

## ENVIRONMENTAL DECISION-MAKING: SOUTH AUSTRALIA'S PLANNING AUTHORITIES†

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### 1. Introduction

#### (A) THE LEGISLATION

In South Australia control of land-use stems basically from the Planning and Development Act 1966-1975. This legislation was introduced in 1966 after a review of South Australia's planning problems and an examination of its existing legislation. Prior to the Act land-use control had been exercised through council zoning by-laws<sup>1</sup> and land subdivision controls vested in

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\* Senior Lecturer in Law, The University of Adelaide.

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1. These by-laws were made pursuant to s.82 of the Building Act 1923.

councils and the Town Planner<sup>2</sup>. Constructional aspects of building development continue to be controlled by the Building Act 1971<sup>3</sup>.

#### (B) THE AUTHORITIES

The Planning and Development Act established a number of authorities who are responsible for the implementation of the Act. They are:

##### (i) *State Planning Authority*

The Authority consists of the Director of Planning and ten part-time members. The members are representatives of major government departments involved in development—the Director and Engineer-in-Chief of the Engineering and Water Supply Department, the Commissioner of Highways, the Surveyor-General and nominees of the Ministers of Housing and Transport—and persons with expertise in local government, business and conservation<sup>4</sup>. The Authority is responsible for formulating basic planning policies through authorised development plans<sup>5</sup> and for implementing planning controls in key areas pursuant to interim development and planning regulations<sup>6</sup>.

##### (ii) *Director of Planning*

The Director is a full-time official with planning expertise. He is Chairman of the State Planning Authority and Head of the State Planning Office. His approval is required for any plan of subdivision of land in South Australia<sup>7</sup>. This approval is in addition to that of the local council.

##### (iii) *State Planning Office*

The Office provides the full-time staff support for the Director of planning; the services of its staff are also available for the State Planning Authority<sup>8</sup>. The staff carry out surveys and assessments of planning areas, provide information relating to planning applications, and investigate compliance with planning requirements.

##### (iv) *Planning Appeal Board*

The Board consists of a panel of judges and commissioners. The commissioners are persons with expertise in local government, commerce and planning<sup>9</sup>. The Board hears appeals against decisions of planning authorities pursuant to the Planning and Development Act and other related legislation. Normally the Board hears cases with a judge as Chairman and two commissioners<sup>10</sup>.

In addition to the specially created authorities, the Planning and Development Act places many burdens upon local councils. The councils are responsible for formulating local policies through supplementary development plans<sup>11</sup> and for the bulk of the administration of the Act. Councils make the decisions in respect of most applications for consent under interim development and planning regulations and subdivisional controls<sup>12</sup> and are largely responsible for the enforcement of the Act.

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2. Control was imposed by the Town Planning Act 1929 and the grounds for refusal of consent to a plan subdivision were set out in regulation 72 of the Regulations of 1930 made pursuant to that Act.

3. This Act replaces earlier similar legislation.

4. Planning and Development Act 1966-75 s.8.

5. Ss.30-35.

6. In accordance with ss.41(5) and 36(5).

7. S.45.

8. S.17.

9. S.21.

10. S.10.

11. S.35.

12. Pursuant to ss.36(5), 41(5a).

In the City of Adelaide the City of Adelaide Development Committee exercises interim development control alongside the Adelaide City Council<sup>13</sup>. The Committee consists of representatives of both the Council and State Government<sup>14</sup>. The Committee came into existence in 1972 and is to act while a detailed plan is formulated for the central city area.

#### (C) DEVELOPMENT PLANS

The policy documents of the Planning and Development Act are authorised development plans. These plans result from an assessment of the resources of regional areas and the demands likely to be made upon them. The plans then set forth the policies for the area. The plans are prepared by the State Planning Authority and adopted by the Governor on the recommendation of the Minister<sup>15</sup>. The original report which inspired the Planning and Development Act is given legal force as the Metropolitan Development Plan<sup>16</sup>.

#### (D) PLANNING CONTROLS

The principles of authorised development plans are translated into legal restrictions on the use of land by means of planning regulations. These regulations are enacted by the Governor on the recommendation of the State Planning Authority or relevant council<sup>17</sup>. In the metropolitan area planning regulations exist for most council districts. The most common planning regulations are those relating to zoning<sup>18</sup>. The form of the planning regulations for any particular area is dictated by model planning regulations. The model provides a standard list of possible land-uses. The individual regulations divide the area covered into zones and provide for each zone which of the possible uses are permitted, which are prohibited, and which may be permitted with the consent of the relevant authority.

Any area may be declared by the Governor on the recommendation of the State Planning Authority to be subject to interim development control<sup>19</sup>. Interim control is normally aimed to regulate development while planning regulations are prepared although the control is not statutorily limited to these circumstances. While such control is in force the use of land may not be changed and no building may be erected without the consent of the State Planning Authority or other authority to which power to consent has been delegated<sup>20</sup>.

As South Australia largely pioneered in the common law world the system of recording land titles, it is not surprising that even early planning controls sought to use these records of title and thereby to regulate subdivision. Control of the size of each allotment in separate ownership was used to attempt to dictate land-use. Despite the existence today of land-use controls, control of land subdivision remains a significant planning weapon in South Australia. Consent for a plan of subdivision must be obtained from both the local council and the Director of Planning<sup>21</sup>. The Planning and Development Act sets out the grounds on which consent may be withheld<sup>22</sup>. The list of grounds of objection is lengthy and usually each ground is spelt out in detail.

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13. Ss. 42a-42h.

14. S.42b.

15. Ss.30-34.

16. S.5(1).

17. S.36(1).

18. Many other matters, listed in s.36(4), may be covered.

19. S.41(1).

20. S.41(5).

21. S.45.

22. In ss.45a-53.

Development plans and subsequently planning regulations specify land which is reserved for public acquisition for such uses as schools, hospitals and roads. When land is subdivided a certain portion must be set aside for public reserves. The State Planning Authority also has power to compulsorily acquire land for such purposes as recreation areas and urban redevelopment programmes<sup>23</sup>.

## 2. Planning Appeals

### (A) JURISDICTION

The jurisdiction of the Planning Appeal Board extends over a wide range of planning matters and a right of appeal is available in most instances to all relevant parties. Any person who is denied consent for any proposal or granted consent subject to conditions may appeal. Any person who lodges an objection to an application for a consent under a planning regulation may appeal under s.36a. An original requirement of a two dollar payment to lodge an objection has been removed<sup>24</sup>, so that the Board may have to maintain a closer watch for vexations or trivial appeals which it may dismiss under s.36a(9). However, the right of objectors to appeal has yet to be abused and it has become commonly accepted that the physical environment does not affect only those with a proprietary interest in neighbouring land. One anomaly remains in respect of objector appeals. An objector may appeal in respect of permission granted under planning regulations. These are defined in s.5(1) as regulations under Part IV of the Act. In consequence an objector has no right of appeal where consent is granted during interim development control or pursuant to the land subdivision controls of Part VI of the Act. Planning regulation decisions create the majority of cases before the Planning Appeal Board but land subdivision decisions, particularly conversions from rural to urban use, can have more impact on the environment.

The Planning Appeal Board has been ready to find jurisdiction for itself and has involved itself in disputes which are probably unsuited to a judicial body. In *B.P. Australia Ltd. v. Tea Tree Gully City Council*<sup>25</sup> the applicant wished to erect a Petrol Filling Station in a Residential 1 Zone. In that zone such a use was prohibited by the planning regulations. The regulations contained a power to recommend to the Governor that a particular piece of land be exempt from the regulations. The Board held that there was a right of appeal to it where the Council declined to make such a recommendation and that the Board could direct the Council to make a recommendation. More significantly in *Campbell v. Munno Para District Council*<sup>26</sup> a council proposed particular zoning provisions as part of its planning regulations. Objections were heard and the Council finally determined its proposed zoning. Owners of land dissatisfied with the proposal appealed to the Board. The Board held that it had jurisdiction to hear the appeal and give directions to the Council about zoning proposals. The approach of the Board in at least the latter case is inconsistent with the subsequent decision of Wells J. in the South Australian Supreme Court in *Quarry Industries Ltd. v. Marion City Council*<sup>27</sup>. This case again involved objections to zoning proposals. Wells J. held that there was no right of appeal to the Planning Appeal Board. He pointed out that under s.26 of the Planning and Development Act there must be a "decision . . . to refuse

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23. S.63.

24. By s.14 of the Planning and Development Act Amendment Act No. 2 of 1975.

25. [1970] S.A.P.R. 82.

26. [1970] S.A.P.R. 136.

27. [1971] S.A.S.R. 55.

... consent, permission or approval". He considered that the terms consent, permission or approval were used in a formal sense and related to applications to deal with title to land or carry out work on land. Furthermore, Wells J. drew a distinction between a ruling based on an inquiry relating to a particular set of facts and a decision to implement legislative policy in a certain way. The word "appeal" was only appropriate in the former case. The preparation of planning regulations was an act of the latter kind. Both arguments indicated that there was no right of appeal in the present case. The reasoning in this decision draws attention to the rôle of the Planning Appeal Board.

#### (B) PROCEDURE

Section 27(6) directs the Board to determine each appeal as it thinks proper. The Board carries out an investigation of the planning merits of each case. As planning authorities are empowered to impose conditions when granting consent, so the Board may impose conditions. These conditions may involve changes to the original proposal. If the changes are great then the final proposal may be one which planning authorities and objectors have had little chance to evaluate. The Board used to accept amendments readily. It could be important that amendments be made and the latter be determined on appeal. In *Stone and Trumble v. Burnside City Council*<sup>28</sup> an amended plan was approved by the Board whereas if the plan had gone back to the Council, it could not have received approval as planning regulations prohibiting part of the proposal had come into effect. The Full Court of the Supreme Court dealt with the issue of amendments in *Becker v. Director of Planning*<sup>29</sup>. The decision is best summarised in a later decision of the Planning Appeal Board<sup>30</sup>.

"The Chief Justice said that planning authorities, and on appeal, the Board, could impose conditions which required considerable variations of the developer's proposals provided that, when the plan had been amended in accordance with the conditions imposed, it was not 'fundamentally different from the original plan.' Hogarth J. said that the plan as amended to incorporate the conditions should not 'lose its identity and become a new plan' but be able to be seen as 'no more than a development' from the original plan. Zelling J. took, perhaps, a narrower view when he said that only 'minor modifications' to the original proposals could be made by the imposition of conditions."

Tribunals have generally been seen as a means of avoiding the tardiness, formality and cost of court proceedings. This attitude is reflected in the provisions relating to the Planning Appeal Board. A party may be represented by counsel, solicitor or other agent<sup>31</sup>. The Board is not bound by the rules of evidence and is authorised to formulate its own procedure<sup>32</sup>. Furthermore, the Board is directed to conduct proceedings with as little formality and as much expedition as the legislation and proper consideration of the disputes permit<sup>33</sup>. These expectations have not been fully realised: the common practice has become that of representation by a legal practitioner and the support of a witness with planning expertise.

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28. [1973] S.A.P.R. 134.

29. (1973) 6 S.A.S.R. 13.

30. [1974] S.A.P.R. 174 at 179.

31. S.23d.

32. S.23(a) and (b).

33. S.23(c).

**(C) NATURE OF THE DECISION**

The Board's jurisdiction is generally seen as one to dispose of the matter before it. Under s.26(2) of the Planning Development Act the Board may confirm or reverse the decision appealed against or give any party to the appeal such directions as the Board thinks fit. In cases where a planning authority has acted on erroneous grounds a possible course of action is to point out the error to the authority and direct it to determine the matter on proper considerations. This practice would ensure that planning policies are determined primarily by the planning authorities, but on the other hand it could add to the cost and duration of the dispute. Despite the general power to give directions the Board has not required reconsideration of matters where an authority has acted erroneously.

The form of determination adopted by the Board is supported by the nature of the inquiry which the Board is directed to undertake. The Board is to make its own judgment as to the merits of any dispute. Section 27 (6) of the Act currently provides:

(6) The board may determine each appeal in such manner as it thinks proper having regard to all relevant matters and, in particular to—

- (a) the provisions of any authorized development plan, the law (whether general or special) applicable or having effect in relation to the locality within which the land, the subject of the appeal, is situated and the grounds upon which the decision appealed against was made;
- (b) the health, safety and convenience of the community;
- (c) the economic and other advantages and disadvantages (if any) to the community of developing the locality within which the land, the subject of the appeal, is situated;

and

- (d) any factors—
    - (i) tending to promote or detract from the amenity of the locality in which the land is situated, the conservation of native *fauna* and *flora* in the locality or the preservation of the nature, features and general character of the locality;
- or
- (ii) tending to increase or reduce pollution in, or arising from, the locality in which the land is situated.

From the outset the Board recognised that it was required to judge for itself any disputes according to any considerations relevant to planning. The decision appealed against may well have had to be determined on narrower considerations.

“The Board is to hear matters *de novo*, . . . having regard to all relevant matters which may be matters beyond the power of the planning authority”<sup>34</sup>.

The Board is composed of a Chairman with legal qualifications and two Commissioners with qualifications in local government, planning, public administration, commerce or industry<sup>35</sup>. It is therefore not unnatural that the Board regards itself as an expert body capable of forming judgments on matters

34. *Secker v. Director of Planning* [1968] S.A.P.R. 22 at 34.

35. Ss.21 and 22.

of planning policy. Unlike other planning authorities, however, the Board is not politically accountable.

### 3. *Interim Development Control*

#### (A) INTRODUCTION

The Planning and Development Act provides that during interim development control a change of land-use or the construction of a building must be approved by the State Planning Authority or any council to whom power to give such consent has been delegated. Until Amendment Act Number 2 of 1975, the Act provided simply that the State Planning Authority could delegate its power to consent and revoke such delegation at any time. The Amendment Act in the current s.41(5a) provides that the delegation may be subject to such exceptions, limitations and conditions as may be specified.

Apart from the Hills Face Zone the practice of the State Planning Authority in the area covered by the Metropolitan Development Plan has been to delegate the power to grant consent during interim development control to the local council. Before such a delegation has been made the Authority has required that the council be proceeding towards the enactment of planning regulations for its area. The Authority has been reluctant to allow an unfettered discretion to the councils. Consequently it has used the initial proposals for planning regulations to control councils' discretion. The Authority's control has been delegated subject to the condition that the council exercise control in conformity with the proposed planning regulations. However, s.41(7) of the Act specifies the considerations according to which interim development control should be exercised.

#### (B) DISCRETION ENTRUSTED TO COUNCILS

The conflict between the practice of the Authority and the provisions of the Act was to surface rapidly in the case of *Alpine Developments Pty. Ltd. v. Burnside City Council*<sup>36</sup> and to continue to cause friction between the Authority and the Planning Appeal Board until the present. The most recent illustration is the case of *Swan and Chancellor v. Adelaide City Council*<sup>37</sup>.

The *Alpine Developments Case* involved an application to erect a single-storey building of six home units on a block 100 feet by 190 feet in Sturdee Street, Linden Park. Sturdee Street was a wide road running from Portrush Road, a major arterial road. There were on Sturdee Street predominantly single-storey one-family dwellings but they were ageing.

The land was within the City of Burnside. On 4th April, 1968, the area within that City was proclaimed to be subject to interim development control. On the same day the State Planning Authority delegated its control for the area to the Burnside City Council. The Council had at the Authority's insistence passed a resolution that it would exercise the delegated authority in accordance with its draft planning regulations as amended by agreement with the Authority. The draft regulations zoned the land involved in a Residential 1A area. In this area the erection of home units was prohibited.

On 30th April, 1968, the appellants wrote to the Burnside Council seeking approval for the erection of the six home units. In response the Council referred to the proposed zoning and refused consent. The appellant appealed to the Planning Appeal Board which granted the appeal subject to conditions.

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36. [1968] S.A.P.R. 105.

37. [1974] S.A.P.R. 198.

The Planning Appeal Board referred to the views of the New South Wales Land and Valuation Court in *Coty (England) Pty. Ltd. v. Sydney City Council*<sup>38</sup>. The Court in that case stated that in exercising its jurisdiction over appeals against decisions under interim development control the Court should avoid giving a judgment or establishing any principle which would render more difficult the ultimate decision as to the form which permanent zoning should take. The Court stated that during the interim control period the Court should act in consonance with planning decisions embodied in the zoning scheme in the course of preparation. The South Australian Planning Appeal Board did not fully accept these views. It resorted to a vaguer formula of striking a balance between the individual interests of private citizens and the interest of the public prior to the coming into operation of planning regulations.

The Board emphasised the provisions of s.41(7). That section directed the Council to have regard to the Metropolitan Development Plan, health, safety and convenience, economic and other advantages and disadvantages, and the amenities of the locality. As the Board pointed out the wording of s.41 made these the sole considerations for authorities exercising interim development control.

Any attempt by the State Planning Authority to require the exercise of interim development control on conditions was ineffectual in so far as those conditions departed from s.41(7). The proposed regulations were in the Board's opinion relevant in so far as they set forth the Council's considered policy for future development of the area having regard to the considerations listed in s.41(7). The Board warned that the proposals were subject to public exhibition and Ministerial approval and had to be treated with considerable caution.

The Board pointed out that interim development control in South Australia differed from that in other States. In South Australia control followed the authorised development plan. Section 41 was designed to protect the concepts and provisions of the authorised development plan and to ensure that undesirable development did not occur prior to the coming into operation of planning regulations. Prospective planning regulations were not the yardstick for control.

On appeal the Board was not restricted to the grounds on which the planning authority had to act under s.41(7). Those grounds were only one of the matters to be considered. Under s.27(5)<sup>39</sup> the Board was to have regard to all relevant matters and was directed to particular matters similar to those set out in s.41(7).

The Board firstly had regard to the Metropolitan Development Plan. It pointed out that the Plan merely designated living areas and set out considerations to be applied when intensive development was involved. These considerations included the preservation of open areas and provision for parking.

The Board considered that little turned on health, safety or convenience or economic or other advantages or disadvantages. The crucial question was that of amenity. The space provided for the home units and their design was in the Board's opinion adequate. In view of the aged nature of the

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38. 2 L.G.R.A. 117.

39. Now s.27(6).



surrounding area, the appearance of the home units would add to the pleasantness of the area. The Board recognised that under the zoning proposals the standards of amenity would be higher as only single dwelling homes would be permitted. However as the regulations were at a formative stage they were a matter of mere speculation. Perversely the Board obtained some support for its decision from the fact that the zoning proposals allowed home units on the other side of the street.

The interpretation of the interim development control powers by the Board in the *Alpine Developments Case* ensured that in planning appeals the Board would become heavily involved in policy decisions. The only guideline for decision making accepted by the Board was the Metropolitan Development Plan and that Plan does not engage in detailed zoning. As each case must be decided on its merits the scope of the discretion granted to planning authorities and on appeal to the Board is considerable. Even more remarkably the regard paid by the Board to the council's views on amenity was scant indeed. The Board conceded that the case ultimately depended upon amenity. Existing land-use and the council's views both pointed to single residences. The only justification for the Board's opposite view was its asserted belief that the proposed units would "add to the pleasantness of the locality"<sup>40</sup>.

The Planning Appeal Board evidently conceived itself as having some kind of supervisory rôle. In deciding the *Alpine Developments Case* it launched into a discussion of the council's proposed regulations. The thrust of its discussion was a preference for discretionary controls to preserve amenity. Such controls would be closer to the British pattern but hardly consistent with the State Planning Authority's Model Planning Regulations. The model reflected at least in part an infant jurisdiction nursed by barely equipped local councils.

In the *Alpine Development Case* the Board was able to emphasise that the proposed regulations had not been placed on public exhibition and had not been considered by the Minister. *Stone and Trumble v. Burnside City Council*<sup>41</sup> involved planning regulations which by the time of the appeal had come into force. The proposal in this case was for the erection of a super-market and a series of smaller shops. The council's objection to the proposal, which was followed in the planning regulations, reflected essentially a boundary problem<sup>42</sup>. Smaller shops were to be erected along the rear of the block to be developed. The rear of the block was situated along a small cul-de-sac. On the other side of the cul-de-sac there was a residential development. For part of the development block facing the cul-de-sac the council proposed an Residential 3B zoning to preserve the residential amenity of the street.

The Board flatly disagreed with this scheme:

"I am unable to see how the Council's aims would be likely to be achieved having regard to the Residential 3B zoning and the District Shopping zoning provided by the Regulations"<sup>43</sup>.

The Board proposed its own solution to the boundary problem:

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40. [1968] S.A.P.R. 105 at 150.

41. [1973] S.A.P.R. 134.

42. Cf. D. R. Mandelkar, *Managing Our Urban Environment* (Bobbs Merrill, 1966) 617-625.

43. [1973] S.A.P.R. 134 at 141.

"I see less reason to think it is good planning to provide for three residential allotments on the western side of Chessington Street so that they may either have a common boundary with a shopping centre on the west or, in the case of one allotment, not only on the west but on the south, than to look for a break between the two use-locales across the road reserve of Chessington Street, particularly as that road reserve will naturally be capable of being affected by activities within part of the District Shopping Zone in any case"<sup>44</sup>.

The Board imposed a number of conditions to attempt to reduce traffic on Chessington Street and to enhance the appearance of the shops from the dwellings on the other side of the street. These conditions required a substantial modification of the original plans.

A series of cases follows *Stone and Trumble v. Burnside*<sup>45</sup>. Each of them involved planning regulations close to promulgation. In each of them the Board states that the planning regulations are relevant but not decisive. In each of them the Board makes its own assessment of the merits of the situation.

*Supple v. Hindmarsh Town Council*<sup>46</sup> involved an application to use part of a dwelling for chiropractic consulting rooms and *Ceravolo v. West Torrens City Council*<sup>47</sup> involved an application to erect a dental surgery. In both cases the proposed planning regulations included the land in a residential zone. In *Supple's Case* the Council on appeal presented no evidence for its decision. The land was situated near a busy intersection where there was considerable traffic noise. The Board accepted evidence that traffic generated by the proposal would not have any disadvantageous effects. In the Metropolitan Development Plan the land was included in a Living Area. The Board permitted the development. In *Ceravolo's Case* the land was on a major road between a number of shops and businesses to the north and a number of residences to the south. There was evidence of a considerable community need for dental services in the locality. The Board considered that use of the proposed surgery would have a minimal effect on traffic and that the surgery would be aesthetically pleasing. The land was in a Living Zone in the Metropolitan Development Plan. Erection of the surgery was permitted.

*Fekete v. West Torrens City Council*<sup>48</sup> involved an application to use land to operate a donut caravan; in *Thomas v. Noarlunga District Council*<sup>49</sup> the applicant proposed to erect three shops; in *Elliott v. West Torrens City Council*<sup>50</sup> permission was sought to use a dwelling as an office and to erect a warehouse.

In *Fekete's Case* the land was in a Living Area in the Metropolitan Development Plan: its zoning in the proposed regulations was not revealed in the judgment. The Board considered that the proposal would increase traffic, noise and litter and thus detract from the enjoyment of the area by near-by residents. The caravan would also detract from the aesthetics of the area. The appeal was dismissed. In *Thomas' Case* the objection to the shops was that the amount of off-street parking required by the proposed regulations was not

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44. *Ibid.*

45. Despite the order of reporting.

46. [1972] S.A.P.R. 188.

47. [1973] S.A.P.R. 157.

48. [1972] S.A.P.R. 193.

49. [1973] S.A.P.R. 26.

50. [1973] S.A.P.R. 47.

satisfied. The Council's planning officer made no objection to the proposal and the appeal was allowed. The land in *Elliott's Case* was in a Living Area in the Metropolitan Development Plan and again its proposed council zoning was not disclosed. Permission for the warehouse was denied both by the Council and on appeal. The Board reasoned that a large structure would adversely affect the amenities of a predominantly residential area. However the Board permitted conversion of the dwelling to an office. The office would serve an existing warehouse to the rear. The conversion would allow cars associated with the business to be parked off the street. Landscaping and the retention of residential appearance would prevent loss of amenity.

### (C) CITY OF ADELAIDE

The conflict between general council policies during interim development control and the Planning Appeal Board's interpretation of s.41(7) again came to a head when interim control was introduced for the Adelaide City Centre. The nature of control in the City Centre is complicated by the co-existing powers of the Adelaide City Council under s.41(5) of the Act and of the City of Adelaide Development Committee under s.42h of the Act.

Control by the City of Adelaide Development Committee involves different considerations to those of control by planning authorities under s.41(7). The matters reflect the historical jig-saw puzzle of the different parts of the Act. They were framed in 1972, but before the 1972 amendments to s.41(7). Consequently equivalents (with some amendments) of the then provisions of s.41(7) appear together with some additional factors. The Committee is to extend its vision to planning directives, planning regulations, reports of advisory committees, opinions of the Adelaide City Council, and sociological effects. The Act is here attempting to move towards statutory force for interim policies.

Crucial to the adoption of binding policies is the concept of planning directives set out in s.42g. That section does not define what a planning directive is but sets out what a planning directive may do. Planning directives are to ensure the proper planning and development of the City of Adelaide or any part thereof. They may control building work, establish zones, regulate the height of buildings, stipulate floor area indexes and standards of design and control the use of land for any use (*sic*).

The Committee adopted Planning Directive No. 1. The terms of this directive are:

- “1. In this planning directive:
  - ‘approved use’ means the use approved by the Committee, pursuant to this planning directive, in respect of the land, building or portion of a building to which such approval relates.
  - ‘Committee’ means the City of Adelaide Development Committee.
  - ‘existing use’ means any use lawfully existing at the time when this planning directive comes into operation.
2. The use of any land, building or portion of a building within the area of the City of Adelaide is hereby restricted to either the existing use or the approved use.
3. This planning directive shall come into operation on the day upon which it is published in the Government Gazette”.

The Committee then proceeded to adopt Statements of Planning Policy. The Statements contained a “Guide to Land Use”.

At first sight it may seem rather remarkable that the substance of s.41(5) can be adopted as a planning directive and then planning policies established. The

control established by the planning directive exists alongside the requirement of s.42h that approval be sought for any building work. There is a right of appeal against refusal to grant permission for a building work (s.42h(7)) and against the terms of a planning directive (s.42g(7)) but not against the refusal of the council pursuant to a planning directive to allow a change of use<sup>51</sup>.

The legality of Planning Directive No. 1 depends principally upon s.42g(2)(f). This subsection provides that a planning directive may, *inter alia*, prohibit the use of any land within the whole of the city or within any zone for any use other than a use approved by the Committee. It does not seem that the subsection requires any zones to be created nor any particular uses requiring approval to be specified. Consequently Planning Directive No. 1 appears to be valid. At the same time the nature of this Directive and the failure to adopt Planning Policies as Directives mean that advantage has not been taken of the additional procedures available to the City of Adelaide Development Committee. Experience with s.41(7) raises questions as to the Planning Policies. The control under the Planning Directive must be exercised by reference to the matters set out in s.42g(4). These matters are identical to those set out in s.42h(4). No reference is made to Planning Policies!

The two leading cases on interim development control in the City of Adelaide have related not to decisions by the Committee but to decisions by the Adelaide City Council under s.41(5). The actions of the Council have been influenced by the Committee's Planning Policies. Whatever the additional considerations that are raised by s.42g(4) and s.42h(4), they are of no assistance to the Council acting under s.41.

Both *Norwich Union Life Insurance Society v. Adelaide City Council*<sup>52</sup> and *Swan and Chancellor v. Adelaide City Council*<sup>53</sup> involved clashes with the general policy of the Council to encourage residential accommodation within the City. In the *Norwich Union Case* the applicant proposed to erect two four-storey office blocks in North Adelaide. The Statement of Policy indicated that the land was in an area of mixed use but of predominantly residential character. The only permitted commercial use was for small professional offices. In *Swan and Chancellor's Case* the applicants proposed to erect an office building on South Terrace. The land abutted the parklands and was designated by the Statement of Policy as a residential area for in-town family living. In both cases, for reasons which are not clear from the judgments, the City of Adelaide Development Committee granted approval for the application. The Adelaide City Council however refused consent and on appeal its decision was reversed by the Planning Appeal Board.

In the *Norwich Union Case* the land faced a major northern road and was opposite the Adelaide Children's Hospital, a building of considerable bulk. The applicants argued that their proposal represented a suitable transition from the hospital building to the residences beyond the subject land. The land was unsuitable for residential development because of the noise and pollution created by the traffic.

The Board considered the provisions of the Metropolitan Development Plan which marked North Adelaide as a Living Area. It considered that the

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51. *Rochford v. Adelaide City Council* [1973] S.A.P.R. 85.

52. [1974] S.A.P.R. 15.

53. [1974] S.A.P.R. 198.

plan indicated the predominant use for the area and did not define detailed land-use zoning. The site in question had peculiar characteristics. Traffic access to the site posed some detriment to community safety and convenience but the Board considered appropriate conditions would overcome these difficulties. The Board considered that the area had a busy commercial air and that the proposed buildings would enhance the visual amenity of the area.

The Council's main argument was that its general view was major office buildings should be confined to a small central area and that in North Adelaide encouragement should be given to residential development. It argued that until detailed zoning proposals were formulated the attainment of this general view meant that no non-residential development should be permitted on the site involved. The Board indicated that such arguments were largely irrelevant to the Council's considerations under s.41(7) but that the Board's concern was directed to all relevant matters.

The Board considered however that the Council's argument imposed too great a restriction during interim development control. This control was designed to prevent great harm to the existing environment whilst regulations were prepared. It stressed that the proposals were in accordance with the character and amenity of the locality. The proposed zoning was a factor of some but not much weight as the proposals had not crystallised to a point where early embodiment in regulations was likely. The general policy to encourage residential development could not dictate the use of every piece of land.

In *Swan and Chancellor's Case* the applicants' argument was again that they would erect an attractive building which would complement an area of mixed development. Again this argument found favour with the Board. Again the Board considered that little weight could be given to the detailed planning proposals and the general policy could not dictate the use of particular sites. The Board was, however, faced with a statement in the Metropolitan Development Plan:

"Residential uses such as multi-storey flats will probably occupy less expensive sites with a pleasant outlook, for example, facing the parklands on South and East Terraces."

The Board was however able to dismiss this comment:

"In its context, however, this statement clearly refers to events which the authors of the Report then considered likely to occur and not to planning recommendations which they were making"<sup>54</sup>.

The case was probably a stronger case than the *Norwich Union Case* for the Adelaide City Council. In the *Norwich Union Case* there were strong arguments against the use of the particular site for residential purposes; in *Swan and Chancellor's Case* there were strong arguments in favour of the use of the particular site for residential purposes. The Board indicated its clear distaste for general policies despite the reference in s.41(7)(c) and s.27(6)(c) to economic and other advantages to the community. The Council was arguing that residential use was a more appropriate use of land and socio-logically a substantial number of residents would make the city a better and more attractive place.

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54. [1974] S.A.P.R. 198 at 206-7.

The Board concluded:

“Before we part with this case we would make one final observation. We think that it will be clear from what we have said that our view is that Part V of the Act does not empower the respondent Council to adopt any general policy towards development within the City of Adelaide. As we see it, the Council’s duty is to consider each application for consent which is received on its merits, taking into consideration the matters stipulated in s.41(7) of the Act as being relevant matters. It appears to us that the respondent Council may well have taken a mistaken view as to its powers and duties under the Act and that it may, in truth, have been in the past seeking to exercise functions and achieve results more appropriate to the powers and duties of the City of Adelaide Development Committee under Part VA of the Act”<sup>55</sup>.

**(D) CONCLUSIONS**

The judgments of the Planning Appeal Board express most clearly its view as to the nature of interim development control. Development is to be prevented only when it will cause substantial harm to the existing environment. Planning proposals are relevant in so far as they are indications of the nature of that environment but no further. The Board rejects the view that during the period of interim development control development should be prohibited except in so far as it is unquestionably consistent with proposals for future development.

It is said that proposals are subject to public comment and correction and that it may well be that such comment will demonstrate that some of the proposals would be environmentally or socially deleterious. The restrictive view of interim development control is not simply that permission should be granted in accordance with planning proposals but that on controversial matters planning authorities should tread cautiously until policy has evolved.

The approach of the Planning Appeal Board results at least partly from the specification of relevant considerations in s.41(7). These have been a cause of constant difficulty and produced technical arguments and amendments. Different considerations are set out in ss.42g(7) and 42h(7). No policy seems to lie behind them other than the view that authorities should consider matters relating to planning.

The nature of interim development control itself involves an issue of public policy. Essentially the question is whether the community can afford to mark time until specific policies for land development have evolved. The Planning Appeal Board acts on a negative answer to that question and imposes that answer as an interpretation of the Act. On the other hand conservationists argue that development should not occur until potential environmental harm is assessed. Economics and conservation are linked. What is the greater threat—economic recession or environmental degradation?

As well as its general attitude to interim development control the Planning Appeal Board has shown a strong tendency to mould disputes into a justiciable form. It has been very reluctant to give weight to matters of public policy. This reluctance cannot be explained simply in terms of s.41(7) as that subsection refers to the health, safety and convenience of the community, economic and other advantages to the community, promotion of the amenity of

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55. [1974] S.A.P.R. 198 at 215.

the locality. In the *Alpine Developments Case* the Council was saying that it wanted single residence development in the area. In *Swan and Chancellor's Case* the Council wanted residential development by the parklands and people in the city. It is true that the Board is ill-equipped to make judgments of this sort but its function is to act as a review body. A review body normally accepts the policy of the body entrusted with the primary discretion. Local councils are primary planning authorities and political bodies. The Board's attitude has meant that with respect to interim development control, public policies on planning matters cannot be expressed through the Planning and Development Act.

#### **4. Zoning Regulations**

##### **(A) INTRODUCTION**

Once planning regulations relating to zoning are in force the scope of the discretion entrusted to planning authorities is reduced. Consequently the decisions which may be reviewed on appeal are more limited. Disputes arise where the planning regulations provide that a use may be allowed if the consent of the relevant planning authority is obtained. The common situations creating disputes have been firstly permission for residential flat buildings in residential zones, secondly permission for hospitals, thirdly permission for commercial uses in residential zones, and fourthly permission for commercial and industrial uses in other zones.

The model planning regulations, followed in each set of planning regulations, set out the considerations to be taken into account in the exercise of discretion under planning regulations. Those considerations are:

- (i) the purpose for which the various zones have been created;
- (ii) the orderly and proper planning of the zone; and
- (iii) the preservation of the character and amenity of the locality.

Furthermore the planning regulations allow for a statement of the purpose for which any zone has been created. The statement of purpose can operate as a guide to the circumstances in which the discretion to permit an activity will be exercised.

##### **(B) RESIDENTIAL FLAT BUILDINGS**

The Planning and Development Act regulations use the term "residential flat building" to describe multiple residences on a single allotment. The term does not cover a "detached, semi-detached or row dwelling-house." It does include "(a) a room or suite of rooms which is wholly occupied or designed, or intended or adapted to be occupied, as a separate dwelling; (b) a service flat; (c) a suite of rooms in the nature of a service flat; and (d) a room or rooms in the nature of a home unit". No distinction is made according to whether or not the flats are to be separately owned, but the issue of separate titles for flats is subject to special planning regulations under the Real Property Act.

The Planning Regulations for a particular area usually set out three residential zones: Residential 1, 2 and 3. In these zones the normal pattern is that in Residential 1 Zones flats are prohibited, in Residential 2 Zones flats may be erected if the council consents, in Residential 3 Zones flats are permitted. Consequently discretion exists, and appeals relating to its exercise arise, in Residential 2 Zones. In all cases the erection of flats is subject to standard conditions. These conditions set out the floor area ratio, the open-space

ratio, the minimum allotment area per dwelling and the minimum parking area per dwelling<sup>56</sup>.

Problems relating to residential flat buildings have occurred during interim development control. To some extent these cases have been concerned with the nature of interim development control, but they provide some guidance for cases arising under planning regulations.

*Alpine Developments Pty. Ltd. v. Burnside City Council*<sup>57</sup> has already been discussed. It was followed by two similar cases—*Minborough Pty. Ltd. v. Burnside City Council*<sup>58</sup> and *R.V.S. Investments Pty. Ltd. v. Burnside City Council*<sup>59</sup>. In these two cases the Council's decision was upheld. In both cases the Planning Appeal Board reiterated much of what it said in the *Alpine Developments Case* and made general observations on planning procedures. In both cases the Board refused approval on the basis of amenity. In *Minborough* the proposal provided little open space for car parking and vegetation. In the *R.V.S. Investments Case* the area was one undergoing extensive redevelopment and the council had set aside the area for large and high-class dwellings. The Board accepted this policy.

*Kuthanara Pty. Ltd. v. Burnside City Council*<sup>60</sup> is a further interim development case involving a dispute very similar to that in the *Alpine Developments Case*. As a result of pressure from local residents the area had been reclassified in proposed regulations to a Residential 1A Zone in which the erection of multiple dwellings of any sort would be prohibited.

The proposal involved related to a large area of land in single ownership. There was an old house on the land and extensive gardens. It was proposed to retain the house and erect eleven single-storey home units. The surrounding area had generally a residential character. There were some large homes set in fine gardens and on the other hand some multiple dwellings and non-residential uses. The bulk of the area consisted of quality detached dwellings.

The arguments of local residents against the flats were put bluntly if somewhat crudely:

“[E]xisting property owners have purchased costly residential homes in this particular area to peaceably and quietly enjoy the amenity of the area as it now exists. Over 90 per cent of the residents did not want transient riff-raff and single storey “Coronation Street” dwellings erected in this boundary area any more”<sup>61</sup>.

The Board quickly retreated to considerations of amenity. It did not seem even to appreciate the sociological conflict presented to it. The Board pointed out that the subject land was large, faced a major arterial road and was close to a public bus service. The proposed buildings were tastefully and carefully designed. The Board considered that preservation of amenity required the retention of substantial open space. It was prepared to give approval for seven flats.

Again general considerations carried little weight with the Board. No reference is made to the availability of facilities for a more intensive population.

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56. Cf. A. P. Moore, “Discretionary Powers of Councils—Medium Density and the Law” in *Medium Density Housing In The R2 Zone* (Civic Trust of South Australia, 1975).

57. [1968] S.A.P.R. 105.

58. [1968] S.A.P.R. 153.

59. [1968] S.A.P.R. 203.

60. [1971] S.A.P.R. 83.

61. [1971] S.A.P.R. 83 at 87.



On the other hand community need for denser housing was expressly raised in evidence before the Board. The professional town planner called by the applicant considered that there was an existing and accelerating trend, well beyond that anticipated in the Metropolitan Development Plan, to high density residential development. He believed that the community had an increasing requirement for new and compact forms of accommodation built in or adjacent to pleasant urban surroundings. Despite its significance this evidence produced no comment from the Board.

There are four cases in which the Board reversed the decision of the Council involved and in which the crucial argument seems to have been that residential buildings of the intensity involved were inappropriate in the locality.

The case of *Smith v. Tea Tree Gully City Council*<sup>62</sup> involved the erection of flats in a newly developing area. The proposal was to erect five single-storey flats at Ridgehaven. The site was 150 yards from a major arterial road, the Main North-East Road. The site was close to a major shopping centre and two light industrial zones. There were very few multiple dwellings in the locality and those few posed special characteristics.

The Council refused consent for the proposal on the grounds of traffic and the nature of surrounding development. The site fronted an unsealed roadway with no kerbs or footpaths. The traffic generated by the flats was claimed to represent a hazard to pedestrians using the roadway and to children from nearby schools. Furthermore existing development was for single residential dwellings and the proposal was claimed to be out of character with this development.

The Board, by a majority, upheld the appeal. Its reasons are extremely difficult to ascertain. The majority conceded that the proposal differed from the type of development already existing but considered that the change was not necessarily harmful. The Council's Town Planning Officer considered that the proposed development would be a suitable use of the subject land. Little guide is given as to his reasons but less is given as to the Board's reasons.

"We find that the subject land falls in a part of the Residential 2 Zone which may be considered for the erection of such residential flat buildings"<sup>63</sup>.

The dissenting judgment is equally unhelpful.

"Having regard to the type of urban development which has already occurred in the locality I do not find that this is a part of this particular Residential 2 Zone which should be considered for the erection of residential flat buildings of medium densities"<sup>64</sup>.

The case certainly involved a conflict between the existing scale of development and the proposed use. It seems that it could be argued that because of proximity to major roads, shopping, and industry and other facilities, sites such as the subject land were suitable for the introduction of more intensive uses.

The dispute in *Lukin v. West Torrens City Council*<sup>65</sup> was as to whether single-storey or two-storey flat buildings were appropriate. The subject land was in an area of mixed development. However, the land fronted a dead-end

62. [1972] S.A.P.R. 173.

63. [1971] S.A.P.R. 173 at 177.

64. [1971] S.A.P.R. 173 at 180.

65. [1973] S.A.P.R. 201.

street where on the opposite side detached dwelling houses were erected. The land next to the subject land was vacant but proposed to be used for single-storey flats. On the other hand beyond the vacant land there were two-storey flat buildings.

The two-storey flat buildings were erected before planning controls came into force and the Council's objection to the proposed flats was that the new flats would destroy the character of the area as a low density residential area. The Board rejected this view. In essence it stated that the detached dwellings would gain little protection from an insistence on single-storey flats on the land opposite.

Whereas most cases involve the difficulty of incorporating a flat development into an existing locality, *J. H. Evins Industries Pty. Ltd. v. Whyalla City Council*<sup>66</sup> involved the development of a three-acre area. It was proposed to erect 68 flats in seven single-storey buildings and five two-storey buildings. In Whyalla there was no zone in which flats could be erected without the consent of the Council. On one side the subject land was bounded by two motels and some flat buildings, in the other direction there were pleasant detached dwelling houses.

The objections to the proposal stemmed from the opposition of the residents of the neighbouring area. The residents argued that the flats would detract from the quality of the neighbourhood and would introduce a lower class of citizen.

The Board considered that the land was in an area appropriate for flats of medium density. There were motels to one side and the land was close to an intersection of two wide roads carrying heavy volumes of traffic. The Board continued to consider at length the appearance of the development and imposed conditions slightly reducing its intensity.

*Horgan v. Thebarton Town Council and Karidis*<sup>67</sup> involved an objector appeal against the grant of permission for seven single-storey flats on two adjoining pieces of land. The rear piece of land had no frontage to any street. The flats would run down the front block and across the rear block. The pieces of land at the time contained two delapidated dwellings.

The basis of the objector's opposition to the proposed flats was their effect on the life-style of the neighbourhood. The objector argued that the flat-dwellers would tend to intrude a new and alien way of life into a locality which was predominantly one in which each household lived in a detached dwelling house (and where there was a substantial European immigrant population).

Whilst the Board considered that the objection raised matters of potential relevance it retreated into amenity considerations largely raised by it. It pointed out that the applicant's plans were somewhat misleading and that the proposal would involve buildings and driveways crowding the land. The zone was primarily intended for single family dwellings on individual allotments and semi-detached dwelling-houses. The very intensive development was, consequently, out of keeping with the amenity of the locality and the orderly and proper planning of the zone.

There are several cases in which permission to erect flats was refused because of the poor design of the flats. In these cases appeals have generally

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66. [1974] S.A.P.R. 144.

67. [1973] S.A.P.R. 283.

been unsuccessful. In *Swan v. Tea Tree Gully City Council*<sup>68</sup> a proposal to erect ten flats in two-storey blocks was denied permission. The Board stated that the buildings would present a dreary and uninteresting aspect from the street and would be overpowering and out of keeping with the character of the neighbourhood. In *McDonald v. Marion City Council*<sup>69</sup> the applicant desired to erect four flats on a small block of land. The Board denied approval as the development was so crammed as to detract from the character of the neighbourhood. In *Stephenson v. Marion City Council*<sup>70</sup> the Board described the proposed building as strictly utilitarian in concept and having little aesthetic appeal. Consent was refused on the basis that the proposal would detract from the amenity of the locality. In *Palyaris Brothers v. Payneham City Council*<sup>71</sup> the car parking area failed to meet the minimum requirements of the regulations. The applicant in *Perry v. Noarlunga District Council*<sup>72</sup> proposed to erect three flats in a triangular building on a relatively small allotment at Morphett Vale. The area between the front flat and the street was to be bitumenised and a carport erected. The Board held that the proposal envisaged a far too intensive and unappealing development for a prominent site. In *Cygnus Properties Pty. Ltd. v. Salisbury City Council*<sup>73</sup> the proposal complied with minimum open space requirements established by the regulations only if adjoining land owned by the applicant but in a Special Use Zone was counted. The Board held that this land could not be taken into consideration.

It seems therefore that in cases where the sole argument has been as to the merit of a particular proposal rather than as to the merit of medium density housing, the Board has not upset the decisions of councils. It is possible that these particular considerations were not the real concern of members of the councils but it is very difficult to evaluate that possibility.

The actions of the Board in opposing overt arguments about medium density can be looked at from different points of view. On the one hand the Board can be regarded as interfering with decisions by political bodies as to the type of desirable neighbourhood. On the other hand the Board can be regarded as protecting a wider community interest against self-interested groups trying to exclude different segments of society from their area. In the United States actions by local groups of an exclusionary nature raise "equal protection" constitutional arguments<sup>74</sup>. In contrast to the Board, the State Planning Authority has been given an insignificant rôle in these cases. Beyond the individual development, changes to the density of residential area create major planning needs. Educational, welfare, cultural and recreational facilities are needed to a greater extent in each developed area and developmental needs on the urban fringe correspondingly reduced. The Board has not adverted to these matters.

### (C) HOSPITALS

Zoning for hospitals poses particular problems. A quiet neighbourhood is preferred but hospitals are usually of considerable bulk and generate a good deal of traffic particularly at visiting hours. Even more difficult is the issue of expansion. Land may originally have been acquired for later growth but

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68. [1972] S.A.P.R. 59.

69. [1972] S.A.P.R. 80.

70. [1972] S.A.P.R. 83.

71. [1972] S.A.P.R. 215.

72. [1974] S.A.P.R. 46.

73. [1974] S.A.P.R. 164.

74. Cf. A. Downs, *Opening Up the Suburbs* (Yale U.P., 1973) 1-12.

the area's residential characteristics may have consolidated. Economically the choice may be between expansion of an existing facility and doing nothing.

The case of *Home for Incurables Inc. v. Unley City Council*<sup>75</sup> typifies the inherent difficulties. The applicant had from about 1870 operated an institution for persons who were suffering from some form of chronic disease deemed to be incurable and who needed nursing care. By the time of the appeal there was a number of buildings of varying ages on the land. The tallest of these buildings was four storeys above the ground. The land was in a Residential 3 Zone. On one side of the hospital there was a secondary school but otherwise in the locality there were single-storey detached dwelling houses generally of mature age set on largish allotments.

The applicant proposed to erect a building of ten storeys above ground level. The Council granted consent for a building of five storeys above ground level. The Board considered that this decision amounted to a rejection of the proposal. The Council's objections were based principally on the loss of amenity for neighbouring residences. The Council pointed to the dominating appearance, noise, traffic, street parking, loss of sunshine and loss of privacy. The Council also considered that erection of the building was contrary to the purpose of the zone and would encourage further multi-storey buildings.

The Planning Appeal Board, by a majority, reversed the decision of the Council. The majority went to some extraordinary lengths to find that amenity would not be impaired. The conclusions as to appearance and traffic are illustrative:

"Having regard to what is before us, whilst the building may be tall, long and wide it will be of such a nature as to be aesthetically pleasant and will not be a detracting feature on the landscape.

The effect of an increase in visits of the order which will occur will not be such as to increase noise on the level of traffic in the locality so as to detrimentally affect amenity"<sup>76</sup>.

It is difficult not to concur with the dissenting member of the Board who argued that what was proposed was a massive and dominating structure in a zone intended primarily for one-storey dwellings and secondarily for flats of up to three-storeys in some parts.

One suspects however that amenity was not at the heart of the majority reasoning. They state: "If we are wrong in reaching that conclusion then we take the view that the advantages to the community of allowing this appeal outweigh whatever relatively minimal loss to amenity might be discerned by other people"<sup>77</sup>.

Evidence was given to the Board on behalf of the Government of South Australia. The Government had approved plans for the building and agreed to meet the total capital cost involved. The Government's position would be reconsidered if a different building was proposed. The Government's opinion was that a five-storey building for the same number of residents and with the same facilities would be considerably more expensive.

This evidence makes the Board's conclusions readily explicable. The majority's tenacity on the question of amenity probably obscured the main

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75. [1973] S.A.P.R. 61.

76. [1973] S.A.P.R. 61 at 70.

77. [1973] S.A.P.R. 61 at 72.

issue. At the same time one can sympathise with the Council representing local residents affected by the development and responsible only for a small part of the area to be benefitted by the development.

In *Dennis v. Unley City Council*<sup>78</sup> the objection of local residents seemed much more based on prejudice. The applicant proposed to use land in Wayville for a psychiatric rehabilitation hostel. The land was in a Residential 3 Zone and at the time of the appeal was used in conformity with the regulations as a boarding-house with 19 lodgers. Most of the land on the same road as the subject land was used for single residences, only of average quality, though the subject land was close to the Wayville Showgrounds and to Greenhill Road where there was a number of office buildings.

The Council's objection was that the land-use in the locality was predominantly residential and that the proposed use would deter families from continuing in and taking up residence in the locality. Consequently, the Council argued, the character of the locality would deteriorate. After consideration of expert evidence the Board concluded that no detriment would result from the proposal.

It is clear that the Council echoed real fears of local residents but fears which a legal system, based on some notions of justice and more particularly of equality, cannot enforce.

The applicant in *Salkeld and Toth v. Burnside City Council and Alexandra Homes Trust Inc.*<sup>79</sup> owned land at Rose Park on which there was a complex of buildings for the housing and care of elderly people. The tallest of the buildings was of eight storeys. The applicant proposed to erect a six-storey building on adjoining land to link with the tall building. The land was in a Residential 3C Zone. This zone was described in the Seventh Schedule of the Regulations as intended for residential accommodation in low to high densities. The council granted approval and the appeal was instituted by objectors.

The Board pointed out that the Council seemed to have been moved by some mistaken ideas to existing use rights. It stated that because a use existed on one allotment there was no right to extend to another adjoining allotment.

The Board recognised the community advantage of the proposal. There was a community need for the provision of facilities for the housing and care of the aged. The proposal would achieve this aim most economically as existing dining and recreational facilities could be utilised. On the other hand the allotment was of insufficient size to allow for generous provision of open space with landscaping and planting of trees and shrubs. The Board recognised that it had to balance the community need for aged persons' accommodation against the detriment to amenity in the area. It concluded that the detriment to amenity was so great that consent should be denied.

This case illustrates the typical problem most clearly. It is disturbing that the balancing process occurred apparently for the first time at the Planning Appeal Board level and that community need was presented by the individual applicant. The procedures for making decisions in the hospital cases seem inappropriate.

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78. [1973] S.A.P.R. 147.

79. [1974] S.A.P.R. 105.

**(D) COMMERCIAL USES IN RESIDENTIAL ZONES**

Residential use requires some supporting facilities. In recent years the trend has been to segregate residential development from all other development to an extent some regard as destroying feelings of community and as creating barren suburbs. However the Metropolitan Development Plan envisages some intermingling. It states:

"The development permitted in living zones would include all types of residential buildings, community buildings such as schools, libraries, and churches and some commercial buildings such as hotels and shops, depending on the views of the local council"<sup>80</sup>.

In general council planning regulations reflect this approach. Consequently councils have a discretion as to where these community and commercial facilities are to exist. Considerations of orderly and proper planning become important in these cases. Commonly councils adopt a policy as to the most convenient part of a residential zone for commercial uses and attempt to consolidate such uses.

The Planning Appeal Board has tended to respect these policies. The case of *Trumble and Stone Pty. Ltd. v. Salisbury City Council and Alan Hickinbotham Pty. Ltd.*<sup>81</sup> best reflects this respect. The applicant proposed to erect a supermarket and a number of smaller shops on several allotments at Salisbury East. The land was within a Residential 2 Zone. The Council's policy was that shops of a neighbourhood scale should be allowed and encouraged in the centre of each neighbourhood precinct adjacent to other community facilities. Other requirements were in the Council's view to be provided for in the town centre. Two neighbourhood centres had been established and a third was proposed. The proposal related to land on a main road on the edge of one of the neighbouring precincts. A company which had built in accordance with the Council's policy joined the appeal as an objector.

The Board upheld the Council's decision.

"[A]s we see it, the appellant's proposals would negate a planning precept adopted by the respondent Council and, at their insistance, by developers over an extended period of time. It would prejudice existing shopping facilities to such an extent as to be harmful to the neighbourhoods in which they are situated and would prejudice the further orderly and proper planning of the zone in the manner in which that planning has been determinedly undertaken in the past"<sup>82</sup>.

The Board's deference to Council policy as to the distribution of commercial uses occurs also in the cases of *Home Market Pty. Ltd. v. Salisbury City Council*<sup>83</sup> and *Peter F. Burns Pty. Ltd. v. Salisbury City Council*<sup>84</sup>. Both cases involved applications to use land in a Residential 2 Zone for real estate offices. Both offices were to be located on sites on main roads leading into the town centre. In both cases the Council refused consent on the grounds that land in the commercial zones was underused and that it would set a bad precedent to allow commercial uses to spread along the major roads in residential zones. The Board supported these objections.

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80. *Metropolitan Development Plan Report* at 284.

81. [1974] S.A.P.R. 1.

82. [1974] S.A.P.R. 1 at 8.

83. [1973] S.A.P.R. 97.

84. [1973] S.A.P.R. 167.

*Patsouris v. Unley City Council and Flinders Trading Co. Pty. Ltd.*<sup>85</sup> is a case turning solely on amenity considerations. The applicant proposed to demolish a house on the allotment behind its retail premises and establish a car park for employees. The land to be so developed was in a Residential 3 Zone. The residents of the property adjoining the proposed car park objected. The Council approved the proposal on the basis that it would decrease street parking and that fencing and planting would preserve the amenity of the adjoining land. The Board confirmed this decision and strengthened the fencing and planting requirements.

*Franzon v. Campbelltown City Council and Wyndarra Developments Pty. Ltd.*<sup>86</sup> is a case in which professional offices were permitted by the Council in a Residential 3 Zone and where the Council's decision was confirmed on an appeal brought by an objector. The land was on the Main North-East Road, a major arterial road. Facing this road on either side of the land there were single residential dwellings but also in the locality facing the road there were many shops and a service station. A major hospital was clearly visible from the land. The Board considered that the offices would preserve the amenity of surrounding sites at least as well as flats and that traffic noise meant that the land was not particularly suitable for residential development of any sort. As the area had a mixed development the proposal would not introduce a commercial intrusion into a residential zone.

One rather peculiar case in which Council and local resident views as to what was acceptable in a residential zone were overturned by the Planning Appeal Board on an objector appeal is *Quin v. West Torrens City Council and Lockyer*<sup>87</sup>. The applicant proposed to erect stables for two ponies and a manure pit and feed store at the rear of his house in a Residential 1 Zone near the Morphettville Racecourse. There were many stables in the area erected prior to the enactment of planning regulations. The Council, openly swayed by the opinion of the majority of residents in the area, granted approval. The Board upheld the appeal on the basis of the detriment to amenity.

The case can be seen as one in which the Board was protecting a minority from actions of a majority beyond that which the Board considered reasonable. The case has amusing features (at least to an outsider) in evidence as to what was tolerated by the neighbourhood and the Council. The Board was somewhat shocked.

“On the south-western corner of Victoria Street and Curzon Street, Victoria Street being a boundary between Residential 1 and the Residential 2 Zones just referred to, is a commercial building, of some sort, portion of which faces onto Curzon Street revealing a doorless privy, apparently used. An Exhibit in the form of a photograph suggests that there was once a door to the privy but the oral evidence is to the effect that has not been in position for some years and on the view which we took, it is not there now in any shape or form”<sup>88</sup>.

If *Quin's Case* is regarded as a case involving protection for minority interests the role of the Planning Appeal Board in the case can again be seen to be similar to that of judicial bodies enforcing constitutional safeguards. The other

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85. [1973] S.A.P.R. 207.

86. [1973] S.A.P.R. 339.

87. [1973] S.A.P.R. 89.

88. [1973] S.A.P.R. 89 at 90.

cases involve express recognition by the Board of the primary planning role of councils in matters of local detail.

#### (E) COMMERCIAL AND INDUSTRIAL USES

In Commercial and Industrial Zones particular commercial and industrial uses may require the consent of the appropriate authority. Two types of consideration are most common in such cases. On the one hand a particular use may harm the amenity of the locality, especially because the locality may include not only the commercial or industrial zone but also a neighbouring residential zone. On the other hand a particular use may not be appropriate for the commercial or industrial zone.

The problems of amenity are neatly illustrated by the case of *Poefinger v. Marion City Council*<sup>89</sup>. The case arose during the period of interim development control but would pose the same considerations once planning regulations were in force. The applicant proposed to erect two additional squash courts on his land. The Council objected to the proposal on the ground that no additional parking was to be provided and customers would be likely to park in what was a narrow and largely residential street. These arguments were supported by the Board.

The case of *Moulday v. Hindmarsh Town Council*<sup>90</sup> poses more difficult problems. The applicant owned four allotments at Ridleyton. On two of these allotments stood a 62 foot by 42 foot corrugated iron shed used as a road transport terminal. The applicant proposed to extend onto the other two allotments which were at the rear of the two allotments then in use. The proposal envisaged that the shed would be enlarged and that vehicles, including semi-trailers, would enter the front allotment, load or unload, turn on the rear allotment and leave from the front allotment. The rear allotments fronted onto another street and opposite the applicant's land the area was zoned Residential 2. The Council refused consent largely because the noise and fumes created by the use of the rear allotments would detrimentally affect the amenity of the residential area. The Board reversed this decision. It stated that the amenity argument was of little weight because the land immediately to the west of the rear allotment was in a different zone and that land could be used as of right for the proposed activity.

Definition of the concept of a light industrial zone arose in a series of cases concerning a rather poorly planned area at Mount Gambier. The three cases, *Blackwell v. Mount Gambier City Council and Waters*<sup>91</sup>, *Mitchell v. Mount Gambier City Council and Gilmore*<sup>92</sup> and *Blackwell v. Mount Gambier City Council and Ruth Motors*<sup>93</sup> all involved objector appeals against the grant of consent by the Council for developments in a Light Industrial Zone.

In *Blackwell (No. 1)* the application was for permission to use land for a joinery workshop and office; in *Mitchell* for a panel-beating business, and in *Blackwell (No. 2)* for a panel-beating and spray painting business. The zone in which the developments were to occur consisted of allotments apparently created for residential detached dwellings. There was a number of dwellings in the zone, all were aged and some had been allowed to deteriorate. There

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89. [1972] S.A.P.R. 88.

90. [1974] S.A.P.R. 89.

91. [1974] S.A.P.R. 154.

92. [1974] S.A.P.R. 57.

93. [1974] S.A.P.R. 174.



were many vacant allotments. There was a number of commercial and industrial uses mostly in small buildings.

The regulations declared that the Light Industrial Zone was intended primarily for industries which manufactured on a small scale and did not create any appreciable noise, smell, smoke or dust and did not generate heavy traffic. Uses such as a petrol-filling station, a warehouse and a timber yard were permitted as of right. The Board pointed out that in such a zone the essential consideration was amenity. No particular consideration was due to existing residential uses but amenity had to be considered in the light of the purposes of the zone. Any industry posing a threat to amenity should not be allowed unless there were some special factors or the threat was contained in some way. Normally a joinery would create dust and noise and a panel-beating works would create considerable noise. Consequently the proposals *prima facie* should not be allowed. However the Board considered that the proposed joinery involved a very limited use and that subject to strict conditions it should be allowed.

The purpose of a General Industry Zone fell to be considered in *Bagot's Executor and Trustee Company Ltd. and Animal Welfare League of S.A. Inc. v. Salisbury City Council*<sup>94</sup>. In that case the applicants proposed to construct an animal shelter and hospital. The facility would provide services for the care of lost, sick, or unwanted animals. The Council denied approval and that decision was upheld on appeal. The Board considered that the proposal was contrary to the purposes of the zone. It commented laconically that the use did not fit in with the predominant uses allowed in the General Industry Zone.

In *Sennar v. Payneham City Council*<sup>95</sup> the applicant proposed to operate a used car lot in a District Shopping Zone. The Council denied consent. The Board reversed that decision. It considered that a used car lot was as appropriate a use as uses permitted as of right and would improve safety by increasing traffic visibility at an intersection. The Council argued that there were better uses for the land but the Board stated that this was an irrelevant consideration. There was nothing inappropriate about the proposed use and therefore it should be permitted.

The Board's comments about the Light Industrial Zone in the Mount Gambier cases are the only general principles to emerge about commercial and industrial uses. The cases in which appeals were successful have been with one exception cases where Councils had, in the Board's opinion, misconceived their task. The one exception is *Moulday's Case* but even in this case the Board did not disagree with the Council's view as to the detriment to amenity which would occur but considered that in assessing the amenity of the area the Council had not taken into account permissible uses on adjoining sites.

## 5. Control of Land Subdivision

### (A) NATURE OF CONTROLS

Because the provisions of the Planning and Development Act relating to control of land subdivision are much more detailed than other provisions of the Act, disputes often centre on the interpretation of particular phrases rather than on planning merits. This trend exists even when the disputes come before the Planning Appeal Board whose jurisdiction is as in all cases to

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94. [1972] S.A.P.R. 73.

95. [1973] S.A.P.R. 107.

consider all relevant matters. The subdivision control provisions are also negative in nature. Whereas other controls are exercised having regard to certain considerations, subdivisional controls allow permission to be withheld if one of the specified grounds of objection is established. This negative form heightens concentration on the interpretation of specific provisions. If a situation can be taken outside the heads of objection then permission must be granted.

This process is well illustrated by three unreported cases—*McGough v. Director of Planning (No. 2)*<sup>96</sup>; *Buczynski v. Director of Planning*<sup>97</sup>; *Keroma Pty. Ltd. v. Director of Planning and Stirling District Council*<sup>98</sup>. The objection to the subdivision plans in these cases stemmed from the concern of the Engineering and Water Supply Department at the degree of entrophication which had occurred in Adelaide's reservoirs partly as a result of an increase in farming activities in the ranges and partly as a result of an increase in human population. The relevant control was s.49(e)<sup>99</sup>, but in the opinion of the Planning Appeal Board this subsection related to direct risks to health in the locality of the land to be subdivided and not to the more general pollution problems presented by the cases. Furthermore the Board held that its general concerns under s.27(6) were not sufficient to allow it to prevent the subdivision. Amendments were made to the list of matters to be taken into account on appeals by the Planning Appeal Board and during interim development control by planning authorities. The Director's powers to refuse consent to a plan of subdivision were enlarged not by amendment to the legislation but by a new regulation. This regulation has an apparent statutory warrant in s.62(2)(c), but a well-advised frustrated applicant might challenge this regulation not through the appellate process of the Planning Appeal Board but through the prerogative process. The task of interpretation involves reading a general regulation making power after a detailed set of grounds of objection specified in the statute and attempting to balance public policy and private rights.

One of the subdivisional controls involving broader planning considerations and introduced first by regulation in 1965 and later incorporated as part of the Planning and Development Act was that based on prematurity. In assessing prematurity regard was to be paid to the availability of services and community facilities, the use of subdivided land in the locality and the provisions of any authorised development plan<sup>100</sup>. The operation of this control is illustrated, if perhaps in an extreme instance, by the case of *Sherriff and Birkenhead Estates Pty. Ltd. v. Director of Planning and Commissioner of Highways*<sup>1</sup>. In that case it was proposed to subdivide into 341 allotments 84 acres of land at Maslin Beach, 25 miles south of the City of Adelaide and on the shore of St. Vincent's Gulf. Between 1957 and 1960 subdivisions creating 516 allotments had occurred at Maslin Beach and by 1973 only 68 dwellings had been erected on these allotments. Water, sewerage and electricity were available for the proposed subdivision. There was a daily bus service to Adelaide. The

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96. P.A.B. appeal No. 19. of 1970.

97. P.A.B. appeal No. 8 of 1970.

98. P.A.B. appeal No. 27 of 1970.

99. This section provides that the Director or a council may refuse approval to a plan of subdivision or a plan or resubdivision if:

“(e) sewerage cannot be disposed of from each allotment defined therein without risk to health.”

100. Planning and Development Act 1966-75 s.52(1)(d).

1. [1973] S.A.P.R. 226.

nearest primary schools were three and four miles away and the nearest township, McLaren Vale, four miles away. The Director refused consent on the basis of prematurity. The Planning Appeal Board considered that the existing subdivision had some detracting features such as a lack of sewerage and a sand pit and rubbish dump on one side and that these features retarded development. Community facilities were scarce but the neighbouring area would ultimately be developed and facilities would then be created. The area was marked as a Living Zone in the Metropolitan Development Plan. The Board considered that in the light of these factors and of strong urban development occurring along the coastline the development was not premature. Two years later the land remains in a rural state.

#### (B) HILLS FACE ZONE

One of the positive features of the Adelaide Metropolitan Development Plan was its identification of the Adelaide Hills and particularly the face of the hills overlooking the city as an area of special importance whose preservation deserved priority in any new planning procedures. The legislation implementing the Plan introduced additional controls over subdivision in the Hills Face Zone. These controls extended to all Rural and Industrial Zones. Where subdivision was proposed in any of these zones the Director had to refer the proposal to the State Planning Authority who had to report whether the proposal conformed to the aims, purposes and objectives of the Metropolitan Development Plan. If the Authority reported that the proposal did not conform, the Director was obliged to refuse consent to the plan of subdivision<sup>2</sup>. In 1972 this control was re-enacted in almost identical terms<sup>3</sup> and an additional rule enacted for the Hills Face Zone. Within that zone each allotment was required to have an area of ten acres and a frontage to a public road of 300 feet<sup>4</sup>. In 1975 control in the Hills Face Zone was further tightened. Subdivision in the Hills Face Zone would thereafter be permitted only by Proclamation by the Governor. The Proclamation is to be made only if the Governor is satisfied upon the advice of the Director of Planning that the plan of subdivision is in the public interest and is not contrary to the provisions, principles and objects of any authorised development plan.

Subdivision in the Hills Face Zone is consequently likely to be rare in the future. The legislation has moved from a discretionary control vested in the Director of Planning with an appeal to the Planning Appeal Board to a control within strict limits vested in the central political body. This change suggests dissatisfaction with the planning process and the cases on the topic are instructive not for what they tell us about the current control but for what they tell us about the role of the planning authorities. The two leading reported cases are *Lloyd v. Director of Planning and Marion City Council*<sup>5</sup> and *Becker v. Director of Planning, Marion City Council and State Planning Authority*<sup>6</sup>. *Becker's Case* has continued through a number of appeals but these appeals have little to do with the planning merits of the case.

In *Lloyd's Case* permission was sought for the resubdivision of four allotments at Flagstaff Gardens on a ridge overlooking the valley of the River Sturt. The State Planning Authority reported to the Director that the plan did not conform to the purposes, aims and objectives of the Metropolitan Develop-

2. Planning and Development Act 1966-67 s.42.

3. As Planning and Development Act 1966-72 s.45a.

4. Planning and Development Act 1966-72 s.45b.

5. [1970] S.A.P.R. 65.

6. [1972] S.A.P.R. 143.

ment Plan because the allotments were less than 10 acres in size and had a road frontage of less than 300 feet. As he was thereupon bound to do, the Director refused permission. The Planning Appeal Board by a majority reversed that decision. The Board considered that the Metropolitan Development Plan proposed for the Hills Face Zone:

- "(1) that lands to which water and sewerage services cannot be economically or advantageously provided should not be developed;
- (2) quarriable materials on the face of the Ranges overlooking the Adelaide Plains should be preserved until required for exploitation;
- (3) the natural character of the face of the Ranges viewed from the Metropolitan Area and the Scenic Road or access roads should not be harmed;
- (4) the provision of buffer strips of open country between 'metropolitan district' "7.

The Board had to consider some more specific passages in the Report.

"Hills' Face Zone: The Hills' Face Zone includes the land on the face of the Mount Lofty Ranges overlooking the metropolitan area. Its western boundary along the foothills is the contour level above which water and sewerage services cannot be supplied economically. The eastern boundary is the top ridge of the Ranges visible from the plains. The zone would be rural in character, and the minimum size of allotment proposed is 10 acres, with a minimum frontage of 300 feet. It is envisaged that the only buildings or other uses of land permitted in the zone would be those which would not impair the natural character of the face of the Ranges"8.

The Report stated further.

"Hills' Face Zone: The Hills' Face Zone includes the land on the face of the Mount Lofty Ranges overlooking the metropolitan area. The minimum size of allotment proposed in this zone is 10 acres, with a minimum frontage of 300 feet. The only discretionary power recommended should be to enable a single allotment of lesser area to be approved in a plan of re-subdivision, where a separate title is needed for a dwelling house or other building which is already erected on the land prior to the coming into operation of the regulation"9.

The Board considered that since this proposal had not been specifically implemented by legislation the proposal was not mandatory. Whilst this argument may be accepted it is difficult to comprehend why nonetheless ten-acre allotments in the Hills Face Zone do not represent one of the aims of the Report<sup>10</sup>. The Board continued by doubting the wisdom of the proposal. It considered that the proposal did not meet the Report's own goal that proposals should be soundly based, logical and necessary and thought that ten-acre allotments should be eschewed. The Board then concluded that as the land surrounding the subject land had already been subdivided the locality had a suburban character and the proposal should be approved. In dissent Judge

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7. [1970] S.A.P.R. 65 at 73.

8. *Metropolitan Development Plan Report* at 284-285.

9. *Op. cit.* at 290.

10. It is relevant to note that the 1975 amendment requires consideration of the "proposals" of any authorised development plan.

Roder stated that although in general he agreed with the majority he considered that the resubdivision would involve a more intensive development to the detriment of the amenity of the locality.

Lady Becker sought approval for the subdivision of 65 acres of lands into 145 residential allotments. Before the Planning Appeal Board she amended her proposals to provide for 119 allotments. The land is between Darlington and O'Halloran Hill and for the most part is immediately to the west of Morphett Road. The proposed allotments in the final proposal varied in area from about 10,000 square feet to about 21,000 square feet.

The Director of Planning referred the proposal to the State Planning Authority. The Authority reported that the proposal did not conform to the purposes, aims and objectives of the Metropolitan Development Plan in relation to the Hills Face Zone. The Authority considered that the proposal would provide for small-scale development in the Zone, destroy the generally open and rural character of the Zone as viewed from abutting roads, destroy the open and rural character of the Zone and the Hills skyline, and that every proposed allotment would be less than 10 acres in area and have a road frontage of less than 300 feet.

Lady Becker appealed. She reduced the number of proposed allotments from 145 to 119. When the appeal was heard counsel for the Director of Planning informed the Planning Appeal Board that the State Planning Authority now considered that the revised plan did conform to the purposes, aims and objectives of the Metropolitan Development Plan. The City of Marion did not share this view, but it was told that it could not present argument on this issue. Its victory, and what may yet be an ultimate victory, was to come later.

Lady Becker called a professional town planner as a witness. He considered that the rural character of the area could, if the subdivision was approved, be preserved by land-use controls. The proposal would not in his view offend against the references in the Metropolitan Development Plan to small scale development. Thirdly, he stated that the Hills Face skyline seen from the plains below would not be detrimentally disrupted by the development.

"The Board must act judicially. On the positive evidence all of which came from the appellant, the view and the unqualified and binding statement of counsel for the Authority that his client is of the opinion that what is represented in Exhibit A6 is a plan which conforms to the purposes, aims and objectives of the Metropolitan Development Plan, the Board can come to no other decision that the appeal against the refusal under s.42(2) must succeed"<sup>11</sup>.

*Lloyd's Case* can be viewed as one in which the character of the locality had been destroyed by previous subdivision. *Becker's Case* cannot be explained in this way. The general comments in *Lloyd's Case* destroyed the force of the more definite statements of the Metropolitan Development Plan Report. On a more general level in *Becker's Case* the State Planning Authority was prepared to concede and the Planning Appeal Board to accept that provided green roofs and appropriate trees were insisted upon the character of the Hills Face Zone would be retained despite division into half-acre allotments.

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11. [1972] S.A.P.R. 143 at 146.

**(C) GENERAL PRINCIPLES**

It is not proposed at this point to analyse the subdivisional control powers<sup>12</sup>. References will be made to two further cases illustrating the approach of the Planning Appeal Board. The cases are *Jennings Estates and Finance Ltd. v. Tea Tree Gully City Council*<sup>13</sup>, and *Richards v. Director of Planning*<sup>14</sup>.

In *Jennings' Case* the issue was the maximum width of road which a subdivider could be required to provide. The Board held as a matter of construction of s.51(1)(a)<sup>15</sup> of the Act that a subdivider could not be required to provide a road with a carriageway greater than twenty-four feet. The Board continued however to consider whether if a greater width could legally be required such a width ought to be required in a case like that before the Board. The Council had required a greater width for one road which it considered would collect traffic from throughout the subdivision (which covered some 80 acres). A width of 36 feet would allow vehicles to be parked on either side of the road and a lane of traffic to proceed in either direction. Furthermore a hierarchial structure of roads would guide users in and out of the subdivision. The Board rejected these arguments. It considered that within residential areas the prime factor should be amenity. It considered that wider carriageways allowed greater speed and encouraged through traffic and should not be permitted.

*Richards' Case* involved a sublease for 93 years of land on the banks of the Murray River ten miles north of Murray Bridge. Leases of part of an allotment for more than five years require the consent of the Director of Planning<sup>16</sup>. The Director refused consent on the grounds of possible inundation of the land by flood waters, the small area of the land and protection of the river bank. The Board considered that flooding would be infrequent. Small allotments allowed attractive gardens to be maintained. The requirement of public reserves along coasts and rivers was construed by the Board as applicable only when a fee simple subdivision occurred. In any event the Board considered that "a public reserve would lead to considerable likelihood of the amenity of the rather narrow area between the river bank and the cliff being badly disturbed" and was undesirable<sup>17</sup>.

**(D) CONCLUSIONS**

These cases show, in the writer's opinion, the types of judgments which the Board interprets its jurisdiction to require it to make. There is some inconsistency in the fact that consideration of all relevant matters does not permit the Board to prevent pollution of water supplies but does permit it to reject the Metropolitan Development Plan's proposal of ten-acre allotments in the Hills Face Zone. There has been a heavy onus on the Director to

12. I have in part attempted that task elsewhere—A. P. Moore, "From Skye Whither?" in *The Adelaide Hills—Plans for Preservation* (Department of Adult Education, The University of Adelaide, Publication No. 42, 1974), at 38-45.

13. [1971] S.A.P.R. 137.

14. [1970] S.A.P.R. 93.

15. S.51(1)(a)(i) of the Planning and Development Act 1966-71 provided that a council might refuse approval to a plan of subdivision unless it was satisfied that "the roadway of every proposed road or street, to a width of at least twenty-four feet, and every water-table, channel and footpath of every proposed road or street has been formed in a manner satisfactory to the council and in conformity with a road location and grading plan signed by a licensed surveyor within the meaning of the Surveyor's Act, 1935-1961, and submitted to and approved by the council prior to the commencement of the work;".

16. Under s.44(1)(c).

17. [1970] S.A.P.R. 93 at 99.

provide evidence to support objections to a plan of subdivision. The long-term view of the Metropolitan Development Plan does not greatly assist the determination of whether a subdivision should proceed immediately. A case such as *Jennings' Case* might be one in which an appellate tribunal was reacting to excessive insistence by bureaucracy on the adoption of standard rules, but in that case and in others the Board itself has relied on general propositions. Although they do not fully illustrate the extent of control the cases relating to land subdivision considered in this part bring out three propositions: the detailed controls prevent some important planning policies being implemented; strong evidence is required to oppose a plan of subdivision; the Board will reach its own decision on matters of public policy.

## 6. Conclusions

### (A) NATURE OF DISPUTES

The purpose of this survey has been to attempt to determine the nature of matters creating planning appeals. Apart from land-use disputes in the Hills Face Zone which cause peculiar problems, the survey of the exercise of discretion under interim development control and planning regulations has been exhaustive. The survey of the exercise of discretion in subdivision matters has been selective because analysis of the interpretation of each subdivisional control power would exceed space available here and would only marginally assist the aims of the survey.

It is possible to generalise about the cases in which the Planning Appeal Board has reversed the decisions of planning authorities. Surprisingly the reversals have been uncommon in what might be regarded as matters of taste. Decisions on matters such as design and siting and annoyance to neighbours have generally been confirmed.

Differences have occurred in relation to:

1. the nature of interim development control;
2. adoption of policies as to the desirability of flats and as to residential accommodation in the city during interim development control;
3. attitudes towards flats in Residential 2 Zones;
4. attitudes towards special uses such as hospitals;
5. (in what might be an isolated instance caused by a history of poor zoning) the nature of Light Industrial Zones;
6. interpretation of subdivision control powers;
7. exercise of judgment as to the desirability of forms of subdivision, particularly but not only in the Hills Face Zone and on the outskirts of the city.

### (B) REFORM

#### (i) *Interim Development Control*

The difference of views as to the nature of interim development control has been set out in this paper. Interim development control as interpreted by the Planning Appeal Board is certainly less restrictive than that existing in other Australian States. The existence of an authorised development plan is the major difference between South Australia and other States. However, in respect of most of the disputes the provisions of the Metropolitan Development Plan are too general to be of much assistance. The arguments for a more or less restrictive control centre on the extent to which the community can afford to mark time in terms of land development until decisions as to the future are made. If the Planning Appeal Board's present view is accepted the nature of

decisions which have to be made principally by local councils will be much more difficult during interim development control than at any other stage of the planning process. Each case must be evaluated "on the merits". If the nature of interim development control is to be changed then s.41(7) of the Planning and Development Act must be amended.

Particularly under the present interpretation of interim development control powers, planning authorities face conflict with the Planning Appeal Board because policies adopted by those authorities have no legal force. The procedure enacted for the City of Adelaide in Part VA of the Act attempted to provide some force for policies. The nature of Planning Directive No. 1 may have destroyed this opportunity. Within the City of Adelaide the composition of the City of Adelaide Development Committee preserved a balance between the local interests and the interests of the rest of the public of South Australia. Policies adopted by the Committee do not, therefore, simply reflect local interests.

Problems of interim development control should not be regarded as temporary problems which will disappear as planning regulations are introduced. So far planning regulations have covered little more than zoning but authorities might decide to prepare regulations relating to such matters as the external appearance of buildings, the preservation of buildings of architectural, historical or scientific interest, the destruction of trees or the erection of advertising signs. Whilst such regulations were being prepared, interim development control could be imposed. Unrelated activities can be exempted from the operation of interim control.

#### (ii) *Planning Policies*

It is not surprising that planning regulations cause less significant disputes than interim development control and subdivisional control powers. Under planning regulations the area of discretion is strictly limited. The "hospital case" type of dispute is one where the discretion would seem better entrusted to a central authority which can review the overall community needs: these cases do not depend primarily on an assessment of local conditions. The discretion under planning regulations can be further controlled by the use of the Seventh Schedule of the regulations in which the purposes for which any zone exists can be spelt out. However in relation to the issue of flats in Residential 2 Zones the uncomfortable conclusion emerges that the Planning Appeal Board has acted to override local objections to flats with little evidence of the desirability for the community generally of the action.

The absence of enforceable policies becomes far more marked when subdivision powers are considered. It is clear that in the eyes of the State Planning Authority some policies exist. It has drawn up boundaries for all towns in the Adelaide Hills yet may lack power to enforce these boundaries<sup>18</sup>. Some policies exist with respect to development in water catchment areas and along river banks.

The only mechanism available at present to enact policies with legal force is that of supplementary development plans. These plans must follow a re-examination of a planning area. The problems of the Adelaide Hills are such that a supplementary development plan is likely. Such an extensive re-examination may not be necessary to formulate other policies. It seems that the result of

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18. S.52(1)(ca) allows the Director to prohibit non-compact extensions of townships—it is difficult to argue that this provision enables him to prohibit compact extensions or new towns.



the current processes is that issues of general concern are not being publicly debated and binding policies formulated. The clearest example of this trend is the report *Residential Capacity, Distribution and Growth in the Adelaide Metropolitan and the Central Mount Lofty Ranges* which was presented to the State Planning Authority late in 1974<sup>19</sup>. Adelaide, like many other western cities, has experienced in recent years a declining birthrate. Population predictions made in 1962 in the Metropolitan Development Plan have to be reconsidered. Any change affects both subdivision on the urban fringe and high density development in the established area. The 1974 Report has not even been made public. Similarly, the decision to establish a new town at Monarto was made largely outside the planning process and the ramifications of that decision for other planning policies have been given scant regard.

In the absence of decisions by the State Planning Authority, decisions have to be made by the Planning Appeal Board. The analysis involved in this paper suggests that the Planning Appeal Board has intervened on broad issues such as the desirability of flats and the need for hospitals. It appears that the planning process would be greatly improved if these decisions had to be publicly discussed and determined at a political level.

It must at the same time be stated that the Planning Appeal Board has been reluctant to accept policy decisions of planning authorities. The ten-acre allotment policy seems rather clear in the Metropolitan Development Plan and the attraction of residential development in the city has been a considered decision of the Adelaide City Council and the City of Adelaide Development Committee. Two factors stemming from the form of the current legislation seem to have caused this result. Firstly the Board is directed to determine matters for itself. Secondly the Board has a wider range of considerations than planning authorities whose decisions are subject to review.

To require the Board to determine matters for itself rather than to review the decisions of planning authorities has the sole effect of encouraging the Board to reach its own judgments on policy matters which this paper has asserted should be determined by political authorities.

The list of relevant considerations, apart from those relating to subdivisional control, are so vague as to carry little meaning. This paper has suggested that the list of factors relevant to interim development control is little more than a list of factors likely to be relevant to planning. The planning regulation factors are significant only in that they refer to the purposes of the zones as set out in the regulations and thus allow the adoption of binding policies. In relation to subdivisional control repeal of the detailed list of factors which justify refusal to consent would simplify the task of planning authorities and more importantly eliminate technical arguments of interpretation. Authorities would be positively directed to the planning merits of any proposal. Furthermore the negative statements intended to protect private owners and those intended to preserve public interest could be stated positively as planning policies. It is not difficult to envisage policies with respect to water supply, sewerage, pollution, road widths, access to allotments, township boundaries in the Adelaide Hills, coastal and riverside reserves, recreational areas, and protection of vegetation and wildlife.

It seems therefore that three changes are necessary. Firstly the Planning Appeal Board should be restricted to determining whether a planning authority

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19. *Planning News No. 14*, June 1975 (State Planning Authority, Adelaide) 3.

has acted incorrectly. This paper has suggested that the Board should intervene in cases such as those where an authority has taken into account irrelevant considerations or has failed to take into account the particular circumstances of a case or the interests of a particular class of persons. It also seems reasonable for the Board to intervene where an authority has acted against the overwhelming weight of the evidence. The second change which appears required is a set of considerations common for all authorities and for every type of decision. Thirdly it should be possible for planning authorities to adopt planning policies. The provisions and principles of both authorised development plans and approved planning policies should be included in the list of relevant considerations. To achieve a balance of interests, planning policies should be approved by the Minister on the recommendation of the State Planning Authority or a local council.

(iii) *Planning Authorities*

The nature of South Australia's planning authorities has to be evaluated in the light of what is expected of them. Local councils are inhibited because their lack of size prevents the employment of expert staff although on the other hand they are more readily accessible to the public. It is proposed that s.383 of the Local Government Act be amended<sup>20</sup> to allow councils to join together to prepare a plan for the planning and development of any area. The problems reviewed in this paper have been at the level of implementation.

The entrusting of subdivisional approval to the Director of Planning and of interim development control and implementation of planning regulations to the State Planning Authority reflects history rather than any rational policy. It would seem desirable to entrust all these decisions either to a planning and implementative authority or to an implementative authority. There is an interaction between policy making and implementation and therefore advantages from combining the two functions. On the other hand implementative decisions cannot be pushed aside and an authority exercising both functions tends to become involved in routine matters rather than broader and more difficult issues.

The State Planning Authority is constituted largely of a body to co-ordinate actions of government departments. This co-ordinating function tends to override the planning function. Furthermore it is difficult for representatives of particular departments to look at problems other than from the perspective of their own department. A co-ordinating committee tends to be a committee to prevent departments conflicting with one another. There is much to be said for separate planning and co-ordinating bodies.

Planning involves decisions as to the type of environment in which people are to live. The decisions involve values ranging from biological (water pollution) to architectural (appearance of buildings) to sociological (types of neighbourhoods). Often interests conflict. The theme of this paper has been that too often the political process has evaded the task of preferring one interest to another.

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20. In the Local Government Act Amendment Bill 1975 whose passage through the Parliament was stopped by the July 1975 South Australian elections.