TOWN PLANNING APPEALS

This article looks at the town planning process in Western Australia, and considers the methods of dealing with appeals. In particular it examines the Town Planning and Development Act Amendment Act 1970 from the point of view of a town planning administrator.

Section 7, Town Planning and Development Act 1928 empowers local authorities to prepare town planning schemes with respect to any land with the general object of improving and developing such land to the best possible advantage; such schemes required ministerial approval. Section 4 establishes the Town Planning Board comprising four persons knowledgeable in associated fields to advise the Minister for Town Planning. Section 3 provides for the appointment of the Town Planning Commissioner who is Chairman of the Town Planning Board and head of a department of professional and other staff with appropriate experience.

This Act, a model in its day, remains in force, and, by the standards of a relatively new and fast developing profession is a now venerable piece of legislation. It has been amended from time to time, but—save in respect of metropolitan region planning (see infra)—it remains fundamentally unchanged. That it is still a functional law is a tribute to the foresight and flexibility of many of its provisions. The dearth of reported cases suggests that it may have served the community well.

In essence it is similar to several British Commonwealth Acts of the period between the two World Wars, with one important difference. It incorporates provisions for subdivisional control—machinery which depends for its operation on a closely controlled system of land tenure, such as the Torrens system. Subdivisional control is almost unique to Australia and has emphasized two dimensional, rather than architectural aspects. Suffice it to say that in Western Australia subdivisional control is a useful planning tool.

Subdivisional Control

Sections 20-27 provide for the control of the alienation of land, and the approval of the Town Planning Board is required before land can be subdivided into lots. The Board may approve an application to

subdivide, approve subject to conditions, or refuse to permit, subdivision. Using those powers the Board exercises considerable influence over the location, form, quality and cost of development.

If this seems a sweeping claim for mere control over the cutting up of land, consider the practice today. Subdivision is a prerequisite of, for example, the establishment of a freehold housing estate and once land in or near a growing town is broken up into quarter or fifth acre lots it is almost inevitable that it will, sooner or later, be covered in a rash of houses (unless zoned for other use). Subdivision establishes the size of building lots, their shape and the pattern of streets about them. It affects living conditions amenity and road safety. The Board not infrequently suggests modifications to designs which have serious defects.

Conditions imposed on subdividers today include, among others, the construction of roads, the widening of major roads, the provision of open space, the filling and draining of land, the reticulation of water supplies, and, the reticulation of sewerage. The Board also requires provision, where large tracts of land are involved, for school sites and other amenities. The supply of subdivided land must be kept up if development is to proceed smoothly. If there are too few lots demand will force prices up. But if there are too many lots prices will not necessarily fall, for lots which lie idle for a long time accumulate debts to interest charges (on land and services) and rates so that their owners cannot, without heavy loss, dispose of them cheaply. The Board therefore tries to ensure an adequate, but not excessive supply of lots in each developing area.

In deciding whether or not to approve a subdivision; in requiring modifications in design and in its choice of conditions the Town Planning Board exercises considerable discretion. The Town Planning and Development Act gives it a very free hand, and although it has adopted guiding policies each case is in some sense unique and requires individual consideration.

Town Planning Schemes

Town Planning Schemes may be used to accomplish many things, and the Schedules to the Act contain a long list of matters with which they may deal.[1]

Some schemes establish a basic pattern of development—a network of major roads into which feeder and distributor roads can be fitted

1 See also Town Planning Regulations 1963, Government Gazette (W.A.) of 1963, p. 2253.

by subdividers, a rational distribution of shopping and other commercial facilities, working areas suitably related to living areas, major recreation space, and so on. They may go further and fill in some detail, but now the detail is generally left to the subdivider or developer to determine.

The majority of schemes are concerned with forms of land use and development. As these things usually result from the activities of developers and individual landowners the schemes seek both to guide and control them, in the interest of the community, to accord with a proposed basic pattern, They usually control use and development by zoning.

Zoning Schemes

Areas are zoned for different purposes—residential, industrial, commercial etc. In crude terms, appropriate uses are permitted in each zone and conflicting uses are not. But, of course, it is not feasible for the planner to foresee just what will be proposed or just what will seem appropriate as development progresses.

Schemes, therefore, now tend to be framed in more flexible terms. Certain uses may be permitted in and others barred from each zone, but most cannot be categorized so clearly. By careful siting, good design, appropriate parking provision landscaping and other attention to detail an otherwise incompatible project may be made perfectly acceptable. In other cases topography, lot shape, drainage, adjacent development or any number of other factors may be relevant. It is therefore not unreasonable that the local authority should reach certain decisions on the merits of the particular application—negotiate if need be and set conditions.

Such flexible zoning is used increasingly. Indeed the very word 'zoning' has become objectionable to some planners who deal in policy areas and other synonyms. The important point, however, from the point of view of this article is that Local Authorities (which by s. 2 are 'responsible authorities', charged with the implementation of their schemes) are now expected to exercise wide discretion.

Schemes do not merely zone. They establish densities, set site and parking requirements, regulate advertising, protect historic buildings and do much else to assist the local authority to control and direct development in their community interest. Some of their provisions allow the responsible authority discretion in so doing.

Development Schemes

There is little in Western Australia to match the positive planning of the British 'Action Plans' or even the American "Urban Renewal

Programmes".[2] The several so called 'development plans' are mainly concerned with the rearrangement of outdated subdivisional patterns. These, once they have been drawn up and approved are specific and clear cut. In implementing them the responsible authority has to exercise little discretion.

Interim Development Orders

Section 7A empowers Local Authorities to control development by way of an Interim Development Order. Such orders are made by the Governor and are valid for twelve months only, though renewable. They are intended, as the name implies, to enable the authority to exercise planning control in the interim while a scheme is prepared—but are on occasion used in other circumstances. They give the authority complete discretion to decide what development may take place and what may not—without any publicly promulgated document to guide it (although the Town Planning Board has in recent years required rough guiding maps or statements of policy to be submitted before recommending that an Interim Development Order be made).

Miscellaneous

Other matters are covered by the Town Planning Act. Section 19 governs the planning of Crown land; the section is not invoked to avoid conflict with the administration of the Land Act. Section 11 enables an authority to impose a levy of a betterment tax, but this again is not invoked because of the practical difficulties. But potentially more important perhaps are the Schedules which list the topics which may be covered by town planning schemes, or even planning by laws. They are numerous and widen the scope of the Act well beyond the limited fields of urban layout, with which it is often associated, into the realms of environmental protection.

One rather minor topic specifically covered is the construction of public roads. Local authorities are empowered in certain circumstances to charge adjacent landowners for such construction. This may seem a simple topic, and perhaps it should be, but section 28A is confusing—and perhaps for this reason rates its own right of appeal.

Metropolitan Planning

The area known colloquially as Perth is in fact a collection of municipalities each with its own council and planning powers. In this it resembles other Australian State capitals. Attempts to stream-

2 See Cullingworth, TOWN AND COUNTRY PLANNING IN BRITAIN (4th edn., 1972).

line the local government system, to rationalise it and to make it more efficient have had limited success due to a mixture of parochialism, vested interest and genuine fears for local democracy. However well grounded these fears may be local governments have remained in small units and hence a poor relation in the family of Commonwealth, State and Local Authority. They lack the money or the expertise to carry out their functions as effectively and boldly as do their counterparts in many countries. For this reason their individual planning efforts did not—for many years—match up to the needs of Perth. Moreover in what is really one large urban area it was essential that planning, if it was to be rational and meaningful be co-ordinated. For these reasons the Metropolitan Region Town Planning Scheme Act was passed in 1959.

That Act set up the Metropolitan Region Planning Authority—a body of eleven persons of whom six are appointed by the Governor and five represent local authorities. The authority was required to prepare a Metropolitan Region Planning Scheme, to administer it, to keep it under review and to propose amendments.

The Metropolitan Town Planning Scheme which was subsequently prepared,[3] based on the recommendations of Professor Gordon Stephenson and J. A. Hepburn came into force in 1963.[4] Briefly it established a planning framework for the whole region. Local Authorities were required to prepare local plans which were consistent with the metropolitan plan, and, although this task has taken them longer than anticipated it is now almost complete.

The Metropolitan Region Planning Authority was by the Metropolitan Region Town Planning Scheme Act endowed with the powers of a responsible authority as defined in the Town Planning and Development Act. It could however delegate those powers to area committees or to local authorities. Thus the Metropolitan Region Planning Authority, the area committees and the local authorities have all become involved in making planning decisions—noticeably in respect of development control. These have involved them in the exercise of discretion.

Decisions

It may be noted that nearly every aspect of planning involves an authority whose function it is to make decisions—not merely to administer an Act or a set of rules but to use discretion.

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3 Government Gazette (W.A.) of 1963, p. 2318.

4 Plan for the Metropolitan Region, Perth and Fremantle, 1955.

Appeals

The appeals with which this article is concerned may be broadly stated as appeals against discretionary planning decisions—whether these decisions are made by the Town Planning Board (in exercising subdivisional control), the Metropolitan Region Planning Authority, or a Local Authority.

Specifically section 26 of the Town Planning and Development Act confers a right of appeal against a subdivisional refusal or condition of approval. Sections 7A and 7B confer similar rights in relation to local authority development refusals or conditional approvals (made by Councils under Interim Development Order). Section 28A relates to appeals against Local Authority demands for road construction costs.

There is—or was, prior to 1970—no specific mention in the principal Act of appeals against development decisions made by a local authority under a Town Planning Scheme. In practice however most schemes do, themselves, confer such rights of appeal. Clause 33 of the Metropolitan Regional Scheme is a case in point—and of course this clause may relate to decisions of the Metropolitan Region Planning Authority or Area Committee or Local Authority, depending how the powers of development control have been delegated. Some schemes mention other classes of appeal specifically—but some simply provide for appeals against decisions of the Council "taken in exercise of a discretionary power".

Objections

Here it might be mentioned in passing that there is a clear distinction between planning appeals and planning objections. Schemes are advertised before they receive Ministerial approval and members of the public are invited to state any objections that they may have. These they address to the Councils concerned which should consider them and eventually answer them. The objectors and the Councils views thereon are considered by the Board and by the Minister, but not as appeals. Not infrequently they lead to modifications being made to a Scheme.

Appeals to the Minister

Prior to 1971 all the appeals described above lay to the responsible Minister. Section 7A(b), Town Planning and Development Act did provide, in the case of appeals relating to Interim Development Orders, that the Minister might appoint a person or persons to hear

an appeal and report thereon to him—but this provision was seldom invoked. In respect of the Metropolitan Region Scheme subsidiary legislation described methods of hearing appeals. In practice, the Minister generally relied, in nearly all cases, upon the written submission of the appellant contained in his letter of appeal, upon the reports of departmental offices made after due enquiry and, in the case of subdivisional applications, on Town Planning Board files. On occasion, however, he discussed the matter informally with the appellants and with the local authority concerned. He sometimes visited the site to which the appeal related. That appeals were not more elaborate or more formal was perhaps due to the time that this would have taken.

Dissatisfaction with appeals to the Minister

The 1960s were boom years. There was a lot of subdivision and development. At the same time there was an increasing public awareness that towns might be better places than they were, that quality counted and that development was not invariably a good thing. This attitude was reflected in a growing interest in town planning, the adoption of more schemes, tighter subdivisional control and the imposition of more conditions. A proportion of would be subdividers and developers received unwelcome answers to their applications.

There were many appeals and by no means all of them were successful, so there inevitably were people who were dissatisfied with the planning process. A Minister for the Crown, is more vulnerable to public criticism than is a judge or magistrate or even, perhaps, a civil servant. Moreover it seemed to some people unreasonable that a Minister in whose name an original decision had been taken should decide an appeal against that decision—and should, in the case of subdivisional appeals, be advised by the same officers that had advised the original decision makers. Inevitably pressures arose for changes in the appeals procedure.

Alternatives

One possibility which was considered was that used in Britain. There, Inspectors (senior civil servants who are professional planners) consider appeals. In nearly half the cases correspondence, coupled with an informal visit to the site, is all that is required—but in other cases the inspector holds a public enquiry. In some instances the Inspector makes the decision, but in other cases he reports to the Minister who has the last word. There can be no question of partiality as the appeals relate to Local Authority decisions.

Another possibility was some form of court or a tribunal—an independent body. South Australia had an Appeal Board.[5] Victoria had recently formed an Appeal Tribunal.[6] A Board, Tribunal or Court may be made to appear impartial; but there would be practical difficulty in its operation. Formal hearings, with expert witnesses and legal representation on both sides would be lengthy. The State covers a million square miles and cases might arise anywhere so that the court and its witnesses might have to travel long distances. Delays could be considerable. Nor was it certain that normal court proceedings were suited to planning decisions; but with that question I will deal later.

The 1970 Amendment

The solution proposed in the 1970 amendment Act was something of a compromise. Section 39 of the 1928 Act now provides that an appeal may lie either to a Court or to a Minister. The appellant may state his preference though by s. 42 the Minister may object to Court proceedings if he considers that in upholding the appeal town planning principles would be violated, and the Governor in this event may stay court proceedings.

By s. 43 the Court has three members—a judge and a nominee of each party. By s. 46(2) either party may have legal representation. By s. 47 Court may summon witnesses and call for documents.

The Public Response

Few appellants have chosen to appeal to the Town Planning Court. In fact up to the end of August, 1972 nearly 400 appeals had been directed to the Minister and only one to the Court. Ironically this one, which involved land on the line of a proposed major road to Garden Island, was the subject of a Ministerial objection which was upheld. (The land has subsequently been resumed.)

Why should the public have preferred to appeal to the Minister? No one can be sure, but the following are possibilities.

Appellants, or their professional advisers, have customarily appealed to the Minister, and this may almost be a habit. The Minister, whoever he may have been, and whatever his political persuasion, has given appellants a fair hearing (using that term colloquially). It has sometimes appeared to planners that private interests have prevailed

5 Ss. 19-27, Planning and Development Act 1966-1967 (S.A.).

6 Town and Country Planning Act 1961 (Vic.), as amended by Town and Country Planning (Appeals Tribunal) Act 1970.

unnecessarily over matters of public concern; there has been little reason therefore for appellants to use the Court because it was likely to present the individual with a better chance of success. An appeal to the Court involves a fee of $20 plus, perhaps, transport costs; an appeal to the Minister costs nothing and costs have never been awarded. Some people are nervous of courts; they would rather suffer than become entangled with the law. The problems seldom concern questions of law.

Whatever the reason the public has evidently not taken advantage of the alternative appeal to the Town Planning Court.[7]

Planning and the Law

Planning decisions should ideally be based on a careful balancing of public and private interests, using Schemes as guidelines, and treating each case on its merits.[8] Planning schemes are tending to become statements of policy rather than rules requiring strict interpretation. Most planning scheme texts are couched in fairly simple, intelligible English—or at least that has been the intention of their writers. Few are framed by lawyers with legal precision. After all there is much talk of public participation in planning; ordinary householders refer to schemes; shire councils and their staffs administer them daily. Schemes provide guidelines—they are not designed to determine the rights and duties of the individual.

Because of the nature of planning decisions and of scheme texts the courts which handle planning appeals will be faced with a situation different from contentious issues on points of law which pertain in most courts of appeal.

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7 Cf. Morling, *Conflict of Planning Legislation with Private Interests* (1970) 9 WEST. AUST. L. REV. 303, at p. 319 expressing a preference for a judicial hearing.

8 See Crichel Down Inquiry, H.M.S.O. (U.K.) Cmnd. 9176 (1954).

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