but not yet approved?

The purpose of sec.45b is clear enough. It is to place a ban on the subdivision of land within the Hills Face Zone unless the requirements of the section are met. In the ordinary case a proposal to subdivide land otherwise than in accordance with the requirements of the section will be blocked by the prohibition against the lodging or depositing of the plan. If that prohibition is ignored, the proposal will be blocked by the prohibition against the plan's being "accepted". In the ordinary case arising after the section was enacted, this means that the plan will not get beyond the "acceptance for consideration" stage. Bearing in mind the general purpose of sec.45b, it is arguable that the word "accepted" is to be interpreted broadly enough to include the granting of approval to a plan which has already been accepted for consideration; so that unless the requirements of the section are met, sec.45b prohibits both the acceptance of a plan for consideration, and its approval if it has been so accepted. But this interpretation leaves unanswered the question, why did Parliament choose the words which we find in sec.45b, instead of simply prohibiting the approval of a plan which does not comply with the requirements of the section? Had it done so, a preliminary examination would have disclosed that such a plan could not be approved, and, as now, a detailed consideration would not be required.

In the result, I have come to the conclusion that the words used in sec.45b were chosen deliberately with the object of not preventing approval being given to a plan which had already been lodged or deposited with the Director or a council when the section came into force, and which had already been accepted for consideration. The section was directed against the initiation after its enactment of the procedure to obtain approval to a plan, but not against the granting of approval to a plan where the procedure had already been instituted.

As I have said, Marion received the plan on or about the 7th November 1970. By the 14th December 1970 it had been examined by the Town Clerk and the By-laws and Traffic Committee, and recommendations of that Committee with reference to the plan had been adopted by the council. There was then no requirement that the council should satisfy itself as to the locality of the subdivision or the frontages or areas of the allotments, as later required by sec.45b. But it seems to me that the council did proceed to a stage where it had embarked upon its consideration of the plan, even to the extent of making representations upon it to the State Planning Authority. In so doing I think Marion "accepted"the plan within the meaning of that word as used in sec.45b; and of course this was before it was prohibited from doing so by the enactment of that section.

In my opinion the prohibition in sec.45b relates to future events; and Marion having already "accepted" the proposal plan (A2) within the meaning of the section, the case does not fall within the prohibition of that section so far as the proposal plan itself is concerned. The first question which we are asked to determine in effect is whether the plaintiff is entitled to have the plan considered. In my opinion, on a proper interpretation of sec.45b, the answer to that question is "Yes". This, however, relates to the proposal plan, exhibit A2. It may be that plan A6 also reached the stage of being "accepted" by Marion after the decision of the Planning Appeal Board before sec.45b came into force. But so far as the information before us goes, the development of plan A2 into the plan in the form of exhibit A6 has not been submitted to the council for consideration, and no question has arisen before us as to the "acceptance" of plan A6 by the council. If plan A6 has not been accepted by Marion then even if Marion were to go ahead with the consideration of plan A2 and approve it, this would not necessarily solve the plaintiff's problems; since the Director's approval is to the amended plan A6, and not to the original plan A2. It seems to me that, somehow or other, the plaintiff must get the approval of both Marion and the Director to the same plan, that is the approval of both either to A2 or to A6.

I do not see how the second and third questions

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asked in the summons can arise until this state of affairs has come about if indeed it ever does come about. But it may help the parties to know what my views are on the matters raised in these questions. As to the second question, I do not think that an outer boundary tracing is a plan within the meaning of the Act and Regulations in general, and of sec.45b in particular. I think that a final plan is within the section. But I think that "plan" means any representation of the same design, even though as between themselves different representations may vary in such matters as scale, lettering and the like. In the scheme of the Regulations, it appears that a design represented by a proposal plan is the same "plan" when it is in the form of a final plan, provided that the design of the latter "does not differ materially" from that of the proposal plan (reg.15); and notwithstanding that the proposal plan is to be on paper and prepared in accordance with the requirements of regs. 34 to 39, while the final plan is to be on tracing cloth, and prepared in accordance with the requirements of regs. 46 to 55. And so, assuming as I do that sec.45b was designed to fit into the scheme already established by the principal Act and the Regulations, and reading the word "plan" in the section 45b as meaning a design, I think that that design probably needs acceptance under the section once only. Consequently, if it has been accepted in the form of a proposal plan, it needs no further acceptance when it reappears in the form of a final plan, always provided that it is the same design.

I would adjourn consideration of the second and third questions raised for our determination until the plaintiff is in a position to claim an unqualified right to have those questions answered, if, indeed, she ever achieves that situation.

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Judgment of Mitchell & Wells JJ.

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Judgment of Mitchell and Wells JJ.

29th August 1974

DELIVERED 29 AUG 1974

BECKER v. THE CORPORATION OF THE CITY OF MARION & THE DIRECTOR OF PLANNING

No. 595 of 1974

Dates of Hearing: 5th and 6th June 1974

IN THE FULL COURT

Coram: Hogarth A.C.J., Mitchell and Wells JJ.

J U D G M E N T of the Honourable Justice Mitchell and the Honourable Mr.Justice Wells

Counsel for the Plaintiff:	Mr. F.R. Fisher Q.C. with Mr. D.J. Bleby
Solicitors for the Plaintiff:	Baker McEwin & Co.
Counsel for the Defendant Marion Corporation:	Mr. D.M. Debelle
Solicitors for the Defendant Marion Corporation	Finlayson & Co.
Counsel for the Defendant The Director of Planning	Mr. M.L. Bowering
Solicitor for the Defendant The Director of Planning	Mr. L.K. Gordon Crown Solicitor

Judgment No. 2088

BECKER v. THE CORPORATION OF THE CITY OF MARION & THE DIRECTOR OF PLANNING

Full Court

Mitchell & Wells JJ.

The plaintiff wishes to subdivide certain land consisting of over 67 acres within the Corporation of the City of Marion (hereinafter called "the Corporation") of which she is registered proprietor. On the 29th September 1970 she lodged with the Director of Planning for approval pursuant to the provisions of the Planning and Development Act 1966-1973 a proposal plan of the subdivision of the land.

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(continued)

Having received a letter from the Deputy Director of Planning informing her that he had refused approval to the plan she appealed to the Appeal Planning Board which directed the Director of Planning and the Corporation each to approve the proposal plan subject to certain conditions in the case of each approval. The Corporation appealed to the Land & Valuation Division of this Court and the appeal was allowed, but on a further appeal to the Full Court it was ordered that the determination of the Planning Appeal Board should be upheld as between the appellant on the one hand and the Director of Planning and the State Planning Authority on the other hand. It was further held that no valid appeal to the Planning Appeal Board had been instituted by the Corporation. After the appeal to the Land & Valuation Division had been heard, but before judgment was delivered by Wells J., an amendment to the Planning & Development Act had been passed and proclaimed to come into operation. That amendment included section 45b which, in so far as it is relevant to the present proceedings, provides

> "1. No plans shall be lodged or deposited with or accepted by the Director or a council if it purports to create an allotment -
>
> (a) that has no frontage to a public road of 100 metres or more;
>
> (b) that has an area of less than four hectares,
>
> where that allotment or part thereof lies within the prescribed locality known as the Hills Face Zone.

The appeal to the Full Court did not encompass any consideration of the effect, if any, of that amendment upon the plaintiff's intended subdivision. It is admitted that the land which the plaintiff wishes to subdivide lies within the Hills Face Zone, that none of the allotments has a frontage to a public road of 100 metres or more, and that each of the allotments has an area of less than four hectares.

The plaintiff has applied by originating summons under Order 54 A rule 2 of the rules made

under the Supreme Court Act 1935-1972 for a declaration as to her rights which, she claims, depend upon the proper interpretation of the Planning & Development Act and in particular section 45b thereof. The originating summons was referred to the Full Court upon the application of the plaintiff and with the consent of the defendants. The court should not, under this rule, make any declaration as to rights where there is no indication that anyone proposes to act in derogation of the rights claimed (In re Carnarvon Harbour Acts: Thomas v. Attorney-General 1937 Ch. 72). The plaintiff can obtain a declaration only if she can show that a legal or equitable right claimed by her depends upon the question of construction and she may not, under this procedure, have determined the question whether something has been validly done under the provisions of the statute Rigden v. Whitstable Urban District Council 1958 2 All E.R. 730. The court may be more ready to determine a question raised under this rule where all parties request it to do so Bagettes Limited v. G.P.Estates 1956 Ch. 290 at 298; Taylor (formerly Kraupel) v. National Assistance Board 1956 P.470 at 495. In this matter there is some doubt as to how far the questions asked can properly be brought within the ambit of Order 54A rule 2. All counsel have asked us to deal with the first question, and Mr.Debelle has submitted that an answer to that question should render it unnecessary for the court to consider the second and third questions. We proceed therefore to a consideration of question one.

First it is necessary to decide what is meant by the word "plan" in section 45b. That word is defined in section 5 as including, unless the context otherwise requires, plan of subdivision and plan of resubdivision. In turn "plan of resubdivision" and "plan of subdivision" are defined. Nowhere in the Act are the expressions "proposal plan" or "final plan" to be found. These words are defined in regulation 3 of the regulations made under the Act under which "final plan" means a plan of subdivision made in conformity with Part II, for the purpose of being deposited in the Lands Titles Registration Office, and "proposal plan" means a plan made, in pursuance of Part II and in conformity with Part III, for the purpose of showing the design of a proposed subdivision. In City of Marion v. Becker (1973) 6 S.A.S.A. 13 the court held that, by virtue of section 3(2)(a) and (c) of the Act

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(continued)

which validated regulations made under previous legislation repealed by the Act the legislature gave statutory recognition to the proposal plan and the final plan which were introduced under the regulations so validated. Bray C.J. and Hogarth J. each held that the word "plan" in the Act may, according to its context, mean both proposal plan and final plan or one or the other. Zelling J. expressed some doubt whether the word "plan" wherever it appeared in the Act necessarily meant final plan. The court did not have to consider the meaning of the word "plan" in section 45b. Under the regulations the proposal plan is to be submitted to the Director of Planning who, if he is satisfied that the same complies with Part III of the regulations, must forward a copy thereof to each of certain persons or bodies including the council or councils in whose area the land is situated (regulations 5 and 6). The plan is to be examined by the council and each of the persons or authorities to whom it is sent, and a report is to be sent by each to the Director within two months. If the Council has not reported to the Director it is deemed to have reported that it has decided to refuse approval (regulation 7). Where the council and the Director have approved the plan the applicant is to be notified in writing, and if the approval is subject to any conditions he is to be notified accordingly in a form which is referred to as Letter Form A (regulation 9). Before a final plan is submitted the applicant must submit to the Registrar-General of Deeds an outer boundary tracing (regulation 12). After the outer boundary tracing has been accepted the applicant may submit to the Director a final plan for deposit (regulation 13). He must then forward to the Registrar-General of Deeds the certificate or certificates of title together with an application for the issue of new certificates of title for each allotment in the final plan (regulation 14). The Director is required to examine the final plan and if, in his opinion, it does not differ materially from the proposal plan as approved and incorporates any alterations required as conditions, he is to forward the final plan to the Registrar-General of Deeds for examination, and a copy thereof to the council or councils in whose area the land is situated and to each of the persons or authorities who had to receive the proposal plan (regulation 15). The council's concern with the final plan is to ascertain that it meets with its

requirements and to inform the Director accordingly (regulation 17). When the Director is satisfied that all conditions specified in the Letter Form A and all other requirements of the Act and Regulations have been complied with he certifies his approval and the date of the approval on the final plan, forwards it to the Registrar-General of Deeds and forwards a copy thereof to the council (regulations 18 and 20).

It seems clear that section 45b must apply to a proposal plan. The purpose of the section is to limit the use by subdivision or re-subdivision of the Hills Face Zone to allotments of not less than a prescribed size and with not less than the prescribed frontage to a public road. That being so, any proposed subdivision or re-subdivision which would result in allotments of less than the prescribed size and frontage should be halted before the applicant has taken time and incurred expense to bring the plan to its final form.

We find it impossible to attribute any different meaning to the word "lodged" as opposed to the expression "deposited with" appearing in section 45b. The Oxford dictionary gives the one as a synonym for the other in the sense in which they are used in this section. The regulations, which were in force prior to the amendment and in the light of which the amendment was drawn, require the applicant to "submit" to the Director the proposal plan. He is not required to lodge or deposit anything with the council, but the Director is required to forward a copy of the proposal plan to the council after he has satisfied himself that the plan complies with the numerous requirements of Part III. The words "lodged or deposited with" must, in our opinion, cover both the submission of the plan by the applicant to the Director and the forwarding of a copy thereof by the Director to the council. The use of the words "accepted by" creates more difficulty. Those words are used in section 45 in relation to the depositing of a plan of subdivision or a plan of re-subdivision in the Lands Titles Office, and neither such plan is to be accepted by the Registrar-General unless certain conditions relating to approval have already been complied with. The verb "to accept" is used in regulation 12(2) in relation to the outer boundary tracing under which the Director, upon receipt of a report from the Registrar-General of Deeds, may notify

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(continued)

the applicant that he refuses to accept or that he accepts the final plan for consideration. We do not think that the word "accepted" in section 45b can be read as synonymous with the word "approved". The latter word is used in various sections in the Act, and it appears in section 45a which was enacted in the same section of the Amending Act in which section 45b appears. The council's obligation with regard to the proposal plan forwarded to it by the Director is to examine it and to forward a report to the Director within two months stating whether the council has decided to approve or to refuse approval to the proposal plan or to approve the proposal plan subject to conditions specified in the report (regulation 7(1) and (2)). We do not think that the word "accepted" in section 45b refers to that stage of the council's report. On the other hand it cannot mean simply "received" in the sense of "received for consideration". According to our reading of it section 45b, by implication, contemplates that there must, at least, be such a degree of scrutiny of the plan as will reveal whether it offends or complies with paragraphs (a) and (b) of section 45b and that scrutiny is necessarily undertaken at a stage that falls short of "accept(ance)". In our opinion, it emphasises what we apprehend to be the true position that before a council can be said to "accept" a plan, the council must have subjected the plan to such appraisals, made such enquiries, and received such information as will, without more, enable it to embark on a final consideration of its merits and demerits as a plan - that is, as the presentation of a project in town planning for the purpose of exercising its discretion to approve or not to approve.

It thus becomes necessary to look at what had been done in relation to the plaintiff's application. On the 6th November 1970 the Corporation received from the Director of Planning a copy of the proposal plan. This plan was discussed at a meeting of the By-law and Traffic Committee of the Corporation on the 17th December 1970. The committee made a recommendation to the Council which was adopted by the Council on the same day. The recommendation reads as follows:-

> "The TOWN CLERK recommended that the State Planning Authority be advised that:-
>
> (1) The Council has received a plan of

proposed subdivision of Part Section 189, 190 and 191 Hundred of Noarlunga (amended Plan S.P.O. Docket 1369/69) for Lady Becker.

(2) The Council believes that 103 allotments of land in the proposed subdivision are either wholly or partly in the Hills Face Zone as set out in the 1962 Metropolitan Development Plan and that the whole of the land in the subdivision is proposed in Regulations receiving consideration to be shown as Hills Face Zone.

(3) No notice has, to the knowledge of the Council, been published that the subdivision is receiving consideration or has objection, if any, been invited to the proposal.

(4) The Council desires the Authority not to approve the plan as the plan does not conform to the purposes, aims and objectives of the Metropolitan Development Plan and in the opinion of the Council it would impair the generally open rural and natural character of the Hills Face Zone in the City of Marion.

The TOWN CLERK further recommended that the State Planning Office be supplied with a copy of the foregoing advice to the Authority and the State Planning Office be asked to advise the subdivider that before further considering the subdivision the Council desires him to give it proof:-

(1) that all roads can be constructed of a gradient not steeper than 12.5%

(2) that access from the proposed roads to adjoining allotments will be at a gradient not steeper than 20%.

At the same time is (sic) is recommended that the State Planning Office be requested to inform the subdivider that should the State Planning Authority only approve the subdivision of land on the subdivision which is not included in the Hills Face Zone in the 1962 Metropolitan Development Plan, then the

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Council would require the road pattern to be amended.

So far as the questions raised by the Director of Planning in his letter are concerned, the Town Clerk recommended that these be deferred for further consideration pending further advice from the State Planning Office.

Recommended to Council that the Town Clerk's recommendation be adopted."

As we read that recommendation the council was doing two things:

(i) requesting the Authority, on its own initiative, to adopt a particular view of the plan before the Authority; and

(ii) seeking further information from the subdivider for its own purposes, having regard to its own responsibilities.

It follows that, in our opinion, the council had not entered upon the task of deciding whether to approve or disapprove. A consideration of the exercise of its discretion with all relevant material before it had not begun. Upon the facts before us, therefore, we are of the opinion that the plan had not been "accepted" in the sense in which section 45b uses that word. The council has done nothing since the 14th December 1970 in relation to acceptance of the plan.

Mr. Fisher submitted that the word "plan" in section 45a could mean only a proposal plan, whereas Mr. Debelle and Mr. Bowering submitted that it included both a proposal plan and a final plan in relation to a plan of subdivision, and Mr. Bowering submitted that it must include a plan of re-subdivision and that the regulations in relation to a plan of re-subdivision provide only for a plan and possibly an amended plan but not for a proposal plan and a final plan. In the view which we take upon the matter it is probably unnecessary to decide whether the word "plan" in section 45b includes a final plan. In relation to any proposal plan which was not submitted before the amendment the question is unlikely to arise. It is difficult to imagine that a proposal plan which did not comply with section 45b would pass

all the examinations which have to be made under Part III of the regulations and be forwarded to the Council and to the other persons and authorities to whom it has to be forwarded if it was a plan in breach of section 45b. It is almost certain that any breach of that section would be detected at the stage of the proposal plan. But commonsense dictates that if the legislature intended to prohibit the depositing or acceptance of a plan which did not comply with section 45b it would prohibit it both at the stage of the proposal plan and of the final plan and in relation to a plan of resubdivision. Further it appears to us that, even standing alone, Mr. Bowering's argument is decisive. It could not be - it was not - contended that the word "plan" did not encompass a plan of re-subdivision, and it is obvious, from a consideration of the regulations confirmed by the Act and those in force when the Amending Act that introduced section 45b was passed, that it is not contemplated that a proposal plan will form part of the regular procedure for re-subdivision. The regulations concerning re-subdivision do permit a procedure in accordance with which a plan similar to a proposal plan may be submitted, but it is clear that they are enabling only and not mandatory.

Mr. Fisher contended that in any event the plaintiff had a right, which had accrued to her prior to the amendment of the Act by the insertion of section 45b, to require the Council to approve or to refuse approval to the proposal plan and that right could not be affected by legislation subsequent to the receipt of the plan by the Council. We were referred by counsel to the decisions R v. Registrar of Titles ex parte John Wolbers Constructions Pty. Ltd. 1973 V.R. 723; Robertson v. City of Nunawading 1973 V.R. 819 and Mekol Pty. Ltd. v. Baulkham Hills S.C. 1971 2 N.S.W.L.R. 54. In all cases the court considered whether the plaintiff had a "right accrued" within the meaning of the appropriate Act relating to the interpretation of statutes. Section 7(2) of the Acts Interpretation Act 1958 (Vic) which was considered in both the Victorian cases applies to an act which repeals or amends any other enactment, and provides that unless the contrary intention appears the repeal or amendment shall not affect any right accrued under the enactment so repealed or amended. Section 16(1) of the Acts Interpretation Act 1915-1972 does not refer to the amendment of an Act. It

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is only the repeal or expiry of an Act which is stated not to affect accrued rights. The enactment of section 45b did not render inapplicable any section of the Act under which the plaintiff's application was made, nor did it impliedly repeal any section of the Act by reducing its ambit. It did put a limitation upon the type of allotment in relation to which approval of a plan of subdivision or re-subdivision could be sought. In Mathieson v. Burton 124 C.L.R. 1 the question was as to the applicability of an amending section of the New South Wales Landlord & Tenant (Amendment) Act upon rights accrued prior to the enactment of the amendment. The court considered the effect of section 8 of the Interpretation of 1897 (N.S.W.) which, in so far as is material, is in similar form to section 16 of the South Australian Act. In that case the amendment to the Landlord & Tenant (Amendment) Act caused certain words to be omitted from the section amended and substituted other words, so that the class of persons given protection in the occupancy of premises under the earlier section was varied. Windeyer J. in discussing section 8 of the Interpretation Act, said of the difference between that section and section 7(2) of the Acts Interpretation Act 1958 of Victoria:-

> "This difference of verbiage is interesting, but in my opinion is not significant. It cannot, I think, be invoked to support a notion that section 8 of the New South Wales Interpretation Act and section 8 of the Acts Interpretation Act 1901-1966 (Cth) - which are in the same terms - apply only to express repeals and not to implied appeals resulting from amedments. For some purposes it may sometimes be relevant to distinguish between a repeal and an amendment, or a modification, as the latter is sometimes called. But an amendment which permanently reduces the ambit of any of the provisions of an Act involves a repeal of it in part. That is because after the amendment the statute no longer operates as it formerly did: and the only way by which a statute which has come into operation can cease to operate is by repeal express or implied; or by its expiry in case of a temporary statute; or by something that was made a condition of its continued operation coming to an end. An Act that excludes from

> the operation of a former Act some matter formerly within its purview does repeal pro tanto, that is to say 'in part'. Provisions of a later Act which are inconsistent and irreconcilable with the provisions of a former Act dealing with the same subject matter are thus an implied repeal of them ..... what counts in determining whether an enactment involves a repeal of earlier legislation is the substantial effect it produces, not the linguistic method by which it produces it." (pp.10-11)

Gibbs J. however distinguished between repeal and amendment and, after discussing the English authorities, said:-

> "I am unable to agree that a section to which words are added and which remains in force in its amendment form can rightly be said to be repealed." (p.22)

It seems to us even more difficult to hold that the passing of section 45b amounted to a repeal of any part of the Planning & Development Act so as to bring into operation section 16 of the Acts Interpretation Act. But we respectfully adopt the reasoning of Gibbs J. in Mathieson v. Burton that it matters little that the Acts Interpretation Act does not apply because, if the plaintiff had an existing right, then at common law an operation is not to be given to the statute which will impair such a right in the absence of language which expressly requires such an interpretation (p.22). In the present case Mr. Fisher contended that the plaintiff had an existing right to have her application for subdivision considered. He expressed it that the application was "in the pipe-line", that the legislation had not affected anything "in the pipe-line", and that the plaintiff had a right to require the Corporation to approve or refuse the application so that the planning process could continue. It is a well established principle that the presumption against the retrospective operation of legislation, whether amending or principal, does not extend to legislation that varies the course of procedure required to be followed for the attainment of positive legal rights. The principle has been expressed in various ways depending on the circumstances, but in no case of which we are aware has it been

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expressed to govern the sort of case now before us. Whatever "rights" the plaintiff may have "against" the State Planning Authority, she has none against the Council, and this fatal defect in the plaintiff's claim to be excluded from the operation of section 45b cannot, in our opinion, be made good by purporting to characterize the procedure for obtaining the Letter Form A as a single procedure comprising several stages, represented by the responsibilities and discretions of as many authorities, the successful achievement of any one of which confers a right - or a more strongly entrenched right. The council, as a separate independent authority, has yet to accept, consider and approve the proposal plan, and without the approval the plaintiff has no right; at most she has a spes.

In our opinion the plaintiff is not entitled to the declaration sought in paragraph 1 of the summons. It becomes unnecessary to consider the further declarations sought.

No.21

Order of Full Court Refusing Plaintiff's application

29th August 1974

No. 21

ORDER OF FULL COURT refusing Plaintiff's Application

SOUTH AUSTRALIA
IN THE SUPREME COURT
No. 595 of 1974

IN THE MATTER of the SUPREME COURT ACT 1935-1972 and the Rules of the Supreme Court made thereunder

- and -

IN THE MATTER of the PLANNING AND DEVELOPMENT ACT 1966-1973

- and -

IN THE MATTER of the CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (as amended)

- and -

In the Supreme Court of South Australia

No.21

Order of Full Court Refusing Plaintiff's application

29th August 1974

(continued)

IN THE MATTER of an application for approval of a plan of subdivision made on the 29th day of September 1970

B E T W E E N :

GLADYS SARAH BECKER Plaintiff

- and -

THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING Defendants

BEFORE THE HONOURABLE THE ACTING CHIEF JUSTICE (MR. JUSTICE HOGARTH) THE HONOURABLE JUSTICE MITCHELL AND THE HONOURABLE MR. JUSTICE WELLS

THURSDAY THE 29TH DAY OF AUGUST 1974

UPON THE APPLICATION of the abovenamed plaintiff by originating summons dated the 29th day of March 1974 coming on for hearing on the 5th and 6th days of June 1974 UPON READING the affidavit of George Patrick Auld filed herein on the 29th day of March 1974 the affidavit of Alexander Douglas McClure filed herein on the 3rd day of June 1974 and the order of the Honourable Justice Mitchell made on the 10th day of April 1974 AND UPON HEARING Mr. Fisher Q.C. and Mr. Bleby of counsel for the plaintiff Mr. Debelle of counsel for the defendant The Corporation of the City of Marion (hereinafter called "the Corporation") and Mr. Bowering of counsel for the respondent The Director of Planning (hereinafter called "the Director") THE COURT DID RESERVE JUDGMENT and the same standing for judgment this day THIS COURT by a majority DOTH ORDER AND DECLARE as follows:-

1. That upon the proper interpretation of the Planning and Development Act 1967 (as amended) (hereinafter called "the Act") and the Control of Land Subdivision Regulations 1967 (as amended) (hereinafter called "the Regulations") the plaintiff is not entitled to require the Corporation to examine the plaintiff's proposal plan of subdivision lodged with the Director on the 29th day of September 1970 and to forward a report thereon to the Director in accordance with the provisions of Regulation 7

In the Supreme Court of South Australia

No.21

Order of Full Court Refusing Plaintiff's Application

29th August 1974

(continued)

of the Regulations.

2. That the costs of the defendants of and incidental to this application be taxed and paid by the plaintiff.

AND no order is made with respect to the further relief claimed by the plaintiff namely:

1. A declaration that upon the proper interpretation of the Act and the Regulations and subject to the issue of letter Form A in respect of the said proposal plan in accordance with the provisions of the Regulations -

   (a) The Plaintiff is entitled to submit to the Director an outer boundary tracing pursuant to Regulation 12 of the Regulations;

   (b) The plaintiff is entitled to require the Director to comply with the provisions of Regulation 12(2) of the Regulations in respect of the said outer boundary tracing;

   (c) The Director is not entitled to notify the plaintiff pursuant to Regulation 12(2) of the Regulations that he refuses to accept the plaintiff's final plan for consideration on the ground that he is precluded from doing so under the provisions of section 45b of the Act.

2. A declaration that upon the proper interpretation of the Act and the Regulations and subject to -

   (i) the issue of letter Form A in respect of the said proposal plan in accordance with the provisions of the Regulations,

   (ii) compliance by the plaintiff with any conditions contained in the said letter Form A,

   (iii) compliance by the plaintiff with all other the provisions of the Act and the Regulations in respect of the said application,

(iv) the Director not having been notified pursuant to Regulation 68 of the Regulations that the whole or any part of the land included in the proposal plan is to be compulsorily acquired,

(v) the plaintiff being notified pursuant to Regulation 12 of the Regulations that the Director accepts the final plan for consideration, and

(vi) the acceptance referred to in Regulation 13 of the Regulations of the plaintiff's outer boundary tracing -

(a) The plaintiff is entitled to submit to the Director a final plan pursuant to Regulation 13 of the Regulations;

(b) The plaintiff is entitled to require the Director to examine the final plan and otherwise comply with the Regulations in respect thereof;

(c) The plaintiff is entitled to require the Corporation to examine the final plan and (if the final plan meets the requirements of the Corporation) to inform the Director that the final plan meets the requirements of the Council.

The above costs of the defendant The Corporation of the City of Marion have been taxed and allowed at $ as appears by the Taxing Officer's Certificate dated the day of 19 .

The above costs of the defendant The Director of Planning have been taxed and allowed at $ as appears by the Taxing Officer's Certificate dated the day of 19 .

BY THE COURT

(Sgd.) M. Teesdale Smith

DEPUTY MASTER

THIS ORDER is filed by BAKER McEWIN & CO. of C.M.L. Building, 41-49 King William Street, Adelaide, Solicitors for the Plaintiff.

In the Supreme Court of South Australia

No.22

Notice of Motion for leave to appeal as amended the 10th December 1974 pursuant to leave of Full Court

18th September 1974

No. 22

Notice of Motion for Leave to Appeal

SOUTH AUSTRALIA
IN THE SUPREME COURT
No. 595 of 1974

IN THE MATTER of the SUPREME COURT ACT 1935-1972 and the Rules of the Supreme Court made thereunder

- and -

IN THE MATTER of the PLANNING AND DEVELOPMENT ACT 1966-1973

- and -

IN THE MATTER of the CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (as amended)

- and -

IN THE MATTER of an application for approval of a plan of subdivision made on the 29th day of September 1970

B E T W E E N :

GLADYS SARAH BECKER Plaintiff

- and -

THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING Defendants

TAKE NOTICE that the Full Court will be moved on Monday the 7th day of October 1974 at 10.30 o'clock in the fore-noon or so soon thereafter as counsel can be heard by counsel on behalf of the above-named plaintiff for an order:

1. That pursuant to Rule 2 of the Order in Council made on the 15th day of February 1909 the plaintiff be granted leave to appeal on such conditions as the Court shall impose to Her Majesty in Council from the judgment of

the Full Court comprising the Honourable the Acting Chief Justice (Mr. Justice Hogarth), the Honourable Justice Mitchell and the Honourable Mr. Justice Wells, given and pronounced in this matter on the 29th day of August 1974 whereby the Full Court by a majority ordered and declared that the above-named plaintiff is not entitled to ~~any of~~ the first declarations sought in her Originating Summons herein dated the 29th day of March 1974 and made certain orders as to costs and made no order with respect to the second and third declarations sought therein.

2. That upon proof of the compliance by the plaintiff with such conditions as the Court shall impose the plaintiff be granted final leave to appeal to Her Majesty in Council from the aforesaid judgment.

3. For such further order as the Court may seem just.

DATED the 18th day of September 1974

per M.F. Martin

Baker McEwin & Co.

C.M.L. Building,
41-49 King William Street,
ADELAIDE.

Solicitors for the Plaintiff.

To: The Corporation of the City of Marion
C/- Messrs. Finlayson & Co.,
33 Pirie Street,
ADELAIDE

And to: The Director of Planning,
C/- L.K. Gordon Esq.,
33 Franklin Street,
ADELAIDE

THIS NOTICE OF MOTION is given by BAKER McEWIN & CO. of C.M.L. Building, 41-49 King William Street, Adelaide, Solicitors for the plaintiff.

In the Supreme Court of South Australia

Appellant's Evidence

No.23

Affidavit of George Patrick Auld

25th September 1974

No. 23

Affidavit of George Patrick Auld

SOUTH AUSTRALIA
IN THE SUPREME COURT
No. 595 of 1974

IN THE MATTER of the SUPREME COURT ACT 1935-1972 and the Rules of the Supreme Court made thereunder

- and -

IN THE MATTER of the PLANNING AND DEVELOPMENT ACT 1966-1973

- and -

IN THE MATTER of the CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (as amended)

- and -

IN THE MATTER of an application for approval of a plan of subdivision made on the 29th day of September 1970

B E T W E E N :

GLADYS SARAH BECKER Plaintiff

- and -

THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING Defendants

I GEORGE PATRICK AULD of 116 Stanley Street North Adelaide in the State of South Australia Company Director MAKE OATH AND SAY as follows:

1. I am the lawful attorney in the State of South Australia for the abovenamed plaintiff and I am authorised to make this affidavit on the plaintiff's behalf.

2. On behalf of the abovenamed plaintiff I instructed the plaintiff's solicitors to file

the Notice of Motion to the Full Court in this matter filed on the 18th day of September 1974 seeking leave to appeal to Her Majesty in Council from the judgment of the Full Court given in this matter on the 29th day of August 1974.

3. The plaintiff seeks leave of this Honourable Court to appeal against the refusal of the Full Court to grant the declarations sought in paragraphs 1, 2 and 3 of the originating summons in these proceedings and against the order for costs made herein.

4. The said judgment of the Full Court prevents the plaintiff from proceeding with an application for approval to subdivide and sell in allotments of less than four hectares in area an area of land in excess of 26 hectares of which the plaintiff is the registered proprietor. The value of the said land is in excess of £500 sterling and I am advised that the said judgment is a final judgment of the Court.

5. The proposed appeal of the plaintiff involves directly or indirectly a question respecting property of the value of £500 sterling or upwards.

6. I am a licensed valuer in and for the State of South Australia and I am of the opinion that the difference in value of the said land to the plaintiff if it is able to be subdivided and sold as aforesaid and if it is not is of the order of $250,000.

7. I am aware of at least three other areas of land in the same locality as that of the plaintiff in respect of which the registered proprietors have made application for approval for subdivision thereof into allotments of less than four hectares. All such applications are the subject of proceedings in the Planning Appeal Board of the State of South Australia which proceedings have been adjourned pending the outcome of the plaintiff's original application in these proceedings. I am informed by the respective registered proprietors concerned that the success or failure of their respective applications depends either entirely or in part upon the outcome of these proceedings.

In the Supreme Court of South Australia

Appellant's Evidence

No.23

Affidavit of George Patrick Auld

25th September 1974

(continued)

8. The said areas of land are as follows:-

(a) An area of approximately 240 acres near Flagstaff Hill in the said State of which the registered proprietor is Reservoir Grazing Co. Pty. Limited of 53a Grenfell Street Adelaide. I am of the opinion that the difference in value of that land if it is able to be sub-divided and sold in the manner sought and if it is not is of the order of $840,000.

(b) An area of approximately 87.5 acres at O'Halloran Hill in the said State of which the registered proprietor is J.A. Sheidow Pty. Ltd. of 68 Greenhill Road Wayville in the said State. I am of the opinion that the differences in value of that land if it is able to be subdivided and sold in the manner sought and if it is not is of the order of $300,000.

(c) An area of approximately 56 acres at O'Halloran Hill aforesaid of which the registered proprietor is the said J.A. Sheidow Pty. Ltd. I am of the opinion that the difference in value of that land if it is able to be subdivided and sold in the manner sought and if it is not is of the order of $200,000.

9. The plaintiff's said land and the three areas of land mentioned in paragraph 7 of this my affidavit are all situated in the Hills Face Zone referred to in section 45b of the Planning and Development Act 1966-1972.

10. There has for the past three years been much public debate and discussion relating to sub-division of land in the Hills Face Zone and relating to the plaintiff's application for approval for subdivision in particular. Such debate has taken the form of articles published in daily newspapers circulating in Adelaide and correspondence in such newspapers. The proceedings to which the plaintiff has been a party relating to her application for approval to subdivide the said land on appeal to the Planning Appeal Board, and on further appeal to the Land and Valuation Division of

this Honourable Court and on further appeal to the Full Court and the plaintiff's application in these proceedings have all been widely reported in such newspapers as a matter of public interest.

11. I respectfully submit that the proper interpretation of the Planning and Development Act 1966-1972 as it affects the applications for approval for subdivision mentioned in this my affidavit and the plaintiff's application in particular has proved of great difficulty and has revealed differences of opinion between the Judges of this Honourable Court.

12. For the reasons mentioned in paragraphs 6 to 11 inclusive of this my affidavit I respectfully submit that the questions involved in the plaintiff's proposed appeal are ones which by reason of their great general or public importance or otherwise ought to be submitted to Her Majesty in Council for decision.

13. I know the facts deposed to herein of my own knowledge except where otherwise appears.

SWORN at Adelaide aforesaid by the said GEORGE PATRICK AULD this 25th day of September 1974 before me:) (Sgd.) G. P. Auld

?

THIS AFFIDAVIT is filed by BAKER McEWIN & CO. of C.M.L. Building, 41-49 King William Street, Adelaide, Solicitors for the Plaintiff.

In the Supreme Court of South Australia

No.24

Judgment of Hogarth J.

23rd December 1974

No. 24

Judgment of Hogarth J.

DELIVERED 23rd December 1974

BECKER v. THE CORPORATION OF THE CITY OF MARION AND THE DIRECTOR OF PLANNING

No. 595 of 1974

Dates of Hearing: 22nd October, 9th and 10th December 1974

IN THE FULL COURT

Coram: Hogarth, Mitchell and Wells JJ.

JUDGMENT of the Honourable Mr. Justice Hogarth
(Application for leave to appeal to Her Majesty in Council from the judgment of the Full Court)

Counsel for the Applicant:	Mr. F.R.Fisher, Q.C. with Mr.N.W. Martin
Solicitors for the Applicant:	Baker, McEwin & Co.
Counsel for the Defendant City of Marion:	Mr. B.M. Debelle
Solicitors for the above:	Finlayson & Co.
Counsel for the Defendant Director of Planning:	Mr. M.L.W. Bowering
Solicitor for the above:	L.K. Gordon, Esq. Crown Solicitor

Judgment No. 2301

BECKER v. THE CORPORATION OF THE CITY OF MARION AND THE DIRECTOR OF PLANNING

No. 595 of 1974

Full Court

Hogarth J.

This is an application for leave to appeal to the Privy Council against the judment of this court

delivered on the 29th August 1974. In that judgment the court ordered and declared

"1. That upon the proper interpretation of the Planning and Development Act 1967 (as amended) .... and the Control of Land Subdivision Regulations 1967 (as amended) ... the plaintiff is not entitled to require the Corporation to examine the plaintiff's proposal plan of subdivision lodged with the Director on the 29th day of September 1970 and to forward a report thereon to the Director in accordance with the provisions of Regulation 7 of the Regulations.

2. That the costs of the defendants of and incidental to this application be taxed and paid by the plaintiff."

The Corporation and the Director mentioned in paragraph 1 of the judgment are the two defendants. I will refer to the first defendant as "Marion", and the second defendant as "the Director". The facts are set out in the reasons for judgment already given, and I will not repeat them.

In her originating summons the plaintiff sought three separate declarations under Order 54a rule 2 as to her rights, upon the proper interpretation of the legislation - the Planning and Development Act 1967 (as amended) and the Control of Land Subdivision Regulations 1967 (as amended). She first sought a declaration that she has a present right to require Marion to examine her proposal plan of subdivision, lodged with the Director on the 29th September 1972 - the plan referred to as plan A2 - and to report thereon in accordance with regulation 7. This question was answered by a majority adversely to the plaintiff, and from that decision she now seeks leave to appeal.

Leave to appeal is sought pursuant to rule 2 of an Order in Council of the 15th February 1909, regulating appeals from this court to the Judicial Committee of the Privy Council. Rule 2 reads:

"Subject to the provisions of these Rules, an Appeal shall lie -

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(continued)

(a) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and

(b) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision."

Although a reading of the rule would suggest that leave is not necessary in the case of a judgment which falls within paragraph (a), the practice and procedure of this court and of other courts from which appeals to the Judicial Committee are regulated by identical or practically identical provisions has been for an application for leave to be sought from the court whose judgment is impugned. If the court is satisfied that the judgment is one falling within the terms of paragraph (a), leave is granted as a matter of course. If the case falls within the terms of paragraph (b), the case is one for the exercise of the discretion of the court. First, then, is the judgment of this court a final judgment within rule 2?

In addition to seeking a declaration on the topic which was answered the plaintiff also sought declarations first as to her right to submit an outer boundary tracing under regulation 12, and secondly a final plan under regulation 13; but in each of these latter two cases the declaration was sought only on the assumption that various events which have not yet occurred, and which may never occur, would have occurred before she became entitled to the rights which she sought to establish. In the case of the outerboundary tracing, the declaration sought was that "upon the proper interpretation of the Act and regulations and subject to the issue of letter Form A (my

underlining) in respect of the said proposal plan", she was entitled to submit her outer boundary tracing. Letter Form A could not issue until the proposal plan had been "accepted" by Marion within the meaning of sec.45b, and considered and approved by it. The declaration in respect of the lodging of the final plan was also sought, subject to the prior issue of the letter Form A and of compliance by the plaintiff with any conditions stated in it; and on the assumption that certain other events would have occurred. No member of the court thought it appropriate to answer the second and third questions; in the case of the majority, because on their answer to question 1, the conditions postulated for the answering of the second and third questions could never be satisfied; in my case, because even though I would have answered the first question in favour of the plaintiff, the conditions postulated for the answering of the second and third questions had not occurred and might never occur. In my view she is not a person therefore who is entitled to have those questions answered under Order 54a, at least until all conditions precedent have been satisfied. Referring to the former English Order 54a - the counterpart of our own order - Warrington J. (as he then was) said in Lewis v. Green (1905) 2 Ch.340 at 343:

> "In the first place, the order is confined to questions of construction. Of course, in a sense, every question of construction may involve some question of fact. It may be a question about which there is no dispute, but in order to raise any question of construction some facts must be proved or admitted. But for all that the order is confined to enabling the court to decide questions of construction and nothing else."

The facts proved or admitted should be such as to give the plaintiff a present entitlement to the relief sought, assuming the construction to be that for which she argues. It is not sufficient that it is proved that in the future certain facts may occur which, if they occur, would give the plaintiff that relief. In my opinion, therefore, the only question which was properly before the court was the first question.

It is true, as Mr. Debelle argued for Marion,

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an answer favourable to the plaintiff on that question would not have been the end to all questions arising between her and Marion and the Director. A favourable answer would not have established her right to have the necessary approvals to the subdivision of her land which she seeks. It would have merely established that she had the right to have her original plan, A2, considered by Marion for possible approval under the provisions of sec.45 of the Planning and Development Act. But for the purpose of these proceedings, I think that the order of the court was final. It finally determined the question whether or not the plaintiff was entitled to have her plan considered by Marion. That was the lis; and that was finally determined adversely to her. Whichever way the decision went, it was a final decision as between the parties. I think therefore that the judgment is a final judgment.

But it is only final judgments of certain types which come within the terms of paragraph (a) of rule 2. They are: "Where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards". The latter part of the sub-rule might be formulated as follows:

"1. Where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards; or

2. where the Appeal involves, directly or indirectly,

(a) some claim to or question respecting property, or

(b) some civil right

amounting to or of the value of £500 sterling or upwards."

I have no doubt that the final phrase "amounting to or of the value of £500 sterling or upwards" qualifies both parts of the second limb.

It was not suggested that the proposed appeal

fell within the first limb. Mr. Fisher argued, however, that it fell within the first part of the second, in that the property, that is to say the land sought to be subdivided, was of a value well in excess of £500 sterling; in the region of a quarter of a million dollars. Some argument was directed to the question whether the value of £500 sterling or upwards related to the claim or question, or to the property in respect of which the claim or question arose. In Meghji Lakhamsh Iron Bros. v. Furniture Workshop (1954) 1 All E.R. 273, Lord Tucker in delivering the advice of the Privy Council said (p.274): "... on the true construction, it is the value of the property, not the value of the claim or question, which is the determining factor. The presence of the word 'indirectly' seems to require this construction." But these remarks must be read in the context of the claim which was before the court; namely a claim by landlords for possession of a plot of land which had been let by them to the respondents. It was established that the capital value of the land exceeded £500 but the respondents contended that the true test was how much it was worth to the landlords to succeed in the appeal; and that this was to be measured by deducting from the value of the land with vacant possession its value to the landlords subject to a statutory tenancy to which they were entitled. This case was considered, along with others, by Kitto J. in Ballas v. Theophilos (No.1) (1957) 97 C.L.R. 186 at 197. His Honour said: "The principle laid down is not simply that if the matter or property to be valued has a special value for the appellant, that is the value to be considered. Its primary meaning, in relation to Privy Council Appeals, is that in order to decide what matter or property is to be valued you consider from the appellant's point of view what is in dispute on the appeal; ...." In Ebert v. The Union Trustee Co. of Australia Ltd. (1957) 98 C.L.R. 172 the court considered the analogous provisions of sec.35(1)(a)(ii) of the Judiciary Act 1903-1955 which provides that an appeal may be brought, inter alia, if it involves directly or indirectly "any claim, demand or question of or respecting any property or any civil right amounting to or of the value of £1,500". In delivering the judgment of the court Dixon C.J. said (at p.175): "It still remains generally true that the plaintiff must show prejudice through the order made which sounds in the required sum of money."

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The present proposed appeal does not involve, either directly or indirectly, any claim to property of the value of £500 sterling or upwards. Had it done so, Meghji's Case would be in point. But does it involve, directly or indirectly some question respecting property of that value? I do not think that it does. The question asked does not relate to the property. It relates to an entitlement to have a proposed plan of subdivision of the property considered by Marion. I do not think that this is a question which relates to the property, within the meaning of the rule. In New Zealand Insurance Co. Ltd. v. Commissioner of Stamp Duties (1954) N.Z.L.R. 1011, F.B. Adams J. (with whose judgment Barrowclough C.J. and Hutchison J. agreed) said (p.1024): "In my opinion the word 'indirectly' must be understood reasonably, and there must be a limit to the distance one may travel from the actual point of controversy in search of something which may be described as 'property' in regard to which a claim or question has arisen indirectly. Meghji Lakhamsh's Case ..... is not, I think, authority for the view that remote matters may be taken into account."

Does the judgment relate to some civil right amounting to £500 or upwards? The question which was answered related to the right of Lady Becker to have a plan considered. If she was entitled to have the plan considered, Marion might have approved it or disapproved it. It might have approved it subject to conditions. It might have been the subject of an appeal to the Planning Appeal Board. The plan might have emerged from these proceedings either in its original form (which does not conform with the plan which the Director was directed to approve, plan A6) or in some other form which differs from plan A6, or it might have been rejected outright. It was conceded by the Director, but not by Marion, that the value of Lady Becker's land if approved for subdivision would exceed its value as broadacres by more than £500 sterling. Neither Marion nor the Director, however, conceded that a favourable answer to Lady Becker's first question alone was to be quantified as being of that amount. I agree. I do not think that any value could be put upon a favourable answer to that question. If the question had been answered favourably, then depending on events which might occur in the future, the value of that favourable answer to

the plaintiff might well be nil. It is not for this court to lay the odds, and to say that, with so much involved, the chance of a favourable answer on this question is to have some notional value attributed to it. I do not think that any value can be attributed to her claim to the civil right which would fall within the second part of the second limb of paragraph (a). I think therefore that the judgment, although a final judgment, does not fall within the terms of rule 2(a).

It remains to be considered whether leave should be given in the discretion of the court under paragraph (b). That is, should leave be given because the question is one which by reason of its "great, general or public importance, or otherwise" or to be submitted to Her Majesty in Council for decision.

On the evidence before us, there is no other person in the position of the plaintiff in this case; and it would seem that a favourable answer to the plaintiff would not be of assistance to any other litigant. I do not think that we can be satisfied that the question involved is of great, general or public importance. In coming to this conclusion, I think that a court must have some regard to the extent to which a favourable answer to the question would have been likely to have helped the plaintiff. If a favourable answer would certainly, or most probably, have permitted her to go ahead with her subdivision then I think that the question is one which might "otherwise" have been regarded as fit for consideration by the Judicial Committee. But as I have said it is far from clear that a favourable answer would have availed her in the long run. Indeed, I tend to the view that her success on question 1 would have been a barren victory. Even success to the extent of having plan A 2 not only considered but approved by Marion would not have given her the one plan approved by both necessary bodies, Marion and the Director. Marion would have approved A2, and the Director A6; and I cannot see how these separate approvals to different forms of the plan could have been of any assistance to her.

For these reasons, in my opinion, the court should not exercise its discretion under paragraph (b) to give leave to appeal. In my view the motion should be refused.

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No.25

Judgment of Mitchell J.

23rd December 1974

No. 25

Judgment of Mitchell J.

DELIVERED 23rd December 1974

BECKER v. THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING

No. 595 of 1974

Dates of Hearing: 22nd October, 9th & 10th December 1974

IN THE FULL COURT

Coram: Hogarth, Mitchell and Wells JJ.

JUDGMENT of the Honourable Justice Mitchell

Counsel for the Applicant:	Mr. F.R. Fisher, Q.C. with Mr. N.W. Martin
Solicitors for the Applicant:	Baker McEwin & Co.
Counsel for Corporation of the City of Marion:	Mr. B.M. Debelle
Solicitors for Corporation of the City of Marion:	Finlayson & Co.
Counsel for the Director of Planning:	Mr. M.L.W. Bowering
Solicitor for the Director of Planning:	Mr. L.K. Gordon Crown Solicitor

Judgment No. 2302

BECKER v. THE CORPORATION OF THE CITY OF MARION & THE DIRECTOR OF PLANNING

Full Court

Mitchell J.

This is a motion for leave to appeal to Her Majesty in Council from the judgment of the Full Court given in a matter instituted by originating summons under Order 54A Rule 2 of the Rules of Court. In that matter the plaintiff applied for declarations as to rights which she claimed to have

upon a proper interpretation of the Planning and Development Act 1967 as amended and the Control of Land Subdivision Regulations 1967 as amended. In the result the court by a majority declared that, on a proper interpretation of the Act and Regulations, the plaintiff was not entitled to the first right claimed by her, and the court made no order with respect to the other declarations sought by the plaintiff. During the hearing of the motion for leave to appeal we were informed by counsel for the plaintiff that the application related only to the order that the plaintiff is not entitled to the first of the declarations sought in the originating summons.

The application is made pursuant to the Order in Council made the 15th February 1909. Rule 2 reads:-

> "Subject to the provisions of these Rules, an Appeal shall lie -
>
> (a) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and
>
> (b) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court, the question involved in the Appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision."

Rule 5 provides that leave to appeal under Rule 2 may be granted only upon conditions as to security for the prosecution of the appeal and for payment of costs and upon such other conditions relating to the preparation of the record for the dispatch to England as the Court may think it reasonable to impose.

Mr. Fisher's first contention was that the appeal lay under Rule 2(a) and accordingly that all

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that this court was required to do was to impose conditions under Rule 5. Alternatively he submitted that if the judgment appealed from was not one to which Rule 2(a) relates, leave should be granted under Rule 2(b).

The first question is whether the intended appeal is from a final judgment. The word "judgment" is defined in Rule 1 as including "decree, order, sentence or decision." In Tampion v. Anderson 48 A.L.J.R. 11, on the hearing of petitions for special leave to appeal to the Privy Council, their Lordships discussed the distinction between final and interlocutory judgments and said:

> "It was submitted, and their Lordships would be inclined to agree, that the authorities are not in an altogether satisfactory state. There is a continuing controversy whether the broad test of finality in a judgment depends on the effect of the order made, as decided in Bozson v. Altrincham U.D.C. 1903 1 K.B. 547 per Lord Alverstone C.J. at p.548, or on the application being of such a character that whatever order had been made thereon must finally dispose of the matter in dispute - Salaman v. Warner 891 1 Q.B. 734."

Mr. Debelle submitted that we should follow the reasoning in Salaman v. Warner and find that a judgment is final only if the decision, whichever way it had been given, would finally dispose of the rights of the parties, and submitted that this was not the position in the present case because, had the first question been answered in the affirmative, Lady Becker would have had to take steps further to establish her rights. Mr. Bowering supported Mr. Debelle's argument, and submitted further that, as questions 2 and 3 in the originating summons had not been answered by the court, it was impossible to say that a final decision had been given. Mr. Fisher was content to accept the test laid down in Salaman v. Warner, but submitted that the only rights with which the court was concerned were the rights claimed in the originating summons; that whichever way the answer to question 1 had been given the rights of the parties on that point would have been finally determined; and that as far as questions 2 and 3 were concerned they were separate questions which could have been the subject of separate proceedings.

In my view this argument is correct. Within its narrow confines the answer to that question, whichever way it went, necessarily determined the rights of the parties sought to be determined in paragraph 1 of the originating summons.

The next hurdle facing the plaintiff was as to the value of £500 which is a pre-requisite to a right of appeal under Rule 2(a). In Oertel v.Crocker (1947) 75 C.L.R. 261 at 271 Dixon J. referred to the difficulty of construing grammatically the provisions of section 35(a)(2) of the Judiciary Act 1903 as amended, which concerns an appeal from a judgment which "involves directly or indirectly any claim, demand, or question to or respecting any property or civil right amounting to or of the value of £300." Dixon J. said at 271:-

> "In the first place, I agree that grammatically the words 'amounting to or of the value of' are attached to and qualify the words 'any property or civil right' which they immediately follow and not the words 'claim demand or question'. The latter are too far back in the sentence as well as being inappropriate. The second thing that may be conceded is that the word 'respecting' is attached to the words 'claim' and 'demand'. It may be that in the expression 'claim demand or question to or respecting' the word 'to' cannot be attached to 'question'. You can hardly speak of 'any question to any property'. But it does not follow that correspondingly the word 'respecting' is attached only to 'question' and not to 'claim', 'demand'. But, conceding so much, I think that the claim or demand must itself relate to a civil right or legal property of the required value before it can fall within the true meaning of the expression 'claim demand or question to or respecting any property or any civil right amounting to or of the value of £300' as used in the sub paragraph. The principle of a provision limiting the right of appeal by reference to the amount involved must go to the prejudice measured in money suffered by parties adversely affected by the judgment."

Mr. Fisher contended first, that wherever there was a final judgment in a question respecting property which was itself of the value of £500 sterling or upwards then the appeal lay as of right. He argued that this was the effect of the

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opinion of the Privy Council in Meghji Lakhamshi & Brothers v. Furniture Workshop 1954 1 A.E.R.273. That was a matter in which an appeal was brought by landlords against an order of the Court of Appeal of Eastern Africa dismissing an application for possession of land and buildings. Leave to appeal had been granted on affidavits to the effect that the capital value of the land exceeded £500. The respondents took the preliminary point that the true test was how much it was worth to the landlords to succeed in the appeal and that this was to be measured by deducting from the value of the land with vacant possession its value to the landlords subject to the statutory tenancy. The Privy Council rejected this argument. At p.274 appears the following passage:-

> "Whatever the result might be in the present appeal if the words 'where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards' stood alone, their Lordships are of opinion that the case falls within the latter part of the article which deals with 'some claim or question to or respecting property .... of the said value or upwards', and that, on the true construction, it is the value of the property, not the value of the claim or question, which is the determining factor. The presence of the word 'indirectly' seems to require this construction. Looked at from the angle of the landlords the value of the property, vacant possession of which they were claiming, was correctly taken on a capital value basis. It by no means necessarily follows that the result would have been the same if the tenants had been appellants ....." (emphasis supplied)

If that part of the judgment which I have underlined stood alone it would seem to give support for the construction claimed by Mr. Fisher. But it is clear from what succeeds it that it is not merely because there is a question respecting property of the value of £500 or over that the appeal lies of right. If that were so then the appeal would lie as of right whether it were the landlord or the tenant who sought to appeal from a judgment affecting that property. (see further the discussion of Meghji's case by Kitto J. in Ballas v. Theophilos (No.1) (1957) 97 C.L.R.186 at 197-199).

Mr. Fisher's alternative argument was that the appeal lay as of right because it involved at least indirectly a question respecting property of the value of £500 sterling. But if as, in my view, the cases establish, it is the claim or question or the civil right which must be of the value of £500 sterling then the appeal must involve either directly or indirectly some such claim, question or civil right. In this case the question to which an answer was sought in the originating summons had no money value. If it had been answered in the affirmative Lady Becker may or may not have been able to proceed to ask the court to consider other questions, depending upon the answers to which again she may or may not have been able to proceed to get some tribunal to consider a claim relating to subdivision of land, which subdivision it is conceded would have been worth considerably more than £500 sterling. The question answered by this court did not either directly or indirectly involve a claim or question to or respecting property or a civil right upon which any value could be placed. In my view the appeal does not fall within Rule 2(a).

Mr. Fisher submitted further that if the court were of the opinion that an appeal did not lie under Rule 2(a) it should nevertheless grant leave to appeal under Rule 2(b). In the affidavit in support of the application it was stated that there were at least three other areas of land in the same locality as that of the plaintiff in respect of which applications had been made to the Planning Appeal Board of South Australia and had been adjourned pending the outcome of the plaintiff's application which was the subject of the judgment of the Full Court from which leave to appeal is sought. It was stated further that the success or failure of those applications depends either entirely or in part on the outcome of Lady Becker's proceedings. This does not of itself make the question involved in the appeal one which has great general or public importance, nor is there any other reason for saying that the question has these attributes. The judgments upon the construction of statutes in which special leave to appeal was given by the Privy Council and which were relied upon by Mr. Fisher, namely In re the Attorney General for Victoria 1866 L.R. 1 P.C. 147 and Brown v McLaughan 1873 L.R. 3 P.C. 458, were both cases in which the construction of the relevant statute would affect the rights

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of many people. In this case Mr. Fisher has been able to point to only three people in addition to the plaintiff whose rights may possibly have been affected by the decision of the Full Court of South Australia.

Finally Mr. Fisher placed emphasis upon the words "or otherwise" in Rule 2(b). He referred to two New South Wales cases in which leave to appeal was granted under Rule 2(b) namely Vincent v. The Commissioner for Road Transport and Railways (1935) 52 W.N.N.S.W. 202 and Clyne v. East (No.2) (1966) 86 W.N.N.S.W. 61. In the first case leave was granted. Although the matter was not one of general importance it was regarded as of public importance, because the appeal involved the obligations of a public body in relation to the payment of large sums of money, and the decision would affect persons other than the immediate litigants. It seems to me that the situation in that case was far removed from that in the present. In the second case the court relied partly upon the fact that it had not been shown that there was any real doubt about the accuracy of the decision against which leave to appeal was sought. In the present case Hogarth J. was of the opinion that the question should have been answered in a way favourably to the plaintiff. Nevertheless, for the reasons which he has given, he does not find that the matter is one in which leave to appeal should be granted. I am partly influenced by this fact in agreeing with him that leave should not be granted under Rule 2(b).

I would refuse leave to appeal.

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Judgment of Wells J.

No. 26

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BECKER v. THE CORPORATION OF THE CITY OF MARION AND THE DIRECTOR OF PLANNING

No. 595 of 1974

Dates of Hearing: 22nd October, 9th and 10th December 1974

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IN THE FULL COURT

Coram: Hogarth, Mitchell and Wells JJ.

J U D G M E N T of the Honourable Mr. Justice Wells

(Application for leave to appeal to Her Majesty in Council from the judgment of the Full Court)

Counsel for the Applicant:	Mr. F.R. Fisher, Q.C. with Mr. N.W. Martin
Solicitors for the Applicant:	Baker, McEwin & Co.
Counsel for the Defendant City of Marion:	Mr. B.M. Debelle
Solicitors for the above:	Finlayson & Co.
Counsel for the Defendant Director of Planning	Mr. M.L.W. Bowering
Solicitor for the above:	L.K. Gordon, Esq. Crown Solicitor

Judgment No. 2303

GLADYS SARAH BECKER v. THE CORPORATION OF THE CITY OF MARION AND THE DIRECTOR OF PLANNING

Full Court

Wells J.

The circumstances in which Lady Becker's application has come before this Full Court have been described in the Judgment of Hogarth J.

The first question is whether the judgment sought to be appealed from is a final judgment. My colleagues are of the opinion that it is. I find, myself, with all respect, not entirely convinced of the correctness of that view; the relief obtained by a prayer for a declaration - the "new-found Haliday" of today's legal world - possesses a character sui generis; historically, it was an ill-begotten intruder upon the legitimate line of English juridical procedure, and its true nature and final implications have yet to be

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adequately explored. So far it has succeeded in disrupting the prerogative procedures, and their orderly and balanced development, and further untoward repercussions are no doubt in store. If the judgment obtained upon the prayer for relief in this case is held to be a final judgment, the imprimatur of this Court's approval will perhaps have been given to a litigant's attempting, by resort to a series of summonses for declarations, to resolve piecemeal a single set of outstanding issues; the adoption of such a course will tend to delay indirectly the final composure of differences.

It is, however, unnecessary to come to a definite decision on that question because, even if it is assumed - as I propose to assume - that the judgment is a final judgment, paragraph (a) of Rule 2 cannot, in my opinion, govern the application before us, because other requirements of that paragraph bar the way.

Rule 2 provides:

"2. Subject to the provisions of these Rules, an Appeal shall lie -

(a) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and

(b) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision."

Mr. Fisher Q.C. for the applicant strove heroically but, in my judgment, unsuccessfully to uphold a construction of paragraph (a) that would make the value of the property - in this case, the value of

the subject-land, alternatively the difference between the value of the subject land as broadacres and its value when subdivided - the amount that is to exceed £500 sterling. As the value of the subject land, on either construction, plainly exceeded £500 it followed (so it was put) that Lady Becker had an appeal as of right. The construction contended for would have this Court treat the final passage "amounting to or of the value of £500" as qualifying the word "property" alone, and not the whole expression "some claim or question to or respecting property". With all respect, that construction, in my judgment, is repugnant both to syntax and to common sense.

It may be conceded that the draftsman made the elementary error of including, in paragraph (a) of Rule 2, an ambiguous modifier (for further and better particulars, see "The Complete Plain Words" by Sir Ernest Gowers, pages 165 to 172, and "Elements of Drafting" 1st Edn., by E.L. Piesse, pages 13 to 15): the passage "amounting to or of the value of £500 sterling or upwards" is placed at the end of the sentence, and accordingly it is difficult, at first reading, to be sure whether the passage qualifies the single word "property" or the whole expression in which it appears.

Mr. Fisher, not unnaturally, adopted the approach of the conventional grammarian, that the qualifying phrase affects only the appropriate word or expression that is nearest to it. But that is no more than a very general rule and must yield to a contrary intention appearing from the context. A careful analysis of the structure and the language of the paragraph reveals conclusively, to my mind, that the concluding passage qualifies the whole expression and not the single word "property". Paragraph (a) permits an appeal as of right to Her Majesty in Council if the intending appellant can bring himself within one or more of three criteria. There can be no doubt that the first and the third of those criteria is each distinguished primarily by a reference in it to the entire subject matter of a lis, and the value of that subject matter: the paragraph ordains that an Appeal shall lie as of right, firstly, "Where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards"; and thirdly, "Where the Appeal involves, directly or indirectly ..... some civil right amounting to or

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of the value of £500 sterling or upwards".

It is manifest from the passages just quoted that what is to be valued in each case is the matter or civil right in dispute on the Appeal; the unwise variation in the structure of drafting represented by a change in form from "in dispute on the Appeal" to "the Appeal involves" cannot mask the essential likeness between the two criteria.

But Mr. Fisher urged us to construe the middle portion of the same paragraph as requiring this Court to value, not the matter in dispute, (in this part of the paragraph, represented and described as "some claim or question to or respecting property" but the property to, or in respect of, which the claim or question involved on the appeal is made or arose. That is a change of surprising magnitude to make at the very heart of the closely integrated structure of a single brief paragraph. For the change, if it was made, would have fundamentally altered the crucial test, upon no grounds of reason or logic that are discernable to my mind, from the value of what is in dispute to the value of some res, (whose value might exceed the value of that matter enormously) to which that matter refers. I decline to adopt a construction that would evidence such a disregard for consistency in law-making and for the comparative merits of would-be appellants.

It would be passing strange if the draftsman had, within the compass of a single legislative declaration, laid down two criteria, each of which comprised elements of the same kind, with the same order of emphasis, and then inserted between them a third criterion, one of whose elements was of a kind fundamentally different from the element corresponding to it in each of the other two. The central passage of paragraph (a) reads "or where the Appeal involves, directly or indirectly, some claim or question to or respecting property ..... amounting to or of the value of £500 sterling or upwards;". It seems to me that, consistently with the rest of the paragraph, the adjectival phrase "amounting to or of the value of £500 sterling or upwards" must be read as qualifying all that proceeds it in that passage.

One's natural inclination, therefore, upon

reading paragraph (a) and analysing it in the manner suggested, would be to assess the value, upon which rests the right to appeal as of right, by reference to the proprietary right or bundle of rights to which the appellant lays claim or as to which he has raised a question. But to value a proprietary right to property is not, of necessity, according to the canons of analytical jurisprudence, the same thing as to value the subject-matter of those rights. It must be admitted that Mr. Fisher's construction has an attractive simplicity about it, but, unfortunately it is a simplicity that the highest courts have eschewed. If Mr. Fisher were right in his contention, the Privy Council in Meghji Lakhamshi & Brothers v. Furniture Workshop [1954] A.C.80 would have unhestitatingly adopted it, and the High Court in Ballas v. Theophilos (No.1) (1957) 97 C.L.R. 186 would have confirmed it; judicial reasoning in both cases is, however, fundamentally inconsistent with it. Those decisions have demonstrated that the passage "property of the value of £500 or upwards" cannot be disengaged from the passage "where the Appeal involves, directly or indirectly, some ..... question ..... respecting property" read as a whole.

From the first of those reports, it appears that the appellants wished to appeal to Her Majesty in Council against an order under the Increase of Rent (Restriction) Ordinance 1949 of Kenya dismissing their application for possession of a plot of land, which had been let by them to the respondents together with an adjoining building. There was a preliminary objection to the competency of the appeal, the grounds of which appears clearly from their Lordship's advance at page 87:

> "The respondents contended that the true test is how much it is worth to the appellants to succeed in the appeal, and that this is to be measured by deducting from the value of the land with vacant possession its value to the owners subject to the statutory tenancy, and that as no evidence of this had been adduced there was no jurisdiction to fix the conditions on compliance with which the final order giving leave to appeal would issue".

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Article 3 of the Eastern African (Appeal to Privy Council) order in Council 1951 is in the same terms as Rule 2 of the relevant Rules in this case.

Their Lordships expressed their view of the argument and of the article on which it was based in the following terms:

> "Their Lordships have no doubt that under whichever limb of the article any case may fall, the 'value' must be looked at from the point of view of the appellant, with the result that an appeal may sometimes lie where the landlord is the appellant although there could be no appeal by the tenant, or vice versa.
>
> Whatever the result might be in the present appeal if the words 'where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards' stood alone, their Lordships are of opinion that the case falls within the latter part of the article which deals with 'some claim or question to or respecting property ..... of the said value or upwards,' and that on the true construction it is the value of the property, not the value of the claim or question, which is the determining factor. The presence of the word 'indirectly' seems to require this construction. Looked at from the angle of the landlords, the value of the property, vacant possession of which they were claiming, was correctly taken on a capital value basis. It by no means necessarily follows that the result would have been the same if the tenants had been appellants, ..."

I pause here to observe that if Mr. Fisher's argument were correct the result would in all cases be the same, because the property that lay at the heart of the dispute would be the same parcel of real property with the one value. Their Lordships plainly state, however, that the result would vary accordingly as the appellant was the landlord or the tenant. It is, moreover, essential to bear in mind that the claim in dispute in that case was a direct claim to the subject land, freed from the statutory tenancy. Their Lordships (at

page 89) expressly stated that "The claim /that is, the claim by the Landlords/ has been treated throughout in all the courts below and on this appeal as a claim for partial ejectment and their Lordships consider it must be so regarded". Both the test and the result in those circumstances was, therefore, only to be expected.

The test is further expounded and clarified by Kitto J. in Ballas v. Theophilos (supra). At page 196 he stated the issues:

> "The argument presented against the competency of the appeal sought to carry expressions which have been used in other cases to such a length as to desert the language of the statute. The relevant provision, s.35(1)(a)(2) of the Judiciary Act 1903-1955 (cth.), gives a right of appeal to this Court against every judgment of the Supreme Court of a State which involves directly or indirectly any claim, demand, or question, to or respecting any property or civil right amounting to or of the value of £1,500. The judgment of the Supreme Court of Victoria against which the present appeal is brought denies a claim by the appellant that he has validly exercised an option to purchase a share in a partnership formerly existing between himself and a person now deceased, and grants a claim by the respondent, the deceased partner's executrix, that orders should be made for the winding up of the partnership and for ancillary purposes. The deceased partner's share in the partnership is worth more than £1,500, but the difference between the value of that share and the price to be paid for it by the appellant if he has validly exercised his option of purchase may be less than £1,500. On the footing that the difference is not shown to be as much as £1,500 the respondent contends that the appellant has not discharged the onus which lies upon him of establishing that the case falls within s.35(1)(a)(2)."

After examining the authorities Kitto J. summed up his opinion:

> "It seems to me, then, that the doctrine as to looking at the judgment from the appellant's point of view means that the

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matter or property in dispute on the appeal or the property to or respecting which a claim, demand or question is involved in the judgment, may not be the same for both parties, and that where that is the case the matter or property to be valued is that which is seen to fill the description when the judgment is looked at through the eyes of the appellant. In many cases it makes no difference through whose eyes it is regarded; and when that is so it cannot matter that the appellant's individual financial interest in the outcome of the litigation is less than the appealable amount, provided that the value of the property is of that amount. Examples of this may be found in Amos v. Fraser (1906) 4 C.L.R. 78 and Tipper v. Moore (1911) 13 C.L.R. 248. See also the kinds of cases mentioned by Dixon J. in Oertel v. Crocker (1947) 75 C.L.R. at p.274. There may well be cases in which difficulty will arise from the uncertainty of the word 'respecting'; but such cases are not likely to be frequent if it is remembered that, as the present Chief Justice has said (1947) 75 C.L.R. at p.271, the word requires a connexion which is close, immediate or proximate, and if the illustrations provided by the cases above referred to are borne in mind".

The joint judgment of Dixon C.J., Webb J. and Fullagar J. also contains a passage of relevance to this case.

"/O/nce you get the denial by a judgment of a claim to a title to an estate or interest in land or an interest in personalty and the estate or interest of which the judgment deprives the claimant is itself of the requisite value you do not inquire further. For it means that he has been prejudiced in proprietary rights which he claims of the prescribed value. You do not inquire further to ascertain whether the appellant himself is consequentially relieved of a personal liability or liabilities which would sufficiently counterpoise the prejudice economically to enable one to say that on balance his economic situation has not suffered to

the extent of £1,500. This falls within what O'Connor J. said in Amos v. Fraser (1906) 4 C.L.R. 78, at pp. 87, 88 in the passage quoted in Oertel v. Crocker (1947) 75 C.L.R. 261, at p. 272 for the formulation of principle. O'Connor J. said - 'the measure of value is to be the value of the appellant's right in the property' (1906) 4 C.L.R. at p.88; that is the right claimed by him but denied by the judgment".

It seems to me that, from these two leading cases, the following propositions, which directly bear on the determination of this case, may be elicited:

(1) Where a Court is considering the application of the central passage in paragraph (a) of Rule 2 (or its legislative equivalent), it is proper, if all other requirements are satisfied, to arrive at the relevant value by taking the value of the proprietary rights to which the claim has been made, or (as the case may be) respecting which the question arose.

(2) Even where the claim or question is one "respecting" property, a connection must be demonstrated, between the resolution of the claim or the question in favour of the appellant and the proprietary rights the subject of the claim or question, that is at once close and immediate or proximate. The facts of the two leading cases discussed above and of the authorities referred to by their Lordships and the judges of the High Court all confirm, in my judgment, the validity of those propositions.

Mr. Fisher's argument fails, in my opinion, because the subject matter of the declaration sought does not fall within the compass of paragraph (a) of Rule 2. The relevant question asked in the originating summons was whether the plaintiff was entitled to require the Marion Council to examine proposal plan A2 and to forward a report thereon to the Director in accordance with the regulations applying to it. It is against the answer given by this Court to that question that leave to appeal is sought. I fail to see how, even "indirectly", this can be said to be a question

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(continued)

"respecting property", or how, if it is, the proprietary right (or, indeed, the "property") is susceptible of valuation. The question concerns, directly, Lady Becker's right - defined, regulated and sanctioned by administrative law and administrative processes - to have the Council consider a proposed plan of subdivision. Indirectly, the same question relates to a plan of subdivision in respect of which the right claimed is said to arise, and by reference to which it is defined. I agree with Hogarth J. that it would be stretching the meaning of the word "indirectly" beyond breaking point to hold, in this case, that the value, simpliciter, of the actual parcel of land, for which the plan for subdivision is ultimately sought, is to be treated as the discrimen that separates a question that is appealable as of right from one that is not.

If the applicant fails, as I hold that she does, in her argument based on paragraph (a) of Rule 2, she can succeed only if, in our discretion, we determine, pursuant to paragraph (b) of that rule, that the question involved in the appeal is one which ought to be submitted to Her Majesty in Council for decision. In my opinion, we ought to refuse leave under this paragraph for the reasons given by Hogarth J., with which I entirely agree.

I accordingly agree that leave to appeal, and therefore the application before us, must be refused.

No.27

Order of Full Court refusing Leave to Appeal

23rd December 1974

No. 27

Order of Full Court refusing Leave to Appeal

SOUTH AUSTRALIA

IN THE SUPREME COURT
No. 595 of 1974

IN THE MATTER of the SUPREME COURT ACT 1935-1974 and the Rules of the Supreme Court made thereunder

- and -

In the Supreme Court of South Australia

No.27

Order of Full Court refusing Leave to Appeal

23rd December 1974

(continued)

IN THE MATTER of the PLANNING AND DEVELOPMENT ACT 1966-1973

- and -

IN THE MATTER of the CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (as amended)

- and -

IN THE MATTER of an application for approval of a plan of subdivision made on the 29th day of September 1970

B E T W E E N :

GLADYS SARAH BECKER Plaintiff

- and -

THE CORPORATION OF THE CITY OF MARION and THE DIRECTOR OF PLANNING Defendants

BEFORE THE HONOURABLE MR. JUSTICE HOGARTH
THE HONOURABLE JUSTICE MITCHELL
THE HONOURABLE MR. JUSTICE WELLS
MONDAY THE 23RD DAY OF DECEMBER 1974

UPON MOTION made unto the Court on behalf of the abovenamed plaintiff pursuant to notice of motion dated the 18th day of September 1974 coming on for hearing on the 22nd day of October 1974 and the 9th and 10th days of December 1974 UPON READING the affidavit of George Patrick Auld filed herein on the 26th day of September 1974 and the order of the Full Court made herein on the 29th day of August 1974 AND UPON HEARING Mr. Fisher Q.C. and Mr. E.H. Martin of counsel for the plaintiff Mr. Debelle of counsel for the defendant The Corporation of the City of Marion and Mr.Bowering of counsel for the respondent The Director of Planning THE COURT DID RESERVE JUDGMENT and the same standing for judgment this day THE COURT DID NOT THINK FIT to grant leave to the plaintiff to appeal to Her Majesty in Council from the said judgment of the Full Court given and pronounced herein on the 29th day of August 1974 AND IT IS ORDERED that the costs of the defendants of and

In the Supreme Court of South Australia

No.27

Order of Full Court refusing Leave to Appeal

23rd December 1974

(continued)

incidental to this application and order be taxed and paid by the plaintiff.

The above costs of the defendant The Corporation of the City of Marion have been taxed and allowed at $ as appears by the Taxing Officer's Certificate dated the day of 19 .

The above costs of The Director of Planning have been taxed and allowed at $ as appears by the Taxing Officer's Certificate dated the day of 19 . L)

BY THE COURT

(Sgd.) R.M. Nunn

MASTER

THIS ORDER is filed by BAKER McEWIN & CO., of C.M.L. Building 41-49 King William Street, Adelaide, Solicitors for the Plaintiff.

In the Privy Council

No.28

Order in Council granting special leave to appeal to Her Majesty in Council from the Order of the Full Court of the Supreme Court of South Australia dated 23rd December 1974 refusing the plaintiff leave to appeal

25th June 1975

No. 28

Order granting Special Leave to Appeal to Her Majesty in Council

AT THE COURT AT BUCKINGHAM PALACE

The 25th day of June 1975

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of May 1975 in the words following viz.:-

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Gladys Sarah Becker in the matter of an Appeal from The Full Court of the Supreme Court of South Australia

In the Privy Council

No.28

Order in Council granting special leave to appeal to Her Majesty in Council from the Order of the Full Court of the Supreme Court of South Australia dated 23rd December 1974 refusing the plaintiff leave to appeal

25th June 1975

(continued)

between the Petitioner and (1) The Corporation of the City of Marion and (2) The Director of Planning Respondents setting forth that the Petitioner prays for special leave to appeal from two Judgments of the Full Court of the Supreme Court of South Australia dated the 29th August 1974 and 23rd December 1974 respectively: that by the Judgment dated the 29th August 1974 the said Court declared that the Petitioner was not entitled to a certain right claimed by her and made no order with respect to other declarations sought by the Petitioner: that by the Judgment dated the 23rd December 1974 the said Court dismissed the Petitioner's application for leave to appeal to Your Majesty in Council: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the two Judgments of the Full Court of the Supreme Court of South Australia dated respectively the 29th August 1974 and 23rd December 1974 and for further or other relief:

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioner to enter and prosecute her Appeal against the Judgment of the Full Court of the Supreme Court of South Australia dated the 23rd December 1974 upon depositing in the Registry of the Privy Council the sum of £2,000 as security for costs and that the consideration by Their Lordships of the Petitioner's prayer for special leave to appeal to Your Majesty in Council against the Judgment of the Full Court dated the 29th August 1974 ought to be adjourned until after the hearing by Their Lordships of the Appeal against the Judgment dated the 23rd December 1974:

" And Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record upon payment by the Petitioner of the usual fees for the same."

In the Privy Council

No.28

Order in Council granting special leave to appeal to Her Majesty in Council from the Order of the Full Court of the Supreme Court of South Australia dated 23rd December 1974 refusing the plaintiff leave to appeal

25th June 1975

(continued)

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the State of South Australia and its Dependencies in the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N. E. LEIGH

IN THE PRIVY COUNCIL No. 35 of 1975

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

IN THE MATTER OF THE SUPREME COURT ACT 1935-1972 AND THE RULES OF THE SUPREME COURT MADE THEREUNDER

AND

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 1966-1973

AND

IN THE MATTER OF THE CONTROL OF LAND SUBDIVISION REGULATIONS 1967 (AS AMENDED)

AND

IN THE MATTER OF AN APPLICATION FOR APPROVAL OF A PLAN OF SUBDIVISION MADE ON THE 29th DAY OF SEPTEMBER 1970

BETWEEN

GLADYS SARAH BECKER (Appellant)

AND

THE CORPORATION OF THE CITY OF MARION AND THE DIRECTOR OF PLANNING (Respondents)

RECORD OF PROCEEDINGS

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