INTERIM DEVELOPMENT APPEALS

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The aim of this article is to draw attention to some recurring problems with respect to administrative powers and to the checks which ought to be placed upon those who exercise them. The particular powers selected for discussion are those enjoyed by town planning authorities under interim development orders.

THE ACT AND REGULATIONS

The Victorian Town and Country Planning Act 1958 is a comparatively short Act. It is silent on many points of importance both to those exercising town planning powers on the one hand and to those affected by them on the other. Some matters of doubt have been settled by judicial authority since the origins of the present legislation came into force in 1944.[1] In the main, however, there has been a remarkable lack of litigation which could give rise to authoritative decisions on doubtful points arising under the Act. The basic reason for this is that the Act gives such very wide powers to town planners, and in the last resort to the Minister responsible for administering the Act, that it has been difficult, if not impossible, for private persons affected by the exercise of those powers to bring their troubles before the courts.

The Act establishes the Town and Country Planning Board with the primary function of advising the Minister with respect to the administration of the Act and to matters relating to town or country planning.[2] It is required to produce an annual report which is laid before both Houses of Parliament by the Minister.

Part II of the Act deals with planning schemes generally. Municipal Councils are authorized to prepare planning schemes and provision is made for the preparation of joint planning schemes where more than one municipality is involved.[3] Municipal Councils and the Melbourne and Metropolitan Board of Works are designated 'responsible authorities' as regards the preparation and the submission for

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I wish to express my gratitude to Mr R. A. Smithers, Q.C., for his most helpful advice and criticism in the preparation of this article and also to Mr C. G. Hooper of Messrs Best, Hooper, Rintoul & Shallard, for his invaluable criticism of the article in manuscript. I should say that there are several views expressed in the article critical of the present practices of the Board of Works with which Mr Hooper would not agree.

[1] *R. v. City of Richmond, ex parte E. B. May Pty Ltd* [1955] V.L.R. 379; *R. v. City of Moorabbin, ex parte Kans Food Products Pty Ltd* [1954] V.L.R. 465.

[2] S. 5. The Board may be required to prepare planning schemes for areas specified by the Minister.

[3] Ss. 10, 11.

approval of planning schemes, and as regards the enforcement and carrying out of any scheme which operates within their various areas.[4] In general, the various powers, functions and duties provided for by the Act are conferred or imposed upon 'responsible authorities'.

Section 14 of the Act provides that after a responsible authority has resolved to prepare a planning scheme it may, with the approval of the Governor-in-Council, make an interim development order controlling or prohibiting the use or development of any land included in the scheme.[5] It is this section which is principally concerned in

[4] Ss. 3, 32—and the Town and Country Planning Board is also designated a 'responsible authority' as regards the preparation and submission of a scheme prepared by it on the Minister's request.

[5] '14. (1) After a date determined and notified by the responsible authority in the manner prescribed as being the date of the commencement of the preparation of a planning scheme, and before the approval of such scheme, the responsible authority may with the approval of the Governor-in-Council (given after consideration of a report by the Board thereon) make an interim development order regulating restricting restraining or prohibiting the use or development of any land, or the erection construction or carrying out of any buildings or works on any land, which may be included in such scheme:

Provided that—

(a) the responsible authority may during the operation of any such order permit, subject to such conditions as are specified in the permit, such use or development of any land or the erection construction or carrying out of such buildings or works, which apart from the permit would be in conflict or not in conformity with the interim development order, as the authority thinks proper;

(b) nothing in any interim development order shall prevent the continuance of the use of any land or buildings for the purposes for which such land or buildings were lawfully used immediately before the coming into operation of the order.

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(3) Any person who feels aggrieved by the refusal or failure within a period of two months of a responsible authority to permit the use or development of any land or the erection construction or carrying out of any buildings or works or by the conditions specified in any permit issued by the authority may within such time as is prescribed appeal to the Minister whose decision shall be final and shall be given effect to by the authority; and the Minister may appoint some person or persons to hear any such appeal and report thereon to the Minister who after considering such report shall give his decision on the appeal as aforesaid.

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(5) The responsible authority may by notice in writing direct the owner of any land affected by an interim development order to remove pull down take up or alter any building or works (and if the owner fails to do so in the time specified in the notice may itself remove pull down take up or alter any such building or works) commenced or continued in contravention of the provisions of such order on any such land after the publication of the order in the *Government Gazette*.

'(6) Any expenses incurred by the responsible authority under the last preceding sub-section may be recovered from the owner of the land on which such buildings or works were so commenced or continued.

(7) Where a planning scheme relating to any land affected by an interim development order is approved by the Governor-in-Council such order shall so far only as relates to any such land cease to have any further effect but without affecting any right liability penalty or legal proceeding accrued incurred or instituted by virtue of or in relation to such order.

(8) The Governor-in-Council may at any time at the request of the Board or at the request of the responsible authority supported by a recommendation of the Board by notice published in the *Government Gazette* revoke any interim development order and such order shall thereupon cease to have any force or effect.'

this discussion, but it is necessary, nonetheless, to keep in mind the general frame of the Act. Section 16 provides that planning schemes may deal with the matters set out in the Second Schedule[6] and shall be prepared in accordance with the regulations.[7] Provision is made for publication of notices of schemes when prepared, for public inspection of schemes, for the receipt and hearing of objections to schemes, and for the submission of schemes to the Minister together with objections made to them. The Minister is required to obtain a report on all schemes from the Town and Country Planning Board—except, of course, on schemes prepared by that Board.[8]

No planning scheme has any force or effect until the Governor-in-Council has approved it and notice of that approval has been gazetted;[9] and even after gazettal either House of Parliament may by resolution revoke a scheme.[10]

When a planning scheme has been approved by the Governor-in-

[6] SECOND SCHEDULE

1. Streets, roads, and other ways, and stopping up or diversion of existing highways.
2. Buildings structures and erections.
3. The prescription of areas in which land is to be used for specified purposes and the prohibition restriction or regulation of the use of land in those areas for any other purposes.
4. Open spaces, private and public.
5. The preservation of objects of historical interest or natural beauty.
6. Water supply sewerage drainage and sewage disposal.
7. Lighting.
8. Land to be reserved for public purposes and the location of buildings or works to be used for public purposes.
9. Works ancillary to or consequential on any of the preceding matters.
10. Extinction or variation of private rights of way and other easements.
11. Dealing with or disposal of land acquired by the responsible authority.
12. Power of entry and inspection.
13. Power of the responsible authority to require an owner to remove alter or demolish any obstructive work or itself to do any of such things.
14. Power of the responsible authority to make agreements with owners, and of owners to make agreements with one another.
15. Carrying out and supplementing the provisions of this Act for enforcing schemes.
16. Limitation of time for operation of scheme.
17. Co-operation of the responsible authority with the owners of land included in the scheme or other persons interested.
18. Provision for ascertaining whether and by what amount (if any) the value of any land is increased by the planning scheme, the levying of a betterment rate for the recovery of one-half of such amount and for those purposes applying with any necessary adaptations the provisions of any enactments relating to those matters.
19. Estimate of the cost of works included in scheme.

[7] In passing it is worth noting that the wording of s. 16 (1) (a) is curious. The words are:

> '16. (1) (a) shall make provision for such of the matters referred to in the Second Schedule to this Act with all such particularity as the Minister requires; and . . .'

One of the 'suches' seems to be hanging in the air. This draftsman's oddity may yet cause difficulty.

[8] S. 18. [9] S. 18 (5).

[10] S. 18 (6). The scheme must be laid before the Houses after approval and either House may revoke within 24 days of the laying of the scheme before the House.

Council the responsible authority is both charged with the enforcement of it and placed under a duty to observe it.[11] Various provisions going to enforcement, to the acquisition of land, to compensation, to evidentiary matters *et cetera,* are included.[12] Part III of the Act makes the Melbourne and Metropolitan Board of Works[13] a responsible authority for the metropolitan area and gives the Board of Works the powers of a city council for the purposes of the Act. It provides also for the relations between the Board of Works and other responsible authorities in the metropolitan area. It is as such a responsible authority that the Board of Works prepared the Melbourne Metropolitan Planning Scheme 1954, which, after years of hearing objections, is at the time of writing awaiting the approval of the Governor-in-Council.

By Part IV of the Act, the Governor-in-Council is given extensive regulation making powers. These have been exercised to some extent and the regulations now in force[14] provide, *inter alia,* for the making, notification, and gazettal of interim development orders, for the making of applications for interim development permits, and for rules governing appeals from refusals of such applications.[15]

INTERIM DEVELOPMENT—DISCRETIONARY POWERS

The discretionary powers of town planning authorities, under Victorian legislation, after a town planning scheme has come into force,

[11] S. 21.

[12] Especially ss. 23-28.

[13] Hereinafter called the 'Board of Works'.

[14] Town and Country Planning Regulations No. 7, as amended by Regulations Nos. 8-10.

[15] Reg. 10. 'During the operation of any Interim Development Order any application made to a Responsible Authority for a permit to use or develop any land or to erect, construct or carry out any buildings or works shall be accompanied by a sketch plan or copy of Certificate of Title of the land, a clear description of the proposed use or development and type of construction of any buildings or works proposed to be erected, constructed or carried out and such other particulars as the Responsible Authority may require. A suggested form of application which may be used is shown as the Sixth Schedule hereto. A suggested form of permit which may be used is shown as the Seventh Schedule hereto. Where a permit has been refused the Responsible Authority shall notify the applicant in writing and shall give the reasons for such refusal.'

Reg. 11. '(1) Any appeal to the Minister against the refusal or failure within a period of two months of a Responsible Authority to issue a permit under its Interim Development Order or against the conditions specified in any permit issued shall be lodged with the Minister within two months of—

(a) the receipt of notification from the Responsible Authority of
  (i) the refusal of the permit or
  (ii) the conditions specified in the permit by which the applicant is aggrieved; or
(b) the expiration of the period of two months within which the Responsible Authority has failed to issue a permit—

whichever first occurs.

(2) Any appeal to the Minister shall be made in writing and shall state the grounds of such appeal.'

may be very wide or comparatively narrow depending on the nature of the scheme itself and its ordinance. Some schemes will be precisely drawn and will leave little room for discretionary decisions to be made by the authority. In such cases the powers of the authority will be those given by the Act to enforce the scheme,[16] and to pursue the aims of positive planning[17] where, of course, the effect on the individual will be matched in most cases by compensation.[18] In other schemes there may be discretionary powers left with the planning authority to permit some kinds of development subject to conditions. In either case the width of discretion is likely to be much less than that of discretionary powers during the interim development period. Indeed some town planning authorities have been horrified to discover, after their plan was approved, that they were 'bound by the plan'. The plan was law; and when they wanted to change something in their municipal area they found that they could not proceed without amending their plan and that, of course, is a somewhat cumbersome business.

During the interim development period, however, there is a phase where policy-making and law-making are going along side by side with the making of decisions in particular matters under wide discretionary powers. Experience during that period ought to be useful in deciding just what provision should be made for checks and balances to be imposed on the exercise of similar powers in the indefinite period which will follow under operating town planning schemes.

Although all municipal councils are 'responsible authorities' for the purposes of the Act,[19] the Board of Works' 'Master Plan' for the Melbourne Metropolitan Area has undoubtedly been the most important planning undertaking in the area. It has not only received the widest publicity but it has given rise to the greatest volume of administration. More objections have been heard, more applications for interim development permits have been received, and more appeals have been brought against refusals to grant such permits, than can be related to any other single planning scheme. This article is, therefore, mainly concerned with the Melbourne Metropolitan Planning Scheme 1954 and reference to the exercise of planning powers herein are to those exercised by the Board of Works unless the contrary is expressed.

As has been seen, the Victorian interim development provisions are fairly simple.[20] They provide for the making of an interim development order which will prohibit development generally; but the responsible authority which is preparing the town planning scheme is at the same time given discretionary power to permit development

[16] Ss. 21 and 26 in particular.
[17] Ss. 15, 25, 28—30 in particular.
[18] S. 27.
[19] S. 3.
[20] S. 14—n. 5 *supra*.

subject to such conditions as it thinks proper. In theory a permit granted under that power merely makes lawful the use of land which otherwise would be unlawful under the interim development order. Further, in theory and in the ordinary case, if, when the plan becomes law, the use permitted by the interim development permit is not in conformity with the plan, its lawful enjoyment before the commencing date of the plan will merely make it a non-conforming use protected as such by the town planning scheme ordinance.

The nature of town planning as a practical operation makes necessary some form of development control between the time when it is decided to prepare a plan and the time when the prepared plan becomes law. A number of different methods of control has been tried in different parts of the world[21] but each method raises its own special problems. The Victorian method at least has the virtues of directness and of simplicity. It can be said that the blanket freezing order, which is what our interim development order may be, is harsh and indiscriminate in operation. The difficulty is to provide a solution to the real problem of interim control which will on the one hand be effective and on the other not be open to such a charge. In any case the Victorian Act provides for discretionary permission of development during this period. It is the scope of that discretion and the importance of the power it carries with it that raise the problems to be discussed here.

How should that power be used? It seems obvious that in the initial stages of preparing a plan a responsible authority ought to permit such developments as appear to be reasonable, in accord with general town planning principles, and likely to conform to whatever plan will be prepared. Of course a responsible authority could take the attitude that it would play completely safe and simply refuse all development until its draft plan should be available to provide the basis for decision. This, however, except in the most exceptional cases, where pressures are great and the time needed to prepare the plan is short, is an unlikely attitude. For practical purposes those remarks are rather unreal, however, for it is not the present practice to approve an interim development order for proclamation until at least the outlines of the planning scheme have been prepared.

The situation changes sharply after a plan has been prepared and has been published and is open to objections. From that time two considerations of importance apply. First, the planner is *primâ facie* committed to his plan and, unless the work he has done is shown to be bad, he should be moved from it only in the light of considerations

[21] See as a contrast to the Victorian position the English provisions for control during the planning period—*e.g.* Town and Country Planning Act 1932 and Town and Country Planning (General Interim Development) Order 1933 (S.R. & O. 1933 No. 236) and see Town and Country Planning Act 1947 Part III.

which go to the virtues of the plan as a plan or which arise from circumstances which were not considered when the planning was done. Second, the public is affected by the publication of the plan. It is true that the published plan has no legal force or effect and that the only legal control arises from the interim development order. Nonetheless the publication of the plan puts the public on notice as to the intentions of the planner and as to the legal restrictions likely to affect the use of land when the plan comes into force. Many members of the public with an interest in the operation of the plan may look at the plan as published and decide that it suits them very well. If it were changed in any one of an infinite number of ways, they may wish to object and they may have good reasons for doing so.

It would seem that the provisions of our Act providing for the hearing of objections and for the procedure to be adopted when an objection is thought to be sound by a responsible authority and an alteration of the plan is made as a result, are defective.[22] That question, however, is one open to much argument and is not one of the questions proposed for examination in this article.

As has been said, in theory, an interim development permit merely makes lawful the use of land which otherwise would be unlawful under the interim development order. In theory, therefore, an interim development permit does not operate as an amendment to the plan as published. In practice, of course, in many cases it does operate as an amendment to the plan, in substance if not in form. For example, if an interim development permit is granted to permit 100 acres of land to be used for a major industrial installation, it is unreal to describe that use as a mere non-conforming use in the subsequent plan. That unreality will usually be recognized by the planning authority and, before the plan is submitted for approval by the Governor-in-Council, the planning authority will have made a modification of its original plan to re-zone the land concerned for industrial uses. A similar situation will arise if a large area of land is made available under an interim development order permit for development as a housing estate.

As a matter of substance, therefore, it may be said that, after publication of a plan, the plan may be modified either by the responsible authority on its own initiative,[23] or by the responsible authority as the result of objections made under the provisions of the Act,[24] or by the Governor-in-Council,[25] or in effect, by the responsible authority as the result of an exercise of the interim development power.[26]

[22] If for no other reason than that no provision is made for public hearings or for participation by all interested parties. These objections may be heard *in camera* and an alteration may result which affects other people who knew nothing of the objection and who have had no real chance to have their interests represented or considered. S. 16 of the Act.

[23] S. 16 (3). [24] *Ibid.* [25] S. 18 (3). [26] S. 14 (1) (a).

If the last mentioned power is used a modification in form as well as in substance may result, in which case the formal change will require the approval of the Governor-in-Council, or it may be a modification in substance only—that is, permitting a non-conforming use which really modifies the scheme in operation—in which case the responsible authority makes it finally subject only to the overall approval of the scheme by the Governor-in-Council.

It is clear that a decision to permit one use or another in an area for which a planning scheme is being prepared may be a decision which affects major economic interests and vast sums of money. A decision to grant an interim development permit for the erection of a carbon black factory may be a vital factor in the spending of two millions of pounds. The resolution of a responsible authority to permit the development of land, zoned provisionally as rural, as a housing estate, may change the market value of the land concerned from £100,000 to the vicinity of £1,000,000.

The supervision of the exercise of those powers provided by the Act is by appeal to the Minister from refusal to grant a permit or by appeal against conditions imposed by the responsible authority on a permit granted; no control or supervision is provided if the decision is to grant a permit. But before discussing the provisions for appeal it is necessary to point out that the power of decision is committed by the Act to the appropriate 'responsible authority'. This means that the decision to grant or refuse a permit must be taken by a municipal council or by the Board of Works, or by both.[27] But both of these authorities are representative and deliberative bodies; the Councils are elected by the ratepayers of the municipality concerned and the members of the Board, with the exception of the Chairman, are elected by the appropriate municipal Councils concerned with the area of the Board's operations.[28] It could be argued therefore, that, in the last resort, these bodies are controlled by the people they represent and that remarks like those made by Lord Russell in *Kruse v. Johnson*[29] are relevant here:

> Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

Kruse v. Johnson, however, was a case where a by-law was challenged, and the subordinate legislative powers of municipal

[27] In many cases there will be two interim development orders affecting the land concerned—one relevant to a municipal council's planning scheme, the other relevant to the Melbourne Metropolitan Planning Scheme 1954 (the 'Master Plan') and then two permits will be needed.

[28] Melbourne and Metropolitan Board of Works Act 1958, Part I, Div. 1.

[29] [1898] 2 Q.B. 91, 100.

Councils are of course set about with checks and controls of their own.[30] Quite apart from the different procedures required, and the supervision provided for, where by-laws are concerned, the nature of the function and the realities of the administration involved make decisions to grant or refuse interim development permits quite different from resolutions to make by-laws.

The Board of Works deals with thousands of applications for such permits each year;[31] and it has a large town planning section under a chief planner which has, as one of its functions, the handling of such applications. It is manifestly impossible for the Board to consider and pass upon the merits of all these applications and it can be confidently asserted that, in almost all cases, it merely 'rubber-stamps' the recommendation of its appropriate committee.[32] Further, it is obvious that even the Board's Committee charged with the task of recommending to the Board, in the vast majority of cases, cannot do more than accept the advice or recommendation of the planning officer who puts the material before it.

The result is that, in all but unusual or politically controversial cases, the decision to grant or refuse is made, as a matter of substance, by the appropriate planning officials. This is so notwithstanding the establishment of a cautious processing procedure in a large organization like the Board of Works, which provides for consultation with appropriate local authorities and final recommendations by senior and experienced planning officials.[33] This means that in many cases a decision is taken by an administrative officer which may, one way or the other, affect the applicant[34] to the tune of many thousands of pounds. It is unreal to point to the representative nature of the 'responsible authorities', in these circumstances, as answering the patent need for supervision of the exercise of powers such as these.

Once an interim development order is in force, the only real control provided by the Act over a 'responsible authority's' power to grant permits, notwithstanding the order, is in the form of an appeal by persons aggrieved by a refusal to grant a permit.[35]

[30] See those enumerated by Lord Russell, *ibid*, 98-100, and see, for Victoria, the Local Government Act 1958, Part VII.

[31] Between March 1955 and the end of 1957, 5,400. Ledgar, 'The Principles and Practice of Development Control' (1958) 2 *The Town Planning and Local Government Guide* 180, 182.

[32] Some applications which have aroused wide public controversy have no doubt been exceptions to this.

[33] It may be that this conclusion is less likely to be true over so many cases in a municipality as it is in the Board of Works, for the volume of business is smaller. But this may produce other evils and make greater the possibility of sectional or private interests bringing effective pressure to bear on members of the Council, with consequent detriment to the town planning aims themselves.

[34] Not to mention other persons who may be affected.

[35] 'Any person who feels aggrieved by the refusal or failure within a period of two months of a responsible authority to permit the use or development of any land or the erection construction or carrying out of any buildings or works or by the con-

The appeal is to the Minister, whose decision is final. Beyond providing that the Minister may appoint 'some person or persons to hear any such appeal and report thereon to him', and requiring him to consider such report before giving his decision, the Act is silent as to the procedure to be adopted.

Three things must be noted at this stage. First, that it is only if an application for permission is refused that there is any control or supervision of the decision to grant or refuse. (There may be supervision, by appeal, of conditions attached to permits, of course, but such appeals do not affect the permit itself—only the attached conditions.) Second, that if there is a refusal and an appeal is instituted, then the Minister's decision is final. Third, that the persons who hear the appeal do not decide the appeal, they merely report to the Minister who may decide the appeal in conformity with their report or otherwise as seems to him best.

As the law stands, therefore, if a permit is granted, the plan, embryo though it is, may be changed in substance with few people other than the prospective developer being aware of the change that is made, and certainly no-one otherwise affected by the permit would have any right to object. In addition, the applicant who decides to appeal from a refusal to grant a permit is given no right to see or to be told what the Minister's delegates' recommendations or reports may be: nor will he have any right to know on what grounds the Minister has decided to grant or to refuse the appeal. He will, in the ordinary course of events, merely be told that his permit has been granted or not. He has no right to ask for reasons or to test the justice or reasonableness of the decision.

Although the Act is silent, so far as procedure is concerned, with respect to grants or refusals of interim development permits and with respect to appeals against refusals of such permits, a general regulation-making power is conferred upon the Governor-in-Council which is wide enough to include the making of procedural provisions for those matters.[36] That power has been used in the most sparing fashion.

As has been noted,[37] the existing regulations provide that an application for a permit

> shall be accompanied by a sketch plan or copy of Certificate of Title of the land, a clear description of the proposed use or development and

ditions specified in any permit issued by the authority may within such time as is prescribed appeal to the Minister whose decision shall be final and shall be given effect to by the authority; and the Minister may appoint some person or persons to hear any such appeal and report thereon to the Minister who after considering such report shall give his decision on the appeal as aforesaid.' S. 14 (3).

[36] S. 39 (1).

[37] Nn. 14, 15 *supra*. Town and Country Planning Regulations No. 7, Reg. 10 (May 1955 *Victorian Government Gazette* No. 329, 31 May 1955) as amended by Town and Country Planning Regulations No. 8 (April 1958, *Victorian Government Gazette* No. 33, 30 April 1958).

type of construction of any buildings or works proposed to be erected . . . and such other particulars as the Responsible Authority may require.

They go on to suggest, but not to prescribe, forms of application and of permit. So far as appeals are concerned, the regulations[38] prescribe that the appeal must be lodged within two months of refusal to grant the permit, that it must be in writing and state the grounds on which it is made, and that responsible authorities, when refusing an application for a permit, must notify the applicant in writing and give reasons for the refusal. No other procedural directions are given.

SOME BASIC PRINCIPLES OF ADMINISTRATIVE JUSTICE

Before discussing the virtues and vices of the situation created by the Act and Regulations in this area and the actual practices which have grown up in recent years, it is necessary to refer to some problems basic to law itself and, in particular, to administrative law, and also to some principles fundamental for any society which claims to live in accordance with the Rule of Law.

In any legal system two basic requirements appear to compete with each other. The first is that the law shall provide continuity, reliability and predictability so far as the subject matter permits, and an assurance that power will not be exercised arbitrarily. The second is that the law should be flexible, adaptable, and ready to meet the need for change. The courts of law, as we know them, tend to emphasize the first requirement and to leave the satisfaction of the second to other organs of government. That is not to say that they ignore the second requirement. There is still much flexibility in the common law and changes in community needs are reflected, however slowly, in the law administered by the courts.

The tremendous increase, in the last hundred years, of governmental regulation and control of activities carried on by private individuals has given rise to a vast literature concerned with what is now called Administrative Law. To the practising lawyer the most significant part, no doubt, is that concerned with determining just when and in what ways the ordinary courts can be moved to interfere with or supervise the administrative activities of government. In the United States of America 'any governmental action substantially affecting private rights may be challenged in the courts as a denial of due process simply on the ground that it is arbitrary and unreasonable'.[39] But this, in the last resort, turns on constitutional pro-

[38] Regs 10, 11.

[39] Nathanson, 'The Right to a Fair Hearing' (1959) 1 *Journal of the Indian Law Institute* 493, 510 and see *e.g. Federal Power Commission v. Natural Gas Pipeline Co.* (1942) 315 U.S. 575 and in particular the concurring opinion of Frankfurter J.

visions and upon the consequent jurisdiction of the courts to review not merely acts of the executive governments but of the legislatures. In Victoria, as in England, so far as town planning powers are concerned, there are virtually no constitutional qualifications upon the powers of Parliament. According to orthodox doctrine, therefore, the courts, when facing a challenge to the exercise of executive or administrative power 'must find their ultimate rationale in the will of Parliament as indicated in the governing statute'.[40] If Parliament has left an almost unfettered power to designated authorities expressly, as is the case in the Town and Country Planning Act, the room for judicial interference or supervision is small and peripheral.

To the citizen jealous of his freedom, to the political scientist, to the legislator, however, the part of more significance concerns the way administrative powers are used and what controls, if not by the the supervision of the ordinary courts, are or ought to be established to prevent their abuse. Much has been published of a polemical kind arguing that the ordinary courts should do much of the work which has come to be done by administrative tribunals of various kinds; or arguing that Parliament ought not to delegate law making powers as freely as it does.[41] To re-argue those questions with respect to town planning powers would now be profitless and unreal; but it may well be profitable to show defects in the existing control of those powers and to suggest minimum requirements, in the light of experience and generally held standards of fairness and prudence.

The growth of governmental administrative activities has more and more required provision for the flexible use of power to decide particular questions in the light of policy considerations. This, quite apart from a deep grained suspicion that lawyers thrive on technicalities which impede rather than facilitate the right decision of 'real' questions, has led to the use of machinery less cumbersome than that provided by the ordinary courts of law.[42] The legislators when providing for the resolution of questions not susceptible of resolution by precise rules formulated in advance but which call for decision as part of the 'positive processes of government',[43] seldom look to the courts, which eschew policy considerations as far as possible and seek to find or to formulate clear rules for decision.

The fact that the problems concerned are of this general kind does not mean that predictability and reliability are considerations to be entirely ignored, however, nor that there are no general rules to be

[40] Nathanson, *op. cit.*, 513.
[41] *E.g.* Lord Hewart, *The New Despotism* (1929); Allen, *Bureaucracy Triumphant* (1931); Allen, *Law and Orders* (2nd ed. 1956).
[42] See *e.g.*, the admittedly incomplete list of administrative tribunals set out in Friedmann, *Principles of Australian Administrative Law* (1950) 87-95.
[43] To use the words of the Franks Committee (*infra*).

extracted from the way they are resolved. Even more important, the fact that the problems are of the kind described does not mean that fairly precise rules establishing the procedure for decision are not compatible with the flexibility of policy required and are not necessary to hinder abuse of power. But decisions whose purpose is to 'further the positive processes of government' vary widely. All may affect the private citizen in some way or another, but some affect his existing legal rights and interests directly and some do not. Where they do not it may well be appropriate to commit them to administrative discretion controlled only by the internal structure of the government department or body concerned. Where they do directly affect such rights, however, it has been usual in our tradition to provide some control or supervision of at least a quasi-judicial nature.

It is not possible here to take such a classification as administrative, quasi-judicial, strictly judicial, from the authoritative pronouncements of the courts, as the basis for discussion, for the argument would then be infected by circularity. This is so because the courts' classification under those heads is made after considering the person to whom Parliament commits the power and the procedure for its exercise laid down by Parliament; but the task here is to consider what ought to be laid down by Parliament or, if Parliament is silent, what might be accepted as proper by those to whom Parliament has delegated power.

Quite apart from the extensive legal and other writing about the desirable controls of such powers, we are fortunate in having the reports of two strong English committees on the subject. Those are the reports of the Donoughmore Committee[44] and of the Franks Committee.[45] The first was called the Committee on Ministers' Powers, and the second the Committee on Administrative Tribunals and Enquiries. They ought to be compulsory reading for all those responsible for legislation and for all senior administrators. The reports in each case were the result of lengthy hearings and the receipt of evidence over periods of nearly two years. Their recommendations are not to be accepted without question, of course; but it is interesting to note that the English Government accepted 71 of the 95 detailed recommendations of the Franks Committee, four of the recommendations were rejected by that Government, and the remaining 20 were either accepted in part or reserved for further consideration.[46]

The Donoughmore committee attempted a statement of what is involved in a strictly judicial function. Although that statement has been subject to much criticism and although the task of classifying

[44] (1931) Cmd 4060.
[45] (1957) Cmnd 218.
[46] See particularly the Tribunals and Inquiries Act 1958 (6 & 7 Eliz. II c. 66), (Eng.) Town and Country Planning Act 1959, Part III (7 & 8 Eliz. II c. 53), (Eng.).

functions as judicial or non-judicial cannot be discharged satisfactorily by *a priori* methods of reasoning alone,[47] it is a convenient basis for stating what are usually assumed to be the prime characteristics of the judicial function committed to the courts of law.

Those characteristics are:

1. An existing dispute between two or more persons.
2. An independent and impartial person to decide that dispute.
3. Existing rules by the application of which the dispute may be decided.
4. The presentation by the parties to the dispute of their case in circumstances where both parties have had a chance of knowing what case it is they have to meet.
5. If the dispute relates to facts, the ascertainment of the facts by the tribunal.
6. If the dispute relates to the rules applicable, a decision on the law by the tribunal.
7. A decision by the person who has heard the case which disposes of the whole matter by applying the law to the facts as found—the decision following as a matter of legal and logical reasoning from the findings of fact and the applicable rules of law.

It is important to note in this context that a judge, to satisfy elementary notions of justice, must be himself unbiased, and he must make his decision on the basis of the materials put before him in the course of the case and not on the basis of any evidence or materials supplied to him by other means or from his own prejudices or opinions.

It is usually assumed in our system that when such functions are involved the various factors which go to make the functions truly judicial cannot be insured of recognition and application unless there is room for an appeal to a further objective and independent body which can pass upon the propriety of the original proceedings. This requires the original judge to state his decision, and give reasons for it which enable objective assessment of the correctness of his decision.

It is clear from what has already been said that there are some decisions which cannot be made most appropriately by the strictly judicial process described. At the same time, to leave them in the hands of an administrator with uncontrolled discretion will be neither sensible nor desirable. They will be decisions which are taken in 'the furtherance of some positive governmental policy' and, probably, decisions on matters where the nature of the subject-matter is such as

[47] See, *e.g.*, the long line of cases in the Privy Council and the High Court of Australia, collected and commented upon by Dr Wynes in *Legislative Executive and Judicial Powers in Australia* (2nd ed.) (1956) Ch. X, where the courts have struggled without success to produce an exhaustive definition of judicial power.

to make it difficult or impossible to formulate precise rules of decision. This will clearly be the case where a question whether or not to grant an interim development permit, during the first stage of planning at least, is concerned. Few general rules could be devised in advance to control such a decision. The application will turn on its own particular facts and on the nature of the planning that is going on. This means no doubt that strict judicial notions are not applicable to the decision of questions such as these. But that does not mean that such decisions ought to be committed to the uncontrolled discretion of an administrator or to the final determination of a local government council. It has already been pointed out that on such decisions great matters will turn. If only to retain the confidence of the public generally, there must be provision for review to enable the use of power to be checked and supervised. Always in these decisions an individual is concerned and he is at issue with a public authority. Always these decisions involve the examination of proposals, and the weighing of considerations which speak for or against them, and all of them involve the application of a general policy in the light of the town planning which is going forward.

The Franks Committee asserted that there were three basic principles which must be satisfied to a greater or lesser extent when considering the particular kinds of provision which are to be imposed over the exercise of such powers as these. Those principles were those of open-ness, fairness and impartiality. They said

> On the one hand there are Ministers and other administrative authorities enjoined by legislation to carry out certain duties. On the other hand there are the rights and feelings of individual citizens who find their possessions or plans interfered with by the administration. There is also the public interest which requires both that Ministers and other administrative authorities should not be frustrated in carrying out their duties and also that their decisions should be subject to effective checks or controls. . . .[48]

It may be accepted that the principle of impartiality has to be applied with some very severe qualifications where some town planning decisions are concerned because, unless one were to commit the ultimate decision of an interim development application to courts of law or some equivalent independent tribunal, the decision will be by the Minister or at least by some such official who is inevitably involved in policy questions relevant to the decision and is therefore not strictly impartial. But if this is so, how can effect be given to the principle of fairness and some protection be given against injustices which arise from uncontrolled exercise of power? The answer lies not so much in juristic theory but in many years of experience in the

[48] (1957) Cmnd 218, 61.

English-speaking world of these matters. And the conclusion is that unfairness and injustice are guarded against best by insuring two things, first open-ness, and secondly by insisting on certain elementary procedural safeguards. Open-ness simply means that all stages in the proceedings should be open to scrutiny by the persons interested and, preferably, that hearings should be open to the public. This does not mean that the hearings would be cluttered up by crowds of sightseers; even in the courts of law that is not so. The mere knowledge that the proceedings and the decision are open to informed criticism profoundly affects the persons controlling them and the persons making the decisions. They are more self-conscious of what they are doing and will always be more careful to test what they are doing against acceptable standards of fairness and of accuracy.

The elementary procedural safeguards should be obvious once they are stated. The first rule of procedure is one that is now provided for by the regulations, but not with sufficient precision to ensure that the rule is properly satisfied in practice. The rule is that those who are to be parties to a hearing of the kind involved in an appeal from a decision to refuse an interim development permit should know, in good time before the hearing, the case which they will have to meet. This applies as well to the authority whose decision is appealed against as to the individual whose rights and interests are likely to be affected by the decision. When it is said that the parties must know the case which they will have to meet, it means that they must know it with some particularity. This is fundamental to any rational inquiry. A rational examination of a dispute is frustrated unless the dispute is formulated in sufficiently precise issues, and unless assertions are backed by sufficiently precise material and considerations.

The second rule is one which goes to the heart of departmental procedure. An appeal is provided from decisions of responsible authorities, and it should be obvious that both parties to the appeal must put their whole case before the tribunal set up to hear it. Further, with the exception of considerations of general policy which may, of course, affect the Minister's ultimate decision, the decision must be based upon the materials and evidence and considerations put before the tribunal at such hearing. Nothing so defeats the fairness of the proceeding and nothing produces such dissatisfaction in the minds of private persons affected as the possibility that either the members of the tribunal itself or the Minister and his advisers may consult one party to the exclusion of the other, or may decide the issues by reference to considerations which have not been open to argument or refutation.

The third rule is that reasons should be given for decisions. Further, when the person ultimately to decide the question does not preside

at the hearing but merely receives a report and recommendations from those who do, then that report and those recommendations should at least be available to the parties and persons interested and perhaps should be made public. Almost every administrator, every departmental head and every minister will resist the application of this rule; but it is a very important rule and one which the Franks Committee unanimously recommended. It is required by both the principle of open-ness and the principle of fairness.

There are obvious difficulties involved in requiring that decisions be backed by reasons. Many administrators will say, and quite rightly, that there are many good decisions given for bad reasons. It used to be traditional for old and experienced Justices of the Peace to tell their young and inexperienced colleagues that they need fear no difficulties on appeal if they took care not to give reasons for their decisions. This comment is, of course, a two-edged sword so far as any objective assessment of the value and fairness of the proceedings is concerned. It is not suggested that the reasons would have to be of the kind that are formulated by the superior courts of law in judgments delivered. They might merely set out the claim made by the appellant and the over-riding policy of the department which makes that claim unacceptable.

Nonetheless the requirement to give reasons does three very important things. First, it operates as a self-conscious check on the persons deciding, and requires them to see whether the decision can be justified by a statement that they are prepared to sign. Second, if published, it gives some indications of principles and practice, which help to provide something of the reliability, certainty and predictability which are found to high degree in the ordinary workings of the courts of law. Third, if the administrative tribunal or authority has completely misconceived the limits of its own functions, as sometimes happens, this may be exposed by the reason given for decision and so enable the person affected by the decision to call upon the courts of law to correct the misconception.

It has been said that the application of this rule is likely to be resisted by persons charged with the exercise of the powers concerned. It is not necessary to point to local instances of such resistance to demonstrate this—no doubt the resistance is natural enough. An example from England will suffice. Sir Carleton Allen, in an article in which he reviews the work of the Donoughmore and Franks Committees[49] reports that:

> Before that Committee [the Donoughmore Committee] a number of Civil Service witnesses insisted strongly on the desirability of leaving

[49] 'Administrative Jurisdiction' (1956) *Public Law* 13. This article has now been published in book form under the same title.

> the communication of reasons voluntary and discretionary. Pressed upon the point, none of them could give a really satisfactory reason for this view, and I know of no more striking example of sheer tenacity to departmental habits for their own sake. One distinguished witness was so unconvincing in this matter that he drew sharp protests from the two members of the Committee who (without the least reflection on the impartiality of their conclusions) were the most sympathetic to executive powers. Their comments are interesting:
>
> *Professor Laski:* 'Would you not agree that to give a decision always without reasons is the very definition of autocracy, and that the giving of decisions without giving the reasons on which they are based is as near autocracy as you can get?'
>
> *Miss Helen Wilkinson:* 'Would not the Shah of Persia in medieval days have approved of the views you are putting forward now?'
>
> There was no answer to these pointed questions.

It is submitted that in this day and in this community there must be very strong grounds before it should be provided that decisions directly affecting private rights and interests may be made without the formulation of reasons in support of the decisions. It will be said that this submission is academical and impractical. It will be said that no account has been taken of the magnitude of the task required; that there are thousands of appeals; that most appeals are brought by people who don't have the assistance of skilled legal advice and who want the proceedings to be brief and cheap; that the State and the responsible authorities are short of funds, and that it is difficult enough to meet the expenses of administering the planning powers already without adding to the expense.

The short answer to such objections is that administrative convenience is not a good reason for establishing autocratic powers in this community. But there are two practical reasons why the proper conduct of appeals, within the principles outlined, is desirable. The first is that such conduct, and particularly the giving of reasons, will tend to cut down the number of appeals that are in fact brought. At present it would appear that approximately one in every three refusals of permission by the Board of Works is appealed against and, if those appeals which are really formal and brought only for compensation purposes are excluded, the number of substantial appeals runs to a little more than one in every five refusals.[50] This is a very high rate indeed—very much higher than the ratio of appeals to decisions at first instance in the ordinary courts of law—and when one imagines a day when all of our town planning authorities in the State, or even in the Metropolitan area, are exercising discretionary powers, it becomes obvious that such a ratio of appeals to decisions would create

[50] These figures are taken from an article: Ledgar, 'The Principles and Practice of Development Control' (1958) 2 *Town Planning and Local Government Guide* 180 (para. 790).

a very heavy burden indeed. There can be little doubt that even in an area affected by discretion and policy as this is, the giving of reasons for decision and in particular the publishing of reasons in selected cases, will cut down the number of appeals brought.

When the number of different town planning authorities who may exercise powers such as these is considered, the practical arguments for providing a proper appellate procedure and for the giving of reasons for decisions become even stronger. Even if no binding rules can be laid down, patterns of decision inevitably emerge after a sufficient number of cases have been heard. No doubt there are already patterns of decision but they are not known. The only practical way for those patterns to have some degree of uniformity across the various fields occupied by the numerous town planning authorities is for a proper central appeal procedure to be established and for provision that reasons for decisions shall be given and made available to the persons and authorities affected. If something of this kind is not done there will arise such divergence of practice between responsible authorities as may bring town planning itself into general disrepute.

THE PRESENT PRACTICE AND PROCEDURE

It remains to consider the actual practice of the authorities concerned with appeals from refusals to grant interim development permits, and to see the extent to which that practice satisfies the fundamental elementary rules outlined above. Some indication has already been given of the way responsible authorities decide upon an application initially. If the application is refused the applicant may appeal and if he does he must lodge a written notice and set out his grounds of appeal. Not all, or even a majority perhaps, of appellants have qualified professional advice; it is not surprising, therefore, that the notices of appeal actually lodged vary widely from those which set out extensive grounds and particulars in support of the appeal to those which are naive in their simplicity. In the early years of appeals under the Board of Works' interim development order, legal practitioners tended to draw notices of appeal which were detailed and informative, but more recently, in response to the attitude adopted by the Board, they have tended to give away as little as possible of their real case in drawing such notices. The attitude of the Board referred to has revealed a real lack of understanding of the elementary rules applicable on the part of the administrators.

Until the Town and Country Planning Regulations No. 8 were gazetted on 30 April 1958, responsible authorities were not required to furnish reasons for refusal to an unsuccessful applicant for an interim development permit. The Board of Works sometimes, as a

matter of grace, did furnish reasons on request but it always pointed out that it was not obliged to do so. Astonishing as it may seem, the Board's attitude was to some extent justified by the assertion[51] that the appellants' grounds of appeal were not disclosed to it before the appeal came on for hearing. It may be that the Department of Public Works, the Department then responsible for the administration of the Act,[52] in not disclosing those grounds to the Board was implementing some rough notion of fairness in the light of the fact that the Board was not required to give reasons for its refusal. The result, however, was the wholly unsatisfactory one that neither party to the hearing on appeal was in a position to know what case would have to be met at the hearing.

The amendment to the regulations referred to[53] was obviously designed to correct this situation. It is now clear that not only must the appellant give the grounds of his appeal, but the Board must give reasons for its refusal. In fact, however, the situation has been little improved. The Board has failed to satisfy the real requirement of the new regulation. Ordinary practice in notifying a refusal of application seems to be to give reasons which will enlighten an appellant as little as possible and which, for the purpose of letting him know what case he will have to meet at the hearing, may be no reasons at all. Thus reasons such as the following are common:

1. The proposed development is prohibited by the provisions of the Melbourne Metropolitan Planning Scheme.
2. The proposed development is contrary to town planning principles and will be detrimental to the amenity of the neighbourhood.
3. The proposed development is considered unsuitable having regard to traffic considerations.
4. The use is not appropriate to a residential zone.
5. The proposed use is not considered appropriate to the location and would prevent the proper future planning of the area.

It needs no legal experience and but little reflection to see that this kind of practice does not satisfy the first of the elementary rules of procedure outlined above. Without particulars, which are almost never furnished, it is not possible from such a statement of reasons to know what issues will be vital or will have to be argued between the parties at the hearing. The immediate result is that many hearings on appeal are inconclusive and leave the members of the Tribunal in no position to make clear recommendations to the Minister on the basis

[51] Made by the then Chief Planner to the writer.
[52] The new Department of Local Government is now the Department responsible for that administration.
[53] Town and Country Planning Regulations No. 8.

of evidence given and argument made at the hearing, but merely in a position to make their own assessment of the merits of the original application on the basis of their own views of the circumstances—much as though they were a responsible authority considering at large an original application. The indirect result is that the inconclusive nature of some hearings and the possibility of surprise issues being raised invites communication between the Minister's advisers and the responsible authority without the appellant's knowledge, particularly in those cases where, as a result of the hearing, it is recommended that the appeal should be allowed or when such a recommendation is being considered.

The actual conduct of hearings on appeal has been commented on by Dr F. W. Ledgar in recent years.[54] The appeals are heard by persons, with qualifications and experience relevant to town planning and local government matters, appointed by the Minister for the purpose. Usually two persons are appointed who sit together and alternate as Chairman at the hearings. Occasionally appeals have been heard by three such appointees. The hearings are extremely informal and brief.[55] It has been the policy of the Minister and of the Board of Works to maintain such informality and brevity so that the ordinary man may feel able to appear in person to put his case and so that no man may be frustrated by fear of expense, or by fear of technicalities which he does not understand. Thus only rarely is the Board legally represented at the hearings and never, to the knowledge of the writer, has the Board been represented by counsel. For some time, to quote Dr Ledgar,[56] it was the practice of the Board

> to send a single representative who may not be professionally qualified to deal with the problem under review and who, moreover, is not permitted to make statements relating to the technical aspects. The appellant will normally go to trouble and expense to prepare a case only to find that there is no opposition apart from a bald statement of the fact of refusal.

Since Dr Ledgar wrote those words some improvement has taken place, perhaps in part as a result of his criticism, and the Board's representative now appears at the hearings briefed to speak about the application concerned and on the reasons for its refusal. In all but

[54] 'Planning Appeals' (1957) 1 *Town Planning and Local Government Guide* 280 (para. 1118) and 'Planning Appeals—The Victorian Practice' (1957) 2 *Town Planning and Local Government Guide* 70 (para. 292).

[55] The delegates usually allow 45 minutes for the actual hearing. In many cases this is completely inadequate. It provides a startling contrast to see the Supreme Court spending several days resolving a dispute over £5,000 and the Minister's delegates attempting to decide upon a complicated matter involving £50,000 or more in 45 minutes.

[56] 'Planning Appeals' (1957) 1 *Town Planning and Local Government Guide* 280, 283. In this article Dr Ledgar pointedly contrasts the procedure on appeals in Victoria and the procedure followed in England with respect to similar appeals.

the simplest cases, however, the procedure at the hearing is still unsatisfactory. The proceedings are begun by the Board's representative explaining to the Tribunal the nature of the application and the reasons for refusing it. He puts in the necessary planning maps to enable the application to be understood in its planning setting. The appellant then presents his case. He calls evidence to support his arguments and the Board's representative has an opportunity to question the appellant, his representative, or any of his witnesses. The Board's representative is then usually given an opportunity to reply or to sum up if he wishes. Very rarely does the Board adduce any evidence or call any witnesses. The Board's case almost always consists of no more than the arguments and assertions presented by its representative which are usually quite brief and rather general in character.[57] If, as sometimes occurs, an important issue of fact arises, the Board's representative is unlikely to be in a position to assist in its resolution. Almost never is anything actually *proved* by the Board in support of its case at these hearings.

The Minister's delegates make it a practice always to inspect the site and surroundings of the land concerned in an appeal. They do this after the hearing and in the absence of the parties to the appeal. Further, even though they may on such inspections discover facts relevant to the decision to be made, but which were not brought out or made the subject of argument at the hearing, they have refused applications by appellants for leave to argue the significance of such facts or to bring further evidence with respect to them at a resumed hearing after the inspection.

While the official policy of ensuring simplicity, speed, and cheapness in these proceedings is laudable and should be maintained, that policy provides no justification for the continual failure to satisfy the first two elementary rules of procedure outlined above which is illustrated by that brief description of the actual course of proceedings in these matters. Perhaps the worst consequence of that failure and of the lack of proper case preparation by the Board is the temptation for communication between the Minister's advisers, and the Board, without the appellant's knowledge after the hearing, when the appellant has presented a well prepared case which has not really been answered by the Board at the hearing. It is widely believed that this temptation has proved too strong on too many occasions. However well-intentioned and fair-minded the officials concerned may believe themselves to be, nothing is more calculated to destroy public confidence in the appeal procedure provided than such back-door com-

[57] In some early appeals the Board appeared by its Solicitor and evidence was given by its planning officials. But on at least one occasion the Chief Planner objected violently to being questioned as a witness and an embarrassing situation developed.

munication with one of the parties to the appeal to the exclusion of the other.

The third elementary rule, relating to the giving of reasons for decision on appeal and to open-ness, has already been discussed. Under the present practice this rule is wholly unsatisfied. From the time the appellant leaves the hearing before the Minister's delegates he learns nothing until he receives the formal notification of the Minister's decision.

The notification is ordinarily silent so far as the reasons for decision are concerned. The recommendations made to the Minister as a result of the appeal hearing are not disclosed to the appellant. If some flagrant error, whether of fact or law, is made by the Tribunal before which he has appeared, he has no opportunity of correcting it before the matter is placed before the Minister for decision. It is clear enough that the Minister enjoys an ultimate discretion to decide an appeal as he thinks fit, and finally; and that he does not have to accept the recommendations of his delegates made after the hearing of the appeal. It is understood that in some cases those recommendations have not been accepted. But the Minister will ordinarily be advised by his departmental officers and this again creates the occasion and the temptation for communications to be made and influences to be brought to bear affecting the decision unknown to the appellant and with respect to which he has no opportunity to make representations in his own interests.

It cannot, of course, be argued that requiring reasons to be given, or making the proceedings open to scrutiny by the parties, will ensure that no mistaken decisions will be made, nor even that all decisions will be really motivated by the reasons given. What is suggested is that, in addition to the arguments expressed earlier for requiring reasons to be given, compliance with this requirement is one important way of providing some check, however marginal, on the use of such powers and there can be no doubt that some checks not at present existing[58] are required.[59]

[58] Two rather sketchy reports of planning appeals appeared in the Australian Local Government Reports in the early days of appeals under the Melbourne and Metropolitan Board of Works' Interim Development Order, but since then there has been an apparently deliberate silence. *Novelty Fair Theatres Pty Ltd v. M. & M.B.W.* (1956) 1 L.G.R.A. 30. *Vacuum Oil Co. Pty Ltd v. M. & M.B.W.* (1956) 1 L.G.R.A. 28.

[59] In one case, where it is believed that a recommendation was made (against strongly held views by the Board of Works) to allow an appeal, the appellant waited many months for the Minister's decision. He had engaged solicitors and been represented by counsel at the hearing. Instead of receiving notice of decision from the Minister, he, the appellant, was invited to see the Minister. When he arrived for the appointment he found the Board of Works' Chief Planner with the Minister and the appointment turned into something like a re-argument of the appeal, and pressure was put upon the appellant to seek other premises for his plans rather than to pursue his appeal—and upon the Chief Planner to assist the appellant in securing such premises free of planning restrictions. The request to the appellant to attend

It may be argued that the elementary rules of procedure outlined herein amount to little more than the requirements of natural justice which the courts of law will enforce, where quasi-judicial proceedings are concerned, by means of the prerogative writs of *mandamus, certiorari* and prohibition;[60] that the appeal hearing before the Minister's delegates is a quasi-judicial proceeding; and that therefore an applicant for an interim development permit is sufficiently protected by the existing legal machinery.

But such an argument must be rejected. First, from a practical point of view, it invites the public to be satisfied with a remedy which, in most cases, will 'shut the stable door after the horse has bolted'. Secondly, it assumes an ambit and a certainty of operation for those writs which do not bear examination.[61] And, thirdly, it ignores the realities of the situation. The Minister is vested with the ultimate discretion to allow or disallow an appeal. That discretion cannot be usurped by the Courts. All they can do is to correct manifest errors and injustices in the course of proceedings which precede the decision. Few appellants indeed will choose to jeopardize their chances of the Minister exercising his discretion in their favour by resorting to judicial proceedings which, in their nature, will involve an attack on the way the powers given by the Act are being administered. The proof of that pudding is in the eating no doubt; no case is known of any appellant resorting to the Courts.

THE NEED TO SUPERVISE THE ADMINISTRATOR

> Managers must be balanced and checked, feared when they talk too amiably about your's [*sic*] or another's good. A necessary good-and-evil, they must be humanely educated, . . . honestly recognize that they enjoy making people and things serve 'useful' ends. Always they must be made to remember that it is dangerous for anyone, it doesn't matter who he is, to have any powers at all. [C. P. Snow]

Before attempting to formulate any recommendation or conclusion arising out of this discussion, it is desirable to refer to one further reason for an effective appeal tribunal with an appropriate procedure. It will be recalled in listing the requirements for a judicial enquiry as formulated by the Donoughmore Committee, mention was made of

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before the Minister was made directly to him and ignored his legal advisers who had acted for him throughout the earlier proceedings. He, naturally enough, came to the meeting quite unprepared to re-argue his case. In any well-ordered community this kind of episode can be described as outrageous without overstepping the bounds of fair comment.

[60] See the article by J. D. Merralls in this issue *infra* 361.

[61] It is not necessary to look further than such classic cases as *Local Government Board v. Arlidge* [1915] A.C. 120; *Board of Education v. Rice & ors* [1911] A.C. 179, and *Franklin & ors v. Minister of Town and Country Planning* [1948] A.C. 87, to support this.

the need for an appellate tribunal to be available to review the propriety of the original decision. The function of such a tribunal, it is obvious, is not merely to ensure that right is done in individual cases, but is to provide general direction to and supervision over the authorities from which appeals may be brought. It will be clear enough from the foregoing discussion that the present appeal machinery and procedure does not satisfy this need properly or at all. The work of the Board of Works is not reviewed in any real sense at all in most cases under the present procedure. Misconceptions as to the Board of Works functions, legal duties, and legal powers are not corrected and consequently repeat themselves. Three illustrations of such misconceptions will suffice, for present purposes.

One has already been mentioned. That is the Board's error in thinking that 'reasons' of the kind listed on page 322 above are 'reasons' within the meaning of the relevant regulation which requires the giving of reasons in writing for the refusal of a permit. Yet the Minister has not directed the Board to give adequate reasons, nor have his delegates sitting as an appeal tribunal done so—and perhaps they could not.

A second is seen by looking again at those sample 'reasons'. The first of those listed is perhaps the most common of all reasons. It often becomes clear when a case is taken on appeal that the Board of Works has failed to give any consideration to the application on its merits after seeing that it conflicts with the provisions of the planning scheme. But the application is for an interim development permit and, *ex hypothesi,* the planning scheme is of no force or effect in law at all. It may well be that the provisions of the planning scheme, as they exist in draft at the relevant time, will provide reasons for rejecting the application; but that will be because, after consideration of the particular case, it is seen that those provisions are sound and should be applied for good reasons. The bare provisions themselves cannot provide the reasons for their own application as, in law, they are of no force or effect. It is perhaps understandable that the Board of Works fell into this error because of the nature of its own interim development orders. Those orders have operated by incorporating by reference most of the provisions of the published planning scheme. Thus, broadly speaking, development was not restricted by those orders if it was in conformity with the published scheme. But this did not and could not relieve the Board of its duty to consider in each case whether or not development should be permitted although not in conformity with that scheme.

A third is of a more fundamental kind and reveals the dangers which beset an administrative authority vested with powers such as those involved in town planning. The dangers are those which arise

out of the temptation to turn town planning powers into general governmental powers for 'the good of the community'. These dangers are seen often and clearly in the conditions which responsible authorities attach to interim development permits. It should be clear enough that the power to attach conditions to permits is a power to attach only such conditions as have a town planning reason—however vague that may be as a limitation[62]—and is not a power to do Parliament's work in all spheres of government.

A hypothetical example will make this point clear. An applicant is granted a permit to carry out major quarrying and pottery making developments; but the permit has conditions attached which reproduce *verbatim* various provisions of the Mines Act, the Health Act, the Local Government Act, and regulations and by-laws made thereunder. The Acts referred to provide for proper authorities to police their provisions and for appropriate penalties—after conviction by a court—for breach of those provisions. But the responsible authority purports to add to Parliament's expressed intention a further and much more drastic penalty, the prohibition of the undertaking altogether, and that upon its own decision without any requirement for prosecution before a court of law. It is submitted that it is not the role of town planning authorities as such to undertake all the burdens of government and that it is unnecessary and improper for such authorities to do so by imposing conditions of this type on an interim development permit. This submission may be supported simply enough. Such conditions may well place a major undertaking at the mercy of an administrative authority. Parliament has provided what are thought to be appropriate penalties for breach of the conditions referred to. With the best intentions in the world the individual may unwittingly break one of the rules and incur the penalty provided by Parliament. That may be viewed as an ordinary risk faced by anyone doing anything in a modern well-regulated community. But the imposition of rules of pre-existing statute law as conditions on a permit might mean that a person who has suffered the penalties provided for by the relevant legislation will, in addition, have his permit cancelled in accordance with its terms. If that result does follow then it may amount to a grave injustice. If it does not then the responsible authority has committed itself to a useless threat which should never have been made.[63]

[62] *Cf.* the reasoning of Latham C.J., Starke, Dixon and McTiernan JJ., in *Shrimpton v. The Commonwealth* (1945) 69 C.L.R. 613.

[63] The town planner's attitude to this particular problem is rather frighteningly revealed by amendments introduced into the Board of Works interim development order of 24 April 1958 (*Victorian Government Gazette* No. 32). Clause 8 of that order reads as follows:

'8. (a) Every permit granted by the Board pursuant to the provisions hereinbefore contained shall in addition to any other condition or conditions which the Board

These and other misconceptions of their own proper functions have affected responsible authorities. A proper appeal machinery could do much to prevent their recurrence.

IN CONCLUSION

In this article the application of certain elementary principles of procedure to the existing structure of planning appeals has been my main concern. It should be clear from the discussion, however, that there is much to be said for the establishment of an expert tribunal, independent of the government department concerned, for the hearing of planning appeals. If this need is clear during the interim development period, then it should be even clearer for a time when planning schemes are in force.

Special considerations may apply to the stage before a planning scheme is first published—if such a stage really exists for the purpose of interim development control—but after the publication of a plan the general scene changes. Planning policy is declared by publication itself and is expressed in detail by the published plan and the ordinance. With the exception of general government policy, which transcends anything relevant to the particular area concerned and which may require ultimate veto or supervisory power in the Minister in respect of any planning appeal, the broad considerations which should affect the granting of interim development permits are public and open to debate. In these circumstances there is much to be said for the establishment of a tribunal which in its composition and the rules by which it is to be guided will ensure the satisfaction of the basic principles which have been outlined above.

It is tentatively suggested that such a tribunal should have an experienced lawyer as chairman, to ensure that the basic procedural

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may impose upon the granting thereof be subject to the following condition (whether or not the same be set forth therein) that is to say:

(i) The Board upon being satisfied that any condition of the permit has not been wholly observed may in its absolute discretion revoke such permit;

(ii) Notice of revocation which may be under the hand of the Secretary of the Board shall be given only to the person to whom the permit was granted;

(iii) In addition to any other means which may be available to the Board any such notice of revocation may be given by prepaid letter posted to the person to whom the permit was granted at the address shown therein.

(b) The Board may upon the granting of any permit pursuant to the provisions in this Order contained impose such additional condition or conditions as in its absolute discretion it may deem fit and the permit shall at all times be subject thereto.

(c) Land in respect of which a permit has been granted shall be used only for such purpose or purposes and subject to the observance of such condition or conditions as may be provided in this Order or by any permit granted under this Order.'

It is submitted that the 'absolute discretions' there claimed by the Board are either not absolute at all or that the clause is invalid as going beyond the powers authorized or conferred by the Act.

requirements discussed herein are satisfied; that one member should be experienced in town planning matters; and that a third member should be knowledgeable in the fields of industry and of government. It is submitted that there is no reason why such a tribunal, properly equipped and staffed, should not both satisfy the needs indicated in this article and, at the same time, meet the desires of those at present involved in planning for expedition, cheapness and comparative informality in the appeal procedure.

Finally, it is necessary to remember that, in the main, it will be local government bodies exercising responsibility for the powers concerned. There is no need to raise the ugly spectre of corruption or to refer to any past sad incidents in Australian local government history, or to the recent troubles in New South Wales. The attitudes and practices of honest, hard-working and well intentioned administrators and local government councillors are sufficient.

It is fruitless to tell the honest, hard-working official that he is likely to act unfairly. He knows that he only wants to be fair and to do justice and to do the best for everyone. There is no way of ensuring fairness or justice absolutely—at least no way yet discovered by man. Some safeguards against unfairness and injustice, however, can be provided and the minimum safeguards may be found in the elementary procedural rules here suggested.

It might well be said that the main burden of this article could have been well put in two or three paragraphs and perhaps more effectively. It could have been said that it was obvious, and that it had been for long recognized in all civilized countries, that the elementary rules here discussed must be observed if good government and good administration are to survive, except where certain well recognized qualifications and exceptions are encountered. It could have then been shown easily enough that such qualifications and exceptions were not present. The available evidence of our subordinate legislator's work and of the ideas and assumptions of many of our senior administrators, however, leads to the view that continuous re-argument of, and perhaps re-education in, these fundamentals is necessary if Victoria's standards of government and administration are not to fall.