The Validity of Conditions Attached to Consents

by

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I. INTRODUCTION

By 1986 it is estimated that the New Zealand population will have exceeded four million people, as compared with its present two and three quarter million.[1] Coupled with this increase is a pronounced drift towards the larger urban centres, where the results of earlier unplanned development are still in existence.[2] For these reasons it is essential that future planning controls be developed and that any land-use schemes which are drawn up be adhered to wherever possible. In anticipation of this need the Town and Country Planning Act 1953 has vested local Councils with the power to deny an application for development which is not in accordance with the devised plan, but it has also allowed Councils to grant applications subject to such conditions "as the Council thinks fit". This paper deals with the legality and validity of these conditions. In particular, emphasis will be placed upon the invalidating factors which the Courts have emphasised: that the conditions imposed are unreasonable, are not based on town planning principles, do not relate to the permitted development or are void for uncertainty.

The logical starting point for this paper is a brief examination of the provisions of the Town and Country Planning Act which provide for the granting of conditional consents by a Council or by the

[1] See *Population Estimates* 1966-1986 (Town and Country Planning Branch, Ministry of Works, 1967) 13.
[2] See, for example, the annual drift to Auckland and Wellington, ibid., 6.

Appeal Board. When it considers conditional use applications, a Council is empowered by section 28C (3) to allow or refuse the application, or to grant it subject to "such conditions . . . as it thinks fit". The main considerations for the Council under section 28C are the suitability of the proposed site and the likely effect of the proposed use on the amenities of the neighbourhood and on the welfare of the inhabitants in the district.[3] Similar wording is used in section 35 which deals with specified departures but here it is "the public interest" which is the paramount consideration. Change of use applications under section 38A give similar powers to a Council but the main concern here is the likely detraction from the amenities of the neighbourhood if the application is granted. In addition, the Appeal Board has considerable powers to affix conditions to consents, and under section 42 (3), it may vary the conditions which the Council had formerly imposed. The non-compliance with any of these conditions is an offence under section 50A of the Act and incurs the penalties provided for under section 50B.

It is useful to note the corresponding English provisions relating to conditional consents, since New Zealand law on this topic has been guided largely by English cases under the United Kingdom Town and Country Planning Act of 1962. Under section 17 (1) of that Act the local planning authorities have almost identical powers to those of the New Zealand Councils and may grant planning permission "subject to such conditions as they think fit". Section 18 lays down more specific guidelines for the determination of planning applications under section 17 and makes provision for "planning permission granted for a limited period".[4]

A second preliminary point to note is that although the power to affix conditions may be basically the same for conditional use, specified departure and change of use applications, the frequency with which conditions are attached to each consent varies considerably. This is logical, since a conditional use is basically a use which conforms to a large degree with the Council's scheme, while a specified departure is a departure from the entire concept of that scheme. It is to be expected then that conditions would more frequently be imposed in the case of specified departures.[5] Nevertheless, the fact that specified departure applications may attract more stringent conditions does not affect the basic principle that the legality of all conditions is measured by the same yardstick. A condition relating to a con-

[3] Section 28C (3A).
[4] Section 18 (2).
[5] See N. J. Burren and M. L. Curtis, *A Businessman's Guide to Town Planning* (1969) 48.

ditional use will fail in the same manner as one relating to a specified departure if it fails to satisfy the rules that have been laid down in the case-law upon the matter.

At first glance, the phrase "as they think fit" would appear to give an unfettered discretion to the Council and to the Appeal Board. However, just as in the field of administrative law, the Courts have limited this discretion and are willing to intervene in certain circumstances. The phrase has not been interpreted as meaning "just as they please" but instead has been limited to cases where the conditions imposed are "proper", "appropriate" or "requisite" from a planning point of view.[6]

As a result, it is possible to formulate basic principles on which a Council must act, and in this respect the cases have laid down certain limitations to the power to affix conditions to consents. These principles are evident from the leading case of *Fawcett Properties Ltd.* v. *Buckingham County Council*[7] and have been summarised by later cases[8] as follows:

(1) A condition imposed must not be so unreasonable that it can be said that Parliament clearly cannot have intended that it should be imposed.

(2) A condition must "fairly and reasonably relate to the permitted development". That is, it must serve some useful planning purpose.

(3) A condition will be declared invalid on the ground that its meaning is uncertain.

II. Invalidating Factors in Conditional Consents

1. *Unreasonableness*

Perhaps the most important ground for striking down a condition is on the ground of unreasonableness. The leading case in this area is *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation*[9] which dealt with the Sunday Entertainments Act 1932 (U.K.). Although the case is not concerned with town planning, it is relevant because licensing authorities under the Act could grant licences subject

[6] This principle is stated concisely by Desmond Heap in *An Outline of Planning Law* (5th ed. 1969) 115.

[7] [1961] A. C. 636.

[8] See, for example, *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 W.L.R. 240, per Willmer L.J. See also A. E. Telling, *Planning Law and Procedure* (3rd ed., 1970) 129.

[9] [1948] 1 K.B. 223.

to such conditions as they thought fit to impose. Exercising this wide discretion, the authority concerned imposed a condition limiting the viewing of Sunday cinema performances to persons over fifteen years of age. It was claimed that this restriction was unreasonable and was therefore ultra vires. From this case came the often cited remarks of Lord Greene M.R.:[10]

> It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be entrusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere . . . to prove a case of that kind would require something overwhelming [as proof].

Lord Greene M.R. therefore held the view that unreasonableness was a ground for invalidity but unless there was overwhelming proof of this, the authority would be protected. This protection is often referred to as the "Wednesbury Umbrella". Unless the authority has acted outside the four corners of its jurisdiction, the Court cannot interfere with its decision.

A good example of a case in which a condition was held to be unreasonable is *Hall & Co., Ltd.* v. *Shoreham-by-Sea Urban District Council.*[11] This case, as well as being an example of unreasonableness, illustrates the principle that the condition must relate to the permitted development. A Company wished to develop some land for industrial purposes. Two conditions were the subject of dispute, and both concerned a busy main road which was adjoined by the premises. The applicants were required to build an ancillary road over the land at their own expense, and to give rights of passage over it to members of the public. In effect, this involved the building of a road and its dedication to the public without the payment of proper compensation by the Council to the applicants. Under the Highways Act 1959 (U.K.) the Court of Appeal held that the Council had imposed unreasonable conditions.

Similarly, the cession of land to a Council for an open space or public reserve should not be attached to planning consents. Blundell and Dobry[12] refer to a decision made by the Minister of Housing and Local Government in England. Permission had been granted by a Council, subject to a conveyance of part of the land to them. The Minister decided that they had no power to require this conveyance. Similarly, in a New Zealand case[13] concerning subdivisions under

[10] Ibid., 230.
[11] Supra, n.8.
[12] L. A. Blundell and G. Dobry, *Town and Country Planning* (1963) 173.
[13] *James* v. *Tauranga City* (1968) 3 N.Z.T.C.P.A. 105.

the Municipal Corporations Act 1954, Kealy S.M. found that a consent subject to the provision of an esplanade reserve was, in the circumstances, unreasonable. In the recent case of *Abbott* v. *Matamata County*[14] a condition was imposed by a Council stating that the applicant should create a public reserve along the Whakauru stream and that he should vest this land in the Council. The Appeal Board found this decision to be unreasonable:[15]

> However, the Board holds that s. 28C (3) of the Town and Country Planning Act 1953 which empowers the Council in allowing a conditional use application to impose "such conditions, restrictions and prohibitions as it thinks fit" does not empower a Council to impose a condition requiring an unwilling property owner to vest land in the local authority without compensation.

It is interesting to contrast this decision with that of the High Court of Australia in *Lloyd* v. *Robinson*.[16] Approval in this case had been given subject to the transfer of a portion of the land to the Crown for park and recreation purposes. The Court stated:[17]

> The assumption may be accepted that the statutory power to annex conditions to an approval of a subdivision does not extend to requiring the setting aside for public recreation of land which is so unrelated to the land to be sub-divided . . . that there is no real connexion between the provision of the open space and the contemplated development . . . But . . . it was well within the limits of a proper understanding of the Board's functions under the Act to insist . . . that open spaces be suitably located within the total area to satisfy reasonable requirements in respect of the total area.

The Court decided that this question of open space was a matter for the discretion of the Board and that unless the discretion was used so unreasonably that it could be said to have "miscarried", the Courts could not interfere. These two cases would suggest that the validity or invalidity of this type of condition is a matter of degree.

Another unreasonable condition which may lead to invalidity is the demand of a money payment. Authority for this proposition is provided by the Appeal Board's decision in *Park West Land Co. Ltd.* v. *Palmerston North City*.[18] This case concerned a subdivision plan and consequent change of use under section 38A. The Council imposed a condition whereby a "service fee" of $32,620 was payable by the applicant Company in order to install water, drainage and sewerage facilities. The Board held that such a condition was not "fair and reasonable" under section 38A and was inconsistent with that

[14] (1970) 3 N.Z.T.C.P.A. 281.
[15] Idem., per Mr Kennard, Deputy Chairman.
[16] (1962) 107 C.L.R. 142.
[17] Ibid., 153. See also M. R. Wilcox, *The Law of Land Development in New South Wales* (1967) 54-55.
[18] (1970) 3 N.Z.T.C.P.A. 223.

section.[19] Similarly, in the Australian case *Woolworths Properties Ltd.* v. *Ku-Ring-Gai Municipal Council*[20] Else-Mitchell J. held that a monetary contribution towards parking facilities in the area was invalid. He stated:[21]

> . . . I should not wish to say more than that any power to require a contribution of money towards the provision of parking space, whether by the imposition of a condition or otherwise cannot in my view be exercised unless the facilities, actual or proposed, are so situated, and defined in such a fashion, as to enable a decision to be reached that they are capable of being identified with or restricted to use in connection with the proposed development.

A condition may be unreasonable in that it interferes with an existing use right. New Zealand authority on this point is lacking, but Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[22] took the view that a condition must not be used in an attempt to suppress an existing use, for example, by requiring an existing factory to close down when the applicant's new factory came into operation on a new site. In support of this proposition, Hill[23] cites *Allnatt London Properties Ltd.* v. *Middlesex County Council*[24] in which an application was made to extend an existing factory. Two of the conditions imposed required that the existing factory and the new additions to it should be used only as one unit and the persons who were to use the premises were also restricted. These conditions were held to be void for unreasonableness.[25]

In certain circumstances it is also possible for a condition limiting the use of the property to a specified group of persons to be declared void. This point was debated in *Fawcett Properties*[26] but the limitation in that case to persons employed in agriculture was held to be valid because it ensured the preservation of a "green belt". If, however, this type of restriction interferes with the owner's freedom to dispose of his property it may be unreasonable, as in the *Allnatt* case.[27] On this authority, the validity of the New Zealand Appeal Board's decision in *Re R. G. Brunton Ltd.'s Application*[28] might be question-

[19] In contrast to this case is *White* v. *Levels County Council* (1966) 3 N.Z.T.C.P.A. 10, in which the applicant was ordered to pay half the cost of improvements to the road frontage when applying for the establishment of a crematorium in a rural zone.
[20] (1964) 81 W.N. (N.S.W.) 262.
[21] Ibid., 266.
[22] [1958] 1 Q.B. 554, 573.
[23] C. Fay and M. Rich, *Hill's Town and Country Planning Acts* (5th ed., 1967) 131.
[24] (1964) 15 P. & C.R. 288.
[25] See also *Minister of Housing and Local Government* v. *Hartnell* [1965] A.C. 1134. (H.L.)
[26] Supra, n.7.
[27] Supra, n.24.
[28] (1966) 3 N.Z.T.C.P.A. 3.

able since the condition at issue in that case stated that the specified departure should apply only as long as the applicant or his successors owned the properties in question. Whether this would be a sufficient restriction on alienation of the property to be declared invalid is uncertain.

A condition which seeks to alter the effect of other legislation to which the condition relates or which seeks to dictate terms to another body in dealing with matters under the condition may also be invalid.[29] This issue was raised in *Lange* v. *Town and Country Planning Appeal Board (No. 2)*[30] in which one condition related to the fixing of underground water levels by the Poverty Bay Catchment Board, and the other related to the purchase of properties belonging to neighbouring objectors. This second condition attempted to outline the basis upon which the properties should be valued. Claims were made by the plaintiff, but rejected by the Court, that the Appeal Board was acting in an unreasonable manner in imposing the conditions. Richmond J. in his judgment, acknowledged that the Appeal Board could not dictate terms to the Land Valuation Court, but he did not pursue the point further.[31]

Mention must also be made of "time conditions", for in certain circumstances these may be held to be unreasonable and consequently invalid. A leading case is *Kingsway Investments (Kent) Ltd.* v. *Kent County Council*[32] which concerned conditions stating that detailed plans should be submitted before any work was done. One condition also stipulated that the permission should cease to have effect if these plans were not approved within three years. The majority of the Court of Appeal held that this time limit was void. Davies L.J. stated:[33]

> In my judgment such a condition is unreasonable and bad. It means that in effect the defendants are taking away with one hand that which they have purported to grant with the other and are thus evading the revocation procedure.

Winn L.J. struck down the condition on the grounds of its repugnancy to the policy of the Town and Country Planning Act 1947 (U.K.). However, the House of Lords reversed this majority decision because they felt that the applicant should have submitted his plan well

[29] See Blundell and Dobry, ante n.12, 172.
[30] [1967] N.Z.L.R. 898.
[31] Ibid., 903. A similar type of situation occurred in *Park West Land Co. Ltd.* v. *Palmerston North City*, supra, n.18, where the Council were trying to achieve by s. 38A what could only be done under the Municipal Corporations Act 1954.
[32] [1969] 2 W.L.R. 249 (C.A.); reversed by the House of Lords, [1970] 2 W.L.R. 397.
[33] Ibid., 269.

before the three year deadline. Moreover, the Court was concerned with the fact that the invalidity of the condition would mean that the whole consent was also invalid. It appears to the writer that the House of Lords has armed a Council wih a valuable weapon. If the Council has doubts about whether it should let the application be implemented it could merely remain inactive and let the permission relapse at the end of the approval period. On the other hand, this type of condition has not yet been challenged in New Zealand, and the general approach of the Court of Appeal could be followed instead.

Criticisms have also been levelled at time limits which require the completion of a development within a specified time. This, it is said, could lead to the owner of a half-completed building finding himself, through no fault of his own, not only deprived of his right to complete it, but also unable to claim compensation.[34] It may also be possible to find a Court disapproving of a condition which limits the period of consent. For example, in *Te Marua Golf Club* v. *Hutt County*,[35] the Appeal Board approved the building of a stock-car track subject to a time-limit of, effectively, only two racing seasons. It would then be open to the applicant to re-apply. Prima facie this would seem to be a common-sense decision, having regard to the noise caused by the track, and traffic hazards and road wear caused by persons travelling to and from it. Yet, the Appeal Board is giving with one hand what it may take away with the other. If the re-application was refused the applicant could find himself in the position of having spent considerable time, energy and money, only to find himself without a consent and unlikely to get compensation for his efforts.[36] The validity of this type of consent, it is submitted, must once more be a matter of degree. If a Council is seeking to stifle an application by the imposition of a particularly oppressive time-limit condition, then it would be open for the Court to find that the condition was unreasonable. Conversely, it is clearly necessary in certain circumstances to place a time-limit on a consent which may have to be reconsidered at a later date.

2. *Lack of Relation to the Permitted Development*

A second ground for invalidity is that the condition does not relate to the permitted development.[37] This principle was stated by Lord Denning in *Pyx Granite*:[38]

[34] See Blundell and Dobry, ante n.12, 181-182.
[35] (1968) 3 N.Z.T.C.P.A. 85.
[36] Two similar decisions concerning short time limits are *In Re Soich and Kiwi Engineering Co. Ltd.* (1960) 1 N.Z.T.C.P.A. 100; and *Foster's Grocery Ltd.* v. *Whangarei City* (1968) 3 N.Z.T.C.P.A. 96.
[37] See the authorities cited in footnotes 7 and 8 ante.
[38] Supra, n.22, 572.

> Although the planning authorities are given very wide powers to impose "such conditions as they think fit", nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object might seem to them to be in the public interest.

On the facts of that case, the Court of Appeal held that conditions limiting the working hours and dust emission of a quarry and requiring the removal of all machinery from the area were valid because they related fairly and reasonably to the development permitted. Similarly, in *Fawcett Properties*[39] the question was raised as to whether a condition restricting the use of the premises to persons employed in agriculture or forestry could be said fairly and reasonably to relate to the permitted development or to any planning policy under the relevant Town and Country Planning Act. The Court held that it was planning policy to maintain the "green belt", and that because of this the conditions should be supported if possible.

The questions of "relation to the permitted development" and "relation to planning policy" are interrelated, and are, in addition, closely associated with the question of reasonableness which has already been considered. For example, in *Re The Maori Trustee's Application*[40] an application for a Maori probationer's hostel in Auckland had been turned down by the Council. On appeal the Board granted the application. A. R. Turner stated:[41]

> It appeared in that case the Council was getting very close to exercising powers of social segregation by using its powers of the Town Planning Act.

The Board, in contrast to the Council, took a wider view of the matter, and had regard to the numerous other hostels in the area, rather than to the "social segregation" policy to which the Council had adhered. Moreover, in order to protect the "public interest", the Board laid down two conditions: first, that the hostel accommodate no more than six persons, and second, that it house no person convicted of a sexual offence. It is this last condition which demonstrates the problem of relating the condition to planning policy and to the permitted development. While it may be in the public interest to limit the type of persons to be accommodated in a hostel, the condition may not come within the realm of "planning" considerations, particularly if the statement of Pearce L.J. in *Fawcett Properties*[42] is borne in mind. In that case he stated that if conditions were imposed from some

[39] Supra, n.7.
[40] (1965) 2 N.Z.T.C.P.A. 206.
[41] "A local authority member's approach to town planning" (1967) 7 Town Planning Quarterly 15, 18.
[42] [1959] 1 Ch. 543, 578. (C.A.)

housing or public health or social consideration other than town planning, the Council would be taking wrong matters into account. Thus, although in the "Hostel" case the Board was attempting to implement planning policy in granting the application, the condition imposed possibly fell outside this sphere, as well as being unrelated to the permitted development. Further examples of this type of invalid condition have already been discussed under the heading of unreasonableness.[43]

3. *Uncertainty of Meaning*

A third ground for invalidity which was mentioned in *Fawcett Properties*[44] is uncertainty of meaning in the condition. A claim was made in that case that the phrase "persons whose employment was in agriculture" was uncertain, and that therefore the condition was invalid. Lord Cohen said that[45]

> . . . in construing a statute or a contract a Court should not hold a provision thereof to be void for uncertainty unless it cannot resolve the ambiguity which is said to be contained therein. I am not satisfied that the condition in the present case contains any such insoluble ambiguity.

Lord Denning also said that the condition should fail only if it could be given no "sensible or ascertainable meaning".[46] Thus the Court, in resolving the uncertainty, will uphold the condition wherever possible.[47] However, it must be noted that expressions which are frequently used by local Councils have been criticised by the Minister of Housing and Local Government in the United Kingdom.[48]

> Conditions should be couched in such a form that the Council will be able to take effective action if they are not observed. Vague expressions such as "maintain the land in a tidy state", or "so as not to cause annoyance to nearby residents", have obvious weaknesses.

When an examination is made of conditions which are contained in consents, it is obvious that many contain such vague expressions. Although their frequent usage means that the Courts would be reluctant to declare them invalid, the Minister's statement is a warning,

[43] Note, for example, that in *Hall & Co. Ltd.* v. *Shoreham-by-Sea U.D.C.* supra, n.8, the provision of roading by the applicant as well as being unreasonable, did not relate to the permitted development.
[44] [1961] A.C. 636.
[45] Ibid., 663.
[46] Ibid., 678.
[47] Note however, that the test of Willmer L.J. in *Hall & Co. Ltd.* v. *Shoreham-by-Sea U.D.C.* supra, n.8, was one of "reasonable construction" which may differ slightly from the tests proposed by Lords Cohen and Denning. See also *Lange* v. *Town and Country Planning Appeal Board et Ors (No. 2)* supra, n.30, for an example of uncertainty and the application of the "Wednesbury umbrella".
[48] Hill, ante, n.23, 136-137.

for if one such frequently used expression was invalidated as being uncertain, it would mean that many similar phrases in other conditions would face the same future.

4. *Delegation*

A further ground for invalidating a condition, which does not fall into any grounds outlined in *Fawcett Properties*,[49] is invalidity as a result of a delegation of duties. This matter recently received attention in *Turner* v. *Allison*.[50] Four conditions were the subject of dispute in this case. The first three stipulated that the appearance and landscaping of a proposed supermarket were to be carried out to the satisfaction of Miss Nancy Northcroft, a town planner and architect. The fourth condition stated that any disputes should be settled by Miss Northcroft and her decision would be final. The Court of Appeal held that the first three conditions were not invalid as a delegation of duties, since,[51]

> [t]here is nothing in s. 35 or elsewhere in the Act which requires the Board to settle every last detail of the conditions which it seeks to impose and in my view, in the case of conditions 2, 5 and 7, the Board neither abrogated its own functions nor delegated to Miss Northcroft a judicial function.

However, the Court felt that the fourth condition attempted to set up a special tribunal which it was not empowered to do. Richmond J. stated that[52]

> . . . the final words of condition 18 go beyond the power of the Board to impose conditions. They purport to appoint an arbitrator whose decision would in effect oust the ordinary jurisdiction of the Courts to determine the question of compliance or non-compliance with a condition imposed by the Board.

In addition to this authority, the Minister in the United Kingdom has ruled that a condition leaving a material discretion in the hands of a highway authority was improper because it delegated a duty which was properly that of a local Council only.[53] Having regard to the

[49] Supra, n.7.
[50] [1971] N.Z.L.R. 833.
[51] Ibid., 857, per Richmond J.
[52] Idem.
[53] See Blundell and Dobry, ante, n.12, 174. In *Figol* v. *Edmonton City Council* (1970) 71 W.W.R. 321, 336, the Appellate Division of the Alberta Supreme Court upheld the actions of a "development officer" who approved a development permit subject to the parking and access and drainage arrangements on the site being "to the satisfaction" of the traffic engineer and City Engineer respectively. The officer had not delegated his own duty of deciding upon whether the permit should be allowed by imposing conditions as to other officials' approval of certain aspects of the total permit which they would, in any event, normally deal with when the construction of the development occurred.

decision in *Turner* v. *Allison*[54] considerable doubt must be raised concerning the validity of one condition contained in *Titirangi Ratepayers' and Residents' Association (Inc.)* v. *Waitemata County*.[55] The condition in question stated:

> If any dispute arises in any amendment to or the imposition of further conditions, the questions at issue shall be referred to the Regional Planning Authority, whose decision shall be final.

On the basis of *Turner* v. *Allison*[56] this would clearly be invalid as a delegation of duty.

5. *Severance*

There has been considerable debate as to the effect on a planning consent when one or more conditions contained within it are found to be invalid. In *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council*[57] the two alternatives were discussed:[58]

(1) The Court could sever the unreasonable conditions and allow the permission to continue, or
(2) It could follow the reasoning of Hodson L.J. in *Pyx Granite*[59] and hold that if a condition is ultra vires, the whole planning permission must fail, since it must be assumed that without the conditions the permission would never have been granted. In *Pyx Granite* Hodson L.J. had stated:[60]

> . . . it would, I think, be impossible to mutilate the Minister's decision by removing one or more of the conditions. The permission given has been given subject to those conditions, and non constant but that no permission would have been given at all if the conditions had not been attached. The consequence would be that if any of the conditions imposed were held to be bad as imposed without jurisdiction, the whole planning permission would fall with it, and the respondents would be left without any planning permission at all, for it would not be open to the Court to leave the planning permission standing shorn of its conditions, or any of them.

However, in *Fawcett Properties*[61] Roxborough J., in the Chancery Division, made a distinction between "trivial" and "fundamental" conditions and this distinction was referred to in *Hall's* case.[62] In *Kingsway Investments*[63] this question of severance was discussed, with varying conclusions. Lord Denning was of the view that if the

54 Ibid.
55 (1960) 1 N.Z.T.C.P.A. 109, 110.
56 Ibid.
57 [1964] 1 W.L.R. 240.
58 Ibid., 260-261 per Pearson L.J.
59 [1958] 1 Q.B. 554.
60 Ibid., 578-579.
61 [1958] 1 W.L.R. 1161, 1167.
62 Supra, n.8, 251 per Willmer L.J.
63 Supra, n.32.

condition was bad then the whole permission should fail because the condition was of fundamental importance, while the other two judges in the Court of Appeal thought that the condition was unimportant and therefore severable. The majority of the House of Lords followed Lord Denning's approach to the problem.[64] In *Turner* v. *Allison*[65] the Court of Appeal considered severance of the invalid condition which concerned the delegation of a judicial duty to Miss Northcroft. Richmond J. stated:[66]

> In the present case the final words of condition 18 are in my view certainly not "fundamental to the whole of the planning permission" but are in their nature merely incidental and superimposed upon the condition validly imposed by the earlier words.

Thus the Court was willing to accept that the importance of the condition to the consent was relevant and that a consent should not fail merely for the invalidity of a minor condition.

There are arguments either way. If the Court accepts severance it may be changing the whole basis of the consent, since the imposition of a condition relating to an extraneous matter shows that the authority, in exercising its discretion, must have paid regard to this extraneous matter.[67] On the other hand, there are two important consequences where the Court refuses to sever the invalid condition. As Garner points out:[68]

> [First] in future if he (the applicant) has the temerity to challenge the validity of a condition . . . and is successful, he will find the ground cut away from under his feet, as he will have no planning permission at all. . . . [Second] this argument that a void condition invalidates the permission will prove to be an invaluable tool in the hands of the authority, for they will not be stopped from setting up the illegality of their own condition, so as to show that development has been carried out without any valid permission at all.

At present, it appears that a Court will continue to strike down the whole consent where the condition is a fundamental one, even though this is to the detriment of a blameless applicant.

III. Conclusion

Because the empowering provisions of the Town and Country Planning Act are so wide and general in allowing the Council to grant or refuse an application so rapidly, it could also be expected that the number of cases to reach the Courts will increase accordingly.

[64] In Australia, the High Court in *Lloyd* v. *Robinson* supra, n.16, avoided the issue and came to no conclusion on the matter.
[65] Supra, n.50.
[66] Ibid., 858.
[67] See Wilcox, ante, n.17, 58.
[68] J. F. Garner, "Void Planning Conditions" [1964] J.P.L. 26.

For this reason it is essential for local bodies to realise that there are certain instances in which conditions attached to consents will be invalidated. Although local Councils are given wide powers in deciding what is reasonable, there are certain recognisable principles upon which the Court acts, and certain conditions, for example, those demanding money payments from the applicant, which they will hold to be unreasonable. It should also be realised that unless consents are framed in clear and unambiguous language, the Court may soon become disillusioned with the ability of local Councils to deal competently with such matters.