

INTRODUCTION TO CONFERENCE PAPERS

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The papers in this issue were first presented at the International Town Planning Conference with the theme "From Zoning to Development Control — Too Much Discretion?" held in Perth on April 12, 1985. The proceedings evaluated the trend in planning schemes away from inflexible zoning restrictions and towards wide ranging discretionary development controls.

This introduction is to catalogue this trend and to discuss some possible causes which are suggested in the town planning literature.

Zoning in Planning Theory

Planning issues raise what Lon Fuller, the legal philosopher, would call "polycentric" questions; they lack any central or core issue and instead are made up many issues. It is significant that each issue in a planning question may be as relevant as any other and one issue, in a particular case, may form the sole basis for a final determination.

Early theories of planning perceived the design process to be the solution of polycentric problems of land use allocation. There was a belief that a designed master plan could solve most problems after the expiry of a fixed time.

The legislative device of zoning fit nicely with the design theory of planning. Possible discordant uses, such as a motel in a residential area, could be separated by manipulating a boundary or even a colour on a zoning map. When a homogeneous zone was established on a map, it was than an easy matter to designate which inconsistent uses should be prohibited.

It has always been apparent that zoning would not create a designed utopia; nor would it improve the quality of land use decisions. The disillusionment with zoning amongst planners is evident in the 1960's — a period also marked by a quest for unified theory of planning. It is the

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thesis of this introduction that as planning theory moved away from the design process there was a greater willingness to accept an increase in discretion in planning.

Movements in Planning Theory

The planning profession, throughout the 1970's, was searching for a unified theory of town planning rather than having to rely on derivative ideas. As few theories were significant, this was a time of insecurity.¹ Perhaps the most compelling theory of that period was that of McLoughlin² who offered the "systems approach" to planning: there may be great uncertainty as to how to decide planning issues but at least planners should be comprehensive and consider all possible points of relevance.

Planning became concerned with environmental and social questions and all manner of miscellaneous and tangential issues. So wide did the embrace of planning extend, that it was no surprise when Wildarsky in 1973 wrote his famous paper: "If Planning is Everything, Maybe it's Nothing".³

In the late 1970's, there was a minefield of planning theory ranging from precision mathematical models to calls for planners to act as advocates for their amorphous causes. Everything from social reform to criminology was taught in planning schools and it was said that when the word planning was mentioned in that period one had to ask "Do you mean planning with a capital P or a small p?"

Zoning no longer had any bedrock to rest upon. Although planning theory vacillated, there was no room for design solutions to urban problems based on zoning. Although still a dominant legislative device in most parts of the world, zoning was further condemned in theory and practice of the implementation, rather than the creation of schemes and plans. In fact, some thought that here, at last, was a solid planning theory.⁴

The implementation literature is concerned with why plans and programmes fail. Empirical studies point to the consistently high failure rate of zoning schemes when the time came to compare the goals of the plan with what was achieved. In an article called "Why Murphy was Right"⁵, the proposition was advanced that when there is a 10% chance of error in a plan, there is a 30% chance that the project will fail.

1. This period of doubt is discussed in Alexander, 'After Rationality, What? A Review of Responses to Paradigm Breakdown' (1984) 50 *Journal of the American Institute of Planners* 62

2. J.B. McLoughlin, *Urban and Regional Planning A Systems Approach* (1969)

3. A.B. Wildavsky, (1973) 4 *Policy Sciences* 127

4. Summarised in Alexander, "Implementation - Does the Literature Add up to a Theory?" (1982) 48 *Journal of the American Institute of Planners* 132

5. R. Bihn, (1980) *Policy Analysis* 6

The legacy of this period is the sentiment that planners cannot solve land use problems which are essentially political or ethical issues. Planning can be seen as a political process — planners can supply the facts but politicians alone have the role of balancing conflicting interests. This has been the touchstone for more reliance on discretion in planning matters exercised as ad hoc political decisions and not by projecting hopes and dreams into the future by means of a zoning plan.⁶

In the Courts and Legislation

The sentiment that planning is a political process has persuaded courts in different jurisdictions that local authorities should not be restrained in the use of the planning power. Schemes have been upheld with provisions only remotely related to traditional planning considerations. In the United States, a good example is *Young v. American Mini Theatres*,⁷ a decision of the U.S. Supreme Court. The City of Detroit had attempted to ban pornographic book stores and movie theatres as part of the zoning scheme. The ordinance was held to be serving a legitimate planning purpose on the basis that a city always has an interest in the future character of neighbourhoods.

In Western Australia, extremely wide discretion has been given to local authorities in planning matters as result of the decision in *Costa v. Shire of Swan*.⁸ Olney J. stated that the purposes for which a Town Planning Scheme can be made are not limited to those enumerated in the First Schedule of the *Town Planning and Development Act* but extend to all purposes related to the broad notion of planning — planning with a little “p”. In no other state of Australia have planning authorities been given such wide power.

In the last five years in Australia there has been a clear move away from zoning and towards more extensive use of discretionary power. This is analysed in the papers of John Whitehouse and Alan Fogg which follow. The most specific example is perhaps the South Australian *Planning Act* of 1982, section 47 of which states that: “no development shall be undertaken without the consent of the relevant planning authority”.

Discretion in Western Australia

The Model Scheme Text for local authorities which is contained in the Town Planning Regulations, is a product of the design era of plan-

6 A similar discussion can be found, as it concerns the United States, in Christine Boyer *Dreaming the Rational City. The Myth of American City Planning* (1983).

7 96 S Ct 2440 (1976)

8 *Costa, v Shire of Swan* (1983) W.A R. 22

ning. It emphasizes the concept of zoning and provides that in each zone certain uses should be permitted, some prohibited and others made the subject of discretion (which are referred to as "AA" uses). It also states that if a use cannot squarely fit into an existing classification, the authority has the discretion to decide where the use belongs. Thus, for a start, there are two discretionary decisions: AA uses and a decision as to the appropriate classification for the use proposed.

Local authorities in the Metropolitan region are delegated the power of the Metropolitan Region Planning Authority for deciding applications for development permission for land zoned under the Metropolitan Region Scheme. The Town Planning Appeal Tribunal has described this delegated power as "super added" to existing discretion for AA uses.

In the *University of Western Australia v. City of Subiaco and M.R.P.A.*,⁹ Burt C.J. drew a distinction between the mere "use" of land and its "development". Development amounts to some physical change or addition to the land. As a consequence, if the "use" of land is completely permitted under a local scheme the "development" still requires the permission of the council as M.R.P.A. delegate. With the exception of single dwelling houses and Clause 32 resolutions (where the M.R.P.A. takes back its discretion for special development) there is no development which is permitted without the approval of council.

The West Perth Town Planning Scheme first adopted the idea of having the uses in all zones "AA", thereby making every use of land subject to discretion. Since that scheme, local authorities in Western Australia have added provisions to scheme which state: "No development whatsoever without the permission of Council have been first obtained."

Such a "no development" clause is largely redundant in the Metropolitan Region but is significant outside. In the decision of the *Aboriginal Boomerang Council v. Town of Geraldton*,¹⁰ the Town Planning appeal Tribunal stated that outside the Metropolitan Region, a clause such as this gives the authority a "super added" discretion regardless of whether a use is permitted expressly in the scheme.

Every development of land, which includes any substantial permanent structure on land such as large signs or fences, requires approval of a local authority in the Metropolitan Region and outside the Region where there is a super added clause or all uses in zones have been made "AA". The zoning of land is now of minor significance. Land use decisions are made by exercises of discretion for particular applications.

9 *University of Western Australia v. City of Subiaco & M R P A*, (unreported) (1980)

10 No. 47, 1981

The Exercise of Discretion

There are no formal rules for the exercise of discretion when an application for development is made. Usually, discretion is exercised by a town planning committee of council. No committee uses a check list of all possible factors to consider in respect of an application. It is likely that one or other relevant factors may be in the minds of the committee and others completely ignored, either because they are unimportant or are forgotten. Most often, decisions are made based on a loosely held view of the relationship of the area under consideration to the area as a whole.

Many authorities have official or unofficial policies for certain areas and uses. Written policies are often ignored or are changed to suit the particular application, a phenomenon with the name of "policy draft".

Most issues only receive cursory examination in council meetings unless the matter comes to the attention of a councillor because it is controversial. No councils or committees carry out social surveys or traffic studies or make a full investigation of the impact of the development on the community. Instead, the decision is often based on only a few of the possible relevant considerations which are significant in deciding the development application. Most development decisions are ad hoc and without any conscientious analysis of the needs of the area nor any examination of how the use fits into the pattern of municipal growth.

Evaluation of Discretion

English law has always assumed discretion to be contrary to the rule of law and inherently bad. Judicial review of bureaucracies and control of discretion by the use of rules contained the unarticulated assumption that a bureaucrat with power is likely to abuse it.

Graham Hughes¹¹ has pointed out the fallacy of this approach. He states that rules have the effect of creating more discretion. He argues that in bureaucracies as in the game of chess, the rules themselves create the game — without the rules there is no game of chess. When a rule is created it requires clarification and can become a new peg on which to hang further issues which may involve discretion.

The argument in favour of discretion in planning is that it encourages the resolution of complex issues by planning professionals; rules can become a dead hand when applied by inept bureaucracies. Discretionary decisions are not necessarily ad hoc; they are not made in isolation from each other but in a manner which provides some continuity. The greatest advantage of rules is probably that they allow the policies of a bureaucracy

11 Hughes, 'Rules, Policy and Decision Making' (1968) 77 *Yale L J* 411

to be manifest. If discretionary decisions are supported by reasons and made public, few complaints can be made.

The best answer to the problem of discretion in development control is that planning is not, in fact, free of values and abstractions. The whole process is riddled with values and will, to a degree, always appear arbitrary.

The shared view of the Conference participants is that decisions should be explained and made public: "A scientific facade can only hide from view fundamental choices which if unexamined and uncriticised will remain arbitrary reflections of hidden bias, unrecognised distortions and unacknowledged political power."¹²

12 Shon, 'Some of What a Planner Knows: A Case Study of Knowing in Practice' (1982) 48 *Journal of the American Institute of Planners* 381