Human Rights and Planning Law

By

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1. Most practitioners will be aware that Charter of Human Rights and Responsibilities Act 2006 has granted Victorian citizens a formal ‘Right to Property’ for the first time. It also grants other rights which will affect planning decisions across the State. With similar parliamentary inquiries also under way in Western Australia and Tasmania, and a Human Rights Act also in force in the ACT, it may not be long before we see a model similar to the Victorian Charter introduced at the Federal level.

2. The Charter creates a system of checks and balances addressing the protection of human rights in Victoria. Although the Charter’s ambit is wide, the mechanisms are not internationally novel and the rights have been the subject of considerable international jurisprudence, to which all Victorian Courts are now expressly permitted to refer to by s.32(s) of the Charter.

3. Of particular interest to VPELA members is the “hot off the presses” UK High Court decision of FH Cummings v Weymouth & Portland Borough Council [2007] EWHC 1601, handed down on 3 July 2007. That Court held that a local planning inquiry into re-zoning land breached a developer’s human rights, by denying the developer adequate opportunity to put forward its case and respond to the local authority.

4. The decision is of interest because the UK planning scheme operates in a broadly similar way to our domestic scheme, and their Human Rights Act 1998 is quite analogous to our Charter.

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2 The Charter partially commenced operation on 1 January 2007, and becomes fully operative on 1 January 2008. See Minister’s second reading speech, Legislative Assembly: 4 May 2006.


5. The offending conduct of the local council planners was to decide that an area of land was not available for residential development, despite acknowledging from the outset that certain ‘green field’ sites would need to be released for housing due to insufficient ‘brown field’ sites existing. A developer who owned green field land therein sought to object to this decision, so that residential development could occur on his land. The Council was concerned about two issues in connection with the land, namely landscaping and drainage. At a preliminary stage, the independent planning inspector conducting the inquiry hearing ordered that:

[24] "Objector's Proofs of Evidence must be submitted 6 weeks before the date of the inquiry session dealing with that matter. These deadlines are not negotiable."

6. At the inquiry, the developer only led evidence on landscaping, the effect of which was to favourably differentiate his site from the alternative green field site known as the ‘Louviers Road’ site. Once the Council led unfavourable evidence on drainage as well as landscaping, the developer apprehended its oversight and sought to lead expert evidence on drainage.

7. Referring to his earlier order that “These deadlines are not negotiable”, the inspector refused to admit the additional drainage evidence without assessing the forensic value of the evidence or the reason for its lateness. He did however allow the developer to cross examine on the drainage issue. This had the effect of extending the inquiry from one days duration to four days, the last of which was six weeks later than the first day of the inquiry. Despite this additional time, the Inspector did not relent and admit the expert evidence itself.

8. The planning decision ultimately went against the developer, who appealed seeking to quash the planning decision on the ground that the Council acted contrary to the rules of natural justice and the UK equivalent of section 24 of our Charter⁵, which grants the right to a fair civil hearing.

9. His Honour Judge Hickinbottom found at [33] that:

(i) At the time of lodging their evidence for the hearing, the developer understood that there was no issue in relation to drainage.

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(ii) That was a misunderstanding. It is unclear how the developer’s misunderstanding arose.

(iii) From wherever the developer’s misunderstanding derived, the Council did nothing to give rise to it. The misunderstanding was not in any way the fault of the Council.

10. Nonetheless, in failing to give the developer an adequate opportunity to put their case in respect of their objections to the planning decision, in so far as poignant expert evidence concerning drainage issues was arbitrarily excluded, His Honour found that the Independent Inspector had violated their human right to a fair trial. The review proceeding lacked "equality of arms" between the parties, which requires striking a fair procedural balance between the parties.6

11. His Honour continued at [52]:

“Therefore, the Inspector failed properly to exercise his discretion as to whether to admit Mr Dilke’s evidence and in so doing he denied the Claimants the opportunity of relying upon important evidence in relation to a crucial issue. He denied the Claimants a fair crack of the procedural whip (see Fairmount at page 1266A, per Lord Russell of Killowen). In so doing he substantially prejudiced the Claimants’ ability to present their case on the objections so far as a vital issue was concerned. Without the evidence of Mr Dilke, they could not have satisfied the Inspector with regard to the in principle drainage issues: because they had understood there was no such issue, they had no evidential basis upon which to do so. Nor could they have persuaded him that the objection site was preferable to the Louviers Road site, as they sought to do.”

12. The planning decision was quashed and remitted to the Council with a direction to admit the developer’s evidence.

13. The decision is relevant in Victoria, as all local government decisions about planning must comply with our Charter by virtue of section 38, so a similar argument is available here. Whilst many planning decisions are already made within a framework which requires natural justice to be accorded, the Charter alters this legal environment by introducing a duty on a Court to interpret planning schemes so as to be compatible with the protected rights. The Court does not need to first find an ambiguity in the legislation before it can alter the plain meaning. It further makes international jurisprudence on these issues

6 At [49]. See also Neumeister v Austria (1968) 1 EHRR 91 at [22], and Fairmount Investments Ltd v The Secretary of State for the Environment [1976] 1 WLR 1255.
relevant when assessing what the actual content of the right should be at our domestic level.

14. A more novel development is that under section 6 of the Charter, Ministers may also be bound by the Charter when they are making decisions or acting on behalf of the Crown, although they have been exempted from the definition of ‘public authority’ in section 4. One can anticipate that the reach of the section 6 obligation will be an key early decision by our Courts, as this is an area where there was not a pre-existing common law right to procedural fairness or natural justice.

15. Under s 38 will be unlawful for public authorities to (a) act incompatibly with protected rights and (b) when making a decision, to fail to give proper consideration to a human right. Under s.3, an “act” includes a positive act, a failure to act and a proposal to act. It is a substantive and procedural obligation on public authorities to take action and make decisions in a certain manner.

16. Sub-section 38 (2) provides an exception to the unlawfulness restriction where the public authority could not reasonably have acted differently or made a different decision given the state of the law, including a Commonwealth law. This gives public authorities a “Nuremberg” defence. The solution in this scenario is to seek s.32 judicial interpretation. Through s.32 interpretation, advocates may be able to change the statutory obligation to a rights-compatible obligation. The rights-compatible interpretation, in effect, becomes your remedy. That is, the law is re-interpreted to be rights compatible, and the public authority then has obligations under s.38(1), and the s.38(2) exceptions to unlawfulness do not apply.

17. Public authorities are defined in s.4 of the Act. In effect, there are three categories of body. Wholly public or “core public authorities” will be bound in their internal and public functions. Subsection 38(3) requires hybrid public-private or “functional public authorities” to comply when exercising their public functions, but exempts hybrid bodies when acting in their private capacity and exempts entirely the wholly private bodies. The current leading case from the UK on public authorities is YL v Birmingham City Council.

18. As far as remedies go, the general rule in s 39(1) is that no new cause of action is created by the Charter, but decisions can be reviewed using the traditional administrative law

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7 See ss. 3, 4(1)(c) and (2).
8 [2007] UKHL 27. The case involved accommodation in a nursing home. The dissents of Bingham LJ and Hale reflect our own statutorily prescribed features of public authorities, whereas the majority have opted for a much narrower definition.
avenues of internal and external review in light of failure to make decisions compatible with human rights. Section 39(2) then sets out two specific examples of the general rule. The first example is that of judicial review of an administrative decision (s.39(2)(a)). Applicants may seek judicial review for unlawfulness, probably on the grounds of *ultra vires*, failure to consider relevant considerations (namely, protected human rights), or an improper exercise of power, and substantiate it by reference to the Charter. The second example is that a person may seek a declaration that the public authority acted unlawfully and claim “associated relief”, such as an injunction to stop the unlawful conduct, a stay of proceedings or an exclusion of evidence (s.39(2)(b)). Judicial review can also consider applicants’ arguments that an act or decision under law was disproportionate under s.7 of the Charter given the human rights considerations.

19. Advocates should remember that these remedies are themselves subject to the judicial duty of interpretation consistent with protected human rights.⁹

20. It is worth noting that the courts will give local government planning decisions a “margin of appreciation” or “degree of deference”¹⁰ when under review, in recognition of the fact that many of these processes are designed to resolve difficult social or political issues which may not translate cleanly into the legal sphere.

21. It is also worth noting that whilst only real people have human rights¹¹ under our Charter, I expect our Charter to have a “horizontal effect”¹² in that the rights must be respected in proceedings between private parties as well as proceedings involving the arms of the state.

22. The Charter of Rights will bring international jurisprudence more readily into our courts. In many cases the issues we debate have received careful international consideration already. Our society will benefit from this sharing of wisdom.

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26 February 2008

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¹⁰ See *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions (Alconbury)* [2001] UKHL 23; [2003] 2 AC 295. This case dealt with the UK ‘right to property’ as set out in Article 1 of the First Protocol to the *European Convention*.

¹¹ Sub-section 6(1).

¹² As it has been held to have in the UK. See *Campbell v MGN* [22004] UKHL  22.