SUPREME COURT OF VICTORIA

WHELAN KARTAWAY PTY. LTD. v. MINISTER FOR PLANNING AND HOUSING

GOBBO J.

14 October, 12 November 1992

Local government — Permit — Refusal of permit — Compensation — Land required for public purpose — Appeals against refusal — Whether bar to claim for compensation — Whether refusal requires formal notice — Planning and Environment Act 1987 (No. 45), ss. 61, 65, 77, 79, 84(3), 98, 99(a)(i) — Planning Appeals Act 1980 (No. 9512), s. 41.

The claimant owned a piece of land which had been reserved as proposed public open space. On 1 February 1990, it applied to the authority for a permit to subdivide, use and develop the land. The claimant lodged appeals against failure to grant a permit pursuant to s. 79 of the *Planning and Environment Act* 1987 on 13 February 1991 and on 30 April 1991. The authority decided to refuse to grant the permit on 6 May 1991 and issued notices of refusal. The claimant sought compensation pursuant to s. 98 of the Act for damage said to have been caused by the refusal of a permit. The authority raised three preliminary points of law: (a) whether the claim pursuant to s. 98 of the Act was barred by reason of the claimant's appeals against failure pursuant to s. 79 of the Act; (b) whether the claim should be stayed by reason of the claimant's appeals against failure pursuant to s. 79 of the Act; and (c) whether the grounds of refusal relied upon fell within the terms of s. 99(*a*)(i) of the Act.

The authority submitted on the first preliminary point that a refusal involved two ingredients — the decision to refuse and a formal notice of refusal — and that without formal notice the decision to refuse did not constitute a refusal. The authority submitted that where an appeal against failure was brought, the Act prevented the authority proceeding to a refusal.

Held: (1) Section 99(*a*) of the *Planning and Environment Act* does not require the issue and service of a formal notice of refusal. It suffices to attract the operation of the section that the authority has made a decision to refuse a permit on the ground that the land is or may be required for a public purpose.

(2) The purpose of s. 84(3) of the *Planning and Environment Act* is to make the Administrative Appeals Tribunal a clearing house for communications. After an appeal has been lodged pursuant to s. 79, the service of a notice of refusal is not a nullity although it is a breach of s. 84(3).

(3) The existence of an outstanding appeal by the claimant against refusal to grant a permit, at the time of the refusal by the authority, does not bar a claim for compensation pursuant to s. 98.

(4) A ground of refusal within the terms of s. 99(*a*)(i) of the Act need not be the sole ground of refusal to attract the operation of s. 98.

(5) The use of land for public open space is a use for a public purpose.

(6) It is not necessary for the notice of refusal to recite the words used in s. 99(*a*) of the *Planning and Environment Act*. It is sufficient that the grounds raise the possibility that the land may be required for a public purpose.

S. R. Morris Q.C. for the claimant.

R. S. Osborn for the authority.

Cur. adv. vult.

Gobbo J.: The claimant has made a claim for compensation against the authority for damage said to have been caused as a result of a refusal of a permit to develop the claimant's land. The land was, at all times, material reserved for a public purpose, namely, proposed public open space. The claim is founded on s. 98 of the *Planning and Environment Act* 1987. Some preliminary points of law have been raised by the authority. The parties have agreed on the facts which they believe are relevant to the disposition of the points of law. The statement of agreed facts is a lengthy one and it is unnecessary to set this out. I will for the moment only refer to those facts which the authority submits suffice to support its argument. These were as follows:

(a) At the relevant time the subject land was reserved in the Brunswick Planning Scheme for "Open Space — Public Proposed".

(b) The claimant made application to the City of Brunswick on 1 February 1990 to subdivide, use and develop the land.

(c) The claimant lodged appeals against failure on 13 February 1991 and again on 30 April 1991.

(d) The responsible authority decided to refuse to grant the permit sought on 6 May 1991 and purported to issue notices of refusal relating thereto.

(e) The appeals were called in pursuant to s. 41 of the *Planning Appeals Act* 1980 on 27 May 1991.

(f) The call-ins are the subject of proceedings challenging their validity.

(g) The appeals have been adjourned to a date to be fixed.

(h) The Governor-in-Council has not determined the appeals.

Sections 98 and 99 of the *Planning and Environment Act* 1987 provide:

"**98.**(1) The owner or occupier of any land may claim compensation from the planning authority for financial loss suffered as the natural, direct and reasonable consequence of —

(*a*) the land being reserved for a public purpose under a planning scheme; or

(*b*) the land being shown as reserved for a public purpose in a proposed amendment to a planning scheme of which notice has been published in the Government Gazette under section 19; or

(*c*) a declaration of the Minister under section 113 that the land is proposed to be reserved for a public purpose; or

(*d*) access to the land being restricted by the closure of a road by a planning scheme.

(2) The owner or occupier of any land may claim compensation from a responsible authority for financial loss suffered as the natural, direct and reasonable consequence of a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land is or will be needed for a public purpose.

(3) A person cannot claim compensation under sub-section (1) if —

(*a*) the planning authority has purchased or compulsorily acquired the land or part of the land; or

(*b*) a condition on the permit provides that compensation is not payable.

(4) The responsible authority must inform any person who asks it to do so of the person or body from whom the first-mentioned person may claim compensation under this Part.

"**99.** A right to compensation and the liability of a planning authority or responsible authority to pay compensation arises —

(*a*) under section 98(1)(*a*), (*b*) or (*c*) after —

(i) the responsible authority has refused to grant a permit for the use or development of the land on the ground that it is or may be required for a public purpose; or

(ii) the Administrative Appeals Tribunal directs that a permit must not be granted on the ground that the land is or may be required for a public purpose; or

(iii) the responsible authority

(A) fails to grant a permit within the period prescribed for the purposes of section 79; or

(B) grants a permit subject to any condition which is not acceptable to the applicant —

and the Administrative Appeals Tribunal disallows any appeal against the failure or condition on the ground that the land is or may be required for a public purpose; or

(*b*) under section 98(1)(*a*), (*b*) or (*c*) on the sale of the land concerned under section 106; or

(*c*) under section 98(1)(*d*), on the coming into operation of the relevant provision of the planning scheme; or

(*d*) under section 98(2), on the refusal of the permit."

The present claim is founded on s. 98(1)(*a*) of the Act and it is contended that there has been a refusal of permit within s. 99(*a*) of the Act.

The three questions of law raised by the Planning Authority were as follows:

1. Is the claim barred by reason of the claimant's current appeals against failure pursuant to s. 79 of the *Planning and Environment Act* 1987, with respect to the applications forming the basis of its claim for compensation?

2. Alternatively, should the claim be stayed by reason of the claimant's current appeals against failure pursuant to s. 79 of the *Planning and Environment Act* 1987, with respect to the application forming the basis of its claim for compensation?

3. Do the grounds of refusal relied upon fall within the terms of s. 99 (*a*) (i) of the *Planning and Environment Act* 1987?

The first question was argued as follows. It was submitted that there had been no refusal of permit but only a decision to refuse a permit. It was said that there were two essential ingredients to a refusal, namely a decision to refuse and a formal notice of refusal. It was argued that ss. 61 and 65 when read together supported this argument. Section 61(1) provides:

"(1) The responsible authority may decide —

(*a*) to grant a permit; or

(*b*) to grant a permit subject to conditions; or

(*c*) to refuse to grant a permit on any ground it thinks fit."

Section 65(1) provides:

"(1) The responsible authority must give the applicant and each objector, a notice in the prescribed form of its decision to refuse to grant a permit."

It was said that a refusal of permit under s. 99(*a*) had to have this twofold character because of the other provisions in the Act, in particular s. 84. This provides:

"(1) A responsible authority may decide on an application for a permit at any time after an appeal is lodged against the failure of the responsible authority to grant the permit."

"(2) ...

"(3) Except as provided in section 34(2) of the *Planning Appeals Act* 1980, the responsible authority must not issue or give a permit, notice of decision or notice of refusal to the applicant, a referral authority or any objector after the lodging of an appeal against a failure to grant a permit."

In short, it was said that where there is an appeal against a failure, the scheme of the legislation permits the responsible authority to proceed to a decision to refuse but not to a full scale refusal. Hence the prohibition against a notice of refusal in s. 84(3). It was submitted that once an appeal against failure was commenced, the Administrative Appeals Tribunal is seized of the matter and the responsible authority can only make its decision to refuse so as to manifest its attitude at the appeal but it cannot issue a formal refusal.

The responsible authority here issued a formal notice of refusal on 6 May 1991, well after the appeals had been commenced in the tribunal. The first appeals had been lodged in February 1991, but because of some doubt as to the validity of these appeals, fresh appeals were commenced on 30 April 1991.

For the claimant it was argued that the authority's argument was in conflict with the clear words of s. 99(*a*) and was generally inconsistent with the policy and history of the Act. It was also noted that s. 84 did not prohibit the issue of a notice of refusal but merely prevented its service upon the persons referred to in the section. It was therefore possible to have both a decision to refuse which could presumably be made known and an issued notice of refusal. The only limitation was on the service of the notice.

I am satisfied that the words of s. 99(*a*) do not assist the authority's argument. They make no reference to notices of refusal. The requirement is that the authority "has refused to grant a permit". It was properly conceded on behalf of the authority that there was no policy reason why there should be both a decision to refuse on certain grounds and a piece of paper recording that refusal which was to be served on the claimant. The presence of a requirement that the refusal be on a certain ground tends to weaken the argument for a formal notice since a decision to refuse on certain grounds contains in substance what the formal notice would provide.

It is also to be noted that the Act does not preclude an appeal against a decision to refuse a permit, as s. 77 plainly shows. It is difficult therefore to find any scheme in the Act to limit the effectiveness of decisions, unaccompanied by formal notice of refusal.

Mr. Osborn, who appeared for the authority, had argued that the notice of refusal in the present case was a nullity because it was served on the claimant in breach of s. 84(3). It is unnecessary to rule on this finally, since on the view I take of s. 99(*a*), a decision to refuse accompanied by the

appropriate ground suffices. Even if subsequent service of a formal notice is a nullity, this cannot alter the character of what has already transpired. I doubt, in any event, whether the service is a nullity and it is more appropriate to treat the provision as a direction of a housekeeping kind designed to make the tribunal a clearing house for communications. In this regard see the views expressed by Teague J. in *Minister of Planning v. N.O.N. Nominees Pty. Ltd.* 1 A.A.T.R. 272, at p. 282.

I further find that the scheme of the Act does not support the interpretation put forward on behalf of the authority. There is no provision that limits the effectiveness of a refusal to the service of a formal notice; indeed it was conceded — and properly so — that there would be a valid appeal from a mere decision to refuse.

Nor does the history of the legislation assist the authority's argument. The previous legislation did not support any similar argument and the earlier provisions addressed matters of substance and not form. With this background, it would in my view require clear words to have a major change in entitlement brought about because of the absence of the formal indication of a refusal that had in fact taken place.

Recourse to authority does not provide any real assistance to resolving what is essentially a matter of interpreting s. 99(*a*) in its context. Such cases as I was referred to did not advance the authority's argument. I note in particular those cases relied upon by Mr. Morris, who appeared for the claimant, as illustrations of how courts looked at the substance of the matter in considering the operation of town planning and like legislation. See *Liverpool City Council v. Weir* (1984) 58 A.L.J.R. 213, at p. 215; *Clydug Pty. Ltd. v. Wyong Shire Council* (1973) 27 L.G.R.A. 254, at p. 255; *Kynvenos v. City of Preston* (1982) 57 L.G.R.A. 345; *Norfolk County Council v. Secretary of Minister for the Environment* [1973] 1 W.L.R. 1400; *Attorney-General for Victoria v. Parkin* [1975] V.R. 942.

I find that the authority has failed to satisfy me that the claim is barred because of the existence of the outstanding appeals by the claimant company at the time of the refusals by the responsible authority.

The second question raised is whether the claim can and should be stayed because of the current unresolved appeals against failure. The authority submits that it cannot be said that a loss has crystallised unless and until the appeals are finally resolved. If appeals are allowed and a permit is granted, no loss, or a quite different loss will follow.

The further issue is then raised as to whether the court is not obliged by the *Land Acquisition and Compensation Act* 1986 (No. 121) to hear the claim. Whatever may be the position as to a permanent stay — and it is unnecessary to decide that — I am of the view that the court has the power to stay a claim temporarily as part of its power to arrange its own disposition of the claim. In my view it is not necessary to impose any stay at the present time. It is common ground that this claim cannot be heard this year. It also appears that the appeals will be heard before the end of the year. It may also be that the minister will intervene. In the circumstances, though there is a good case for resolving the appeals before the hearing of the claim, it is premature to impose any stay at this point.

The third preliminary point of law goes as to whether the ground of refusal in the present case satisfied the requirements of s. 99(*a*) of the Act. At the outset, Mr. Osborn made two concessions that were in my view

properly made. The first was that the use of land for public open space is a use for a public purpose. See *Van der Meyden v. Melbourne and Metropolitan Board of Works* [1980] V.R. 255. The second was that it is not necessary that a ground meeting the terms of s. 99(*a*)(i) be the sole ground of refusal: *Minister for Planning and Environment v. N.O.N. Nominees Pty. Ltd.* 1 A.A.T.R. 272; *City of Nunawading v. Day* [1992] 1 V.R. 211, at p. 222 ff.

It was argued that the grounds in the notice of refusal of permit did not amount to a statement that the land was required for a public purpose. Grounds 2, 3, 4 and 5 provided as follows:

"2. The land is reserved for public open space and the use and development proposed is contrary to the purposes for which it is reserved.

"3. The proposal is contrary to the future planning and enhancement of the Merri Creek Parklands and interim planning controls pending the preparation of a concept plan for the Merri Creek as a whole.

"4. The proposal would prejudice a significant linear open space link along the Merri Creek and associated parklands.

"5. The proposal is contrary to the Metropolitan Open Space Plan (1988) because it would prejudice the implementation of a significant component of that plan specifically the linear open space network identified in the plan."

It was argued that the above grounds merely said that the subdivision or development were inconsistent with a purpose, not that the land was required. It was said that the word "required" was to be equated with "needed".

There are a number of difficulties with these arguments. In the first place, the Act does not refer to the land being required. Significantly the Act states that the land is or *may be* required. Those additional words facilitate an argument that grounds which by their nature raise the possibility that the land may be required are sufficient. A ground that in substance states that the proposed use will prevent the land being available for the public purpose will, it might be thought, ordinarily convey that the land is, or at the least may be, required for the public purpose. There is no point in stressing inconsistency of use if the public purpose use is not still on the agenda, as it was.

It is not, in my opinion, necessary for the notice of refusal to recite the very words used in s. 99(*a*), namely that the land is or may be required for a public purpose. It is sufficient if that ground is conveyed as a matter of substance.

In the present case the proposed use involved construction of a large waste recycling transfer station on land reserved for public open space purposes. There was no suggestion, even if it were feasible, that the user was a temporary one. In these circumstances and given the verbiage used, I am satisfied that the grounds conveyed that the land was or might be required for the public purpose in question. I do not find it necessary therefore to resolve the question as to whether the court can go behind the grounds and ascertain what was the true intention of the responsible authority.

I therefore answer the three questions of law as follows:

1. No.

2. No.

3. Yes.

Judgment accordingly.

Solicitors for the claimant: *Rush & Failla.*

Solicitor for the authority: Victorian Government Solicitor.

K. P. HANSCOMBE
BARRISTER-AT-LAW