

PAPER 3

THE ADEQUACY OF PLANNING PROCEDURES IN  
RELATION TO OUR NEEDS

P.M. SALMON ESQ.

Barrister  
Auckland

THE ADEQUACY OF PLANNING PROCEDURES IN RELATION TO OUR NEEDS

If one is to consider land use planning in relation to the needs of society one must look at questions such as why we have planning at all and what conflicting aims and aspirations must be provided for in an adequate planning system.

Some form of city planning of course has been in existence for thousands of years but the regulation of the use of land is of relatively recent origin. In England it came into existence as a result of a search which had gone on for a number of years for ways to improve the standard of housing. It was preceded by legislation directed to public health and with the inspection and repair of substandard houses.

In the United States land use controls developed through the zoning system. As Richard F. Babcock says in his book 'The Zoning Game' at page 3 :-

"The insulation of the single family detached dwelling was a primary objective of the early zoning ordinances, and this objective is predominant today although in every other respect the zoning technique has undergone changes so dramatic as to make almost impossible a comparison of the device as it appeared in the 1920's with its progeny four decades later".

While planning in England developed in a way which resulted in control being exercised on a discretionary and ad hoc basis the zoning technique was refined and developed and adopted as a basic planning tool in countries such as Canada, Australia and New Zealand. In New Zealand a desire for certainty in planning in distinction to the discretionary approach adopted in England has strongly influenced the development of planning in this country. As F.B. Adams J. said in Wong v Northcote Borough [1952] N.Z.L.R. 417 at p. 423 :-

"... it is the essence of "the rule of law" that the rights and duties of the citizen should be clearly defined and not left to the discretion of public officials or bodies".

As I see the position in New Zealand a constant tension has existed between the desire for certainty on the part of those owning land and the desire for the retention of discretion on the part of those controlling the use of land. Our Courts have recognised that good planning requires both these elements - see Ideal Laundry v Petone Borough [1957] N.Z.L.R. 1038.

The objectives of the planning process in New Zealand must of course be sought in the provisions of the Act itself. Section 4 of the 1977

Act provides that Regional, District and Maritime planning shall have for their general purposes the wise use and management of the resources and the direction and control of the development of a region, district or area in such a way as will most effectively promote and safeguard the health, safety, convenience and the economic, cultural, social and general welfare of the people and the amenities of every part of the region, district or area. These general purposes are stated to be subject to Section 3 which sets out matters which are declared to be of national importance and which must be recognised and provided for in the preparation, implementation and administration of schemes.

In addition to those matters provided for in the 1953 Act the new Act provides in Section 3 for the following further matters of national importance :-

- (i) The conservation, protection, and advancement of the physical, cultural, and social environment:
- (ii) The wise use and management of New Zealand's resources:
- (iii) The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities:
- (iv) The relationship of the Maori people and their culture and traditions with their ancestral land.

I consider it most important for there to be some national direction in relation to matters considered to be of national importance. The proper implementation of these national policies depends of course on the quality of the planning in the particular area and of the quality of the decision makers both at local level and at the appeal level.

By comparison with the 1953 Act it is I think noteworthy that the purpose of schemes has been substantially widened particularly by the reference to the wise use and management of the resources of the region, district or area. This emphasis on the wise use and management of resources and the statement in Section 3 that this should be a matter of national importance raises interesting prospects for planners. It seems to me to now be possible for planning schemes to control the rate and manner of use of natural resources of various kinds or even in appropriate circumstances to prohibit the use. In providing this as one of the functions of planning I believe that the legislature has correctly seen this as a need in the community at this stage in our development. Whether Councils have the resources and expertise to engage in this type of planning is another matter altogether.

The needs that are provided for then in the new Act are the need to use and manage our resources wisely and the need to control the development and direction of development of the area. It is significant too that in the preparation of schemes regard must be had to the principles and objectives of the Soil Conservation and Rivers Control Act 1951 and the Water and Soil Conservation Act 1967. This seems to me to be a recognition of the fact that proper planning must have regard to a much wider range of considerations than has hitherto been thought to be the case.

The other significant addition to the purposes of planning is the reference to the promotion and safeguarding of the "cultural" welfare of the people. When this is combined with the reference in the list of matters of national importance to the relationship of the Maori people and their culture and traditions with their ancestral land and the specific reference in the Second Schedule to provisions for Marae and ancillary uses, Urupa Reserves, Pa and other traditional and cultural Maori uses it can be seen that Councils now have a very direct responsibility to take into account minority needs, particularly those of the Maori people.

In fulfilling the planning purposes outlined above it is necessary too, to balance the desire for certainty against the desirability of retaining some discretion.

The purpose of the balance of this paper will be to endeavour to assess whether the procedures and incentives provided for in the Act are sufficient to achieve these purposes.

The key to our planning system is the preparation of schemes. In terms of need therefore the first need to be fulfilled is that the authorities responsible for preparation of schemes should have the resources both in terms of finance and staff available to enable them to fulfill their obligations. In this regard one would have expected to find in the Act some provision empowering Government to make grants where necessary or to provide expert assistance of one sort or another to Councils which were unable through lack of resources to provide an adequate planning scheme. In terms of the conservation of resources it is often likely to be the case that unexploited resources are situated within the jurisdiction of a territorial local authority with very limited finance. The Act does give the Minister the right to take such steps as he considers necessary to have a district scheme prepared and made operative as quickly as possible in the event of failure by the Council to do so - Section 39. It also provides that the Minister may for that purpose employ such planning consultants

and other persons as he considers to be required. However, the emphasis is placed on the Minister taking action on the default of a Council. A more positive approach would have been to give the Council the right to seek the Minister's assistance or to apply for money grants to enable them to employ the necessary experts.

Our planning legislation has always recognised the rights of people affected by planning decisions to have the right to object to proposals before they become operative. The widened purposes of planning schemes necessitates an expanded opportunity for public involvement and I am pleased to see that the Act now gives a right to object not only to people affected but also to any person representing some relevant aspect of the public interest.

When we come to the processes that lead up to a scheme becoming operative and to the applications that can be made pursuant to that scheme we find that the procedures in the Act are very much as they were previously. In connection with district schemes it is recognised that people may wish to make representations on a scheme but may not wish to object to it. The Act provides that people may make submissions or objections. The opportunity for such submissions or objections however does not arise until the scheme has been prepared and publicly notified. Particularly as far as submissions are concerned I think that there should be an opportunity on some formal basis for submissions to be called for as to the contents of the scheme before it is finally prepared and advertised. In the very nature of things a scheme once advertised takes on a prima facie air of finality, and the onus tends to be on those wanting to change it to persuade the promoters of the scheme that it should be changed.

In the preparation of town planning schemes it is interesting to speculate on the significance of the lack of specific reference to zoning or to the segregation of uses. In the Second Schedule to the 1953 Act the first matter listed to be dealt with in district schemes was the zoning or definition of areas to be used exclusively or principally for specified purposes or classes of purposes. No similar provision appears in the Second Schedule to the 1977 Act. The nearest the 1977 Act comes to suggesting some form of zoning is in subsection (4) of Section 36 when it provides for district schemes to distinguish between classes of development, uses and buildings in all or any part or parts of the district. The emphasis in that subsection is on the classification of development, uses and buildings into those permitted as of right, those permitted as conditional uses and those permitted subject to the exercise of powers and discretions. It seems to me that this change of emphasis

reflects an acceptance of the proposition that the segregation of different types of uses is not necessarily desirable. Presumably much more emphasis will be placed on performance standards rather than segregation in future schemes.

Bearing in mind the importance of certainty in the control of land use I cannot see how we can move away altogether from the zoning concept. But what we must recognise is that zoning is a legislative technique, the integrity of which should not be an untouchable premise, but an assumption subject to continuous challenge and to proof of its present validity. Babcock notes that zoning does itself a disservice when it tries to dignify its techniques, objectives, devices and goals with more pretentious labels. The danger is that the changes in techniques necessary to meet changes in demand will be discouraged if the technique comes to be regarded as a principle. Hopefully the reduced emphasis on zoning will encourage planners and perhaps more importantly local body politicians to regard it as a technique rather than a principle. Just because the main use in an area is residential does not preclude other uses but residential uses should be protected against harmful uses. The question is whether uses other than residential harmonize with the residential character so as not to result in preventable injury.

The net result then of the changes to which I have been referring is to introduce a note of flexibility into the techniques that may be adopted. This would seem to me to be a desirable change provided always that the resulting ordinances can provide the necessary degree of certainty.

When it comes to the hearing of objections the position as already indicated is very much as it was previously. One change that will ease the load on Councils is that under Section 48 it is now made clear that the Council may appoint one or more committees to hear objections. One matter that has not been clarified is the question of whether or not the objector is entitled to call evidence in support of his objection. Subsection (3) of Section 48 gives an objector the right to be heard either personally or by his counsel or duly authorised representative and subsection (4) gives the Council the power to summon witnesses. There is however no right given to an objector to call witnesses in support of his objection.

Although the present system of receiving, advertising and hearing objections has been criticised from time to time it is difficult to think of any better system. Now that the right to object has been widened to include any body or person representing some relevant

aspect of the public interest I am of the opinion that the Act gives a reasonable opportunity for a full and adequate discussion of the contents of a proposed scheme.

Administration of District Schemes :

Once again the situation is very much as it was before. There is provision for conditional use applications and specified departures and for applications to permit works contrary to a proposed change. The power to grant dispensations and waivers from the scheme is very much as it was in the 1953 Act. It is now made clear that if the various consents required before a dispensation or waiver can be granted are not forthcoming the Council's powers may be exercised on a notified application - see Section 76 (4). There is of course too the special class of use which is permitted subject to powers and discretions specified in the scheme relating to landscaping and design and external appearance of buildings. However, another speaker will be dealing specifically with the scope of discretionary powers and I will gratefully leave a full discussion of that subject to him.

Town planning applications may now be heard by a Commissioner appointed for that purpose by the Council. The Council still makes the final decision but the Commissioner makes a recommendation to the Council. This power could relieve Councillors of much time-consuming work but it is to be hoped that if Commissioners are appointed they will be selected for their ability rather than their availability.

In the case of many town planning applications everyone involved knows that the hearing before the Council is only a preliminary to the real battle before the Tribunal. But in many cases it is a very expensive and time-consuming preliminary. I am sorry that the opportunity has not been taken to provide a procedure whereby such matters can be brought before the Tribunal with the minimum of delay and expense. It would still be necessary for the Council to receive sufficient information to enable it to form a view on the matter but this could be done by the presentation of written submissions without the necessity for a formal hearing.

Despite the fact that schemes must be reviewed every five years it is often the case, particularly in fast developing areas, that development proposals are made which are not provided for in the operative scheme and are not suited to the specified departure procedure. In such cases if the Council refuses to make a change to its scheme the only remedy left is that of a specified departure.

I think it is a pity that Parliament did not accept the Law Society's suggestion that there should be provision to require a Council to make a change to its scheme upon request. After all one must bear in mind that although schemes must be reviewed every five years there is usually a much longer period of time between the date when objections to one proposed scheme close and the date when objections to the next one can be made. The Act does make provision in Section 56 for the Minister to require changes to be made to the district scheme. I can see no reason why a similar opportunity should not have been given to anyone, perhaps together with the power for the Tribunal to order that the costs of the change be paid by the promoter in appropriate cases.

I welcome the new provision in Section 71 providing for a procedure whereby application may be made to vary or cancel any condition and also the provision in Section 153 which enables application to be made to the Tribunal for a declaration as to whether or not the use is a permitted one either pursuant to the scheme or as an existing one.

I consider it unfortunate that the 1977 Act has not done anything to reduce or streamline the multiplicity of procedures which must be adopted in the case of many development projects. In the case of a development of any substance the following procedures may have to be instituted :-

- (i) An environmental impact report to be prepared at the expense of the applicant for subsequent audit by the Commission for the Environment.
- (ii) An application for subdivisional approval under the provisions of the Municipal Corporations Act or the Counties Act with subsequent rights of appeal to the Tribunal.
- (iii) Possibly a change to the regional planning scheme.
- (iv) Probably an application for a water right under the Water & Soil Conservation Act, once again with a right of appeal to the Tribunal.
- (v) Probably a specified departure application to the local authority or a change to the authority's scheme with subsequent rights of appeal.

In relation to each step, with the exception of the application for subdivisional approval, there is the opportunity for public



participation and even in the case of approval of a subdivision this distinction may disappear next year. Proposals which may be very much in the public interest can be so expensive and so long drawn out that only the most determined and tenacious developer will stay the course. We can all think of examples of what I am referring to.

There should be some procedure whereby an application can be made for development rights which could be forwarded to each of the authorities concerned and publicly notified for objection. In such a case there would seem little point in having formal hearings before each of the authorities. Rather their involvement should be limited to the consideration of written submissions perhaps supported by an appearance by the interested parties if they or the authority concerned particularly requests it. However, the objective should be to bring the whole matter before the Tribunal for determination as expeditiously as possible. Such a procedure is not only desirable from the developer's point of view, it is highly desirable in the public interest because it would reduce the expense to the public and would also ensure that the total impact on the environment of a proposal would be considered at one time rather than piecemeal.

The Tribunal :

The body which hears town planning and other appeals has had a change of name and becomes a Court of Record. Obviously the intention is to increase its status and I hope that this will be the result. My personal view however is that because of the importance to the community of the matters which come before him the Chairman should have a higher status than that of a Magistrate. I think that it is absolutely essential that the right people should be attracted to the position of Chairman of the Tribunal. They must be members of the profession who, in the words of Justice Holmes, "are aware of the felt necessities of the times". They should be people whose practice at the Bar has included extensive experience in environmental law. We have been indeed fortunate in the quality of some of our Appeal Board Chairmen and I believe that this has been due to a real sense of vocation on their part. I would doubt however whether we can always rely on this as a sufficient motivation.

Apart from the Chairman the membership of the Tribunal, as was the case in the 1953 Act, consists of two persons who in effect are recommended by the Municipal Association and the Counties Association, and one other person. It is at least arguable that the present provisions do not result in a sufficiently representative tribunal. For example, although the Tribunals spend most of their time dealing

with planning matters there is no provision for the New Zealand Planning Institute to be consulted in relation to appointees. Then too, an increasing part of the Tribunal's work has to do with matters relating to applications for water rights. There is no provision for the appointment of anyone with expertise in this field. Despite the very extensive changes that have taken place since 1953 in relation both to the jurisdiction of the Tribunals and the complexity of planning the provisions relating to membership of the Tribunal are in essence exactly the same as those enacted 25 years ago.

Compensation :

The compensation rights under the Act are essentially the same as they were under the 1953 Act. Nor is the legislation any easier to follow than it was under that Act. I have never been able to decide whether the lack of claims for compensation under the Planning Act reflects the lack of any real loss caused to the community by planning proposals or an inability to follow the convolutions of the relevant section of the Act. I suspect it might be a bit of both. Certainly I think that most people find that they benefit from planning rather than otherwise, and this is no doubt the reason for the absence of claims. In most cases, of course, where loss is caused it is due to the exercise of designating powers so that compensation falls to be payable under the usual provisions of the Public Works Act. However, as planning becomes more sophisticated it may be that particular individuals will be more likely to suffer loss and perhaps we will see a greater willingness to grapple with the intricacies of Section 126.

Flexibility and Discretions :

I have already indicated that in my view in the preparation of the scheme the new Act gives considerably more flexibility than was previously the case. This is particularly so because the new regulations do not include any provision for model scheme statements and code of ordinances. In a number of decisions the Supreme Court has justified a finding that a provision is ultra vires by relying at least in part on the fact that provision is not to be found in the model codes. See for example Fifth City Estates v Christchurch City [1976] 1 N.Z.L.R. 354. In the preparation of a scheme, therefore, I consider that there is much greater opportunity for flexibility than previously. However, once a scheme is operative I believe that the opportunities for the exercise of discretion by Councils are effectively no greater than they were before and in fact they may even be more limited. This subject as already indicated will be

dealt with in more detail by another speaker but it seems to me that effectively the exercise of a discretion is now limited to the circumstances provided for in subsection (4) (c) and subsections (5) and (6) of Section 36. One must add to this of course the wide area of discretion which may be exercised in the case of conditional use applications but subject to a right of appeal to the Board. I certainly believe that in relation to matters where there is no right of objection or appeal careful limits must be imposed on the extent of discretionary powers. However, if these limitations have the effect of stultifying good planning some acceptable alternative formula will have to be found.

Maritime Planning :

In relation to this subject I wish to confine myself to a brief summary of the effect of Part V of the Act. Maritime planning areas may include any area in New Zealand between the seaward side of mean high water mark and the outer limits of the territorial sea including any island not included in a district. Before any maritime planning can be done it is necessary to appoint the Maritime Planning Authority which may be a united or regional council, a regional planning authority, a harbour board or other existing public authority. The duty of the authority is to prepare a Maritime Planning Scheme and in due course to enforce the scheme.

Provisions as to preparation, the hearing of objections and appeals from decisions are very similar to those which apply in the case of district schemes. There are also provisions relating to changes variations and reviews of maritime planning schemes and for applications for exceptions to such schemes which are comparable to those applicable to district schemes. Until a maritime scheme is operative there appears to be no power to control activities or works other than those under existing legislation.

A possible interesting new dimension to the activities of the planning lawyer is raised by Section 115 which requires maritime planning schemes to be consistent with international law and to fully respect the provisions of any international agreement or understanding or the terms of any judgment or arbitral award of the International Court or any other Tribunal or body binding upon the Government of New Zealand. For anyone seeking to challenge the vires of a maritime scheme some interesting new possibilities arise. On the other hand, those with expertise in international law will no doubt be in great demand as advisers to maritime planning authorities.

Some Thoughts on Participation :

As a result of the rights of objection and appeal given by the 1953 Act that Act encouraged a greater community awareness and this, in turn, has engendered a sense of responsibility in the community as to the direction that development should take. I believe that this development of a community spirit is most important and will probably be encouraged by the increased opportunities for participation given by the 1977 Act.

Of course, opinions on the desirability of participation vary but I think that there can be little doubt that more participation rather than less is desirable right throughout the community. In this respect it is interesting to note that in the New Zealand Planning document - Planning Perspectives 1978-1983 - the statement is made :-

"the Council has assumed that greater efficiency will be achieved not by edict but by the greater involvement of citizens in the decisions which have to be taken".

It may well be then that the degree of participation which one is coming to expect in the field of land use planning could well become the norm in many other areas in New Zealand.

Conclusion :

The 1977 Act makes some important and I believe beneficial changes to the substance of planning in New Zealand. In relation to procedures however I consider the Act to be deficient in some important respects. It is to be hoped that we will not have to wait for 25 years before those deficiencies are remedied.

.....

P.M. SALMON