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# PUBLIC ADMINISTRATION

## ADMINISTRATIVE DISCRETION—OFFICIALS, EXPERTS AND THE PUBLIC

Papers by Sir John Goodsell, Professor A. F. Davies, Mr M. C. Timbs, Mr  
George Clarke and Professor Geoffrey Sawyer

## BUREAUCRACY AND DISASTER—II

J. M. Power and R. L. Wettenhall

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OF THE ROYAL INSTITUTE OF PUBLIC ADMINISTRATION

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## ADMINISTRATIVE DISCRETION IN THE URBAN PLANNING AND DEVELOPMENT FIELDS

GEORGE CLARKE

### *Introduction*

Control and discretion are conterminous in the present town planning and urban development control scene. Without exception, the legislation covering the activities of state planning authorities and local government bodies in the Australian states is liberally endowed with the word "may". The *Acts Interpretation Acts* typically tell us that "wherever in an act a power is conferred on any officer or person by the word 'may', such word shall mean that the power may be exercised, or not, at discretion. . . ."<sup>1</sup> Not only is there a discretion whether to exercise a power or not, but also to the matter in which it may be exercised.

What meaning can be given to that other ubiquitous word "control", in urban planning and development control? The *State Planning Authority Act* (N.S.W.) charges that Authority with "the responsibility of promoting and co-ordinating town and country planning and securing the orderly and economic development and use of land".<sup>2</sup> Literally, control is defined as the "power of directing and restraining"; the "right of supervision"; the "means of checking"<sup>3</sup> the actions of a subordinate or petitioner. When we add the equally ubiquitous element of discretion, the "liberty of deciding as one thinks fit, absolutely or within limits", a prime consideration is whose discretion is to be absolute, and whose is to be limited, how; when; where; and why?

If the limits to discretion are too wide or non-existent, then the controllers run rampant over individual rights. We are in an even deeper morass if there is no consensus of popular opinion, or no widely understood scientific basis, as to precisely how the urban development process operates in its full social economic, perceptual<sup>4</sup> and programming ramifications, particularly if these ramifications are constantly expanding and shifting in a time of rapid social and technological change. Some wish to plan for 20 years ahead, others for tomorrow. Who shall exercise which discretions for generations yet unborn? In a field where it can reasonably be asserted that the sum of human comprehension is doubling every, say, 7 years, we suffer a series of "generation gaps" between the differing discretions of people of different age groups whose vision, expertise and character of judgment was gained at different times and in different places. In such a multi-disciplinary field, we have conflicts between the discretions of many different types of experts and many different authorities. In a field which

<sup>1</sup> *Interpretation Act*, 1897 (N.S.W.).

<sup>2</sup> Section 12.

<sup>3</sup> O.E.D.

<sup>4</sup> "Perceptual" is here used to connote the full range of sense experience within the physical environment—visual, aural, olfactory, kinaesthetic, *et al.*

encompasses national issues and yet touches individuals so intimately, the proper scope or limits of discretion are difficult to establish. We have trouble enough in agreeing what, if anything, the "public interest" is, but we also have difficulty in defining the extent of the "public" which has a real "interest" in particular matters or particular cases.

It is not surprising, therefore, that the process of urban physical planning and development control is one where the exercise of discretion is a matter of sufficient difficulty, sufficient frequency, sufficient chaos, sufficient urgency and sufficient national importance to merit greater attention by more and better minds than it traditionally, and still commonly, receives.

It was the opportunity to stimulate this attention that encouraged me to accept the invitation of this Royal Institute to lead the discussion at this conference on this subject. I say "lead the discussion" because I do not presume to attempt any kind of even quasi-definitive paper on such a subject, at least while I am so heavily engrossed on the battlefield of professional practice. I am now full of trepidation in even appearing before the national conference of this Royal Institute because I had no idea it would be so highly distinguished, so predominantly official, and so expert in its composition of individual conferees.

I will therefore merely try first to indicate the major processes of statutory discretions in the urban planning and development fields. I will also attempt to state a series of principles and proposals as to the direction in which I feel we could, and should, be moving so as to increasingly provide positive and specific solutions to many town planning quandaries which are today so crudely settled on an *ad-hoc* basis.

#### *The processes and levels of discretion*

Discretion is currently exercised in a series of processes at many overlapping levels of regional and urban planning and development control. The people who exercise the discretions can be seen as ranging from the counter-clerks and other more senior servants of local councils, the actual aldermen or councillors of local authorities, up through a confusing series of separate but equal state government bureaucracies which often resemble feudal baronies, to a State Government Minister who often has to defer to separate but equal brother Ministers if not, indeed, to Cabinet, as a whole. In most States, we now also have an appellate tribunal established by legislation as in Victoria and South Australia, or a court, such as the Local Government Court in Queensland and the Land and Valuation Court in New South Wales. These tribunals and courts hear certain categories of appeals against the use, abuse and/or misuse of administrative discretions by "responsible authorities", which may be local councils, regional authorities or, in certain cases, state authorities. On the matters which come before them, the discretionary decisions of these tribunals and courts is usually final, with further right of appeal, rarely exercised, only possible on points of law. The Victorian Town Planning Appeals Tribunal was established by the *Town and Country (Amendment) Act*, 1968. The South Australian Planning Appeals Board was established by the *Planning and Development*

*Act* 1967-68. The Queensland Local Government Court was established by the *City of Brisbane Town Planning Act*, 1964. In 1967, the court's jurisdiction was extended to the whole State. The N.S.W. court's jurisdiction in planning appeals, however, dates from 1945.

#### *The New South Wales Court*

The Land and Valuation Court in New South Wales has accumulated such a wealth of experience and such a body of case law as an appellate planning tribunal that its decisions affect the whole Commonwealth. In view of the many basic similarities in local government powers and procedures throughout the States of Australia, and in view of the seniority of the N.S.W. court as an appellate planning development control tribunal, the situation in N.S.W. provides a useful case study.

In New South Wales, the major sources of control are the *Local Government Act*, and *State Planning Authority Act*, as interpreted by the Land and Valuation Court. There is little to be gained by dissecting the present legislation. However, a selection of the controls exercised under the Act, and the nature of their administration, presents clearly the confusion under the present system. Firstly, the discretionary powers of municipal councils in dealing with applications for development, subdivision, and/or building, as generic powers, reveal a wide ambit of matters which may be considered. This is so, regardless of the status of land, which may be subject to a Prescribed Planning Scheme, or Interim Development Order. It may be the subject of special ordinances of a more stringent character, or merely subject to council resolutions or codes of a "policy" or "guideline" nature, which nevertheless frequently purport to bind the council.

In the case of the *Shell Company of Australia Limited v. Ryde Municipal Council* it was noted that the range of matters which the responsible authority must take into account (in ruling on a development application) has been expanded so that in practice it covers all potential environmental problems. At the extreme limit of discretion was the former power to dictate architectural design. In its crude form, this power has been cut down by the courts in recent years, but theoretically the scope of control by arbitrary council resolutions is unlimited. So in *Boye v. Burwood Municipal Council*, *Else-Mitchell J.* said "the mere fact that any proposed building does not conform with the code or rules so adopted, *prima facie* justifies and warrants the refusal of any development to the contrary, subject to the owner's right of appeal, to a reconsideration of the matter . . .".

Throughout Australia at the present time the administration of planning is not often controlled by really precise schemes. Planning Scheme Ordinances and Interim Development Orders in New South Wales take a loose form, albeit a wordy one. *Sugerman J.* said in *Old v. North Sydney Municipal Council*: "an ordinance . . . may restrict or limit the discretion which the council would otherwise have in relation to any one of these specified matters . . . an ordinance might well restrict the scope of that discretion, for example, by providing for some fixed standards . . . It might even be that the making of an ordinance dealing with part of one of the subject matters might be

regarded as exhaustively defining the province left to the council's discretion." It has been the concern of planners to make this statement meaningful, but progress has been slow.

Not only must a council exercise its discretions within the limits prescribed by ordinance or order, but it should also maintain consistency in the application of its own resolutions. In *Consolidated Realities v. Baulkham Hills Shire Council*, the council, having given a development approval to a previous owner, refused to renew the approval on the application of the subsequent owner. If the court was convinced that the first approval was a mistake in terms of "amenity", "public interest" or other head of consideration, then it was obliged to favour the council. Another problem that arises is where a council is cautious in giving approval for fear an undesirable precedent is set; the court has held that in refusing to approve an otherwise unobjectionable project on the ground that a mass of similar buildings would be undesirable; it must show that the proliferation of such developments is in fact probable.<sup>5</sup> However, *Hardie, J. in Hunter District Industries v. Newcastle City Council* has said that previous policy decisions of a council are valid considerations to be taken into account in deciding whether an application should be approved or not.

What are the limits imposed by planning scheme ordinances? Everyone who exercises a discretion in dealing with a Development Application is enjoined to consider the "amenity of the area, the circumstances of the case, and the public interest".<sup>6</sup> Council's grounds for refusal, or conditional consent, of a development application must relate, somehow or other, to particular paragraphs in the ordinance controlling the area.<sup>7</sup> In *Ex parte Bankstown Municipal Council*, *Else-Mitchell J.* said "every statutory power or discretion has limits which must be determined in the light of the functions of the authority in which the power or discretion is vested, and having regard to the scope of the legislation by which it is created". This does little to reduce the *ad hoc* quality of exercises of discretion. Councils have the power to impose conditions on to development proposals. "These conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority is not at liberty to use its powers for an ulterior object, however desirable that may seem to them in the public interest."<sup>8</sup> Attempts have been made to de-limit the idea of public interest. In *Pitt-Mullis v. Sydney County Council*, general moral and social interest were held to be wider issues than "public interest" in the town planning sense. But "public interest" was in no way defined by that statement and the question is often asked, where does the concept arise? An anguished local planning officer has asked: "Planning is supposed to be for the people, so is it to conform with people's wishes, or is it to implement the council's, or any other planning authority's, idea of what is good for them?"

<sup>5</sup> *Emmott v. Ku-Ring-Gai Municipal Council* per *Sugerman J.* and *Girvan v. Willoughby Municipal Council* per *Sugerman J.*

<sup>6</sup> See, e.g., County of Cumberland Planning Scheme Ordinance, clause 27.

<sup>7</sup> *Shell Co. of Australia Ltd v. Ryde Municipal Council*, per *Sugerman J.* and *Jumal Developments Pty Ltd v. Parramatta Council*.

<sup>8</sup> *Pyx Granite Co. v. Ministry of Housing (U.K.)*.



### *Discretions generally*

In New South Wales the Land and Valuation Court is a full appellate body in planning matters. This means that it can exercise its own discretion, at variance with decisions of the planning authorities. The court can substitute its own "reasonable" decision for the authorities' unreasonable one. But in Australia a "hierarchical" approach is used in review of discretion. Briefly, this means that the higher the level of the administrative official exercising the discretion, the less likely it is to be reviewed by the courts. There is, however, room for argument within this broad notion. In the case of *Bailey v. Corole*, regulations passed by the Governor of a State were impugned on the ground that they were made (albeit at a much lower level) with an ulterior purpose.<sup>9</sup> This is rare—but not so uncommon are cases of ministerial decisions being questioned on grounds of bad faith and unreasonableness,<sup>10</sup> or that the Minister has exceeded the bounds of his competence in the particular matter. The recent case in England of *Radfield v. Minister of Agriculture* is an example where the Minister went outside the bounds of discretion allowed by the legislation. In the well-known decision of the House of Lords in *Franklin v. Minister of Town and Country Planning* it was conceded that, although actions of a Minister are not lightly to be set aside, a deviation from a prescribed statutory procedure may allow this to be done. Some difficulty exists in deciding whether a Minister's action is governed by legislation, or is merely an expression of policy. Obviously, the Minister will be committed to policy in relation to most planning matters and in *R. V. Anderson: ex parte Ipec*, the High Court of Australia held that a Minister's discretion can only be questioned when the matters under consideration are not dictated by policy. At lower levels of administration, policy is still relevant. (Note the case of *Hunter District Industries v. Newcastle City Council* previously mentioned). But by-laws may be queried for a number of reasons, including the *bona fides* of the officers drafting them.<sup>11</sup> The position of regulations has been discussed previously. A conclusion that is forced on us is that planning objectives are being lost in the plethora of discretions. In New South Wales, the State Planning Authority follows an unadmitted, unofficial but privately acknowledged aim of keeping all planning, where possible, at the interim development stage. This is also the aim of other harassed bureaucrats in other States. By doing this, they maintain an alleged flexibility. It is clear that the Authority also retains a great measure of discretion in deciding whether to approve an application or not, without having to provide any specific planning guidance to people who may be affected.

Planning is all too often an apparently arbitrary interference with owners' rights to use land as they imagine they are entitled to do, under some apparently settled Planning Scheme Ordinance or Council Code. Although it was said in *Royal Sydney Golf Club v. Federal Commissioner of Taxation*,

<sup>9</sup> See Article 43 ALJ, Hogg.

<sup>10</sup> Generally of his advisers.

<sup>11</sup> *Stewart v. Oakleigh Municipal Council* per Hudson J.

that "there is all the difference between a public law affecting land, and a restriction of title", the words used are "public law", and not "administrative discretion". That is a very different matter. Land users are entitled to know where they stand. Australians today acknowledge that land use is more a privilege than a right. They are mostly discontented because they do not know, and cannot find out, precisely what their privileges are in particular cases.

It is the plethora of discretions which today creates discontent among developers, and equally among those who feel themselves injuriously affected by development. We tend to focus our discussion on the microscopically tiny fraction of disputes or cases which come before appellate tribunals or courts, because there the issues and considerations are more fully and openly ventilated and recorded. But the great mass of discontent lies in those administrative and policy-making processes which never come before the courts. The council servant's exercise of discretion is often reversed by his council committee. The committee's exercise of discretion is often reversed by the council. The council's exercise of discretion can be reversed by the exercise of discretion of a commissioner appointed by the Minister to hear objections to an exhibited Draft Planning Scheme, or by an administrator hearing an Interim Development Appeal. The commissioner's or administrator's exercises of discretion are often predominantly reversed again by officers of the State Planning Authority. The State Planning Authority's agenda is so huge that it probably finds difficulty in reversing the recommendations of its officers. Finally, however, the Minister's exercise of discretion frequently over-rides the long drawn out exercises of the State Planning Authority. It is not unknown, in some Australian States, for the Minister's exercise of discretion to be reversed by his perhaps more discreet, differently motivated, or more powerful, Cabinet colleagues. Such intervention of discretions other than those at the command of the Ministry for Local Government or Town Planning are not confined, in their exercise, to Ministerial levels. Administrators of Boards and Departments of Main Roads; Railways; Industrial Development; Decentralisation; Water, Sewerage and Drainage; Ports and Harbours and so on, are constantly horizontally enmeshed in the predominantly vertical web of discretions previously described.

#### *Towards more precise performance standards*

The science and art of urban planning today is in a state analogous to that of medicine shortly after Harvey's discovery in 1628 of the circulation of the blood. The comparable basis for understanding how *cities* work is probably the notion that traffic is a function of land use, which began to be coherently written-up only from 1952.

The administrative discretions which proliferate today in urban planning may therefore be seen as akin to the medical discretions of the late seventeenth or early eighteenth centuries. It is not surprising that confusion, contradiction and squalor abound.

The problems of environmental planning and control will presumably only yield to the same kinds of massive efforts as have subdued the problems

of public health and private medical practice over the last century or more. One of these efforts will be in basic and applied research, so that basic conflicts between differing but equally ignorant guesses can be removed from exercises in administrative, political and judicial discretion. Another massive effort will be required in the field of education. Australian schools of "town planning" have tended, to date, to teach a rough and ready trade rather than an intellectual discipline or anything remotely like the new environmental sciences which are being grappled with overseas. A further massive effort, akin to the political and legislative efforts of the nineteenth century in the public health field, will be required from our parliaments. With 70 per cent of our national population now resident in only eight urbanizing regions, environmental planning will simply have to receive more attention, of one kind or another, from our governments, both federal and state, than they attract today.

Meanwhile, what can we administrators and professional practitioners do? I suggest that we must constantly strive to reduce the scope of necessary discretion (i.e. reduce the amount of guesswork) by evolving more precise, more mathematical, more detailed, plans and codes. We must seek to codify sets of performance standards to more closely define such things as "amenity", "privacy", and the "public interest" in particular types of localities, for particular types of buildings, for particular sets of circumstances. The N.S.W. court has, over the past decade or two, made some solid progress in this direction. Under the wise direction of Justices *Sugerman*, *Hardie* and *Else-Mitchell*, it has successively codified the standards to be applied to, for example, service stations and hotels. It is now in the middle of a series of cases which one trusts will eventually lead to the intelligent codification of definitions of acceptable plot ratios, site coverages and so on, for residential flat buildings. This process of codification of mathematical performance standards does not necessarily have to be done by courts. The Western Australian Government Planning Authorities did it quite simply by hiring a professional consultant who went out and talked with all the interested local and state authorities, and with all the private and professional interest groups, thereby devising a comprehensive set of regulatory codes with the full participation of what political scientists call the "veto groups". Western Australia gets by without a court, because it invests more heavily than other states in skilled and experienced planning administrators, professional staff and consultants. This is, very broadly speaking, also the pattern on which English Town Planning has evolved.

New South Wales presents a contrary example. For reasons which are perhaps obscure, but in any case beyond the scope of this essay, N.S.W. administrators and politicians, at both local and state levels, have been unable to make much progress in reducing discretionary chaos. What little progress has been made in that State is primarily an achievement of justices of the Land and Valuation Court. A high ranking N.S.W. town planning administrator once, relatively recently, explained to me, in dismissing my suggestions of citizen participation in the planning process: "The job of the government is to govern." Apropos of citizen group protests about ~~man~~

road routes being cut through residential neighbourhoods, and parliamentary questions about the uses and abuses of administrative discretions in statutory planning scheme public objection procedures, he went on to inform me that "Parliamentarians don't know what the public interest is, and neither do Ministers. Don't talk to me about citizen participation—the man-in-the-street is a one-man pressure group. We public servants are the only ones with the knowledge and independence to determine the real public interest". This sort of attitude has been, in my experience, more endemic in New South Wales than elsewhere. It comes as no surprise to me, therefore, that New South Wales is now finding difficulty in agreeing upon the need for, and the machinery of, "third-party" citizen appeals against the granting of development consents by councils. Queensland and Victoria saw the need for these, legislated for them, and operate them quite successfully. New South Wales is only now, after a persisting series of statements in their favour by Justices *Hardie* and *Else-Mitchell*, showing signs of accepting the idea in principle.

However, even I have been dismayed by a recent report of the latest N.S.W. administrative committee. This is the "Report of the Building Regulation Advisory Committee on Standards for Residential Flat Buildings", ordered by the N.S.W. Parliament to be printed on 12th August, 1969. The Committee was predominantly a public service one. It had a sub-committee which met over an unadmitted number of years on 86 occasions, and has finally proposed new standards which, in my view, are not a sufficient improvement on the old ones. But that is not what has surprised me. In view of the record of achievement of the N.S.W. Land and Valuation Court, I am dismayed and surprised at paragraphs 256 to 263 on page 35. Herein it is frankly admitted that at the initial prompting of three Institutes of Real Estate Developers, Agents and Builders, it has arrived at a recommendation that appeal to the Land and Valuation Court should be replaced in favour of a loose tribunal like the N.S.W. "Building Boards of Appeal", in cases where "a council seeks to impose at the development consent stage requirements in excess of the specific provisions of building regulations which the council itself has decided to impose".

The Committee's prose is turgid and impenetrable. But the suggestion of setting-up another "developers and administrators" board which would not, as far as I can see, even meet the Franks Committee criteria, and which would reduce the beneficent jurisdiction of the Land and Valuation Court, is to me a backward step.

The way forward, in my opinion and in my experience, can only lie in more participation by citizen and interest groups in the planning process and in the process of development control and administration. Urban planning, like public health, is an educative, as well as a regulatory process. It must secure the concern, the involvement, the participation and the education of the citizen. I have tested these hypotheses in Perth, in Battery Point in Hobart, and in Artarmon in Willoughby, in the preparation of codes and plans. My associates and I are now starting to apply these hypotheses again in the evolution of a detailed plan for Darling Point in Sydney. I

believe that the hypotheses work, in that procedures in accord with them produce codes and plans which represent a consensus of opinion, and are at the same time mathematically precise. Thus, the area of discretion (i.e. guesswork) is reduced. The more we can reduce guesswork, in relatively simple matters, the more we can free our administrators, politicians and justices for the next new set of problems, the next new provinces for law and order.

#### DISCUSSION ON MR CLARKE'S PAPER

*The Hon. Mr Justice Else-Mitchell:* I should like to thank Mr George Clarke for the paper he has prepared and presented to this conference and for the inspiration which he has given to the planning process in so many respects. I should also on behalf of the Land and Valuation Court of which I am a member like to express appreciation of the compliment he has paid to the court and to the various judges who have presided in that court for the contributions that have been made by them in town planning matters; I hope that I have in some small respect made some such contribution myself.

Some aspects of Mr Clarke's paper are of a highly sophisticated and inspirational character and I should like to make a legal and more humble practical approach to the matter of administrative discretion in town planning and allied fields commencing with some brief historical discussion and an explanation of the way in which the controls have arisen and require to be exercised.

Some control of town planning, subdivision and building constructing by planning authorities, local government councils, boards and courts is essential because by the common law the rights of an owner of land are virtually unlimited.

Prior to local government legislation, a landowner could subdivide his land, lay out such roads—and they would be private roads—as he thought fit; he could build houses of such size and in such localities as the prospect of profit dictated; he could set factories and shops close by dwelling houses and farms; and he could quarry the minerals and stone from the soil wherever it was found.

The only limits on a landowner's rights were general and required recourse to the ordinary courts for definition: a landowner could not conduct activities such as mining, quarrying or diverting the streams so as to cause damage by subsidence or flooding to the land of a neighbour; nor could he cause undue interference to his neighbour's land by noises, smells, fumes, and the like of such intensity as to constitute public or private nuisances at law; and in England he could not build out the light or aspect enjoyed by a neighbouring landowner for 20 years or more.

The experience of the Industrial Revolution in England and some of our early mining towns where housing, health and factory standards represented the barest minimum consistent with the maintenance of the life and capacity of the worker showed the need for limits being imposed on a landowner's rights. This was achieved in the first instance by not selling the land but by granting long term leases under which the lessee agreed to use the

land only for certain purposes—a method used in large sections of London and places like Paddington—or by imposing covenants on the sale or subdivision of land binding immediate and subsequent owners, a device which was also adopted in areas like Belgravia and other localities in London to ensure proper residential development, as it also was in Wollstonecraft and Haberfield near Sydney.

But these devices had the defect of inflexibility because lessors and others entitled to the benefit of these covenants were loth to exercise any discretion so as to authorize a change of use, and sometimes they had no power to do so. In due time controls of a similar or parallel character were introduced into the local government legislation requiring the dedication to public use of roads in new subdivisions and the approval and registration of plans of subdivision; houses were to comply with certain basic health and construction standards; minimum areas were prescribed for lots in new subdivisions, provision was made for the proclamation of residential areas in which there should not be certain industries or trades, or in which flats should be prohibited, and subdividers were required to set aside part of the subdivided area for public recreation or to contribute an equivalent value in money to the local council's funds for that purpose.

These controls, some of which are of relatively recent origin are generally accepted today as necessary and reasonable—they would have been regarded as highly objectionable to the *laissez faire* advocates of the nineteenth century; perhaps we have been more socialistic than we realize. Experience has shown the inadequacy and ineffectiveness of many of these specific controls. They cannot regulate old subdivisions; they only enable individual cases to be dealt with, and cannot extend to redevelopment schemes nor to the design of a total precinct unless all the land is owned by the same person. Hence we have planning schemes which proceed on the basis of a broad design plan for an entire city, town, municipality, or a defined segment of some local governing area, affecting the freedom of the owner of every parcel of land in the planning scheme area and *pro tanto* destroying the proprietary rights of the owner.

If the social purposes and public interests which are sought to be served by town planning subdivision and building controls are to be achieved and so long as private rights of land ownership subsist, these controls will inevitably involve the exercise of discretions for someone has to make decisions about the terms and effect of the planning scheme; questions of definition are also entailed which may involve some discretion or power of variation or relaxation.

Elsewhere I have argued for the conversion of all land ownership into long term leasehold interests in order to avoid some of these problems but except in the Australian Capital Territory and the Northern Territory and a few other isolated areas, all land in Australia is vested in the owner in fee simple for an estate of freehold so that the only sensible approach to control is by prohibitory and regulatory laws and ordinances the impact of which may be relaxed by the exercise of a power or discretion. By way of digression, I understand that there is a move in the Australian Capital

Territory to convert leaseholds to freeholds but in a planned city of this sort that would be a retrograde step which could well result in planning and administrative chaos.

As Mr Clarke has said, most exercises of power entail a discretion so that the powers under a planning scheme, to grant consents to permissible uses, to approve the layout of subdivisions, and the erection of buildings, all require the designation of an authority or person to exercise the relevant power and the prescription of some criteria for its exercise.

Time was when the criteria were simple—for example, "*a house shall not be erected within 20 ft of the street alignment*"; but there was nevertheless a discretion and it required an element of judgment in some cases: the street alignment might be curved and the front of the house straight; the house might be on the top of a cliff 20 feet above the street; or some non-habitable portion of the house, a porch or carport, might be within 20 feet and the rest further away. But some authority—and it must ultimately be a court of law—would have to decide the question in a marginal case. And if the law or ordinance allowed a building to be erected within 20 feet of a street with the consent of some appropriate local governing authority, someone on behalf of that authority would have to decide the further question whether the relevant circumstances made it proper to grant the consent.

In both of these questions the building inspector of the local council might be the first person to give a decision on the two questions—first, does the proposed building infringe the law or ordinance, secondly, if so, should a consent to its erection be given?

The building inspector might take one view; the council's engineer and town planner a different one; the council would then have to make a decision and this decision could be challenged by some appropriate relief in legal process, though strictly the first question would be one for the ordinary courts of law whilst the second as a discretionary exercise of power would fall for decision by the appropriate special appeal tribunal designated by the local government or planning legislation—a board of appeal or in New South Wales the Land and Valuation Court.

But no one would suggest that problems of this sort should be determined at first instance by a highly trained judicial tribunal such as one of the superior courts of law. Elsewhere I have stated three reasons why this should not be the case. First, "the qualities which judicial determination possesses are hardly appropriate to the resolution of those disputes and claims which tend to be stereotyped in character or to fall into readily classifiable categories. Not only are the techniques and talents of traditional courts and their judges unnecessary for repetitive duties of this type, but the time and cost entailed in dealing with such cases becomes prodigious. . . . the established courts suffer from excessive congestion of cases and there is of necessity a limit to the intake of work with which such courts can cope. . . . Secondly, . . . any claim or dispute which falls into an accepted and easily defined category or which is capable of resolution by the application of pre-determined formulae, simple principles or scales should not require that

high degree of individualization of justice which the traditional courts provide, but should rather be the subject of administrative determination at a less formal and lower level. Thirdly, the proper function of the traditional courts and particularly of courts of superior status is to provide a means of ultimate review of the scope of jurisdiction—as distinct from the mode of exercise of jurisdiction—of administrative authorities and those courts should be encouraged to concentrate upon the functions of review rather than being confined to the determination at first instance of cases which in the ultimate may be little more than a wilderness of single instances.”

There is thus a need for a proper hierarchical arrangement of decision-making authorities each of which will have a discretion to exercise, but at each level the authority will tend to be more sophisticated than the one below it and correspondingly those at the top will deal only with the more complex cases or those in which an important or novel principle or question of law is involved. And it is also desirable that there should be no dichotomy or division of functions between two tribunals or authorities; function is hard to define but the specialist tribunal should have power to decide all incidental questions of law as well as to review the exercise of discretion though, as Professor Sawyer and other writers have pointed out, the power of the superior courts of law to review exercises of power and questions of law on jurisdictional grounds may seldom be properly or effectively excluded.

Not only does the need for some sort of hierarchical arrangement of decision-making mean that the exercise of discretion has become more complex than it was in past years but the criteria which are critical in the decision-making process have become wider, more numerous, and in some respects more diffuse. In illustration, the protection of a homeowner from commercial intrusions or flat development once depended upon the delimitation of an area or district as one in which trades or flats were prohibited by a restrictive covenant or a proclamation under the relevant Act (for example, section 309 of the Local Government Act (New South Wales)). Today, however, similar questions are to be resolved under prescribed planning schemes in New South Wales upon the basis of considerations such as the following:

- (b) the character of the proposed development in relation to the character of the development on the adjoining land and in the locality;
- (e) the existing and likely future amenity of the neighbourhood including the question whether the proposed development is likely to cause injury to such amenity including injury due to the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, grit, oil, waste water, waste products or otherwise; and
- (f) the circumstances of the case and the public interest.

And whereas the siting of a building on a parcel of land was formerly determined simply—if inadequately for good planning—by the requirements of building regulations and ordinance (Local Government Ordinance 71 and Schedule VII of the Local Government Act (New South Wales)) that it should be at least 3 feet from the boundary for one storey and an additional distance for every extra storey, planning schemes now provide that the relevant authorities shall “take into consideration”—



the size and shape of the parcel of land to which the application relates, the siting of the proposed development and the area to be occupied by the development in relation to the size and shape of the adjoining land and the development thereon.

The matters so specified and the others set out in provisions of typical planning scheme ordinances (as in clause 27 of the County of Cumberland Scheme Ordinance), namely:

- (a) the provisions of any planning scheme (including this scheme) affecting the land;
- (d) any representations made by any statutory authority in relation to the application or to the development of the area, and the rights and powers of any such authority.

are not criteria in the nature of conditions precedent so that if compliance is established the development must be approved. Rather are they qualitative matters which must be taken into consideration before any application for development is determined affirmatively or negatively.

As a matter of law as well as common sense it will be seen that the six matters mentioned in clause 27 of the County of Cumberland Planning Scheme Ordinance which is a typical planning scheme ordinance entail factors of varying and even conflicting weight so that the exercise of discretion requires a series of value judgments the effect of which in a total sense must be determined before it can be said that the discretion is properly exercised. It is at this point that the desirable process of hierarchical decision-making on planning matters tends to falter if not collapse entirely on occasions.

The first reason why I say this is that the legal construction of provisions like clause 27 of the County of Cumberland Planning Scheme Ordinance is seldom properly understood by councils and in particular it is not appreciated that the council must consider each one of the specified matters in turn and reach a conclusion upon it; planners have said in evidence before me that members of councils by which they are employed simply do not comprehend the obligation to make value judgments on these matters.

Secondly, whilst the various matters specified in the ordinance are assumed to invoke all relevant planning factors the investigation of the facts and the preparation and submission to council of a report with appropriate recommendations is often made by an officer of the council who has neither a town planning nor a legal qualification and his recommendation in favour of a development may be accepted by a council without any proper consideration being given as the ordinance requires; this is one reason why it is imperative, as Mr Clarke has said, to provide a right of appeal against the granting of development consents. The political and local government opposition to doing this is to me incomprehensible but it is a fact that at a recent local government conference at Dubbo local government delegates refused to agree to a right of appeal against consents granted by their councils.

In the third place, the matters set out in provisions like clause 27 of the County of Cumberland Planning Scheme Ordinance are the main if not the exclusive considerations to which a council can have regard. As has been said, the council cannot look at extraneous matters for this may vitiate the exercise of the discretion in the manner suggested in Mr Clarke's paper.

For this reason I have as a matter of law questioned whether under the ordinances as they are a council can devise a code which seeks to specify more precise standards of a calculable character for the qualitative and abstract considerations in clause 27; and, to cite a comment of *Hardie J.*, "testing an application against the code is not a substitute for the exercise of the discretion which the ordinance grants".

A final reason why the planning ordinances as they are presently cast do not provide a full and effective means of resolving the exercise of planning discretions is that there is inadequate participation by and notice to the public of planning applications. Some participation is envisaged and encouraged at the scheme-making stage by the exhibition of a draft scheme and the lodgment of objections, but the view is taken that, once this has been done, there need be little or no notice to the public or local residents; and even though notice may be given by some councils it is nevertheless the council's job to govern and the local resident or the man in the street does not matter. This was stated by a Member of the Legislative Assembly, Mr M. S. Ruddock (Member for The Hills), in a debate on the question of a right of appeal earlier this month as follows:

During my twelve years in local government there were times when I heard a councillor say: "I am sorry, but I am here now to make the decisions. You elected me, and I will make the decisions for three years. I will not listen to what you have to say. You will have the opportunity to have your say at the end of three years." But by the end of three years all sorts of things could have happened; in fact, they do happen. I was shocked . . . that a conference of so-called responsible councillors and aldermen should decide that there should be no appeal against their approvals.

All these factors I think demonstrate the inadequacy of a local governing authority such as a municipal council being the ideal body to exercise a final discretion in planning matters, and they support the contention advanced by Mr Clarke and others that there should be an appeal in all instances and, most importantly, where a discretion to approve or refuse a development is conditioned on matters as general and wide as those set out in the planning ordinances.

And, without wishing to urge the adequacy of the jurisdiction of the Land and Valuation Court as ideal, it seems to me desirable that the appeal must be to a special court or some other skilled tribunal having some of the major qualities of a court. Only such a body can provide adequate ventilation in public without the inquiry becoming too protracted, only such a body can devise standards of consistency and give reasons for its decisions which will, as a matter of law, be reasonably final. Lawyers and judges acquire great experience in weighing and evaluating evidence just as a physician develops special skill in diagnosis and it is the judicial technique which makes judicial determination publicly satisfactory; if I could quote a comment I made elsewhere:

The difference between a judge and an administrative tribunal no doubt lies in the accepted tradition of judges to perform their functions in a manner which enables a litigant to know where and how he has failed, and perhaps, as Professor Robson observed many years ago, the infusion of a spirit of judicial determination into the work of administrative tribunals could do more to improve the plight of the citizen than the imposition of objective rules.

At the same time I agree that if the measure of value judgment in

planning decisions can be reduced by the prescription of more precise standards this would be an excellent step and I should fully support Mr Clarke's *cri de coeur* for more precise performance standards. But it will never be possible to eliminate value judgments entirely, at least not if some decent aesthetic and amenity standards are to be preserved for these are probably not capable of reduction to formulae and when there is a dispute or doubt it is probably most satisfactory to allow some open debate about it in a fashion which will permit the protagonists to put their respective contentions and have them examined to test their validity. Is it possible to do this otherwise than by creating an appeal to a court or some judicially framed tribunal which will allow a proper hearing free from local pressures and prejudices and give reasons for its conclusions and decisions? Some Boards consisting of lay persons or experts who sit as casual members—sometimes also representing or acting for parties in matters before the board—can hardly give public satisfaction or result in consistency; indeed, if applied to town planning and similar appeals they could well destroy public confidence in the appeal or review process.

At the same time I should not advocate that in a specialized field like town planning one of the ordinary courts will necessarily give public satisfaction as an appeal tribunal; such a tribunal must be created to deal with the particular field of jurisdiction or be constituted by judges or others having special experience or qualifications. After all, town planning appeals now cover a field of administrative jurisdiction of great width and important content and its width and importance will increase as has industrial arbitration. It is not a coincidence that Mr Clarke has ascribed to its subjects H. B. Higgins' description of "new provinces for law and order". In this field standards must be as clear and specific as practicable so that compliance with those standards can resolve the main bulk of applications, but the necessity for value judgments is likely to remain. As to these a right of appeal against any exercise of discretion to a court or tribunal properly constituted and equipped should result in the formulation of general standards which on a basis of consistency and precedent can provide a body of rules capable of being applied to similar or analogous cases; it may then be possible to give statutory effect to the rules so formulated as standards of general application.

Public participation in the exercise of planning discretions is also desirable but whilst it takes one form, such as Mr Clarke has described in the making of planning schemes, it can be provided in the case of individual applications only by wider public notice of such applications and a right of appeal on both sides so that the administrative decisions taken will be decisions with which people are content to live—and this is but one, though a major feature, of a satisfactory planning environment.

*Mr G. France (University of Queensland):* I believe there are two options in considering this matter—to start either at the bottom or at the top. Unless we start at the top and get principles established, planning cannot succeed. In fact planning itself is ill-defined. What do we mean by it? Can we really start without basic principles—in fact strategic principles?

Can we work out strategic decisions to be taken at Federal Government, or State, or Local Government levels? State Governments, I feel, should not delegate responsibility for planning to Local Government.

Turning to the participation of the people in planning, how can we ascertain not only what they demand, but also whether everyone wishes to participate. I feel that the public ought to be allowed to opt out of involvement in planning. They should be told what the options are. Local Government councillors have a representative role to explain options and policies so far as Local Government is concerned.

*Mr Clarke:* Perhaps the concept of top level strategic planning is relevant here. The situation in New South Wales is that in effect there is one single State Planning Authority whose functions are manifold, including supervision and administration of individual applications.

In Victoria it has been recommended that a State Strategic Council for Regional Co-ordination be created. So far as New South Wales is concerned, perhaps more power in this area has been given to the Sydney and Metropolitan Water Board as a Regional Planning Authority. I consider that New South Wales and Victoria offer two opposite examples of planning authorities, the former is more bureaucratic while the latter in general has a more liberal philosophy of decentralization.

The function of the Victorian State Planning Committee is to make strategic plans and lay down policies for regional development. These are handed down to Regional Authorities. On the New South Wales scene, I envisage a Central Coast Regional Authority consisting of four to six regional authorities with a state representative appointed by the Minister to each regional authority. In this way there would exist a team of local government and state authority individuals who would be responsible for policy and detailed plans. Overall planning would still be subject to a reviewing body such as an appellate board. I picture an organizational chart with decisions being made at each level in respect of particular problems appropriate to the level.

On the second point raised by Mr France, overall strategic planning could be done at the Commonwealth level in such matters as a broad policy for development of airports and harbour development in the States. From here it could proceed downwards through State Planning Authorities to Local Government. I deplore the attitude that public servants are the only ones with knowledge and independence to determine the real public interest; the public is the best qualified to determine public interest—this may be done at neighbourhood level with face to face discussions before planning becomes highly formative and legal.

*Mr H. W. Eastwood (Valuer-General's Department, New South Wales):* At my level I am concerned with the proper and lawful use of land and in this area the position is crystal clear. The changes inherent in planning have an effect on land values and consequently on rates and taxes. People affected by these kind of changes cannot be forgotten and I feel that this is one indictment of town planning. Planners must look with some interest at

the welfare of the community and plan accordingly and realize that even an apathetic community can often be stirred into action.

*Dr R. Mendelsohn (Commonwealth Department of Housing):* Planning stops very much at the State level and regional planning has not made a very valuable contribution to overall development. There seems to be a curious demand for Commonwealth funds for city areas but it must be evident that there is little Commonwealth interest in land development at State levels and I wonder when this will occur. I feel that there is no real relation between the Commonwealth and the States in the urban planning and development field and perhaps this indicates a lag in Federal interest in planning. It seems to me that there is a real dilemma in establishing a Federal interest and is it really its function to concern itself with environmental planning of city or country?

*Mr Clarke:* I believe that the same considerations apply in respect of this question as were discussed in the Victorian context, and that the role of the top planning authority, in this case, the Federal Government, is the determination of national strategy. (In this I do not take into account Commonwealth-State financial relations.) In terms of urban planning, I do not consider that it is the role of the Commonwealth to plan the development of Leichhardt in Sydney or Battery Point in Hobart. Its role is to lay down broad principles of strategic planning such as the future disposition of ports, airports and so on.

Here there is an involvement in a Federal system of equalization and it is not beyond the Heads of Commonwealth Departments to develop a national study of development to give something to each State. The biggest problem in the State sphere is to guess which way the cat is going to jump and this also affects local council planning. An instance is the decision to establish a container port at Balmain which in my view was a crisis decision and not the result of regional planning. The broad principles of management and communication are the same in planning and development. A secondary function of the Commonwealth could be to finance research into standards of planning and development—at least it could look at the problem.

*Mr F. W. Kirby (University of Sydney):* I should like to look at the earthy side of development planning in its early stages without ignoring the higher principles envisaged by Mr Clarke. It seems to me that the main source of trouble is the grass roots sort of decisions made by people not well briefed in the consequences that could flow from their actions. I instance the case of a gentleman whose only notice of acquisition of his property was the notification by the Valuer-General of dispossession. There does not seem to be any real publicity of decisions; nor are the consequences of such decisions known to many people. Until this facet of informing the public of consequences is established, local government planning cannot be efficient.

*Mr Clarke:* I am cognisant of the imperative need to work at both national and local levels to ensure that neighbourhood interests are not neglected. However, a cautionary note: when the Hobart City Council prepared a plan for Sandy Bay and invited public comment, 100 per cent of

rate-payers lodged objections and the plan was withdrawn. In my own experience in preparing a development plan for Battery Point the need to attend meetings of Progress Associations, to listen to opinions and generally to find out the interests of local groups was a prerequisite to planning. I listened to the views of all groups and acted as a catalyst in engaging the citizens in the planning process. Everybody could then participate but those who wished to opt out could always do so. However once the plan was decided upon and adopted by the council no one could ever say that they were not consulted and any attempt to change the plan would involve all the people concerned in its formulation.

*Professor R. N. Spann (University of Sydney):* I can see the special value of the Battery Point exercise but not its extension to other areas. For example, in an area such as Bankstown which would not have the same community of interest as Battery Point, how could the residents really participate or have a real interest in its development?

*Mr Clarke:* A similar exercise was carried out in Perth, but I must admit there would be problems in transferring such a procedure to areas where the residents were apathetic. Referring specifically to Bankstown, I feel that the people of this locality would have strong views but the methods of talking to residents and of holding meetings would differ. However, one has to start somewhere, and the procedures developed at Battery Point should continue to be used to ensure the participation of the less educated and less informed members of the public in the planning process.

*Mr P. K. O'Gorman (Land Administration Commission, Queensland):* The practice of leaseholding land in itself restricts the right of the individual to determine for himself how his leasehold land should be used. In this regard he has no say as to the development of the area where he lives.

*Mr Clarke:* I agree that land use in practice is now more a privilege than a right with an absence of certainty as to its ultimate use. Whatever system of land ownership is used this is more a machinery matter than an obstacle to the planning process.

*Mr E. J. Minchin (Crown Solicitor's Office, New South Wales):* The people of Australia are not only the residents of Bondi. In Canberra we have the most outstanding example of real planning in a city which we could regard as being owned by all Australians. Yet Canberra citizens have not participated in the city's planning. How does this fit into Mr Clarke's dynamic process of planning?

*Mr Clarke:* In my view Canberra is a hot house study. Mr Menzies said there should be Canberra and lo and behold, there was! So far as Canberra is concerned this is an example of total power of planning and physical design. It is a totalitarian creation of a society ruled by politicians and subject to all the disadvantages which I have pointed out in my paper. It is not an example which could be extended to other parts of Australia.

*Mr R. O. Kifford (Department of Agriculture, Victoria):* What interests me is the cost of the expensive legal system for appealing against town plans and the setting-up of various committees in the planning process. I wonder about the cost benefit of schemes outlined by Mr Clarke.

*Mr Clarke:* I estimate the cost to be from \$100 to \$150 per acre of planning, but the question of local amenities touches individuals closely and the cost is justified. The present situation is fairly analogous to public health advancement in the eighteenth century. It is a problem which will yield only to the same massive effort and cost which in an affluent society must be met. Progress in the implementation of planning could be achieved with the courts as a backstop to safeguard the rights of the individual.

*Mr M. E. Piper (Sydney Water Board):* I should like to ask Mr Clarke what would be the effect on local consultation of citizens' ingrained attitudes towards government, departmental and statutory authority? What would be their attitudes and expectations if they felt that their objections would be steam-rollered anyway? My experience is that they are reluctant to approach government officials for consideration—a large proportion of the community who have difficulty in paying their water rates do not know that they can discuss their problems, nor are they aware of the help they can be given. People are prone to suffer in silence and it is disturbing to find so many people estopped in an approach to the authority concerned, preferring to go to other persons such as their local M.L.A. and even to their Federal representative concerning a local authority matter. In all these cases representations could best be dealt with by face-to-face consultation in order to explain what has happened or what is going to happen. Suspicion, distrust and lack of information among the community seem to be the reasons why citizens fail to prosecute their own representations. I wonder how far in Mr Clarke's community approaches the same suspicion and reservation would be evident and how these could be dealt with unless through the educational processes in schools, or does Mr Clarke have a ready solution?

*Mr Clarke:* The Sydney Water Board, as I understand it, is representative, so that any of its problems are small indeed compared with those of other authorities. I admit that I had to overcome ingrained suspicions in the various communities; success in this area is not a public relations trick but only the result of a determined effort to get the message across. In this the assistance of politicians skilled in public relations does much to help but I do not think that anyone could put up any substantial argument why town planning proposals should not be submitted for public consideration.

*Mr J. F. Wharton (Chief Secretary's Department, Victoria):* I question the idea of a top or a bottom. In a case involving a national asset there is no room for an expert body to make an enlightened decision. It is concerned only with the technical side of the problem—the final decision should have regard to the wishes of the community which might be contrary to a decision based on technical considerations only. In terms of the participation process, however, I wonder how long it takes to confer and whether decisions are really based on the views of residents.

*Mr Clarke:* The Perth Code of Local By-laws, which have been in operation for over 3 years, were the result of symposia at which half a dozen people gave papers. Symposia such as these fill a major function when local

authority codes are being reviewed. However, I stress that while any planning scheme needs to be under continuous review to meet changing conditions, it should remain static at least for 2 to 3 years. The main problem is to identify the public who have an interest. For example, so far as the Australian coastline is concerned, I consider that this is not a local matter but one which really deserves a Commonwealth policy.

The Chairman, *Professor D. Corbett (Chairman, South Australian Group)*: In closing this session I should like to remark that the discussion has been characterized by a certain basic utilitarian optimism. Conflict is inherent in all human relations, even to the way in which we conduct our family life, and planning will never cease while differences have to be reconciled.

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