THE SOCIAL AND ECONOMIC EFFECTS OF LAND USE: HOW WIDE ARE COUNCIL'S POWERS?

By Gerard C. Rowe*

Section 90(1) (d) of the Environmental Planning and Assessment Act 1979 (N.S.W.) empowers municipal councils to take into account the social and economic effects of a development decision upon a locality. Mr. Rowe considers what scope this might provide for local authorities by examining the approach that the courts have taken towards the social and economic considerations which might be regarded as relevant to land-use control. The article questions how widely the section may be interpreted and what beneficial effects it could have upon the community.

I INTRODUCTION

Important institutional changes occurred in September 1980 with the adoption of a new system of land use and environmental control. The Department of Environment and Planning and the Land and Environment Court were established, replacing the Planning and Environment Commission, the Land and Valuation Court and the Local Government Appeals Tribunal.[1] Some procedural innovations were also included, particularly for the preparation of subordinate legislation in the form of environmental planning instruments. Some reallocation of powers between state and local authorities took place. However, it is not intended that these matters be considered here. In addition to the changes just mentioned the range of matters relevant to the exercise of local authority discretion in land-use control was modified. It is one aspect of this modification which is the subject of this paper, namely section 90(1) (d) of the Environmental Planning and Assessment Act 1979 (N.S.W.), which allows councils in exercising their discretion to consider the "social effect and the economic effect of [the] development in the locality".

II BACKGROUND

Land-use control law has a general pattern which is three-fold: (1) the categorization of activities or land-uses; (2) the attachment to activities so categorized of statutes or legal incidents; and (3) the enforcement, whether by citizen or state, of the status so determined. Such a pattern appears deceptively simple.

However, the complexity of the problem of categorization and the scope of statutory terms has been the subject of much litigation. Just one example of such difficulty concerns the question of what constitutes a "dwelling house" for the purposes of land-use control. Are a converted warehouse with ten bedrooms to house a group of unrelated people,[2] a surburban bungalow used as a home for a group of unrelated, intellectually

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1 This was effected by the following statutes: Environmental Planning and Assessment Act 1979 (N.S.W.); Land and Environment Court Act 1979 (N.S.W.); Miscellaneous Acts (Planning) Repeal and Amendment Act 1979 (N.S.W.); Heritage (Amendment) Act 1979 (N.S.W.); Height of Buildings Amendment Act 1979 (N.S.W.).

2 *Municipality of South Sydney* v *James* (1977) 35 L.G.R.A. 432.

handicapped children,[3] or a building to be used as small scale accommodation for aboriginal youths receiving education in Sydney[4] dwelling houses? It is not here intended to engage in an elaborate discussion of this issue although this question has been considered by the Court.

The determination of the status of any given category is, in some cases, of the utmost simplicity, for example where the statute declares a particular category of activity permissable as of right or prohibited absolutely. Difficulty arises, however, when the status rests on the exercise of a discretion by a public authority, usually, but not always, a local council. One can refer to such a status as "contingent" since the particular category of activity will be permissable only with consent that is in effect, only on the issue of a licence. Along with the problem of categorization, the licensing element of land-use and environmental control law is the most problematic and litigated area.

The matter of enforcement is largely without difficulty although sometimes questions of standing and availability of remedies complicate matters, for example, whether a council can obtain an injuction to prevent the breach of land-use control law,[5] or the availability to provide citizens of remedies to enforce land-use or environmental laws.[6]

In the exercise of any licensing power, or any administrative discretion, a public official is rarely unfettered; whether by statute or by common law doctrines, some limit is put on the use of the power. One of the principal fetters is that the person exercising the power must take into account relevant considerations and ignore irrelevants ones.[7] In order to discover what is or is not relevant one looks first to the statute conferring the power.[8] In some cases the statute will actually list relevant matters.[9] Even where such a list exists, however, a question will arise as to whether the list is intended or not to be exhaustive.[10] Where a statute contains no list or where the list is held not to be exhaustive, it is necessary to consider the general nature and context of the power to decide what is or is not relevant.[11]

Prior to the commencement of the Environmental Planning and Assessment Act 1979 (N.S.W.), a local council had with respect to land-use, a licensing power under Parts XI, XII and XIIA of the Local Government Act 1919 (N.S.W.) and subordinate legislation under that Act, principally Ordinance 70 and Town Planning Scheme Ordinances. A license under Part XIIA and the planning schemes was called "development approval",

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3 *Lorna Hodgkinson Sunshine Home* v *Lane Cove Hospital Council* (1980) 38 L.G.R.A. 282.

4 *Aboriginal Hostels Ltd.* v *Burwood Municipal Council* [1978] A.C.L.D. DT453.

5 *Eg., Cooney* v *Kuring-gai Municipal Council* (1965) 114 C.L.R. 582 and note Local Government Act 1919 (N.S.W.) s. 587 which gives councils the same standing as the Attorney-General to bring proceedings for the enforcement of the Act.

6 *Australian Conservation Foundation Inc.* v *Commonwealth* (1979) 54 A.L.J.R. 176 and generally L. Pearson, "Locus Standi and Environmental Issues" (1979-1980) 3 *U.N.S.W.L.J.* 309.

7 *Eg., R* v *Trebileo; Ex parte F. S. Falkiner & Son Ltd.* (1936) 56 C.L.R. 20, 32.

8 *Eg., Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation* [1948] 1 K.B. 223, 228.

9 It is important to observe the distinction between, on the one hand, a statutory list of matters relevant to the exercise of an administrative discretion (say, a decision on a development application), for example, the lists in Environmental Planning and Assessment Act 1979 (N.S.W.) s.90(1), or Melbourne Metropolitan Planning Scheme Ordinance (Vic.) cl.7(2), and, on the other hand, a list in enabling statutes, of matters which subordinate legislation (say, an environmental planning instrument (N.S.W.) or a planning scheme ordinance (Vic.)) may deal with, for example, Environmental Planning and Assessment Act 1979 (N.S.W.) ss.24 and 26, or Town and Country Planning Act 1961 (Vic.) s.92(2) (a) and Third Schedule.

10 See *e.g., Howard Hargrave Pty. Ltd.* v *Penrith Municipal Council* (1958) 3 L.G.R.A. 260, 262. Compare *Tooth & Co. Ltd.* v *Parramatta City Council* (1955) 97 C.L.R. 492, 501; *Smith* v *Wyong Shire Council* (1970) 19 L.G.R.A. 61, 63.

11 *Wednesbury Corporation* note 8 *supra; Tooth & Co. Ltd. Id.*, 502.

and in considering a "development application" a local council was directed by a clause in the pertinent Scheme Ordinance (that is, the Ordinance applicable in the council's area) to take into account certain matters. The lists in those Ordinances have not been regarded as exhaustive.[12] These lists varied somewhat and in recent years have become longer and more specific. However, they shared a number of common elements and some were of the greatest generality. Important examples of these are the existing and future amenity of the neighbourhood; the circumstances of the case; the public interest and the provisions of the scheme.[13]

It has already been indicated that as these lists in planning scheme ordinances were held not to be exhaustive, a council would have been bound to take into account the listed matters and may have taken into account other matters provided that these could still be regarded as relevant.[14] Councils have, in fact, attempted at various times to take into account other matters or to take into account matters which would have been admissable only on a very wide reading of the statutory lists. It was then necessary, when these matters were challenged by unsuccessful applicants for development approval, for the courts[15] to decide where the boundary of relevance lay, whether by defining the words in the statutory list or, that list being non-exhaustive, by indicating what other matters could be relevant. As part of this boundary setting the courts asserted, *in general,* that it was irrelevant, whether under the guide of "amenity", "public interest", "circumstances of the case" or otherwise, for councils in exercising this land-use discretion to consider "social and economic effects".

III THE OLD DOCTRINE OF "SOCIAL AND ECONOMIC EFFECT"

The basic proposition of this doctrine is found in *Ampol Petroleum Ltd.* v *Warringah Shire Council*[16] where Mr. Justice Sugerman said:

> It is difficult to express the precise distinction between what considerations may fall within the scope and object of the subject legislation and what consideration fall outside it . . . probably the true distinction, under cl.27,[17] is that between what has been referred to in some of the decisions[18] as "town planning considerations" and, on the other hand, social or economic considerations of a general character, not specifically related to town planning; between, that is to say, on the one hand, the responsible authority, which is the local municipal or shire council, directing its mind to considerations of town planning and, on the other hand, it's

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12 *Tooth & Co. Ltd.* v *Parramatta City Council* note 10 *supra,* 502; *Allen Commercial Constructions Pty. Ltd.* v *North Sydney Municipal Council* (1970) 123 C.L.R. 490, 500; *Parramatta City Council* v *Kriticos* [1971] 1 N.S.W.L.R. 141, 143; but for a contrary view see M.A. Wilcox, *Law of Land Development* (1967) 344.

13 *E.g.,* County of Cumberland Planning Scheme Ordinance 1951 (N.S.W.) cl. 27, these particular expressions being introduced into that clause by the County of Cumberland Planning Scheme (Amendment No. 1) Ordinance (1957); City of Sydney Planning Scheme Ordinance Cl. 32 (g), (h), (i), 1971 (N.S.W.); Parramatta Planning Scheme Ordinance cl. 35 (i), (j), (k), 1979 (N.S.W.)

14 Because of the generality of some of the quoted provisions it may be suggested that even if the clauses were regarded as not constituting an exhaustive list the range of relevant matters would in no way have been cut down.

15 Principally in N.S.W., the Land and Valuation Court, the Subdivision Boards of Appeal, and the Local Government Appeals Tribunal, the jurisdiction of all of which is now in the Land and Environment Court.

16 (1956) 1 L.G.R.A. 276.

17 County of Cumberland Planning Scheme Ordinance, note 13 *supra.*

18 *Cecil E. Mayo Pty. Ltd.* v *Sydney City Council* (1952) 18 L.G.R. 152, 154; *Ampol Ltd.* v *Rockdale Municipal Council* (1953) 19 L.G.R.A. 64, 69.

> directing its mind to considerations which go beyond town planning and are of a general social or economic nature, more appropriate to be dealt with by the central government . . ."[19]

The prohibition on "social and economic considerations of a general character" so expressed was the first general proposition of this kind under the New South Wales zoning system introduced in 1951, although a few prior cases[20] appeared to move towards such a proposition.

It is here intended to focus on the development of the "doctrine" from this general proposition. Of particular importance is the degree to which the generality of that proposition accords with the decided cases. Although Mr. Justice Sugerman's proposition is widely expressed, some exceptions exist. The question may be asked whether a change in the law was wrought by section 90(1) (d)[21] which provides that consent authorities shall consider "social effect" and "economic effect". Only if it can be asserted, at least broadly, that there was a doctrine which prohibited consideration of "social and economic matters" can it be said that section 90(1) (d) effected such a change.

It is submitted that there was such a doctrine, generally along the lines suggested by Mr. Justice Sugerman's broad proposition. It is suggested that the law has changed and, in one respect, the change may have been to reduce the scope of relevant considerations.

As one might expect, the development of the doctrine into two lines of cases: those concerned with the prohibition on "economic considerations" and those with the prohibition on "social considerations" (or, more broadly, "moral and social considerations",[22] may be traced to the dichotomous nature of Mr. Justice Sugerman's categories of prohibited criteria.

(a) Economic Considerations

A number of sub-themes may be observed in the sorting out of this branch of the doctrine. The material will be dealt with in terms of the following concerns although it is conceded that these distinctions may seem artificial: (i) the number of land-uses of a particular type in an area as it relates to the needs of that area, (ii) the nature of business competition in an area, (iii) industrial reggulation and market intervention generally, and (iv) hardship to an individual developer or neighbouring land-owner.

(i) Needs of an era

A common ground for councils' refusal of development approval has been that the local area has no need for more uses of the type proposed, or that the proposed use will displace uses which are more needed. The general doctrine declares this to be an invalid

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19 Note 16 *supra*, 279. Given the whole decision in that case these remarks probably must be regarded as *obiter dicta*. The distinction between "planning considerations" and "economic considerations" has also been drawn in the U.K. (in *Fawcett Properties Ltd.* v *Buckingham County Council* [1961] A.C. 636, 679) although in applying that distinction it has been held that, on approval to build a farm cottage, a condition requiring their occupation by agricultural labourers was a valid planning consideration. *(Id.* 661-2); see also *R* v *East Kesteven Rural District Council* [1947] 1 All E.R. 310. Such a view would not, I think, have been taken in N.S.W. unless, perhaps, on the "balance of uses" principle discussed in text accompanying note 49 *infra*. *Cf.*, another view expressed in the U.K. that "any consideration which relates to the use and development of land is capable of being a planning consideration", *Stringer* v *Minister of Housing and Local Government* [1971] 1 All E.R. 65, 77, but *quaere* whether this is so because, in this case, the relevant consent authority was the "central government" in the person of the Minister.

20 Note 19 *supra*.

21 Environmental Planning and Assessment Act 1979 (N.S.W.).

22 *Pitt-Mullis* v *Sydney City Council* (1964) 10 L.G.R.A. 242, 245.

ground. *Ampol* v *Warringah* itself was a case where the council sought to refuse an application for use of land for a service station partly on the ground that those stations already in operation adequately catered for the then requirements of the area.[23] Sugerman J. did not reject outright the ground of refusal but saw it as "extremely questionable".[24] In *Ampol Ltd.* v *Rockdale Municipal Council*[25] the same Judge said that councils could not refuse approval "for the purpose of rationalising trade and industry as by limiting the number of service stations in a locality to what the responsible authority believes to be its requirements,"[26] but he weakened this proposition in a later case where he effectively allowed a council to limit the number of service stations in the local area on the view that:

> to require the best use in the general interest of a conveniently situated but limited area available for some purpose, or to have regard to the overall requirements of an area by way of ensuring the most convenient provision for the inhabitants of various portions of it, may, within proper limits, involve legitimate town-planning considerations.[27]

However, this weakened proposition was nevertheless accompanied by a reiteration of the view that attempts to regulate the number of businesses of a certain type in an area on the basis of the assumed need might be "an essay into the field of general economic policy of a kind which was not intended to be entrusted to local councils".[28]

The question of the number of service stations in an area has been a recurring one. *Atlantic Union Oil Co. Pty. Ltd.* v *Randwick Municipal Council*[29] concerned the adequacy of existing service stations to serve local needs. Mr. Justice Hardie saw the problem in terms of the dichotomy between legitimate "planning considerations" and illegitimate "economic factors". The Council had argued that the existing service was adequate and

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23 Note 16 *supra*, 278.

24 *Id.*, 279.

25 Note 18 *supra.*

26 *Id.*, 69.

27 *Neptune Oil Pty. Ltd.* v *Ku-ring-gai Municipal Council* (1958) 3 L.G.R.A. 316, 321. Notice also that Sugerman J. relied on this case, and on *Lux Motor Auctions Pty. Ltd.* v *Bankstown Municipal Council* (1955) 20 L.G.R. 178, 183 to say, in *Shell Co. of Australia* v *Randwick Municipal Council* (1951) 4 L.G.R.A. 348, 362:

> "[T]he circumstance that an additional service station would result in an undue aggregation of service stations in a particular locality may be a relevant town-planning consideration within the competence of a council as responsible authority under the Ordinance".

28 *Neptune Oil Pty. Ltd, Ibid.* In Victoria it has been said:

> [Q]uestions of the "need" for a use or development . . . should not be taken as a condition precedent or essential to the grant of a permit. In our opinion evidence showing that there is a need or demand for the proposed use . . . is merely a factor which would be said to support the grant of a permit. The absence of such evidence or indeed evidence to the contrary, does not necessarily mean that the proposal should be rejected.

Pacific Seven Pty. Ltd. v *City of Northcote* (1978) 9 V.P.A. 375, 380. Curiously, the Tribunal goes on to suggest that if there had been evidence of a lack of need it might have rejected approval ("[W]e are not prepared to find . . . that there are sufficient service premises in the area so as to warrant the refusal of the permit": 9 V.P.A. at 380). A Victorian case which follows the first part of the above proposition, that is that a need will be a factor to support the grant, is *e.g., Skateland Pty. Ltd.* v *City of Frankston* (1977) 15 V.P.A. 58, 60; also, the same view appears to be accepted in Queensland (*see e.g. S.B.G. Company Pty. Ltd.* v *Brisbane City Council* (1978) 37 L.G.R.A. 147, 149 and South Australia (*see e.g. Cheng* v *District Council of Munno Para* (1977) 2 S.A.P.R. 169, 171. The second part of the above proposition from *Pacific Seven,* that lack of evidence of need or even evidence of lack of need will not necessitate refusal, seems to have been departed from quite commonly; *(see e.g. Barker* v *Shire of Newham & Woodend* (1978) 16 V.P.A. 129, 130; *Akat Pty. Ltd.* v *Melbourne & Metropolitan Board of Works* (1978) 16 V.P.A. 185, 186; *Truefitt* v *Brisbane City Council* (1972) 26 L.G.R.A. 315, 321.

29 (1956) 20 L.G.R. 332.

therefore a new service station should not be approved. The Judge found that the existing service was not adequate and therefore this ground of the Council's refusal was not supported. He concluded that there was no need to decide on which side of the dichotomy such a ground fell. It may be wondered, whether the inadequacy of the existing stations (about which the judge speaks with an almost passion[30]) was influential in the decision to allow the applicant's appeal, for if so, then it must be concluded that "inadequacy" of service was regarded as a legitimate planning consideration.

Hardie J. stated his position more clearly in *B.P. Australia Ltd.* v *Sydney City Council*[31] when he said that council sought support for the refusal of a service station application from "the large body of evidence that the capacity of the existing service stations was considerably in excess of the present and anticipated demand in the area" and that "[t]his approach . . . is not in [his] view a sound one".[32] Also, in *Total Oil Products (Aust.) Pty. Ltd.* v *Sydney City Council*[33] Hardie J. explicitly accepted as settled that adequacy of existing facilities was not in itself sufficient ground for refusing consent.[34] His Honour went on to consider another related ground of refusal – the alleged inadequacy of the area reserved for light industry – about which more will be said later. Mr. Justice Else-Mitchell has expressed a similar view, although perhaps not quite as categorical in saying that "even though economic needs may require the inclusion of a service station in the development, those needs are far outweighed by planning considerations which will ensure that maintenance of some flexibility in the conception of a complex including an omnibus terminal, shopping and business centre and railway concourse."[35]

Apart from attempts to set a maximum on the number of service stations in a particular area, councils have also attempted to specify a mimimum distance between service stations. Sugerman J. regarded such an attempt as "difficult to justify"[36] but in doing so seemed to depart from the stringency of the general doctrine as set out above. He indicated that one should not specify minimum intervals "without regard to variations in the circumstances and *needs* of various roads and localities",[37] and concluded that the need, in the case before him, for a service station did not outweigh certain other considerations. He reasoned similarly in *B.P. (Australia) Ltd.* v *Bankstown Municipal Council*[38] where the same council had refused approval on the basis of a "code"[39] establishing

30 *Id.*, 335.
31 (1963) 10 L.G.R.A. 322.
32 *Id.*, 131-132.
33 (1962) 8 L.G.R.A. 217.
34 Observe the discussion is note 28 *supra; cf. Loccisano* v *City of Keilor* (1979) 15 V.P.A. 207.
35 *Stocks & Realty (Maroubra) Pty. Ltd.* v *Liverpool City Council* (1971) 21 L.G.R.A. 5, 12; *Cf. Rex Ley Pty. Ltd.* v *Sutherland Shire Council* (1962) 8 L.G.R.A. 297, 302.
36 *Smith & Total Oil Products (Australia) Ltd.* v *Bankstown Municipal Council* (1960) 6 L.G.R.A. 135,137.
37 *Ibid.*
38 (1961) 6 L.G.R.A. 322.
39 A "code", prior to September 1, 1980, was a shorthand expression for various informal (*i.e.*, not legally binding) expressions of council policy. Such expressions, adopted by resolution of council, were permissable as relevant considerations under the several planning scheme ordinances usually by virtue of the paragraph as follows:

"a detailed plan or design adopted by resolution of the responsible authority for the development of the locality in which the land to which the application relates is situated" *(e.g.* North Sydney Planning Scheme Ordinance, cl. 36(d) and *see* discussion of this in *Austin Construction Co. Pty. Ltd.* v *North Sydney Municipal Council* (1967) 14 L.G.R.A. 154, 158. Councils were not permitted to apply such codes as arbitrary rules without considering each case on its merits *(e.g., Progress Properties Ltd.* v *Woollahra Municipal Council* (1969) 18 L.G.R.A. 166, 168, but, paradoxically, little weight would be given to a code, even though a relevant consideration, if a council once having adopted it did not follow it fairly consistently

continued over . . .

minimum intervals between service stations.

These latter cases reflect an important qualification to the main principle, a qualification which in fact had been present all the time. For example, in 1952 Sugerman J. allowed that the "preservation of an existing balance of uses may be a means of preserving the amenity of a neighbourhood", the "amenity of the neighbourhood" being an expressly permissable consideration by force of statutory provisions.[40] In 1955, Hardie J. relied upon this proposition, although obiter, saying that with respect to the number of used car lots, "saturation point has been reached".[41] He insisted that it was not a saturation point based on the satisfaction of the demands of people living in the area, or travelling through it, for used car outlets, but rather based on the amenity of the neighbourhood using "amenity" in a broad sense.[42]

This qualification, which might be called the "balance of uses principle", finds expression in other cases. Refusal of a service station was upheld in one case because, *inter alia,* its erection would effect a bar to redevelopment in conformity with the generally residential character of the vicinity.[43] The "desirable mix and extent of uses necessary to either maintain the present or secure the planned future character and amenity of the area"[44] was taken into account in determining an application to use land for a sex shop. Shortages of land in other cases, for "industrial use"[45] or "light industry"[46] were said to be relevant to a development application for a service station since, as was said in *B.P. (Australia) Ltd.* v *Bankstown Municipal Council,* a question arises as to whether:

> there is in the particular circumstances a sufficient need for a petrol station in order to serve the general convenience, with the unavailability of other suitable sites, to

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39 continued . . .

(e.g. McGarry v *North Sydney Municipal Council* 1 L.G.A.T.R. 637, 638). Such policy expression have, since September 1, 1980, been put on a more formal basis. The Environmental Planning and Assessment Act 1979 (N.S.W.) s.72 nor provides for certain manner and form requirements for what are to be called "development control plans" and 2.90(1) (a) (iv) provides for plans, so made, to be relevant considerations on the exercise of land-use control discretions.

40 Such as those cited at note 7 *supra.*

41 Note 27 *supra.*

42 The concept of "amenity" relates to the physical incidents of an area or neighbourhood which make it suitable for particular land uses, especially residential ones. It is "that element in the appearance and layout of town and country which makes for a comfortable and pleasant life rather than a mere existence": *Ex parte Tooth & Co. Ltd.; Re Parramatta City Council* (1954) 55 S.R. (N.S.W.) 28, 306, quoting Minister of Town and Country Planning, "Town and Country Planning 1943-1951", [1951] *J. Plan. L* 377. Injury to the amenity

> carries with it the notion of something which is wrong, or is contrary to the rights of others . . . (T)he question must become one of ascertaining what measure of immunity from the particular kind of disturbance in question those in or concerned with the neighbourhood are justly entitled to expect in the light . . . of its existing state of development and . . . of all other relevant circumstances.

Balgowlah Investments Ltd. v *Manly Municipal Council* (1954) 19 L.G.R. 327, 335. Commonly amenity will refer to an absence of noise: *Allen Commercial Constructions Pty. Ltd.* v *North Sydney Municipal Council* note 12 *supra,* 498-9; smoke, dust: *Rio Pioneer Gravel Co. Pty. Ltd.* v *Warringah Shire Council* (1969) 17 L.G.R.A. 153, 169; smells: *Ex parte Tooth & Co. Ltd.; Re Parramatta City Council* (1954) 55 S.R. (N.S.W.) 282, 306; congestion and parking problems: *Westfield Development Corporation Ltd.* v *Kogarah Municipal Council* (1969) 17 L.G.R.A. 6, 10; *Harris* v *Woollahra Municipal Council* (1977) 4 L.G.A.T.R. 145, 148; and ugly buildings or structures: *J.L. Stewart & Sons Pty. Ltd.* v *Auburn Municipal Council* (1977) 4 L.G.R.A. 59, 61.

43 *Smith & Total Oil Products (Australia) Ltd.* note 36 *supra.*

44 *Venus Enterprises Pty. Ltd.* v *Sydney City Council* (1974) 3 L.G.A.T.R. 152, 159. See also *Kentucky Fried Chicken Pty. Ltd.* v *Gantidis* (1979) 53 A.L.J.R. 478, 482.

45 Note 38 *supra.*

46 Note 33 *supra,* 217, 220.

> outweigh the disadvantages of adding to the shortage of industrial sites by allowing an available site to be absorbed by a non-industrial use.[47]

This "balance of uses principle" was said to establish a principle particularly important in *Total Oil Products* v *Sydney County Council:*

> The principle established by the decision is an important one particularly in near-city suburban areas zoned for light industry in which the pressure from the various petrol-selling companies to establish an outlet for their own product on the main highways, is considerable, forcing market values of real estate up to high figures and establishing price levels which can mitigate against the entry of light industry.[48]

The implication of this proposition is that decisions on development applications may take into account the degree to which some uses will affect land prices and the degree to which some developers can meet higher prices. If the disparate abilities of developers to pay for land will lead to a contradiction of the "balance of uses principle" and a consequent adverse effect on amenity then a development application might be refused. If this is a correct interpretation of those cases, the now current policy of the Sydney City Council[49] regarding development applications for sex shops would seem not to give rise to inadmissable considerations even under the pre-1980 law. That policy asserts that the proprietors of sex shops have the ability to pay higher rents for shop front premises in the Kings Cross area of Sydney than do proprietors of most other types of shops; that this leads to a reduction in the diversity of shops available for residents of the area and, that this adversely affects amenity and should be stopped by the refusal of development applications or at least by allowing sex shops only in certain locations.

Leaving aside until later consideration of whether such grounds of decision are permissable under section 90(1) (d),[50] it can be said that, assuming they were permissable under earlier provisions,[51] it seems clear that the general prohibition on considering the needs of an area and the number of businesses of a particular type was subject to a considerable qualification derived from the concept of "amenity".

The issue of the number of land-uses of a particular type has also arisen in cases other than those concerned with service stations. The most common examples have dealt with the amount of residential accommodation in an area and the need for this type of user. In *Cecil E. Mayo,* previously referred to in relation to the "balance of uses principle",[52] the Council had refused consent because the proposed commercial use would supplant existing residential accommodation which, in its view was in short supply. The court, Sugerman J., said such a reason was beyond the scope of Council's discretion. Sugerman J. adopted the same view, obiter, in *Vacuum Oil Co.* v *Ashfield Municipal Council,*[53] although in *Greenberg* v *Sydney City Council*[54] His Honour left open the question of whether the existence of the power in section 496 of the Local Government Act 1919 (N.S.W.) (a power with respect to housing) allowed Council to take into account the housing shortage when exercising a development control discretion. In the latter case the question was left open because the Judge had formed the opinion that

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47 Note 38 *supra,* 328.
48 Note 33 *supra,* 217, 220.
49 As expressed by Alderman Robert Tickner in a letter to *The National Times,* No. 538, 24-30 May, 1981, p2.
50 Environmental Planning and Assessment Act 1979 (N.S.W.).
51 Such as those cited at note 13 *supra.*
52 *See* note 18 *supra.*
53 (1956) L.G.R.A. 8, 13.
54 (1958) 3 L.G.R.A. 223.

the impact of the proposed development on the housing shortage was negligible. His Honour similarly left open this question in *Robert Porter Pty. Ltd.* v *Sydney City Council*[55] and in so doing, conceded the possibility that a shortage of residences may be a relevant matter even in zones other than "residential".[56] Despite the attempt in *Greenberg* by the Council to rely on section 496 for support in consideration of residential shortages, it should be noted that this section has not been relied upon in other cases.

Unlike Sugerman J. who displays some uncertainty regarding the relevance of residential shortages, Hardie J. has made his view quite clear.

In *Shell Co. of Australia* v *Leichhardt Municipal Council*[57] His Honour considered that the Council was not justified in refusing approval for a service station on the basis that it was "from the community's point of view uneconomic to destroy a (residential) building which had some useful life as a dwelling-house".[58] He reiterated this view in *Chippendale Estates Pty. Ltd.* v *Sydney City Council*[59] and in *Walls Machinery Pty. Ltd.* v *Sydney City Council.*[60]

More recently, Else-Mitchell J. has also taken a clear stance, but one to the contrary, at least in respect of the "economic life" of existing buildings. In *Austin Construction Co. (Aust.) Pty. Ltd.* v *North Sydney Municipal Council*[61] he asserted that "sound planning principles . . . must always allow, on *economic grounds,* if no other, for the fact that existing buildings should not be demolished whilst they are still sound, useful and convenient".[62] His Honour also stated "that the *public interest* would not be served by allowing the demolition of sound and reasonably attractive residential buildings, which . . . are far from the end of their economic life".[63] In contrast to those earlier mentioned cases where "amenity" was relied upon to depart from the general doctrine, His Honour was here relying on the "public interest" category of relevance[64]

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55 (1960) 5 L.G.R.A. 234.

56 *Id.,* 237. In *Greenberg,* Sugerman J. considered whether a shortage of residential accommodation might become relevant where the subject land was in an established or planned residential area: (1958) 3 L.G.R.A. at 231. For further discussion of this point see *Auto Auctions Investments Pty. Ltd.* v *Sydney City Council* (1959) 4 L.G.R.A. 373, 376.

57 (1957) 2 L.G.R.A. 262.

58 *Id.,* 267.

59 (1960) 6 L.G.R.A. 194, 199.

60 (1961) 79 W.N. (N.S.W.) 101, 103.

61 Note 39 *supra.*

62 *Id.,* 161.

63 *Id.,* 162.

64 The matter of "public interest" in the land-use control context encompasses a number of different elements but is not unlimited.

> [T]his undefined phrase has never been regarded as giving the Court the power to consider and review the whole spectrum of human affairs arising from the use of land in a civilized community: certain things as part of the established order must be taken for granted and not the least of these are the structure of government, the existence and powers of public authorities created to deal with defined aspects of government, and those of the officials and bodies whose function it is to determine the future planning of land in the State:

Rio Pioneer Gravel Co. Pty. Ltd. v *Warringah Shire Council* (1969) 17 L.G.R.A. 153, 163. However, " 'The circumstances of the case' and the 'public interest' open up . . . a wide field of enquiry": *Coty (England) Pty. Ltd.* v *Sydney City Council* (1957) 2 L.G.R.A. 117, 224. An example of such a wide field is found in the proposition that the public "interest here in question is the interest in the progress and development of architecture, an aspect of the wider social interest in cultural progress": *Farley* v *Warringah Shire Council* (1948) 17 L.G.R. 9, 14; distinguished in *Crawford* v *Randwick Municipal Council* (1950) 17 L.G.R. 186, 189. It must be noticed that this proposition in *Farley* is by Sugerman J. and that it seems directly at odds with the principle he later enunciated in *Ampol* v *Warringah* (1956) 1 L.G.R.A. 279. A possible distinction between the two cases is that the proposition in *Farley* may relate to the *Court's*

continued over . . .

set out in the appropriate Ordinance. The same Judge in a later case[65] also relied on consideration of the "public interest" to allow a service station to replace some dwelling houses which were said to be "approaching the end of their economic life".[66]

It is important to notice, however, that these considerations allowed as relevant by Else-Mitchell J. perhaps represent only a limited qualification to the general doctrine as first stated. This is so, not only because of the narrow language of the term "economic life" but also because the Judge in the latter case expressly rejected an argument by the Council that the service station proposal be disallowed because there was a sufficient supply of service stations. His clear endoresement of this proposition is, however, considerably weakened because he relied on *Shell* v *Leichhardt* which does not at all address the question of sufficiency of supply of uses similar to the subject of the development application in issue. To the extent that that case addresses the relevance of general economic considerations it rejects as irrelevant (a) consideration of the sufficiency of supply of uses to be *displaced* by the proposed use and (b) any consideration of the economic life of buildings which will be displaced.[67] In other words, it offers *no* support for the proposition stated by Else-Mitchell J. and, necessarily but implicitly, it directly *contradicts* the Judge's "economic life" principle. In the light of express endorsement of *Shell* by Else-Mitchell J. but his implicit contradiction of part of it, it is difficult to determine what status should be accorded to the propositions of Hardie J.

The number of uses of a particular type and the needs of the area have received attention in other cases. It was doubted in *Pioneer Concrete (N.S.W.) Pty. Ltd.* v *Hornsby Shire Council,*[70] whether a Council had power, in exercising its development control discretion, to limit the number of factories or plants of a specified type in a particular industrial zone. The need of an airport in the Newcastle (N.S.W.) area was irrelevant to whether a development application should be approved.[71] In the related area of councils' discretion to approve subdivisions of land[72] it has been held that "the encouragement of the subdivision of land by developers to provide more home sites for a growing population is no part of the function of a council under the Local Government Act, although it may itself undertake the acquisition and sale of land and the building of new homes".[73] It would seem that the need for a convalescent hospital and the virtual lack of such facility

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64 continued...

role under the then s.341 (Local Government Act 1919 (N.S.W.)) while the principle in *Ampol* v *Warringah* may relate to the *Council's* role under cl. 27 (County of Cumberland Planning Scheme Ordinance). On that view "public interest" for the Court would have a wider connotation than it would for the council. Note that, with respect to the Land and Environment Court's role, it has the essentially same powers and limits on power that local councils possess: Land and Environment Court Act 1979 (N.S.W.) s.39. Further aspects of "public interest" are treated at notes 90, 98 and 115 *supra.* "Public interest" may also involve a concern for public safety: *Southern Cross Gliding Club Ltd.* v *Wollondilly Shire Council* (1979) 4 L.G.A.T.R. 246, 249.

65 *Amoco Australia Pty. Ltd.* v *Randwick Municipal Council* (1968) 16 L.G.R.A. 121.

66 *Id.,* 124.

67 See text at note 47 *supra.*

68 See notes 46-49 *supra.*

69 Environment Planning and Assessment Act 1979 (N.S.W.).

70 (1965) 11 L.G.R.A. 310.

71 *Sticpewich* v *Newcastle City Council,* [1978] 4 L.G.A.T.R. 171.

72 Local Government Act 1919 (N.S.W.), Part XII, especially s.333; it should be noted that the list of relevant considerations in that provision is considerably narrower than the lists which relate to development control (examples given at note 8 *supra)* and, in any case, the list in s.333 was held to be an exhaustive list: refer to the discussion in text at notes 4-7 *supra.*

73 *Gosford Shire Council* v *Anthony George Pty. Ltd. (No. 2)* 16 L.G.R.A. 165, 168, *per* Else-Mitchell J.

in the area is not a "town planning consideration".[74]

In summary therefore, following *Ampol* v *Warringah,* consideration of the number of, or the need for, uses of a particular type in an area was generally not permissable except where this might relate to "amenity" which would justify a concern for the "balance of uses". This seems to have been related to the provision in an area of a convenient mix of services and facilities particularly for the benefit of residents. For this reason it was possible, in some cases, to speak of a shortage of, say, service stations, but not of, say, housing. However, with regard to the latter, Else-Mitchell J. has allowed consideration of the economic life of certain residential buildings as a matter of public interest.

(ii) Business competition

Another sub theme of the question of economic considerations is whether a council is entitled to refuse development approval in order to avoid business competition in an area. Reference to this matter has been made in discussing *Ampol Ltd.* v *Rockdale Municipal Council*[75] where the Court said that councils could not consider "rationalising trade and industry".[76] This case appears to be the only New South Wales authority in which direct consideration has been given to this question. The Local Government Appeals Tribunal has asserted that "we doubt that the impact of financial competition on the viability of existing development is a legitimate head of consideration when assessing the merits of any application".[77] There are also a number of other Australian cases which deal with this matter which deserve attention.

In *Kentucky Fried Chicken Pty. Ltd.* v *Gantidis*[78] the High Court of Australia took the view that a council could not properly consider the matter of competition.[79] Although the details of the case are somewhat complicated, some deserve mention. The appellants had sought a permit to use land for a take-away food establishment. A permit was granted by the Council. The respondent, who also conducted a take-away food establishment and who objected to the grant of a permit, appealed to the Town Planning Appeal Tribunal (Victoria). The respondents sought and obtained from the Supreme Court of Victoria an order directing the Tribunal to rehear the matter taking into account *inter alia* the "effect of the proposed use upon the economic viability of the adjoining area"; the appellants successfully appealed against this order to the High Court. Although the main reason for the appellant's success concerned the Supreme Court's erroneous inference of the Tribunal's reasons (when no reasons had been given) Chief Justice Barwick and Mr. Justice Stephen expressed their view of the matters which the

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74 *Chartres Construction Pty. Ltd.* v *Randwick Municipal Council* (1972) 25 L.G.R.A. 193, 195; *but cf. Bryan* v *Melbourne & Metropolitan Board of Works,* 16 V.P.A. 150, 153 where the need for a geriatric hospital in the area was a "factor in favour" of approval; see also *Koekoek* v *City of Kew,* 15 V.P.A. 231, 233.

75 Note 18 *supra.*

76 *Id.,* 69.

77 *Woolworths Ltd.* v *Bankstown Municipal Council* [1978] 4 L.G.A.T.R. 264, 269.

78 Note 44 *supra.*

79 A much earlier decision of the same Court seems to allow a local authority to consider the matter of competition, at least in a very special case:

> It might not unreasonably be thought to be more in the public interest of the ratepayers that public amusements should be held on the ground which the municipality controlled and which was formed and maintained by the ratepayers' money than on a competing ground conducted for private gain by a hotel-keeper in the immediate neighbourhood of his own hotel.

Randall v *Northcote Corporation* (1910) 11 C.L.R. 101, 112. Note however, that the judge (O'Connor J.) allowed that such a matter may not be a proper consideration: at 112.

Supreme Court would have had the Tribunal take into account on a rehearing.

The Chief Justice referred to "a misapprehension as to the permissable scope of a planning authority's consideration" and went on to say that "economic competition feared or expected from a proposed use is not a planning consideration within the terms of the planning ordinance[80] governing this matter".[81] He qualified this by saying that if the proposed use would destroy the amenity, given a wide meaning, permission may be refused. In this qualification, which implies the possibility that some effect on competition may flow into an effect on amenity, there seems an echo of Sugerman J's "balance of uses" principle.[82] Stephen J., agreeing with the Chief Justice, expresses this clearly:

> If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical or financial causes, and if the resultant community detriment will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing business are at one and the same time also threatened by the new competition . . . However the mere threat of competition to existing businesses . . . will not be . . . relevant.[83]

A similar view of mere competition has been expressed by the Victorian Town Plannings Appeals Tribunal in *Galli* v *City of Melbourne*[84] and by the South Australian Planning Appeals Board in *Cheng* v *District Council of Munro Para*.[85] Taking the same line, the Local Government Court of Queensland in *Truefitt* v *Brisbane City Council*,[86] seems to drift into an "economic life" argument not dissimilar from that of Else-Mitchell J. as discussed:[87] "[A]n inquiry [into competition and economic feasibility] may well tend to preserve obsolescent development at the expense of modern effective commercial development providing greater service to the public."[88] In seemingly little accord with the basic principle it epouses, however, the Court here refused development approval for a shopping complex on the basis that the substantial oversupply of shopping space in the locality would have the effect of decreasing the trading area of the proposed development.[89] The "planning" relevance (in the doctrine sense) of this seems obscure. It was not suggested that the development will affect a disruption, or reduction of community facilities generally, a matter which Barwick C. J. and Stephen J. would allow to be considered. The decision assumes that the new development will not succeed competing against existing uses when, in reality, the proposed use may be fully realised and existing uses may wither or be modified to become complementary. The decision may implicitly rest on some concern for the economic viability of the proposed use and may have been made in order to "protect" the applicant from some anticipated loss. If the last of these

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80 Melbourne Metropolitan Planning Scheme Ordinance, Clause 7(2); this sub-clause gives a list of relevant considerations which, in summary, are the primary purpose for which the land is zoned, the orderly and proper planning of the zone, and amenity.

81 Note 44 *supra*, 480.

82 See text at note 30 *supra*; see also note 28 *supra*, 149.

83 Note 43 *supra*, 482.

84 (1978) 9 V.P.A. 295.

85 Note 28 *supra*, 170. Note also that in the issue of Crown leases in the Australian Capital Territory under the City Area Leases Ordinance 1936, s.11A, the effect on business competition of the issue of a lease is not relevant: *In the Matter of City Area Leases Ordinance 1936 as amended s.11A, Anthony Hordern and Sons Ltd., Applicant* 9 L.G.R.A. 190, 215.

86 Note 28 *supra*.

87 See text accompanying note 61 *supra*

88 Note 28 *supra*, 320.

89 *Id.*, 321.

elements is a correct interpretation it represents a curious twist to another "prohibited" consideration, namely "hardship", which will be discussed later.[90]

As earlier mentioned, there is little New South Wales authority directly on the matter of competition. It might be argued that the wider language of the list of relevant considerations in New South Wales Ordinances[91] compared for instance with the language considered in *Kentucky Fried Chicken*[92] would mean that the general principle of the irrelevance of competition would not apply in New South Wales. However, it is submitted that the language in *Ampol* v *Warringah*[93] and *Ampol* v *Rockdale*[94] suggests that the principle would have been applied as strongly in New South Wales as elsewhere. The effect of section 90(1) (d) is yet to be considered.

(iii) Industrial regulation generally

While the cases discussed under parts (i) and (ii) above have concerned the question of council's power to control the economic structure of a local area, another question has also arisen as to the degree to which council may consider economic matters going beyond the local area. As already discussed, the answer to the former question is, generally, that the council may not attempt this sort of control, subject obviously to all the qualifications that have been noted. It may be anticipated, given that the second question raises control going beyond the local area, that the answer would be more certainly in the negative. This expectation however, is only partly realised.

In one case, *Long* v *Copmanhurst Shire Council*[95] the question arose whether, under the power in Part XI of the Local Government Act 1919 (N.S.W.)[96] a council could refuse approval to erect a building for use as a milk pasteurization plant on the general ground that it was not in the best interests of the milk industry. The Court held that it could not, despite the fact that the Council was given certain discretions under the Dairies Supervision Act 1901 (N.S.W.) and powers to regulate milk stores under section 299D of the Local Government Act 1919 (N.S.W.).

In two other cases, both concerning the quarrying of blue metal, economic considerations going beyond the local area were raised. These however, did not turn on the interests of the particular industry, as in *Long*, but rather the needs of the general community for the products of this particular industry. It should be noted that this goes beyond the matter considered in part (i) above, the needs of local areas, to a broader "needs" concern. In *Crane & Williams Pty. Limited* v *Hornsby Shire Council*[97] a question arose whether, in deciding on a development application for a blue metal quarry, it was relevant to consider the national or country need for blue metal. The Court found

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90 See text accompanying note 123 *supra.*
91 See text at note 9 *supra.*
92 See provisions summarised in note 80 *supra.*
93 See text at note 16 *supra.*
94 Note 18 *supra.*
95 (1969) 19 L.G.R.A. 29.
96 This Part of the Local Government Act 1919 (N.S.W.), concerns the regulation of the erection of buildings. It is therefore to be distinguished from "development control" laws as found in or under the Environmental Planning and Assessment Act 1979 (N.S.W.), although the general regulatory pattern as described at p. *supra* is just as applicable to building regulation (being a form of land-use control) as to development (or "use") control. Importantly the list of considerations relevant to a council in considering a development application are different from those in the environmental planning instruments examples of which are set out in text at note 9 *supra.* The list is set out in Local Government Act s.313 and has been held not to be exhaustive in *Smith* v *Wyong Shire Council,* (1970) 19 L G.R.A. 61, 63.
97 (1966) 12 L.G.R.A. 396.

that there was no such need in fact, but proceeded on the assumption that if such a need or demand were found to exist it would be a relevant consideration. Other matters were also assumed to be relevant but, in the absence of detailed evidence, did not play a major role. The Court alluded to the possibility that industry (building construction and road-making) would function more efficiently and cheaply if this particular site could be worked as a quarry and that savings to consumers (including local authorities) might ensue. The assumed relevance of such matters was made explicit by the same judge, Else-Mitchell J., in *Rio Pioneer Gravel Co. Pty. Ltd.* v *Warringah Shire Council*[98] another blue metal case. This judgment is one of the most important in the history of the Land and Valuation Court because it canvasses the proper functions of council, court and central planning authority in the planning process. Its special importance here is the extent to which it represents an exception, or indeed, a contradiction of the basic principle enunciated by Sugerman J. in *Ampol* v *Warringah.*[99]

In *Rio Pioneer Gravel* Else-Mitchell J., quoting from a commonly known text on town-planning,[100] said that planning is "the direction of the development and use of land to serve the *economic and social* welfare of a community in respect of convenience, health and amenity".[101] On this basis and from the nature of the planning scheme ordinances[102] His Honour said that responsible authorities[103] exercising their land-use control discretions have "an obligation to weigh up the competing considerations and to strike a balance which will best serve the *economic and social needs* of the community."[104] Such an expression of the responsibility of councils or similar authorities must, on its face, be treated as a direct contradiction of the general doctrine of the irrelevance of economic and social matters outlined earlier. However, it will be suggested later that this superficial contradiction is not conclusive, not at least with respect to *every* subcategory of "economic and social matters".

Two other related matters in *Rio Pioneer Gravel* deserve close attention: the proper

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98 Note 42 *supra.*

99 A narrow but plausible basis on which to avoid this apparent conflict is similar to an argument used to distinguish *Farley* from *Ampol* v *Warringah:* see note 64 *supra.* This is that the language of Local Government Act 1919 (N.S.W.) s.342N (which provided for a right of appeal to the Land and Valuation Court) changed between *Ampol* v *Warringah* and *Rio Pioneer Gravel,* and changed again after the latter case. At the time of the latter case the Court, on appeal, had its own statutory list of relevant matters (including "the circumstances of the case, and the public interest") which arguably, despite the language being similar to that in the Shire of Warringah Planning Scheme Ordinance, cl.36, may have given the *Court* a wider range of matters than was given to the *council.* Else-Mitchell J. does not make it clear whether he saw a distinction between the role of the Court and the role of council: some remarks contradict such a view: at 162, others may support it: at 163. Note Land and Environment Court Act 1979 (N.S.W.), s.39 (2) (4) which provides that the Court is to have the powers of the consent authority and that in respect of an appeal, it is to have regard to "this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest". These provisions do not make clear whether or not there is for the Court a wider range of relevant matters than for Councils.

100 Brown and Sherrard, *Town and Country Planning* (1959).

101 Note 42 *supra,* 162.

102 Now, "deemed environmental planning instruments": Environmental Planning and Assessment Act 1979 (N.S.W.) s.4.

103 Now "consent authorities": Environmental Planning and Assessment Act 1979 (N.S.W.) s.4.

104 Note 42 *supra,* 162 (emphasis added). Else-Mitchell J. applied this view in *Lawler* v *Windsor Municipal Council* (1971) 23 L.G.R.A. 272, 274, when he said, "It is in the *public interest* that there should be production and such things as eggs and poultry within the County of Cumberland. We surely have not got to the stage, in a city of this size, of having to import all our foodstuffs from outside the country" (emphasis added). See also the discussion of "public interest" at note 64 *supra.*

role of the different agencies of government in the land-use regulatory system and the nature of matters in the particular case which were considered relevant to the final decision to allow a blue metal quarry to be established. It is not, however, appropriate to treat these matters more fully in this paper, although the former of them is touched on again in discussion at the end of part (iii).

As a final reference to the "quarry cases" regard may be had to the similar but comparatively superficial approach of the Victorian Planning Appeals Board in *Krause* v *Shire of Newham & Woodend*[105] wherein it was said: "As is the case in most quarry cases the real issues here are whether there is a need for the product and whether the development and use will affect the amenity of the neighbourhood".[106]

Another matter may be considered here. This concerns a refusal to proposed use of land for an oil storage terminal, although it is not a direct attempt at non-local industrial regulation by a council. One ground of refusal was that an undue concentration of bulk oil terminals in the Botany district of Sydney would be a hazard in the event of an enemy attack.[107] The Court doubted whether it or the Council could properly consider this matter and it was assumed that the State Planning Authority[108] was the appropriate body to take such matters into account although the Court did endorse the view of the Director of Civil Defence regarding risks inherent in enemy attack. His view was that such risks must "be measured against economic necessity and the practical demands of commerce and industry".[109] Reference can also be made at this point to another example of the prohibition on dealing with "matters of general economic concern to the community at large."[110] In *Ex parte S. F. Bowser & Co.; Re Municipal Council of Randwick* a council was forbidden to use its powers[111] to encourage preference for goods of Australian manufacture.[112]

Taken overall and apart from the cases considered in the immediately preceding paragraph, the cases considered in part (iii) must be seen as allowing economic considerations going beyond a local area to be influential on the exercise of councils' discretion. Semble, *Long* prevents this reaching into the area of interference with a particular industry. *Rio Pioneer Gravel* allows consideration of wide community need of a particular industry's products. There is therefore some distinction between *Long* and *Rio Pioneer Gravel* but it does not avoid the fact that some inconsistency of principle must be acknowledged. This inconsistency can, perhaps, be resolved by another, technical distinction which must be noticed: *Long*[113] was a case under Part XI (Building Regulation of the Local Government Act 1919 (N.S.W.) whereas *Rio Pioneer Gravel* was under Part XIIA (Town and Country Planning Schemes) of that Act and a Planning Scheme Ordinance under that Part. Therefore different lists of relevant considerations applied. This may explain the differences of principle between *Long* and *Rio Pioneer Gravel.*[114] However, it does not make it any easier to state a consistent view of the relevance of economic

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105 (1979) 16 V.P.A. 242.

106 *Id.*, 243. See also *Martinuzzi* v *Mulgrave Shire Council* (1975) 33 L.G.R.A. 276, 283 for a slightly more complex treatment of the same issue.

107 *Esso Standard Oil (Aust.) Ltd.* v *Botany Municipal Council* (1968) 15 L.G.R.A. 145, 151.

108 This agency was replaced by the Planning and Environment Commission in 1974, which itself was replaced in 1980, by the Department of Environment and Planning.

109 Note 107 *supra.*

110 Note 73 *supra.*

111 Under Local Government Act 1919 (N.S.W.) s.421, which allows councils to control the placement or construction of pipes or any structures on a public place.

112 (1927) 27 S.R. 209.

113 Note 95 *supra.*

114 But see my observations at note 95 *supra.*

factors to the exercise of land-use control discretions, given the inconsistency between *Rio Pioneer Gravel* and *Ampol* v *Warringah*.

This latter inconsistency may, however, be narrowed somewhat by consideration of the following observations. First, it is suggested that Else-Mitchell J's view that councils must consider the "economic and social needs of the community"[115] should be related to his quotation from Brown and Sherrard as to welfare "in respect of convenience, health and amenity".[116] These terms seem to fall reasonably within the concept of "amenity" as used in New South Wales land-use law[117] although the reference to "health" must certainly, at least in part, be regarded as near the boundary of "amenity". If this be correct Else-Mitchell J's view is not significantly different from the general trend of authorities discussed earlier, although his sweeping use of "social" and "economic" is nevertheless at odds with *Ampol* v *Warringah*.

Secondly, despite the generality of his language in *Rio Pioneer Gravel*, Else-Mitchell J's decision can be limited to its particular facts. Indeed the Judge's implicit endorsement[118] of parts of the "doctrine" prohibiting consideration of social and economic matters seems almost to require such limitation. This is not to deny the fact that Else-Mitchell J's views as to the range of matters relevant must be regarded as wider than those of the other judges of the Land and Valuation Court. Nevertheless, if limited to the particular facts of *Rio Pioneer Gravel* His Honour can be said to be supporting merely the principle that local authorities may take into account the needs of the region or beyond.[119]

Thirdly, the consideration of regional needs which he allows in *Rio Pioneer Gravel* might be said to be a consequence of the intervention in the litigation of a number of State agencies.[120] In *Ampol* v *Warringah* itself reference is made to matters "more appropriate to be dealt with by the central government",[121] notwithstanding that in *Ampol* v *Warringah* such representations were ultimately not relied upon, these representations were statutorily relevant matters under the local planning scheme.[122]

(iv) Hardship

The consideration of "hardship" has two aspects, one, the financial or proprietary hardship which might be sustained by the individual owner or applicant were an application for approval to be refused; and secondly, the hardship which might burden an individual neighbour of land the subject of an application were the application to be approved.

The matter of hardship to the applicant has been considered quite often in New South Wales cases. An important general proposition can be found in *Metropolitan Water Sewerage and Drainage Board* v *Cumberland County Council*[123] where Hardie J. said:

> Little or no progress would be made in the adoption and implementation of and adherence to sound town planning principles and practices if the particular need or

115 See quotation at note 104 *supra*.
116 Note 100 *supra*.
117 See authorities cited at notes 28-42 *supra*.
118 See text at note 35 *supra* and notes 133, 164 *infra*.
119 Subject to the argument made at note 99 *supra* and to what is discussed in the following paragraph.
120 Note 42 *supra*, 160.
121 See text accompanying note 19 *supra*.
122 Shire of Warringah Planning Scheme Ordinance cl.36(c). Note also that Environmental Planning and Assessment Act 1979 (N.S.W.) s.90(1) (n) provides that there will be relevant "any representations made by a public authority in relation to that development application, or to the development of the area, and the rights and powers of that public authority".

urgency of the owner, whether a public body or an ordinary commercial concern, were permitted to justify departure from those principles and practices.[124]

This proposition was endorsed by Else-Mitchell J. in *Gosford Shire Council* v *Anthony George Pty. Ltd. (No. 2).*[125] It should be observed however that both these cases were under Part XII of the Local Government Act 1919 (N.S.W.) which deals strictly with subdivision and not with development control. However, on this present matter it is clear that there is no difference.

This lack of difference is illustrated by *Caringbah Investments Pty. Ltd.* v *Sutherland Shire Council*[126] where *Gosford* v *Anthony George* was cited in support of the proposition that no valid objection could be made to a *development* condition since it would make the proposal prohibitively expensive. "[T]he economics of a development should not be allowed to stand in the way of planning objectives."[127] Hence, the fact that the Council would allow only an intensity of use less than that proposed, thereby entailing financial loss to the applicant, demonstrates that the price paid for the land did not influence the Court in allowing a higher intensity of use.[128] Rather, in one case, it merely provoked the advice that the developer should have entered into a conditional contract of purchase.[129]

The general rule asserting the irrelevance of hardship to the applicant seems fairly clear.[130] Qualifications, however, should be noted. It is a relevant consideration if "unprofitability" or lack of "economic feasibility" attaches to all possible land-uses, other than that which has been refused, so as to "sterilize" the land.[131] In other words, if the developer can do nothing else with the land other than that which has been proposed, this factor may be considered. It is important to note that sterilization of the site will not determine the matter on appeal, but it is a relevant consideration whereas "mere" hardship is not. It seems that the courts would impose a fairly stringent test of what is "sterilization" since in *Dorbil Pty. Ltd.* v *Warringah Shire Council*[132] Else-Mitchell J.

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123 (1962) 7 L.G.R.A. 270.

124 *Id.*, 283. Note also *Crawford* v *Randwick Municipal Council,* note 64 *supra.* where it was said: [I]t would not be possible to administer effectively in the public interest a system of the regulation and control of the erection and alteration of buildings if it were thought necessary to allow . . . consideration of hardship, and not necessarily insuperable hardship, to prevail over . . . the general welfare".

125 Note 73 *supra.*

126 (1970) 20 L.G.R.A. 377.

127 *Id.*, 381.

128 *Meriton Apartments Pty. Ltd.* v *North Sydney Municipal Council* (1970) 19 L.G.R.A. 385, 387; *J. M. Watson & Associates* v *Auburn Municipal Council* [1972] 1 N.S.W.L.R. 84, 87-8; *F.J.S.I. Investments Pty. Ltd.* v *Woollahra Municipal Council* (1969) 17 L.G.R.A. 138, 141. Similar views have been expressed in other jurisdictions; see *e.g. Snell* v *Town of Henley and Grange* (1968) 18 L.G.R.A. 243, 250; *Adams* v *Melbourne & Metropolitan Board of Works* (1977) 6 V.P.A. 395; *J. Murphy & Sons Ltd.* v *Secretary of State for the Environment* [1973] 1 W.L.R. 560. In the last case just cited the element of "hardship" to the developer was raised, not by the developer, but by someone who opposed the development. The thrust of the arguments were that the development should not be allowed because the cost of the development would be excessive for certain site reasons, and therefore would not be a wise commercial venture. The court said: "The planning authority exercises no paternalistic or avuncular jurisdiction over would-be developers to safeguard them from their financial follies", at 575.

129 *Ibid.*

130 Constrast U.S. Department of Commerce, A Standard City Enabling Act (rev. ed. 1928) which provides that a variance of zoning for a particular parcel of land is authorized where the zoning will result in unnecessary hardship.

131 *Dorbil Pty. Ltd.* v *Warringah Shire Council* (1968) 16 L.G.R.A. 125, 130; *F.J.S.I. Investments Pty. Ltd.* v *Wollahra Municipal Council* note 28 *supra.*

132 *Dorbil Pty. Ltd. Id.*, 125.

dismissed the argument of sterilization, saying that some limited development was still possible, and that as the applicant "acted speculatively and its speculation having failed, it seems to me that it cannot now complain".[133]

A second qualification is the imposition of conditions on a development approval. In *Stocks & Realty (Maroubra) Pty. Ltd.* v *Liverpool City Council*[134] Else-Mitchell J. said:

> the appeal must be considered upon the basis that the appellant is obliged to provide such public facilities as are necessarily and reasonably incidental to the type of development proposed, but that the council is not thereby relieved entirely of its duty to provide every communal facility which members of the public, either as train travellers or shoppers, are entitled to expect.[135]

In one respect this rule can be seen as preventing a local authority from placing onerous burdens on the applicant and therefore the court might be said to be considering "hardship". Another view of this comment is that it is simply reflecting the broad rule of relevance earlier discussed.[136] This view finds a similar expression in cases under the Local Government Act 1919 (N.S.W.) section 333 (1A) (c)[137] and (2) dealing with the contribution on subdivision of land or money for public reserves,[138] also in cases under the various planning scheme ordinances dealing with contributions on development of land or money for public reserves, car parking or road widening[139] and now, in the Environmental Planning and Assessment Act 1979 (N.S.W.) section 94 which provides for contributions of land or money for, seemingly, a wide range of public amenities.

The other major element of the relevance of "hardship" is as it relates to particular persons other than the applicant for approval. This "hardship" should be distinguished from the broader consideration of "amenity".[140] In addition there is the possibility that this latter "hardship" is *expressly* a relevant consideration under the head of the "relationships of that development to development on adjoining land or on other land in the locality[141] and under other heads which permit councils to hear objections to developments.[142] This aspect of "hardship" also relates directly to the matters discussed earlier

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133 *Id.*, 130; see also *William McKenzie Pty. Ltd.* v *Leichhardt Municipal Council* (1964) 10 L.G.R.A. 137, 145.

134 Note 35 *supra.*

135 *Id.*, 9.

136 See note 7 *supra.*

137 Prior to 1 September, 1980, this was s.133 (1) (g).

138 See *Forsberg* v *Warringah Shire Council* (1922) 6 L.G.R. 80, 82; *Hanly* v *Hornsby Shire Council* (1954) 19 L.G.R. 214, 216; *Warringah Shire Council* v *Armour* [1972] 2 N.S.W.L.R. 328, 331.

139 See *Woolworths Properties Pty. Ltd.* v *Kuring-gai Municipal Council* (1974) 10 L.G.R.A. 177, 181; *Greek Australian Finance Corporation Pty. Ltd.* v *Sydney City Council* (1974) 29 L.G.R.A. 130, 137.

140 Note 42 *supra* where the concept of "amenity" is outlined.

141 County of Cumberland Planning Scheme Ordinance cl.27 (b), City of Sydney Planning Scheme Ordinance cl.32 (a), and Environmental Planning and Assessment Act 1979 (N.S.W.) s.90(1)(h).

142 Councils have commonly taken into account, with highly variable weightings, views expressed by persons near to or affected by particular development applications. In the special case of residential flat buildings this was mandatory under Local Government Act 1919 (N.S.W.) s.342ZA now repealed, (and still is mandatory, *under that section,* by virtue of the Miscellaneous Acts (Planning) Savings and Transitional Provisions Regulation, New South Wales Government Gazette No. 119, 4451 (29 August, 1980) cl.14. It is now also mandatory under the Environmental Planning and Assessment Act 1979 (N.S.W.) ss. 84-89 and s.90 (1) (b), in the cases of "designated developments" (which have been statutorily listed in the Environmental Planning and Assessment Regulation, New South Wales Government Gazette No. 120, 4455 (29 August, 1980) cl.70 and Schedule 3. Consideration of the views of objectors was, even when not mandatory, regarded as relevant under the various lists of considerations relevant to the exercise of development control discretions, especially under the heads of "amenity" and "public interest". See *e.g. Austin Construction Co. (Aust.) Pty. Ltd.* v *North Sydney Municipal Council*

continued over . . .

under the general heading of business competition.[143] Individual matters of hardship can arise and it would seem that these are relevant.

This particular matter of hardship arises where business difficulties of a non-competitive kind are caused to neighbouring individuals. So, for example, if the presence in an area of a number of sex shops can be said to cause a "down trend in business generally" this would probably be regarded as a relevant consideration under the pre-1980 law.[144] *Semble* the isolation of a shop from the remainder of a commercial area by the interposition of a service station and the consequent deleterious effect on the shop's business is also a relevant matter of the "hardship" type.[145]

The position with respect to economic considerations prior to 1 September, 1980 was summarised in this way. Subject to an admittedly broad "amenity" qualification the needs of an area were an illegitimate economic consideration. Subject to a similar qualification the nature of business competition in an area was also, in law, irrelevant. However, it was permissable to consider the interest of the community as a whole in the provision of certain services or the availability of certain goods. Finally, hardship to an individual applicant was not a relevant matter, but hardship to an individual neighbour was perhaps relevant as part of amenity or possibly under some other head.

(b) Social Considerations

It is in *Ampol Petroleum Ltd.* v *Warringah Shire Council*[146] that one also finds the broad prohibition on considering matters of "a general social . . . nature, more appropriate to be dealt with by the central government."[147] In a more recent case this general view was endorsed when it was said that "by virtue of judicial pronouncement, the board was not here concerned with public policy as to the desirability of the use of the premises on moral grounds or social grounds as opposed to town planning grounds".[148] As with economic considerations, there are a number of sub-themes which will be dealt with separately despite, again, a considerable artificiality in these distinctions: (1) moral welfare, (2) social offence, and (3) taste.

(i) Moral welfare

One of the clearest judicial propositions on this question comes from Hardie J. in *Pitt-Mullis* v *Sydney City Council:*[149]

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142 continued . . .

note 39 *supra*, 162; *Boral Road Services Pty. Ltd.* v *North Sydney Municipal Council* (1970) 19 L.G.R.A. 388, 391; *Dapto Vale Estates Pty. Ltd.* v *Wollongong City Council* (1974) 2 L.G.A.T.R. 432, 435; *Rio Pioneer Gravel Co. Pty. Ltd.* v *Warringah Shire Council* note 42 *supra*, 161. The principles in these cases will almost certainly be applied under the Environmental Planning and Assessment Act 1979 (N.S.W.) where s.90 (1) (b) is not appropriate.

143 A good illustration of the hardship-competition nexus is found in *Galli* v *City of Melbourne* note 84 *supra* where forty persons with interests in existing eating establishments in Carlton, Melbourne, objected to the approval of a further proposed eating establishment for fear of business loss. The tribunal upheld the approval.

144 *Venus Enterprises Pty. Ltd.* v *Sydney County Council* note 44 *supra*, 158.

145 Note 27 *supra.*

146 Note 16 *supra.*

147 *Id.*, 279; see the more lengthy quotation at p. *supra.*

148 *Venus Enterprises Pty. Ltd.* note 44 *supra*, 154.

149 Note 22 *supra.*

> [C]ounsel for the respondent adverted to a number of matters of public interest[150] in the broad sense . . . the undesirability of this area for the siting of a recreational, social or cultural centre for juveniles, an area which is pervaded by a bohemian atmosphere and aroma and in which prostitution and solicitation are rife. He contended that . . . public interest, in the wider sense of moral and social considerations affecting the young impressionable section of the community, was closely related to public interest in the Town Planning sense. I do not accept this . . . The existence of a legislative and administrative vacuum in this important field of providing and/or regulating juvenile recreational and social activities in the city or near-city areas is no justification . . . for extending the discretionary power of this Court into foreign fields of public policy in the general moral and social sense.[151]

In that case the proposed land-use was as a "sound lounge" (or, more contemporarily, a disco) in William Street, Sydney. The Judge agreed with the Council that the siting of the activity was highly undesirable on "broad moral grounds of juvenile welfare,"[152] but apart from imposing an opening hours limitation based on a noise/amenity consideration, he did nothing to control the use. However, he asserted the urgent need for the establishment of an agency to regulate and control such establishments. In his view the agency should be:

> a specialist body empowered and equipped to consider the problem from all angles and particularly from the point of view of juvenile delinquency and other anti-social behaviour, habits and attitudes of the adolescent class in the community.[153]

The principles of *Pitt-Mullis* were applied in *Abbey Investments Pty. Ltd.* v *Sydney City Council*[154] where an application was lodged for approval of a night-club in which strip shows were to be presented. The Court said that it was not relevant for the Council to "examine in detail the type of entertainment provided or to express a view as to whether it tends to deprave the participants and/or the onlookers".[155] This view of Hardie J. received implicit endorsement from Else-Mitchell J. in *Venus Enterprises Pty. Ltd.* v *Sydney City Council*[156] where in an appeal against refusal of approval for a sex-shop he said:

> [I]t is not for this Court to express any approval or disapproval of the use of the sort of articles or applicances which are sold or proposed to be sold in the premises, nor any of the practices . . . for which the shop may cater. Whether there is some therapeutic value in sex aids, books, slides, films or other articles . . . also appears to me to be beside the point.

Despite these fairly clear propositions, it will be seen that some examination of the type

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150 It will be recalled that "public interest" is a head of consideration which a council has been specifically entitled to consider under the statutory lists of considerations: see text at note 13 *supra* and the discussion at note 64 *supra.*

151 Note 22 *supra.* It should be noted that, strictly, the rules stated in this case so firmly, relate to the particular statutory context of the planning scheme ordinance in that case and similar expressions in similar ordinances. This point is made forcefully in *Goulburn City Council* v *Carey* (1975) 32 L.G.R.A. 277, 292, where it was said that the same limit did not apply to a council's decision making under the L.G. Act 1919 (N.S.W.) s.362 (control and regulation of places of public amusement).

152 Note 22 *supra.*

153 *Id.*, 237. Constrast two English cases where the social welfare of the young was considered a relevant matter on the issue, by a local authority of a licence, under the Cinematograph Act 1909 to open a film theatre on Sundays: *Harman* v *Butt* [1944] 1 K.B. 491; *Associated Provincial Picture* v *Wednesbury Corporation* note 8 *supra.*

154 (1965) 12 L.G.R.A. 51.

155 *Id.*, 54.

156 (1972) 25 L.G.R.A. 358.

157 *Id.*, 360.

of activity to be conducted is permitted under the head of "amenity". In *Randall* v *Northcote Corporation*[158] Griffith C. J. took the view that a council could refuse approval of a sports ground in the vicinity of a public house on the ground that drunkenness and disorder may be encouraged.[159] It is not clear whether the Chief Justice was primarily concerned with amenity matters or with moral welfare but the fact that he makes no attempt to distinguish the two may be significant.[160]

A consistently recurring issue which raises the question of moral welfare is that of premises with pin-ball machines. Cases dealing with this issue have tended to focus on two elements, first, the undesirable effect on the users of these machines and, secondly, the adverse effect on amenity of the congregation of a number of people for the purposes of playing this game. The two elements come together when the cases discuss the congregation of undesirables at pin-ball establishments. In *Parramatta City Council* v *Kriticos*,[161] where the Council sought an injunction to prevent the defendant using premises for pinball machines, the defendant argued that Council had no power to control such things within its town-planning discretions. On its face, it might seem irrelevant given the proposition quoted in *Abbey Investments*[162] that patrons on the premises played pinball. The defendant explicitly relied on *Pitt-Mullis* claiming that council was seeking to be a "moral supervisor of the conduct of people who might resort to the premises".[163] Else-Mitchell J. did not state any clear view as to the propriety of such behaviour by the Council if it be assumed that it had so behaved, but merely observed that a council's power under a planning scheme Ordinance was "not unlimited".[164] He went on to find for the council on the basis of amenity considerations, particularly considering the noise which might derive from the machines and juke boxes. His Honour also thought that mere "congregations of people" might give rise to disamenity.[165]

In Victoria, there appears to be much greater readiness to take on the moral supervisory role which Else-Mitchell J. apparently avoids. The Victorian Town Planning Appeals Tribunal has stated an adamant opposition to pin-ball machines on a number of occasions, most notably in *Stagen Nominees Pty. Ltd.* v *City of Springvale*[166] where it calls for such machines to be banned.[167] As in other cases[168] the Tribunal here clearly showed some concern for amenity aspects of such activities which include noise, bad language, appearance of premises, obstructing footpaths with bicycles and the assembly of persons in residential areas. However, the reasoning is by no means limited to this. In one case where

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158 Note 79 *supra.*

159 *Id.*, 108.

160 It may also be significant that this case has been relatively little cited in lower courts. In one such citation, in *Taylor* v *Tweed Shire Council* (1975) 34 L.G.R.A. 154 it was carefully distinguished on the basis of the statutory provisions which applied. Needham J. said that, in *Randall,* there was no express limitation upon the council's exercise of power because the power was for the council to register amusement grounds *as it saw fit.* Where a council is given a list of relevant considerations on which to decide a development application, even if not an exhaustive one, it would be difficult to say that the council would decide as it saw fit. Therefore, Needham J.'s distinction may have a wider applicability, even under the wide terms of Environmental Planning and Assessment Act 1979 (N.S.W.) s.90(1).

161 (1970) 91 W.N. (N.S.W.) 303.

162 *Id.*, 306.

163 *Ibid.*

164 *Ibid.*

165 *Id.*, 307.

166 (1979) 16 V.P.A. 163.

167 *Id.*, 166.

168 *Trivellas* v *City of Sunshine* (1979) 15 V.P.A. 187; *Fioramonte* v *City of Melbourne* (1979) 16 V.P.A. 60; *Abelas* v *City of Brighton* (1979) V.P.A. 187; *Elzaibak* v *City of Broadmeadows* (1979) 16 V.P.A. 234.

it was proposed to install pinball machines at a rollerskating rink, the "moral supervisory" character of the decision is apparent. The Tribunal said:

> [P]arents who are sending their children to engage in a sporting function such as rollerskating were entitled to know that that was the only activity that would be carried on.[169]

In other cases, the Victorian Tribunal has expressed concern at the proximity of pin-ball establishments to local schools on the basis that the machines were an "irresistable allurement"[170] to young children and often lead to the stealing of money by the young in order to play the games.[171] The machines have been perceived as "simple traps placed in the way of children going about their proper daily affairs" and are likened to the poker machines of adult's leisure time[172] although curiously, no distinction is observed in the degree of visual and co-ordination skills required for poker machines and pin-ball machines.

The final reference to moral welfare is brief. In considering an appeal in connection with a proposal to use land for a hotel the Local Government Appeals Tribunal admitted sociological evidence of crime patterns in the Newcastle area, despite the fact that the admissibility of such evidence was challenged by the appellant, who relied on the general doctrine asserted in *Pitt-Mullis*. The Board said that, ultimately, it placed little weight on the evidence but

> sociological factors could not always be discounted in any town planning survey [but] that, [in this case there was] a lack of community and social facilities and that such facilities were desirable . . . could be drawn from elementary town planning theory alone.[173]

The Board did not elaborate on the nature of this "theory".

(ii) Social Offence

In New South Wales land-use approval cannot be refused on moral welfare grounds but if there are amenity elements such as noise, obstruction or large congregations of persons then refusal is possible. "Social offence" has some overlap with such amenity considerations but includes other matters as well. Where pure "amenity" normally concerns physical characteristics of the environment such as clean air, quiet residential areas, safe and uncongested streets and compatible visual aesthetics, social offence seems to involve rather more metaphysical elements. Three elements are racial or ethnic inter-mixture, social compatibility and moral affront.

The Local Government Appeals Tribunal (N.S.W.) has had to consider whether to approve a child-care institution, managed by people of Turkish origin.[174] The proposal was subject to many written objections which were concerned with ethnic or racial matters. These objections were "of an emotive nature and appeared to have no reasonable basis."[175] Without discussing this point, the Tribunal declared these matters not to be

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169 *Sunshine Roller Skating Co.* v *City of Sunshine* (1979) 15 V.P.A. 161, 162. At the time of writing there is a pin-ball machine installed in the students common room, University of Sydney Law School. It is interesting to contemplate what the Tribunal would say of that, given the view expressed in *Sunshine*.

170 *Antonopoulos* v *Shire of Cranbourne* (1979) 15 V.P.A. 251, 253.

171 *Fioramonte* v *City of Melbourne* note 167 *supra*, 61.

172 *Stagen Nominees Pty. Ltd.* v *City of Springvale* note 166 *supra*, 167.

173 *McIntosh* v *Lake Macquarie Shire Council* (1974) 2 L.G.A.T.R. 340, 342.

174 *Australian-Turkish Child-Care and Social Welfare Co-operative* v *Auburn Municipal Council* (1978) 4 L.G.A.T.R. 189.

175 *Id.*, 191.

proper considerations in the appeal.[176] *Johnson* v *City of Fitzroy*[177] raises the same matter in the most tangential fashion. In that case there was an application for approval of a massage parlour (for which, all the Victorian cases tell us, read "brothel") and the Tribunal observed that the proposed establishment would be passed daily by women who were "predominantly of ethnic origin"[178] working at nearby factories. The application was refused by the tribunal because, *inter alia,* "there was a danger of these females being embarrassed by knowledge that the subject site was being used for the purpose of a massage parlour".[179] If the reason for the reference to ethnic origin was that such embarrassment which those women might feel would not be suffered by women (or perhaps men) of other ethnic groups then the Victorian Tribunal seems to be taking into account racial matters which its New South Wales counterpart would not do.

That Victorian case also serves to introduce the second element of "social offence", namely "social compatibility". Just as "amenity" embodies notions of visual aesthetic compatibility (houses with houses, factories with factories)[180] so too one may ask whether social offence (or perhaps the head of "public interest" or the new head[181] of "social effect in the locality"), embodies a notion of social compatibility. Should people going about their normal journey to and from work be made aware of, or face the possibility of being made aware of, a brothel in their path. *Johnson* says no. Other Victorian cases assert that brothels will have an adverse effect on residential amenity,[182] and since no argument is given as to why this is so it may be inferred that these decisions are based on the notion of social compatibility. In a similar case, where the proposed location of a brothel was a commercial area, the Tribunal said "the very nature of the premises and their existence would itself introduce a denigration of the area"[183] and that

> in an area such as this matters such as good taste, cleanliness and the better things of life all go to promote an attractive and acceptable business and commercial area . . . We do not see any reason why the members of the public who go there for legitimate and pleasant purposes should have to rub shoulders with persons visiting premises such as those proposed.[184]

The Tribunal urged the State Government to intervene declaring that town planning laws were never intended to deal with such matters.

Another aspect of social compatibility is the attraction of "undesirables" to an area. If a proposed use is likely to attract undesirables this is a relevant consideration. Else-Mitchell J. in *Venus Enterprises Pty. Ltd.* v *Sydney City Council*[185] implicitly accepts the view that even if the proposed sex shop attracts people of deviant and permissive standards the amenity of the area will not suffer because he agreed with evidence that the "King's Cross district has acquired a reputation as a resort of prostitutes, homo-

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176 *Ibid, Quaere.* Whether, if the Board had taken the view that ethnic or racial matters were relevant, this would not contravene the Anti-Discrimination Act 1977 (N.S.W.) s.19, noting s.7 and the definition of "services" in s.4..

177 (1980) 16 V.P.A. 168.

178 *Id.*, 469.

179 *Ibid.*

180 "The solitary shop in a residential street . . ." per Else-Mitchell J. note 42 *supra;* " . . . a congenial locality of predominantly single-unit homes": *Ferro Constructions Pty. Ltd.* v *Brisbane City Council* (1968) 19 L.G.R.A. 282, 284.

181 Under Environmental Planning and Assessment Act 1979 (N.S.W.), s.90 (1) (d).

182 *See e.g., Kowalczyk* v *City of Essendon* (1977) 8 V.P.A. 194; *Gleie* v *Melbourne and Metropolitan Board of Works* (1979) 15 V.P.A. 207.

183 *Burton* v *City of Geelong* (1979) 16 V.P.A. 107, 109.

184 *Id.*, 110.

185 Note 156 *supra.*

sexuals and people in search of various forms of immoral or deviant excitement".[186] If a proposed use will attract "rowdy or unreasonable sections of the community . . . whose conduct would not take into account but would ignore the feelings or susceptibilities of those living in the vicinity",[187] or, more broadly, if the activity encourages "anti-social conduct",[188] these would be relevant matters.[189] *A fortiori,* if such conduct simply creates noise which disturbs the amenity, this may be a ground of refusal.[190] A South Australian authority has said, however, that it is not proper "to *speculate* upon the possible bad habits of possible tenants"[191] with respect to noise-making when considering an application for approval of a flat building.

The final element of social offence is what may be called "moral affront". This is not to be sharply distinguished from the aspects of "social compatibility" which have been discussed. Certainly the objection to the establishment of a brothel rests on the assumption that people passing it by in the ordinary couse of business would be morally affronted. However, the particular objection in *Johnson*[192] seemed to focus on the location, rather than the brothel *per se* although there was no endorsement of the latter. "Moral affront", to the extent that it is distinguishable as a separate concept, contains the element of objection to an activity *per se.*

Hence, in *Randall* v *Northcote Corporation*[193] Mr. Justice O'Connor objected to the location of a public amusement ground adjacent to a hotel. The objection did not focus on the location however, but rather on what might follow from the location, namely, that crowds of people attending football matches would consume alcohol and therefore might act in a way "offensive or shocking to ordinary notions of decency and good order".[194] It was not merely the location of the grounds but the offensiveness of behaviour which led him to refuse the approval.

The only other examples of moral affront which will be dealt with is that of sex shops. Else-Mitchell J. took the view that if people would be "affronted or would find any embarrassment"[195] at the presence of a sex shop this would be a relevant consideration in deciding an application for approval. In *Venus Enterprises* he found that there would be no such affront. However, he did say:

> [t]he site, it was claimed, is in too public a place where it is sure to cause offence to a substantial segment of the community . . .

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186 *Id.,* 360. In the Local Government Court of Queensland it was considered relevant in an appeal against refusal of consent to a nudist colony that "evidence reveals that the use proposed is not likely to . . . attract perverts or undesirables to the area": *Alfred* v *Beaudesert Shire Council* (1978) 37 L.G.R.A. 404.

187 *Foley* v *Waverley Municipal Council* (1962) 8 L.G.R.A. 26,31.

188 *Abbey Investments Pty. Ltd.* v *Sydney City Council* note 154 *supra,* 55; *Venus Enterprises Pty. Ltd.* note 44 *supra.*

189 Contrast *Skateland Pty. Ltd.* v *City of Frankston* note 28 *supra,* 61 where the "likelihood of vandalism . . . [and] the presence of unruly youths" was not a "proper ground for denying a reasonable use". These views of the Victorian Tribunal should be contrasted with its views on pinball parlours, *see* notes 166-172 *supra.*

190 See *e.g. 729 Club Ltd.* v *North Sydney Municipal Council* (1963) 10 L.G.R.A. 109; *Abbey Investments Pty. Ltd.* v *Sydney City Council* note 154 *supra; North Sydney Municipal Council* v *Allen Commercial Constructions Pty. Ltd.* (1969) 18 L.G.R.A. 1; but for a good illustration of the difficulty of distinguishing "physical" amenity from "social compatibility" see *Reg (Hanna)* v *Ministry of Health and Government* [1966] N.I.L.R. 52, 63 concerning noise on Sundays.

191 *Minborough Pty Ltd.* v *City of Burnside* (1968) 17 L.G.R.A. 330, 331. See also *Sharpin* v *Richmond River Shire Council* (1976) L.G.A.T.R. 395.

192 Note 177 *supra.*

193 Note 79 *supra.*

194 *Ibid.*

195 Note 156 *supra,* 361.

> [And] the . . . claim would [if true] be a sound ground for refusing planning permission.[196]

In a subsequent sex shop case[197] the council attempted to prove the affront and embarrasment which had not demonstrated in the abovementioned case. In particular an attempt was made to show that persons were affronted or embarrassed "not in a moral or social sense but in terms of "taste" . . . being the ability to recognize pleasantness, congeniality, that which is in harmony with surroundings and may be regarded as modest as opposed to brazen and distasteful".[198] The reason for this distinction can be traced to the *Pitt-Mullis* doctrine, although in the earlier *Venus Enterprise* case, Else-Mitchell J. did not insist that the affront or embarrassment which he would allow as relevant would exclude affront "in a moral and social sense". Nevertheless, the Local Government Appeals Tribunal rejected the attempted distinction.[199] It is not clear from the Board's judgment whether it implicitly took a narrower view of relevant matters than did Else-Mitchell J. The Council did not attempt to argue that affront in a moral and social sense was relevant and could be proved to exist. The Board did not say whether it was relevant. Rather, having gone to some pains to decide one could not distinguish it from affront in terms of "taste", the Board then asserted that, if such a distinction were possible, "taste affront" would not be a relevant matter and could not here be shown to exist.[200]

(iv) Taste

In *Venus Enterprises* the Board distinguished two matters of taste; "taste as related to the general question of use"[201] and taste in relation to certain other specific matters. The former has been largely dealt with under the sub-heading "social offence". The latter will be dealt with here. Two further sub-topics should be specified: compatibility and visual aesthetics.

In some respects compatibility has already been canvassed.[202] However, there is a further sense of compatibility which can be treated separately. "Social compatibility", discussed earlier, is concerned with the relationship between day to day activities and some proposed land-use. This further sense of compatibility, which might be called "physical compatibility", is a more abstract concept. It is the compatibility which can be observed between one land-use and another, whereas "social compatibility" is that between an observer and a land-use. Examples, given in the second *Venus Enterprises* case include the placement of a funeral parlour next to a convalescent home, an incinerator next to a hospital,[203] a hotel next to a school, a pet foods shop adjacent to a butcher or a licensed hotel or a gambling establishment adjacent to a place of worship.[204] It would seem clear that such matters of compatibility are irrelevant in the view of the Local Government Appeals Tribunal. In support of this proposition, it relied on the observation that, in certain zones, diverse types of land-uses are permissable without

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196 *Id.*, 360.
197 *Id.*
198 *Id.*, 156.
199 *Ibid.*
200 *Ibid.*
201 *Id.*, 157.
202 At pp. *supra.*
203 *Woollahra Municipal Council* v *Sydney City Council* (1966) 12 L.G.R.A. 175, 185 where such a matter of compatibility was raised partly on the basis of evidence as to the "possible functional resemblance of the proposed incinerator to a crematorium", but which was rejected, not as irrelevant but as not proved.
204 See *Sir Paul Strzelek House Co-operative Ltd.* v *Ashfield Municipal Council* (1957) 3 L.G.R.A. 79,92, for a discussion of the "amenity compatibility" of a club in the vicinity of a church.

consent (subject to conditions) and such compatibilities would not be controlled in those cases. Also, the Board quoted extensively from *Pitt-Mullis* in support of the view that such considerations would be a trespass on "foreign fields of public policy in the general moral and social sense".[205]

However, visual aesthetics are another matter. The general proposition is that they are to be regarded as part of amenity considerations.[206] Hence, in both the *Venus Enterprises* cases the nature of the facade of the establishments was considered; in the first, to impose a condition that the window be opaque;[207] and in the second, to consider whether the unattractiveness of an opaque window was such as to require refusal of approval (which, the Board held, it was not).[208] In other cases concern has been shown for the aesthetics of highways,[209] landscaping of factories[210] and the screening of unsightly fixtures.[211] It has also been conceded that visual aesthetics have also been admitted as relevant matters when councils exercise their powers to regulate advertisements under the Local Government Act 1919 (N.S.W.) section 510.[212]

IV THE EFFECT OF SECTION 90(d) ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 (N.S.W.)

The wording of section 90(d) which commenced on 1 September, 1980, is as follows:

> 90(1) In determining a development application, a consent authority shall take into consideration such of the following matters as are of relevance to the development, the subject of that development application:
>
> . . .
>
> (d) the social effect and the economic effect of that development in the locality.

Prior to the enactment of this section, neither this provision nor any equivalent existed in the land-use control statutes of N.S.W. The most general provisions of statutes dealing with the range of considerations open to consent authorities (as they are now called) have already been examined.[213] The issues to be considered are: the intention of the change in the form of such provisions by the introduction of paragraph (d) (and certain other general paragraphs[214]) and, most importantly, their ramifications.

The matter of intention can be easily disposed of, as it has been declared that no change was intended.[215] Nevertheless, it seems curious that the necessary supefluity

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205 Note 44 *supra*, 158.
206 See *e.g., Attunga Pty. Ltd.* v *Holroyd Municipal Council* (1966) 13 L.G.R.A. 350.
207 Note 156 *supra*, 361.
208 Note 44 *supra*, 157.
209 Note 97 *supra*, 402-403. *Austral Brick Co. Pty. Ltd.* v *Blacktown Municipal Council* (1969) 18 L.G.R.A. 310, 313.
210 *Master Foods of Australia Pty. Ltd.* v *Botany Municipal Council* (1969) 17 L.G.R.A. 401.
211 *Riches* v *Gosford Shire Council* (1974) 2 L.G.A.T.R. 447.
212 See *e.g., Ankerwyke Holdings Pty. Ltd.* v *Willoughby Municipal Council* (1976) 4 L.G.A.T.R. 1026; see also *Claude Neon Ltd.* v *City of South Melbourne [No. 3]* (1979) 15 V.P.A. 181.
213 See text at note 13, 14 *supra*.
214 In particular the following paragraphs of s.90(1):
(b) the impact of that development on the environment (whether or not the subject of an environmental impact statement) and, where harm to the environment is likely to be caused, any means that may be employed to protect the environment or to mitigate that harm; (c) the effect of that development on the landscape or scenic quality of the locality; . . . (k) whether public transport services are necessary and, if so, whether they are available and adequate for that development; (l) whether utility services are available and adequate for that development".
215 A view expressed by Mr. Leon Hort, Chief Legal Officer, Department of Environment and Planning, N.S.W., in speaking from the floor at a conference, Local Government and Torts, held at the University of N.S.W., Saturday, 8 November, 1980.

of words which has been introduced into the statute is of words so carefully chosen as to echo, if not match precisely, the language of Sugerman J. in *Ampol* v *Warringah*[216] If one were to conclude that the Judge's words reflected no general principle which existed prior to the new law one might concede that paragraph (d) effects no change. However, the preceding discussion of the "old doctrine" suggests, at least, that even though subject to many qualifications the principle enunciated by Sugerman J. had substance. Furthermore, one may observe that that doctrine, for all its qualifications, has never been directly or expressly contradicted. The Land and Environment Court, a creature of the new legislation, has itself, in a case under the old law,[217] expressly endorsed that doctrine by way of, *inter alia,* an unacknowledged quotation from Mr. Justice Sugerman's proposition.[218] In doing so the Court expressly left open the effect of "any changes in planning policy wrought by the Environmental Planning and Assessment Act, 1979".[219] The Chief Judge[220] of the Land and Environment Court has also endorsed this older doctrine. In a recent case[221] he said, "A planning authority is not a custodian of morals. However, that does not mean that, under the guise of tolerance, it should turn its back on considerations of urban amenity and aesthetics".[222] He points out that in an earlier part of the judgment[223] that this was also a case under the "old law",[224] so the question, central to this discussion, of whether his endorsement of that doctrine will stand in the face of paragraph (d), remains to be answered.

More particularly, a question arises whether the reference to social effect in paragraph (d) allows a council to be a "custodian of morals". Can a council limit the opening hours[225] of an establishment for youth entertainment on the ground that the moral welfare of those attending will be protected by sending them home early? Can a council impose a condition on approval of use of land for a pharmacy that contraceptives not be sold, or at least not to certain classes of persons? Can certain books be prohibited from sale when approval of a bookshop is given? It would be hard to deny that these and many other land-uses including such as have been discussed above will have a social effect in the particular proposed locality. What limit is there on council's power to deal with these effects? The parameters of council's powers are yet to be determined.

Reference to legitimate "environmental planning considerations" might be a basis for drawing a boundary. The known local presence of a brothel, sex-shop, or indeed the congregation of young people at a pin-ball parlour might all be said to constitute part of one's "surroundings". These are relevant matters just as they might have been under the previous concepts of "moral affront" and possibly "social compatibility". Where the matter of concern is solely one of individual moral welfare it is hard to see how this

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216 Note 16 *supra.*

217 *Harrison* v *Leichhardt Municipal Council* 5 February, 1981, Land and Environment Court, unreported, Senior Assessor Bignold. This case is an appeal against refusals of development applications, such applications not having been determined prior to 1 September, 1980.

218 *Id.*, 36.

219 *Ibid.*

220 Mr. Justice James McClelland.

221 *Snashall* v *Sydney City Council* No. 10117 of 1981, 15 June, 1981, unreported.

222 *Id.*, 12.

223 *Id.*, 4.

224 In this case, City of Sydney Planning Scheme Ordinance cl.32 which has been expressly replaced by s.90(1): *see* Order under the Miscellaneous Acts (Planning) Repeal and Amendment Act, 1979, published New South Wales Government Gazette No. 139, 26 September, 1980.

225 It should be noted that conditions limiting opening hours are allowable, provided they are grounded on relevant considerations: *see Allen Commercial Constructions Pty. Ltd.* v *North Sydney Municipal Council* (1970) 20 L.G.R.A. 208.

could be regarded as part of the surroundings. Perhaps, therefore, under the new law a local council can be no more a "custodian of morals"[226] than under the old law.

In summary, the use of the phrase "environmental planning consideration" as a general label for relevant matters does not seem, like the earlier "town planning considerations", a particularly useful basis from which to argue that paragraph (d) should receive a generous interpretation. It is not clear that the phrase has any greater width, particularly if the definition of "environment" is interpreted as having a spacial connotation. However, as the phrase is not a strict statutory expression, it may not be appropriate to burden its use by the strict application of the definition of "environment".

Further, in the earlier cases the distinction was not always simply between "town planning considerations" and other matters, but rather between legitimate matters and essays "into the field of general economic policy *of a kind which was not intended to be entrusted to local councils.*"[227] On the basis of that reasoning, and for more general reasons of policy, one could put a gloss on paragraph (d) so that it would read, "the social effect and the economic effect . . . in the locality *to the extent that these matters proper to the consent authority.*" Of course, this begs all the same questions which have been posed as to the proper role of local government in the planning hierarchy.

An emphasis on the statutory language of paragraph (d) alone suggests unacceptably wide powers for local authorities. A method like that used by the judges in earlier cases (suitably modified to take into account the rhetorical shifts in statutory language) seems to allow only a slight expansion in those powers. What alternative interpretations of paragraph (d) are possible and what is the importance of its interpretation?

(i) Policy

The scope of section 90(1) (d) is important for a number of reasons. It is clear from the number of cases that on numerous occasions local councils have attempted to make decisions of a very ambitious nature. Often the council is not equipped to make the decision in the proper way either because of the paucity of the policy framework or the insufficiency of the data on which to make a judgment. An attempt to act in the best interests of the milk industry[228] when the council probably had no detailed knowledge of the working of that industry could not be justified. Similarly unjustified would be decisions purporting to regulate business competition[229] when councils almost certainly had no knowledge of the price-elasticities of supply and demand for the products to be sold. Clearly, limitations on council's powers are appropriate.

Council decisions are often of the most illiberal and socially narrow kind. Examples are provided by the decisions of the Victorian Planning Appeals Tribunal supporting council decisions with regard to pin-ball parlours.[230] Decisions on development applications may have a significant impact on the liberty of both the applicant and his customers. There may be "amenity" reasons for the infringement of one person's liberty in order to secure the liberty of another. Some of the cases[231] may be justified on this basis but others could only be justified on the most illiberal and paternalistic grounds.[232]

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226 See the text accompanying note 225 *supra.*
227 *Neptune Oil Pty. Ltd.* note 27 *supra.*
228 As in *Long* v *Copmanhurst Shire Council* note 95 *supra.*
229 As in *Kentucky Fried Chicken* v *Gantidis* note 44 *supra.*
230 See the cases at notes 166-172.
231 *E.g., Parramatta City Council* v *Kriticos* note 161 *supra.*
232 *Stagen Nominees Pty. Ltd.* v *City of Springvale* note 166 *supra;* for a recent and challenging exposition of liberal political theory see B. Ackerman, *Social Justice in the Liberal State* (1980).

A wide interpretation of paragraph (d) may lead local authorities, other consent authorities or the court, to make decisions involving matters beyond their competence and in which values may be asserted that offend even widely held perceptions of how society should be structured. Without careful and public consideration of the exercise of power decisions may be reached under a veneer of administrative and legal propriety.

However, a wide interpretation of section 90(1) (d) can have beneficial effects. Should the section enable a local council to improve the position of disadvantaged groups by imposing contribution conditions on development approvals so as to subsidize low income housing or should they by refusing applications exclude the disadvantaged from city areas?[233]

In light of the broadened provisions regarding contribution conditions,[234] even though ostensibly confined to "public amenities and public services", the opportunity for councils to seek such ends has expanded considerably. The interaction of these provisions with paragraph (d) will be of considerable importance.

More generally, paragraph (d) may be significant because individual development applications will have efficiency and equity effects within local government areas and between such areas. Whether these effects are termed "social" or "economic" does not matter. If paragraph (d) allows adverse equity and efficiency effects to be controlled or prevented, this will be welcome. Note however, that the expression "in the locality" may not allow councils to deal with spillover effects going beyond the immediate vicinity of the development.[235] It is essential that local governments be prevented from considering matters going beyond the local government area but whether the boundary should be narrower than that suggested by the words "in the locality" might be doubted.

Paragraph (d) may not only allow councils to avoid spillover effects and other adverse consequences of development. Arguably, it may also allow councils to create them by the land-use control decisions. Decisions which will have the effect of excluding certain types of land-use in order to maintain land values in a locality would exemplify such results. Decisions of this type would exacerbate existing problems of economic disadvantage even more than present considerations of amenity. As was suggested earlier, it may be that councils could use paragraph (d) in a positive way on behalf of disadvantaged groups, even to the extent of contradicting the earlier, rather conservative, attitude to "amenity". Any such attempts by councils should receive the encouragement of the Land and Environment Court. That Court should, however, also use its power to resist any employment of paragraph (d) to produce adverse outcomes of the type discussed.

In proposing such a policy for the Court reference should be made to the way it might proceed in its determination. It has been suggested that the correct method for the Land and Valuation Court was as follows:

> The Court must derive what guidance it can from the legislation and such evidence as is brought before it, with such assistance as may be afforded by matters of judicial notice or general reasoning. The Court is not a policy-making body but is concerned with implementation under a scheme which confers wide discretions and in a field where the boundary between policy-making and implementation is not always easy to define. In so far as the Court is concerned with ascertaining policy, it must do so as well as it can until the material already mentioned are available to it.[236]

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233 See *e.g.* D. Hagman, Urban and Development Control Law (1975); R. Fishman *Housing for all Under Law* (1978).

234 Environmental Planning and Assessment Act 1979 (N.S.W.). s.94.

235 As in *Rio Pioneer Gravel* note 42 *supra.*

236 *Ready Mixed Concrete (N.S.W.) Pty. Ltd.* v *Sydney City Council* (1952) 18 L.G.R. 206, 208.

237 Whether the Land and Valuation Court, or its successor, the Land and Environment Court.

Contrary to Mr. Justice Sugerman's view that the Court is not a policy-making body it is contended that not only is it inevitable that the Court will be such a body, it should openly acknowledge this fact and seek to fill the policy void left by the legislature when the new legislation was introduced. A court with responsibility for enforcing laws of the type discussed in this article cannot resolve difficult questions in the way proposed by His Honour. The Court should not rely merely on the "evidence brought before it"; it must go beyond a purely adversarial method and seek theory, evidence and argument on its own initiative in order to allow for creative use of section 90(1) (d) in the service of a just allocation and distribution of resources.

V CONCLUSION

The change in the law introduced by section 90(1) (d) of the Environmental Planning and Assessment Act 1979 (N.S.W.) allows for an expansion, to some degree at least, of the matters relevant for local councils in considering development applications and, necessarily, it expands such matters for the Land and Environment Court. The new range of relevant matters allows for both satisfactory and unsatisfactory decisions, and for land-use control to become a tool for a more just allocation of resources or the opposite. A great responsibility is placed, initially upon local authorities and, on appeal, upon the Land and Environment Court. The Court is well placed in the land-use control system to develop policies and principles to effect a just allocation of resources and, in the absence of any clear guidance from the legislature, has a duty to do so; section 90(1) (d) requires and allows such a development.