TOWN PLANNING AND THE CONTROL OF PUBLIC WORKS

Town and Country Planning law may conveniently be defined as a present regulation of the use and development of land to secure the controlled and orderly future development, and to protect the amenities, of a particular community. In this way, the various objects of planning legislation may be summarised. Of course, there are many complementary legal devices and codes concerned with land use control, but it is the element of futurity, above all else, which distinguishes planning law from other allied concepts. Thus in *Hall and Co. Ltd.* v. *Shoreham-by-sea U.D.C.*,[1] Glyn-Jones J. commented that, "it is the essence of planning that it should make provision for the future".[2] In New Zealand, this essential element of planning has been acknowledged in a number of appeals determined by the Town and Country Planning Appeal Board, and is clearly stated in the Town and Country Planning Act 1953, which provides that local bodies must have regard "to the present and *future* requirements of the district".[3] In *Auckland Regional Planning Authority* v. *Mount Wellington Borough*[4] Reid S.M. expressed the same principle: "it is essential in the initial stages of planning to make provision for the foreseeable future needs of the district under consideration".[5]

The second purpose of planning law stated at the outset, namely the protection of amenities, is equally clearly provided for in the 1953 Act. Section 18 states that the general purpose of a district scheme is to "promote and safeguard the health, safety and convenience, and the economic and general welfare of the inhabitants and the amenities of every part of the area".[6] The word "amenities" which was defined by

---

1. (1963) 61 L.G.R. 508, 514.
2. This view appears to be held equally valid in American decisions—see for example: *Mansfield and Swett Inc.* v. *Town of West Orange* 198 A. 225 (1938); *Shelton* v. *City of Bellevue* 435 P. 2d. 949 (1968); *Exton Quarries Inc.* v. *Zoning Board of Adjustment of West Whiteland Tp.* 228 A 2d. 169 (1967); and *National Land and Investment Co.* v. *Kohn* 215 A 2d. 597 (1966).
3. S. 21 (1)—italics mine.
4. (1960) 1 N.Z.T.C.P.A. 129.
5. See also, *Silich* v. *East Coast Bays Borough* (1959) 1 N.Z.T.C.P.A. 105; *Giddens and Churcher* v. *Fielding Borough Council* (1957) 1 N.Z.T.C.P.A. 39; *McLean Institute* v. *Christchurch City Council* (1959) 1 N.Z.T.C.P.A. 16; and *Bailey and Another* v. *Mt. Wellington Borough Council* (1960) 1 N.Z.T.C.P.A. 123.
6. This seems generally akin to the American requirement that zoning ordinances should promote or relate to "public health, safety, comfort, morals or general welfare of the community."—see for example *Mutz* v. *Village of Villa Park* 226 NE 2d 644 (1967); *Mistretta* v. *Village of River Forest* 223 N.E. 2d 282 (1966); *Anthony* v. *City of Kewanee* 223 N.E. 2d 738 (1967); *De Bruter Homes Inc.* v. *County of Lake* 222 N.E. 2d 689 (1960); *County Commissioners of Queen Anne's County* v. *Miles* 228 A 2d 450 (1967) and *Hourun* v. *Township Committee of Union* 238 A 2d 501 (1967).

Scrutton L.J. as "pleasant circumstances or features, advantages",[7] has been given an expanded statutory definition in the 1953 Act. This Act defines amenities as "those qualities and conditions in a neighbourhood which contribute to the pleasantness, harmony and coherence of the environment and to its better enjoyment for any permitted use",[8] and makes considerable provision for the protection of, or the prevention of detraction from the amenities of the district.[9] The clear intention of the Act is that, while communities should be forward-looking in their planning of the district, the district should not in the process, whether by pre-scheme developments or by permitted departures from the scheme, "become less pleasant or agreeable".[10]

If it is the element of futurity which distinguishes planning law from other codes, it is the protection of the amenities which links planning to other legal concepts such as the restrictive covenant and nuisance.[11] Having thus stated the basic objectives of planning legislation, it is now proposed to examine the relationship of public works to these concepts.

The Definition of Public Works

The term public works is defined in the Town and Country Planning Act 1953, by reference to the Public Works Act 1928, where the term is defined as including "every work for which his (sic) Majesty, or the Governor-General, or the government, or any minister of the Crown or any local authority,[12] is authorised to undertake under this [the 1928] or any other Act . . . ".[13]

7. *Re Ellis and Ruislip-Northwood U.D.C.* [1920] 1 K.B. 343, 370.
8. S. 2 (1). In *Rockley* v. *New Plymouth City Council* (1961) 1 N.Z.T.C.P.A. 153, the board considered that, each of the three words, 'pleasantness, harmony and coherence' had equal weight.
9. E.g. ss. 34A and 38.
10. Per Reid S.M. in *Bridgman and Another* v. *Alexandra Borough Council* (1961) 1 N.Z.T.C.P.A. 151.
11. Note generally *Re Ballard's Conveyance* [1937] Ch. 473, [1937] 2 All E.R. 691 and *Cunard* v. *Antifyre Ltd.* [1933] 1 K.B. 551 in which Talbot J. said at 557 "Private nuisances . . . are interferences . . . with the use and enjoyment of neighbouring property." It appears that in America the courts have tended to uphold zoning ordinances designed to protect amenities, by analogy with the law of nuisance—see *Village of Euclid et al.* v. *Ambler Realty Company* 272 U.S. 365 (1926). Note also *Cromwell* v. *Ferrier* 225 N.E. 2d 749 (1967) in which a zoning ordinance based on aesthetic considerations alone was upheld.
12. The 1953 Planning Act defines "local authority" in very broad terms to include not only territorial councils, but also *ad hoc* authorities, and "any person or body constituted by or under any Act and having as his or its principal function . . . local charge or harbour, public passenger transport, educational, river, water supply, irrigation, sewerage, drainage, electrical, gas, fire or hospital works or services . . . or any body . . . that is authorised to . . . undertake, establish or manage a public work, or that is declared by or under any enactment to be a local authority for the purposes of the Public Works Act 1928 . . . ."

    The Appeal Board has held that a licensing trust may be a local authority—*New Zealand Farmers Co-operative Association of Canterbury Ltd.* v. *Ashburton Borough* (1958) 1 N.Z.T.C.P.A. 63, and one wonders about the position of private companies constituted under the Companies Act 1955, and which provide any of the listed services. It could be contended that some of these would be covered by the definition.
13. Public Works Act 1928, s. 2.

It is to be noted that while this definition is extensive and covers practically all works undertaken by both central and local government, it has recently been amended to include "any public reserve within the meaning of the Reserves and Domains Act 1953".[14]

Not only does the 1953 Planning Act refer to Public Works, it also refers to public utilities, which term, although apparently referring to a type of public work, is nowhere defined. This will be discussed at a later stage, and it is to be observed, may be of some significance.

The Basic Requirement of Public Works

In a modern society, where both central and local government must play a substantial role, it almost goes without saying that any form of land use planning must have regard to the future development needs of the public sector, and the 1953 Act certainly makes ample provision for this. On the other hand, where Parliament has passed town and country planning legislation, it must equally be important that the development of law by public bodies must be undertaken within the framework laid down in that legislation. As Callan J. has observed:[15] "The new legislation [the subdivision controls of the Municipal Corporations Act 1933] was, I think, prompted by a realisation that towns ought to be planned rather than allowed to grow in a haphazard fashion, that prevention is better than cure, and that, if urban development were allowed to proceed in whatever manner was dictated by the natural desires of property owners[16] . . . , conditions might arise detrimental to the health and comfort of urban dwellers generally, which could be righted only by much expenditure of money, time and labour, and the causing of inconvenience or even hardship." These views are perhaps equally applicable to the planning legislation. It is admitted, however, that many factors other than town planning principles must be considered, by public authorities, when developing land; matters such as the most suitable site for the particular work, and cost factors, as illustrated by the evidence given for the education board in *Halswell County* v. *Canterbury Education Board*[17] where it was alleged that the site selected for a school in that case was "the only suitable site available". Nevertheless, the Act is, it is submitted, rather lacking in effective means of compelling public works authorities to submit to planning control. As will be shown later, it is important that such control as exists, should be exercised to the full, if public works are not to be totally freed from planning law.

Planning Futurity and Public Works

"Zoning is a means by which a government body can plan for the future,"[18] and as we have seen the element of futurity is at the root of

14. Town and Country Planning Amendment Act 1968, s. 2 (c).
15. *Auckland Harbour Board* v. *Auckland City Corporation* [1947] N.Z.L.R. 912, 920, [1947] G.L.R. 419, 421-2.
16. From the circumstances of the case, this phrase "property owners" would include public bodies as well as private owners.
17. (1968) 3 N.Z.T.C.P.A. 111.
18. Per Roberts J. in *National Land and Investment Co.* v. *Kohn* 215 A 2d. 597, 610 (1966).

planning. The question to be considered now is, how far the 1953 Act provides for the future planning of public works within the framework of planning schemes. The case of *Auckland Regional Planning Authority* v. *Mount Wellington Borough*,[19] which concerned a future public work in the form of a road widening scheme, illustrates the fact that amongst the probable and foreseeable future needs of the community, the provision of public works must play a significant part.

The Town and Country Planning Regulations 1960 require that a district scheme shall, so far as practicable, provide for the future development of the district for a period of twenty years,[20] and one of the matters required by the Act to be incorporated into the scheme on this basis is "the designation of land for public works or for proposed public works, differentiating between government and local works".[21]

The originating procedure for such designation is laid down in sections 21 and 21A of the 1953 Act. Briefly, the provisions are, that the recommended district scheme, prior to public notification, shall be submitted to the Minister of Works "for consideration in conjunction with existing and proposed public works",[22] and a copy shall be supplied to "every local authority having jurisdiction within the district . . . ".[23] The Minister and the local authorities are then entitled to require[24] provision to be made for public works for which they are financially responsible. Such required provisions, or suggested provisions under section 21A, must be incorporated into the scheme to the satisfaction of

19. Supra n. 4.
20. S.R. 1960/109 Reg. 14.
21. Town and Country Planning Act 1953—2nd Schedule—clause 3A.
22. S. 21 (5) (a). This is surely also the function of the Regional Planning Authority where one exists—s. 6 (1) 1st Sched. and Reg. 17 (1) (b) (i) of the 1960 Regulations.
23. S. 21 (5) (b). It is difficult to understand the difference in the wording between paras. (a) and (b) of Subsection 5—that the scheme be submitted to the Minister, while a copy must be supplied to local bodies, in view of the fact that requirements for public works flow from both sources, unless this is a "throw-back" to the provisions of the Town Planning Act 1926, which required schemes to be approved by the Town Planning Board (s. 16). (Cf. s. 2 (2) Town Planning Act 1926 (U.K.) and s. 8 (1) Town and Country Planning Act 1932 (U.K.).) It is to be noted that provisions requiring the *submission* of plans and schemes to a Minister or planning board are a common feature of planning legislation—see for example: ss. 4 and 5 Town and Country Planning Act 1962 (U.K.), as proposed to be modified by the Town and Country Planning Bill 1968 (U.K.) following the White Paper "Town and Country Planning" Cmnd. 3333 (1967); s. 18, Town and Country Planning Act 1958 (Vict.); s. 342 H. Local Government Act 1919 (N.S.W.) and s. 12 State Planning Authority Act 1963 (N.S.W.); s. 726, Local Government Act 1962 (Tas.). In each of these statutes where the word "submitted" is used in the present context it imports that the Minister or other authority has substantial powers to approve or control district schemes. The legal powers of the New Zealand Minister of Works cannot be put as high as this, although undoubtedly, the Minister, through the Town Planning branch of the Ministry, does give advice and make suggestions for the preparation and improvement of schemes.
24. The requirement apparently need not be in any specific form provided it is sufficiently mandatory: *Waitemata County* v. *Auckland Harbour Board* (1962) 2 N.Z.T.C.P.A. 45.

the requiring authority. The plan may then be publicly notified and the public have the opportunity of objecting to and later appealing against the required provision in the scheme.[25]

It therefore seems clear that the legislature is aware of the need to make initial provision in the scheme for public works, and has provided accordingly. Equally it seems just that there should be some opportunity for public comment on the designation of land for proposed public works. However, as will be seen at a later stage, the legislation has also provided in the Act, a system whereby some public works may be developed without any real regard for the provisions of the district scheme, and with little opportunity for public comment and appeal.[26]

While it seems clear that *all* proposed public works should normally be designated in the scheme, by requirement or otherwise, it is submitted that in some cases only those public works actually contemplated or "on the drawing-board" at the time of submission of the recommended district scheme, will be so incorporated into the scheme. This is, perhaps, borne out by the provisions of section 21 (7) whereby requirements for public works may be made by the Minister or by a local authority *at any time* after the scheme has become operative. Such later requirements will subsequently be brought into the scheme at the next change or review. The point that, perhaps in some cases, the future provision of public works and the need to make present reservation for them is not very seriously regarded, is well illustrated by the case of *New Zealand Institute of Surveyors* v. *Hamilton City Council*,[27] in which the Appeal Board made provision in the district scheme for a future road not designated in the scheme. Kealy S.M. commented:[28]

> it is possible that the proposed new road may never be required. On the other hand, the history of this country is so full of records of lost opportunities, of penny wise works, of "too little and too late", that when, as at present, the opportunity does occur of locking the stable door while the horse is still inside, the Board feels it would be wrong in the extreme to let such opportunity escape unseized.

Public Works and the Amenities

It may be argued, and indeed is often true, that some public works are in themselves amenities, as necessary contributions to the pleasantness, and enjoyment of a neighbourhood. A road, a new power station, or gas works, however unattractive in themselves, may fall into this category and add something of value to living conditions in a district. Nonetheless, this must not be allowed to cloud the view that the Act is clearly designed to protect existing amenities, to prevent developments

25. It seems, however, that the council must overrule any such objection, although the Appeal Board may have greater powers to remove a required designation: see *New Zealand Farmers' Co-operative Association of Canterbury* v. *Ashburton Borough* (1958) 1 N.Z.T.C.P.A. 63.
26. See the "public utility" provisions of s. 21 (9) and post.
27. (1965) 3 N.Z.T.C.P.A. 53. This case also shows that proposed public works may be incorporated into a district scheme by means of objection by a private body.
28. At p. 54.

which "will worsen an already existing state of affairs".[29] It is submitted that developed "willy nilly", public works can detract from the existing amenities, and particularly from the visual amenities[30] of the neighbourhood. Thus Reid S.M. felt constrained to comment in *Waitemata County* v. *Ministry of Works*,[31] a case which concerned an automatic telephone exchange: "the Board considers that there will be little, if any, detraction from the amenities of the neighbourhood, if a suitably designed or sited building is erected . . . ".[32] It seems implicit in these comments that if the stated conditions were not fulfilled then a serious detraction from the amenities might have occurred. No doubt the Board would, if a particular appeal were brought before it, decide in such a way as to prevent a public work detracting from the amenities.[33]

The Planning Control of Public Works

By the terms of section 33, the Town and Country Planning Act 1953 provides that a district scheme shall have the power of a regulation made under the Act and that following from this it shall be the duty of every public body[34] and local authority to enforce the observance of the scheme, and not to depart or permit departures from the scheme, otherwise than authorised by the Act. The legislation, therefore, makes some provision for the observance of planning requirements by public bodies. In detail this control is achieved by means of various other provisions which should be considered in detail.

(a) CONTROL THROUGH SECTION 34A

Section 34A, as a further safeguard of the amenities, requires that certain objectionable elements, "whether of noise, smoke, smell, effluent vibration, dust or other noxiousness or danger or detraction from amenities" are to be kept to an absolute minimum. Any person not complying with the section is liable to both a fine and injunction at the instance of the council. It seems reasonable to suggest that the word "person" includes public bodies,[35] and that *prima facie* public authorities are bound to prevent their development creating such amenity nuisances.

However, an analogous situation arises under section 190 of the Counties Act 1956.[36] This provides that no public work authorised by

29. Per Reid S.M. in *McKendrick Bros. Ltd.* v. *Gisborne City Council* (1958) 1 N.Z.T.C.P.A. 68.
30. Apparently the pleasant and harmonious aspects of the landscape which ought not to be disfigured by development. See generally *Fuller and Sons Ltd.* v. *Bay of Islands County Council* (1962) 2 N.Z.T.C.P.A. 31, and *Bulletin of Selected Appeal Decisions V/16* (1949—included Vol. 2 Encyclopaedia of Planning Law and Practice—ed. D. Heap. at para. 5-092).
31. (1961) 1 N.Z.T.C.P.A. 153.
32. Similar views have been expressed in English planning appeals—note for example *Bulletin of Selected Appeal Decisions VII/2* (1950—D. Heap (ed.) op. cit., at para. 5-121.).
33. See *Halswell County* v. *Canterbury Education Board* (1968) 3 N.Z.T.C.P.A. 111.
34. This term is undefined but would presumably include a government department.
35. S. 6 (1) Acts Interpretation Act 1924, and see *Pahiatua Borough* v. *Sinclair* [1964] N.Z.L.R. 499.
36. A similar provision is contained in s. 168 Municipal Corporation Act 1954.

this Act shall "entitle the council to create a nuisance". Notwithstanding this statutory provision it was held by Haslam J. in *Nobilo* v. *Waitemata County*,[37] that no action would lie against the county council for a nuisance which was necessarily or inevitably involved in the construction and maintenance of an authorised public work. If this decision is correct, it seems possible to say that, notwithstanding section 34A of the 1953 Act, a public body will not be liable for a detraction from amenities arising from an objectionable element "necessarily and invariably" consequent upon an authorised public work. If this is so, it represents a serious breach in the intentions behind the planning legislation.

(b) CONTROL OF DESIGNATED LAND

In so far as provision is made in the Town and Country Planning Act for the designation of land for future public works, it may be that some measure of control can be achieved. The opportunities for planning control of designated land may depend upon the time at which the control is sought to be exercised. There are two situations to be considered:—

i. Control before the designation becomes finalised.
ii. Control after the designation has become operative.

(i) *Control before the Designation becomes Finalised*

It can hardly be doubted that in the majority of cases there would be considerable consultation and discussion between the requiring authority and the council, which may well result in a designation acceptable to both parties, and perhaps in accord, with general planning principles. However, in the particular case of the requirements of central government, some councils may too easily capitulate, and accept all requirements without question. The council may feel some pressure in such instances, and albeit the requirements would presumably have been vetted by the Town and Country Planning branch of the Ministry of Works, some ill-planned provisions may, therefore, be incorporated into the scheme. Thus a consultative process standing alone may prove an insufficient form of control, especially because even if the consultation or discussion fail, in the terms of section 21 (6), the requirement of the public works authority must prevail.

If the council itself has few direct powers of control, the Appeal Board has apparently, in view of section 42 (3), considerably more. If the council were to appeal to the board against the requirement, it could be removed, if contrary to good planning principles. The main problem here is that section 21 (6) does not give a direct right of appeal to the council against a requirement.[38] Nevertheless, once the designation is incorporated to the satisfaction of the requiring authority, the scheme may be publicly notified and thereafter becomes open to objection and

37. [1961] N.Z.L.R. 1064, applying *Irvine and Co. Ltd.* v. *Dunedin City Corporation* [1939] N.Z.L.R. 741; [1939] G.L.R. 390, C.A.
38. Cf. the right of appeal given to a Regional Planning Authority in similar circumstances in s. 10 (3) and the council's own right of appeal against the location of a public utility in s. 21 (9), but note s. 26 (2) and (2A) discussed later.

subsequently to appeal. Of course, as has been noted earlier, the council must apparently reject the objection. It is, however, open to the council to adopt the following procedure: namely to adopt the required designation, object to it in its own name, override its own objection and finally take advantage of the appeal provisions of section 26. This procedure, it is submitted, is well within the powers of the council, as a result of section 24 of the Act, and Regulation 19 (2) of the Town and Country Planning Regulations. Section 24 provides machinery for local authorities to object to district schemes, while Regulation 19 (2) specifically provides for objections by a council to its own scheme. It has been suggested that Regulation 19 (2) is *ultra vires*, but the council's right to object to its own scheme appears to have been accepted by the Supreme Court in *Evans* v. *Town and Country Planning Appeal Board and Another*.[39]

At this point, it is to be noted that section 26 does give the council two direct and specific rights of appeal in connection with requirements. The first arises where the requiring authority refuses to approve a variation of the requirement to meet objections raised at the hearing of objections.[40] The second right of appeal arises where the Minister for a local authority has made a late requirement under section 21 (7).[41] It is submitted, however, that neither of these is directly applicable in the case where the council wishes initially to contest the requirement, although the former may assist the council when hearing its own objection.

(ii) *Control after the Designation has become Operative*

The purpose behind the designation of land for public works is to ensure that land is reserved and available for future public use.[42] Once the designation of land in a district scheme has become operative, it is submitted that the designation thereafter, so far as concerns the council and the public works authority at least, amounts to a full zoning of the land for the proposed public work, which therefore, becomes a kind of predominant use. This does not, in fact, deny the need for an underlying zoning,[43] or the distinction between zoning and designation expressed in such cases as *Canterbury Club Incorporated* v. *Christchurch City Council*,[44] but merely attempts to express the value of designation to the public works authority. It has been nowhere suggested, least of all in the Act, that the public works authority must seek a specified departure from the underlying zoning for the development of the designated public works.

39. [1963] N.Z.L.R. 244 (1962) 2 N.Z.T.C.P.A. 47 (Hutchison J.). See also the decision of the Appeal Board in the earlier appeal in the same case (1962) 2 N.Z.T.C.P.A. 25 *sub nom. Evans* v. *Gisborne City Council*.
40. S. 26 (2).
41. S. 26 (2A).
42. In England, designation of land in a development plan is entirely an indication of future compulsory purchase: Town and Country Planning Act 1962. s. 4 (3) (b) and (c). English planning authorities are, however, by s. 4 (3) (a) bound to define the sites of certain specified public works but this does not generally grant an automatic planning permission.
43. See s. 33A and Town and Country Planning Amendment Act 1968, s. 13.
44. (1961) 1 N.Z.T.C.P.A. 150.

(c) CONTROL OF PUBLIC DEVELOPMENT WHERE LAND NOT DESIGNATED IN AN OPERATIVE DISTRICT SCHEME

If in the initial stages of the preparation of a district scheme, the responsible authority makes no requirement under section 21 (6) within six months of the plan being submitted, it shall be deemed to have no requirement to make.[45] However, the responsible public works authority may subsequently, at any time,[46] make a requirement for eventual incorporation in the district scheme. In this case the council must publicly give notice of the requirement for general information, and at the next change or review of the scheme, it is incorporated into the scheme, as if it were a requirement under section 21 (6). That is to say, it may be the subject of objection and appeal. The council is, however, given a more immediate right of appeal against such a requirement under section 26 (2A).[47]

If the responsible public works authority does not make such a requirement under section 21 (7), and later acquires land for a public work (or indeed extends to develop for a public work land already held for the purpose), it is submitted, in the absence of direct authority, and subject to the exemptions from planning control referred to later, the authority must comply with the district planning scheme and seek consent to a specified departure or a conditional use as may be appropriate. This must necessarily follow from the fact that the acquired land would have been zoned for other purposes in the scheme.

(d) CONTROL OF PUBLIC WORKS WHERE NO DISTRICT SCHEME

Under the Town and Country Planning Act 1953 sections 38 and 38A, councils are empowered to exercise some interim development control intended to protect schemes in the course of preparation.[48]

Section 38 enables councils at any time before a district scheme becomes operative to absolutely or conditionally refuse consent to the "carrying out of any detrimental work" within their district, or to prohibit the execution of such work. It is to be noted that section 38 (1) quite clearly intends that the section shall be enforceable in the case of public works, as the term "detrimental work" means: "any structure, excavation, or other work *whether public* or private . . . ".[49] However,

45. The Proviso to s. 21 (6).
46. It is submitted that the wording of s. 21 (7) is wide enough to include a power to make requirements at any time before the initial submission of the plan or after the s. 21 (6) time limit has expired, although the power may be exercised more often in the latter case.
47. It is noted, however, that this subsection empowers the council to appeal where the requiring authority as referred to accept a variation of the requirement under s. 21 (7), and the definition of "variation" in s. 2 (1) may not include a complete removal of the requirement. cf. *Ashburton Borough* v. *Ashburton Licensing Trust* (1958) 1 N.Z.T.C.P.A. 63.
48. In fact these powers seem to have been used on occasion as a means of avoiding the preparation of a scheme—see A. E. Hurley, "Town and Country Planning and its impact on the individual", (1966) 1 Otago L.R. 122.
49. Italics mine. The definition also includes subdivisions of land contrary to planning principles, and it is to be noted that throughout the definition the phrase "whether public or private" is constantly used.

there are only three circumstances in which the section may be applied:—

i. Where the detrimental work would be a physical obstacle to any work likely to be constructed either under any proposed district district scheme, or in accordance with town and country planning principle likely to be embodied in a draft district scheme,

ii. Where a public or private work would detract from any amenities of the neighbourhood.

iii. Where any subdivision or other work might adversely affect any existing or proposed public work.[50]

A refusal or prohibition by the council, which may be compelled, in the case of a refusal or prohibition to protect a public work or proposed public work, by the responsible authority,[51] is subject to a right of appeal by any person injuriously affected thereby.[52]

While section 38 is designed to prevent detrimental works spoiling a plan in the course of preparation section 38A is designed to control changes of use of land for the same reason. Section 38A, unlike section 38, does not specifically refer to changes of use "whether public or private", but it is submitted the section is equally applicable to public land as to private land: "Except with the consent of the council, *no use* of any land or building that is not of the same character as that which immediately preceded it shall be commenced by *any person* after the date of the commencement of this section . . . ".[53]

Public Works — Exemptions from Planning Control[54]

The effectiveness of the planning control over public work, as outlined above, is somewhat diminished by the existence of exemptions from such control. The position in New Zealand is not of such proportions as is apparent in the United States, where it seems that no governmental agency or authority is bound by zoning regulations. Even the zoning authority is not bound by its own plans or regulations, unless either the state enabling legislation provides otherwise, or the authority flagrantly disregards its own scheme.[55] In New Zealand, it is to be noted, the council which prepares a scheme is bound to adhere to its own scheme which can be enforced against the council by an affected citizen. This is the apparent result of the Supreme Court decision in *Pahiatua*

---

50. Presumably a proposed public work of an authority other than that executing the detrimental work.

51. S. 38 (13-16).

52. S. 38 (8).

53. S. 38A (1)—italics mine.

54. For fuller examination of some of the theories behind such exemptions see: Wolff, "The inapplicability of Municipal zoning ordinances to government land uses," (1968) 19 Syracuse L.R. 698.

55. See *O'Brien* v. *Town of Greenburgh* 195 N.E. 210 (1935); *Nehrbas* v. *Inc. Village of Lloyd Harbour* 140 N.E. 2d 214 (1957); *State* v. *Board of County Commissioners of Cuyahoga County* 79 N.E. 2d 698 (1947) and Wolff loc. cit.

Borough v. *Sinclair and Another*,[56] which is generally reinforced by the provisions of section 33 of the 1953 Act.

Generally, in this country, there are only two broad categories of exemption from planning control: (a) the Crown and (b) Public Utilities.[57]

(a) THE CROWN

The general proposition, resting on the ancient maxim: *Roy n'est lie par ascun statute si il ne soit expressment nosme*, is that the Crown is not bound by an Act, unless the contrary is expressly stated.[58] In New Zealand, this maxim remains good law although it has been given a general statutory effect by the Acts Interpretation Act 1924.[59] It seems that the Crown in this context includes not only central government ministries and departments, but also agents of the Crown, whilst acting on behalf of the Crown.[60] However, it appears that neither licensees from the Crown,[61] nor independent state corporations[62] are entitled to the same exemption, unless the Act expressly so provides.[63]

As a logical extension of the principle laid down in such cases as *Gorton Local Board of Health* v. *Prison Commissioners*[64] and *Lower*

56. [1964] N.Z.L.R. 499, (1964) 2 N.Z.T.C.P.A. 125. It is to be noted that this case had somewhat unusual facts, and its general authority might therefore, be limited. In England, the local planning authority is bound by the planning legislation, although a special procedure is laid down in s. 42 Town and Country Planning Act 1962, and the Town and Country Planning General Regulations 1964.
57. In England the Crown alone, and not statutory undertakings (authorities charged to carry out certain public utilities) is exempt from planning control. It should be noted, however, that an administrative procedure for consultation with planning authorities over Crown development has been established by the Minister of Housing and Local Government—the 'circular 100' procedure.
58. *Hornsey U.D.C.* v. *Hennell* [1902] 2 K.B. 73; *Cooper* v. *Hawkins* [1904] 2 K.B. 164; *Attorney-General* v. *Hancock* [1940] 1 K.B. 427; and *Province of Bombay* v. *Municipal Corporation of Bombay* [1947] A.C. 58 (J.C.).
59. S. 5 (m) and note such cases as *Raven* v. *Keane* [1920] G.L.R. 168; *Harcourt* v. *Attorney-General* [1923] N.Z.L.R. 686, [1923] G.L.R. 154 and *Lower Hutt City* v. *Attorney-General* [1965] N.Z.L.R. 65.
60. *Commissioners of Works* v. *Pontypridd Masonic Hall Co. Ltd.* [1920] 2 K.B. 233 and the dictum of Griffith C.J. in *R.* v. *Sutton* (1908) 5 C.L.R. 789, 796—this rule "does not apply to every person who in any part of the world represents the Crown, but only to those representatives of the Sovereign who have executive authority on the place where the law applies, and even there, only as those matters to which the executive authority applies."
61. *Pahnatua County* v. *Akitio County No. 2* [1930] G.L.R. 361.
62. *Tamlin* v. *Hannaford* (1949) 65 T.L.R. 422, and *The Council of the Town of Gladstone* v. *The Gladstone Harbour Board* (1964) Qd.R. 505, in which Mansfield C.J. said at 510: "Both in England and Australia, there is evidence of a strong tendency to regard a statutory corporation formed to carry on public purposes as distinct from the Crown unless parliament has, by express provision, given it the character of a servant of the Crown. The fact that a statutory body exercising public duties is to some degree controlled by the executive will not be sufficient to identify that body as a department or agent of the Crown." And note also *Grain Elevators Board (Vict.)* v. *Dunmunkle Corp.* (1946) 73 C.L.R. 70.
63. As was the case for example of the Central Law Board under s. 40 of the Town and Country Planning Act 1947 (U.K.).
64. (1887) reported [1904] 2 K.B. 165 (n)—the building by-laws.

Hutt City v. *Attorney-General*,[65] in which legislation somewhat akin to planning law was held not to apply to the Crown, it is perhaps not surprising that the Crown is considered exempt from planning legislation. Thus J. A. B. O'Keefe expresses the New Zealand position in the following terms: "The Crown is not bound by the Town and Country Planning Act 1953 save as to development schemes undertaken under the Housing Act 1955. . . . "[66]

This view has been recently upheld by the Town and Country Planning Appeal Board in *Hutt Valley Electric Power Board* v. *Porirua City Council*.[67]

While this exemption of Crown developments from the provisions of the Town and Country Planning Act 1953 is no doubt correct in law, it could be unfortunate in practice, because it might, in the absence of some binding specific agreement, like the English circular 100, enable substantial development to take place with a disregard of planning principles. On this, O'Keefe confidently states that it is evident that, as a matter of policy, the Crown conforms to the spirit of the land planning legislation, and it is unlikely that a Crown plan would flout the local body requirements.[68] However, the appeal of *Halswell County* v. *Canterbury Education Board*,[69] illustrates the fact that government departments may attempt to ignore sound planning. Were it not for the authority of the Appeal Board, it may be that many such developments would take place under shelter of the exemption.

---

65. [1965] N.Z.L.R. 65—the Drainage and Plumbing Regulations 1959 (N.Z.).
66. O'Keefe, *Crown Land Law and Practice* (1967) p. 27. The English Minister of Town and Country Planning (as he then was) put the matter in similar terms . . . "[D]evelopment by the Crown does not require planning permission . . . ". Circular 100—included in vol. 2 *Encyclopaedia of Planning Law and Practice* ed. D. Heap—para. 4-084. See also *Minister of Agriculture Fisheries and Food* v. *Jenkins* [1963] 2 Q.B. 317, and s. 199 Town and Country Planning Act 1962 (U.K.). The Crown may, however, agree to be bound by the English legislation, ibid. s. 200.

    Circular 100 issued in 1950 by the then Minister of Town and Country Planning, as slightly altered by Circular 11/54, provides for consultation between Government departments and local planning authorities, except on certain kinds of development: e.g. secret developments (in this case consultation is directly with the Minister of Housing in Local Government), minor works, developments similar to existing works in the same site. The development authority must in the terms of the circular send details of its developments to the local planning authority, and although the circular rests on agreement, in the writer's experience, it can be most effectively enforced by the Minister of Housing and Local Government.

    In Victoria and other Australian States, it appears that all state and public authorities are bound by a planning scheme unless the Governor directs otherwise by order in council.
67. (1967) 3 N.Z.T.C.P.A. 34. Cf. New Zealand's early planning legislation. The Plans of Towns Regulation Act 1875 which applied only to *Crown* land.
68. O'Keefe op. cit. p. 27.
69. (1968) 3 N.Z.T.C.P.A. 111. The Board (per Watts (Chairman)) held that the proposed Education Board development was "completely contrary to principles which the [Appeal] Board is called on to enforce not only against agents of the Crown such as the Education Board but also against private individuals." This will be discussed later.

The Extent of Crown Exemption from Planning Law — where the Crown is bound

The observation of the chairman of the Appeal Board in the *Halswell* case[70] indicates that the Crown may be subject to the jurisdiction of the Town and Country Planning Appeal Board. However, as this case concerned a requirement made by the Education Board, it is submitted that the Appeal Board's jurisdiction over the Crown is limited to this type of case—namely a control over requirements, or circumstances where an appeal can be taken before the Board. The Crown is quite clearly bound, if it so desires, to make a requirement for designating land,[71] but it is further submitted, the Crown would not be bound to seek consent to a specific departure or a conditional use, although possibly bound by the duty to observe the scheme imposed by section 33 which may be enforceable by mandamus.

In New Zealand, the 1953 Act does, on the other hand, specifically bind the Crown on one matter. This relates to state housing schemes and is set out in section 2A. Prima facie, it appears that this section renders state housing development schemes totally subject to the Act, but this section is, itself, frought with difficulties, which tend to limit the extent to which the Crown is, in fact, bound.

The first point to notice is that Crown liability under the section is limited to development schemes undertaken after the 1st February 1958,[72] and therefore it is submitted cannot affect development schemes undertaken or in progress at or before that date. This would probably be so in the case of subsequent development in respect of such schemes.

Secondly, section 2A further limits Crown liability by providing that the district scheme shall bind state housing schemes, if, after 1st February 1958, the Minister has made a requirement (or presumably a suggested requirement under section 21A) under section 21 (6).[73] The Crown will, it is submitted, be exempt from the effect of a district scheme in respect of housing development commenced even after the specified date where the Minister makes no initial requirement.[74]

(b) PUBLIC UTILITIES

In explaining the exemption of local bodies from zoning regulations, one American judge has said: "In the very nature of things a municipality must have the power to select the site of buildings or the structures for the performance of its governmental duties. Accordingly, it necessarily follows, a village is not subject to zoning restrictions in the

70. Supra note 69.
71. Perhaps an example of the principle that the Crown is bound by an Act, if it takes advantage of its provisions—see *Harcourt* v. *Attorney-General* [1923] N.Z.L.R. 686.
72. S. 2A was first enacted by the Town and Country Planning Amendment Act 1957.
73. Quare whether the requirement must be a requirement in respect of a housing scheme or otherwise.
74. Since s. 2A omits any reference to s. 21 (7), it appears that subsequent requirement cannot affect Crown exemption from liability until *after* the scheme has been formally charged or reviewed.

performance of its governmental as distinguished from its corporate or proprietary activities."[75] As has been noted earlier, in New Zealand local bodies or other public bodies, other than the Crown, are generally bound by planning legislation and by schemes made thereunder. However, it may reasonably be assumed that similar reasoning lies behind the possible exemption of public utilities from planning control.

This apparent exemption is stated in section 21 (9) of the 1953 Act, which provides that "where any local authority or other public authority is authorised by any Act to determine the location within the district of a council of the public utilities under its control without the approval of that council, every such public utility shall be deemed to be a predominant use in every zone in that district".[76]

This apparently straightforward provision is subject to a number of difficulties, which render unclear exactly how extensive is the section in its application. It seems clear that the intention is to exempt certain public utilities from planning control. Public utilities may, for planning purposes, be put into two categories: predominant uses under section 21 (9) and conditional uses,[77] although the boundary is somewhat indistinct.

The Definition of Public Utilities

The term "public utility" is not defined either in the 1953 Act or in the Public Works Act 1928, but it seems that the term denotes a type of public work which relates to a limited number of public services. Thus in the case of *Gulf States Utilities Co.* v. *State*,[78] the term "public utility" was interpreted as a business which is engaged in regularly supplying the public with some commodity or service which is of public consequence, such as electricity, gas, water, transportation, or telephone or telegraph service.[79] Similar guidance to the definition of public utilities may be found, although in slightly wider terms in the 1st Schedule of the 1953 Act,[80] where in relation to a regional planning scheme, the following

75. Per Fuld J. *Nehrbas* v. *Inc. Village of Lloyd Harbour* 140 N.E. 2d 241, 242 (1957).
76. This appears generally similar to the Town and Country Planning General Development Order 1963 (U.K.), which grants permission without need of further application for certain minor works. However, by Art. 4 of the Order, the Local Planning Authority may, by direction confirmed by the Minister, require that any class or classes of permitted development may not be undertaken without a specific permission.
77. See Model Code Ord. II, (34) (d). Town and Country Planning Regulations 1960—"Every public utility that is not provided for in subsection (9) of s. 21 of the Act shall be deemed to be a conditional use in every zone and partition thereof." In spite of these general words, some apparent public utilities are listed as specific conditional uses in other clauses of Ord. II. See clauses 3 (1) (b) (vii)—4 (1) (b) (iv) and 4 (2) (b) (ii). These also appear to include utilities which are deemed to be predominant uses by s. 21 (a).
78. 46 S.W. 2d 1018. Cited in Black's Law Dictionary (4th ed. 1951), p. 1359.
79. In England a similar definition of Public Utility Undertaking is to be found in s. 39 (2) ot fhe Local Government Act, 1929. The term has subsequently been replaced in English Planning Legislation by Statutory Undertaker. In New Zealand, bodies providing such services are included in the definition of the term local authority, but may include private utility supply companies.
80. Clause 3.

matters are included under the heading "public utility": land drainage, sewerage and sewerage disposal, water supply, production and distribution of power and fuel, and regional health, educational and other facilities. This suggests that some quite substantial ancillary buildings and land uses may be included as public utilities, and this seems to be borne out by decided appeals. Thus in *Waitemata County Council* v. *Minister of Works*[81] an automatic telephone exchange was considered to be a public utility, and in *Auckland Transport Board* v. *One Tree Hill Borough Council*,[82] a tram barn was held, likewise, to be a public utility.

It may be that some quite substantial developments which could be of some detriment to the amenities, as suggested in the *Waitemata County Council* case, might be exempt from planning control by becoming deemed predominant uses under the Act.

The Extent of Section 21 (9)

Having suggested the scope of the term "public utility", it must be noted that not all public utilities are to be deemed to be predominant uses, but only those of which the appropriate public body can determine the location without the approval of the council. The important words appear to be "the approval of the council".

These words cannot reasonably be considered to be an approval under the planning legislation, because the public utility is deemed to be a predominant use with no conditions attached. It is clear from the model code of ordinances as usually adopted, that the council's consent is not required for a predominant use. Clearly in subsection (9) the fact that approval of the council is not required is a condition precedent to the predominant use. Likewise, it seems the question of approval cannot refer to any question of designation—because designation *à propos* the utility may amount to the zoning of a predominant use. If land is not designated, it seems that normal planning control applies to public works and utilities so that any consent cannot make a predominant use under section 21 (9).[83]

Other types of consent may equally be discarded without much comment. Any consent of a central government department is obviously not the approval of the council.[84] On the other hand, consent under the building by-laws, if the proposed utility includes a structure which may be regarded as a building, is the consent of the council, and if it is required it must be obtained. Such a consent relates to the construction of the building, not to its location. It is consent to the latter which is referred to in section 21 (9).

81. (1961) 1 N.Z.T.C.P.A. 153.
82. (1958) 1 N.Z.T.C.P.A. 59—note also *Nehrbas* v. *Inc. Village of Lloyd Harbour* 140 N.E. 2d 241 (1957) (Storage sheds for refuse collection vehicles were held to be a public utility), and *Village of Larchmont* v. *Town of Mamoroneck* 147 N.E. 191 (1924) where a building ancillary to a waterworks was considered exempt from zoning restrictions as a public utility.
83. Since the Town and Country Amendment Act 1963, s. 8 (3), the grant of a specified departure no longer amounts to a re-zoning.
84. Cf. s. 41—Town and Country Planning Act, 1962 (U.K.) the deemed planning permission provisions.

Resulting from the foregoing discussion, it is submitted that the approval referred to in the subsection must be some specific approval required by an authorising statute. Thus it is fair to conclude that there may be a few instances where public utilities do not become predominant uses. However, at this point should be noted the case of *Hutt Valley Electric Power Board* v. *Porirua City*.[85] In this case the City Council sought to require, in its code of ordinances, the utility undertaking to supply in advance a written notice of its intention to erect or construct any electrical works, and the proposed location thereof, with the intention that council should have the opportunity to request that they be placed underground. The Appeal Board upheld this provision in the Code. From this it may be suggested further that the approval referred to in section 21 (9) is an approval required specifically in the Code of Ordinances, namely a provision that no utilities are located in any district without the prior consent of the council. It is submitted, however, that such a provision would be *ultra vires*, as a taking away of a statutory right by means of subordinate legislation without a specific statutory power.

Control of Public Utilities

By the terms of section 21 (9), a public utility within the section is deemed to be a predominant use. Therefore, no consent would be required for the development of a public utility, so that a council is given little control in this case as the zoning stems from the Act and not from any provision of the district scheme.[86] In 1961, however, section 6 (2) of the Town and County Planning Amendment Act added a proviso that the council may appeal against the proposed location of any such public utility. The proviso was later modified and expanded into its present form, that, within either one month from receiving advice of the proposed location of a public utility, or three months from the construction of the utility, when no advice given, the council may appeal. If the council exercises its powers to appeal, therefore, the construction of public utilities is subject to the overriding planning control of the Appeal Board. However, as the council is the primary enforcing authority, it may be that the *Hutt Valley Electric Power Board* appeal[87] may indicate that councils would prefer some more direct control. Further, since affected property owners are given certain rights and powers in respect of planning schemes in New Zealand, it seems somewhat illogical for them

85. (1967) 3 N.Z.T.C.P.A. 34.

86. This fact also seems to deny affected landowners their rights to object and appeal. However, the council is given a right of appeal, and it seems from the decision of the appeal board in *Graig and Another* v. *Hutt County Council* (1966) 3 N.Z.T.C.P.A. 7, that nonetheless affected landowners may join an appeal by the council, or initiate an appeal themselves.

87. Supra n. 81.

to be denied similar rights, particularly in the case of substantial utility works.[88]

However, in the case of public utilities not within the scope of section 21 (9), the utility authority must seek the council's consent as a conditional use.[89] This, despite the controversy surrounding *McNamara* v. *Waimairi County Council*,[90] would give local authorities a considerable discretion to control public utilities. Further, by the terms of sections 28C and 28D, every person affected by the application has the right to object and appeal.

Conclusion

The New Zealand Town and Country Planning Act 1953 rests considerable responsibility for town planning, through the preparation of schemes and their enforcement, on local bodies. Indeed throughout the world, town-planning is almost entirely a local authority function. The most normal procedure is for planning to be initiated at local authority level, particularly by means of applications for planning permission or consent, with a subsequent appeal to an appellate and supervisory authority. This is certainly the case in England, and is generally so in New Zealand. So far as public works are concerned, this type of local authority responsibility in New Zealand exists only where the public works authority has to make a planning application in the first instance; as for example where the work or utility amounts to a conditional use, or where a specified departure from the scheme is needed. In every other case of public development any control which the local council wishes to impose must be exercised through the Appeal Board. Such a course may be justifiable in the case of the designation of land for public works, for the district scheme, the central part of planning, is in the formative process, but this is just where the right of direct appeal by the council is most doubtful. It is not so, however, in the case of the day-to-day administration of planning, particularly concerning the siting of public utility works. In all this, however, one important point must be borne in mind, designation in section 21 (9) has the effect of declaring some, perhaps the majority of public works, to be predominant uses, thus taking them outside the control of planning

88. As a general rule in England neighbouring landowners have few, if any, rights when applications for planning permission are considered—*Gregory* v. *Camden London Borough Council* [1966] 1 W.L.R. 899. However, in England Local Planning Amendment Act 1968, s. 7.
ment of land by statutory undertakers. The general rule is that statutory undertakers must seek planning permission in the normal way, except that by the combined operation of ss. 41 and 160 of the Town and Country Planning Act 1962 (U.K.), development which requires the authorisation of a government department planning permission may be deemed to be granted by the authorising department. This power has to some extent been waived by the terms of agreement set out in Circular 63/51 issued by the Minister of Housing in Local Government.

89. See Model Code of Ordinances—Ord. II 1 (4) (d).

90. (1964) 1 N.Z.T.C.P.A. 146, doubted in *Mobil Oil (New Zealand) Ltd.* v. *Napier City* (1968) 3 N.Z.T.C.P.A. 82, disapproved in *Dean and Anor.* v. *Taupo Borough* (1968) 3 N.Z.T.C.P.A. 117—see now Town and Country Planning Amendment Act 1968, s. 7.

authorities. In the case of public utilities, the council may not be able to exercise its control through appeal, until the public works authority has presented it with a *fait accompli.* It would be a happier situation, perhaps, if all undesignated works were to be conditional uses. This, at least, would return direct control to the local body who would have to consider each application and not have the more difficult task of having to exercise the discretion contained in the words "may appeal". Also, the affected neighbour could be sure his views would be noted, and this surely would bring public works and utilities into line with the general framework of the Act.

So far as Crown developments are concerned, it appears that while they continue to be generally exempt from planning law, a more openly stated and practised policy of co-operation would be of considerable advantage to the twin ideals of planning—futurity and amenity protection.

Control through Appeal — Some Final Observations

Arising particularly from section 21 (9), the right of appeal is given to the council alone and the Appeal Board has expressed the view that only those persons given the right of appeal may exercise it, to the exclusion of all others.[91] However, because a landowner might be seriously affected by development by a public body and the council may not, for some reason, appeal, it is suggested that following *Graig and Anor.* v. *Hutt County Council,*[92] an individual landowner may appeal himself or at least join in an appeal, under the terms of section 42 (2).

At this point, it should be noted that all public and local authorities have a duty to comply with and enforce the provision of a district scheme,[93] and it seems that both, the local council may be compelled to exercise its rights of appeal, and a public body compelled to comply with the scheme by means of mandamus or some similar remedy. This indeed was suggested by Tompkins J.: "[L]ocal authorities are not usually prosecuted for failing to carry out their duties, . . . they are usually kept within the orbit of their rights, duties and liabilities by injunction, prohibition, or mandamus or claims for damages."[94]

B. H. DAVIS.*

---

91. *Wright Stephenson and Co. Ltd.* v. *Dargaville Borough Council* (1958)—see *Town and Country Planning Principles in New Zealand* (1963), Government Printer p. 13.
92. (1966) 3 N.Z.T.C.P.A. 7.
93. S. 33 (2).
94. *Pahiatua Borough* v. *Sinclair and Anor.* [1964] N.Z.L.R. 499, 501. That mandamus is available also against the Crown, see *Board of Education* v. *Rice* [1911] A.C. 179; *R.* v. *Minister of Health ex p. Rush* [1922] 2 K.B. 28. See also *Flynn* v. *Town of Seekonk* 223 N.E. 2d 690 (1967).

* L.LB. (Wales), L.A.M.T.P.I., Lecturer in the Department of English and New Zealand Law at the Victoria University of Wellington.