DISCRETION IN ENVIRONMENTAL PLANNING: NEW SOUTH WALES EXPERIMENTS

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This conference provides a suitable juncture to reflect upon the experiment of the new environmental planning system in New South Wales, particularly as it relates to the exercise of discretion. This topic raises a number of major issues in the field of planning. First, the relationship between plan making and development control. Second, whether plans should be capable of prohibiting or restricting development by force of law rather than persuasive heads of consideration in the development control process. Third, the constraints which affect the exercise of discretion at the development control stage, constraints of both process and procedure as well as heads of consideration. Fourth, the extent to which discretionary decisions on development control are subject to review or appeal.

Under the *Environmental Planning and Assessment Act* the planning system has in general, two stages:

- the preparation of environmental planning instruments; and
- a system of environmental planning control for developments which are permissible with consent under an environmental planning instrument.

The key to the operation of the statutory framework rests with the provision of environmental planning instruments. Without them specifying individual developments as permissible with consent, the environmental planning control provisions of Part IV of the Act do not come into operation. Of course, the environmental planning control provisions do not operate in respect of developments which are either prohibited by an environmental planning instrument, or which are permissible without consent under an environmental planning instrument.

A three-level hierarchy of environmental planning instruments is created by Part III of the Act, based upon the division of responsibility between the State Government and Local Government in the field of environmental planning. Thus, the Act enables the State Department of Environment and Planning to prepare State Environmental Planning

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Policies and Regional Environmental plans dealing with matters which are of significance for environmental planning of the State or a Region. Local Government is empowered to prepare Local Environmental Plans, provided they are not substantially inconsistent with the provisions of any State Policy or Regional Environmental Plan.

The legal scope of environmental planning instruments is broad indeed. Section 26 of the *Environmental Planning and Assessment Act* provides that an environmental planning instrument may make provision for or with respect to, among other things, protecting, improving or utilising to the best advantage the environment, controlling development, reserving land for use for the purposes of open-space or other public purposes, controlling demolition, protecting and preserving trees or vegetation and controlling advertising. The legislation is silent regarding the format, structure and subject matter of State Policies and Regional Environmental Plans. Section 71 provides that the Minister may make make orders regarding the format, structure and subject matter of a Local Environmental Plan. The Act further provides for the preparation of development control plans by local councils to amplify the provisions contained within a Local Environmental Plan whilst generally conforming the provisions of that plan. It should be noted that development control plans prepared under the Act have no statutory effect but are advisory, having persuasive force only in the development control process.

When the *Environmental Planning and Assessment Act* commenced to operate on the 1st September 1980 it did not confront a tabula rasa in the field of planning but rather had to accommodate the legacy of planning control built up since 1945 under Part XIIA of the *Local Government Act* 1919, statutory provisions based upon the 1932 English legislation with a system of prescribed planning schemes and interim development orders providing the basis of planning control. In its transitional provisions the new legislation gave continuing life to the products of the old system providing that interim development orders and prescribed planning schemes, in force at the date of commencement of the new legislation, were "deemed" environmental planning instruments under the new system.

In looking at the relationship between plan making and development control under the New South Wales system, the extent to which planning authorities rely upon development control as the principal planning technique is a matter of choice for the planning practitioners unconstrained by the terms of the statute. Thus the perceived trend towards an excessive reliance upon development control, as opposed to plan making, has been as a result of choice by planning practitioners. That choice may be either conscious or accidental. But you may well ask why is plan-making considered a more lofty activity than development control; is in fact there anything wrong with utilising development control as the prin-

cipal planning tool? And anyway, is there a difference between plan making and development control?

The theory behind the distinction between plan making and development control is based upon the distinction between formulation and enunciation of policies in the plan making process versus a "merits of the case" evaluation of individual development applications within the development control process. Thus the distinction may be posed as one between a predictive rather than reactive approach. Of course such a broad generalisation of the distinction between plan-making and development control is highly simplistic as the two are not separate and distinct, but merely two ends of a spectrum in planning. And of course, in a planning system with a well established policy framework, the role of discretion within the development control process is not eliminated. Rather it focuses on the translation of broad policy objectives into specific decisions and deals with the application of principles to specific development proposals. What is to be decried is the application of discretion in the development control process in the absence of a firm policy basis. Evaluation in planning is not an objective science, but one which relies heavily upon values, upon the weight which the decision maker gives to the various competing objectives.

A policy based approach makes explicit the value choices involved in planning decision making rather than shielding such value choices in the obscurity of individual development control decisions. I am a strong advocate of a policy based approach to planning, where policy directions are made clear and explicit in plans and where plans contain some vision for the future.

The features of a planning system which avoid such a policy approach and rely principally on development control in isolation as its evaluative technique, include the following: First, the absence of discernable policy approaches in plans. Second, a system where plans provide that the vast majority of development is permissible with consent, but provide no guidance for the exercise of discretion in the development control process. Third, where plans themselves are little more than development control devices directed towards either approving or prohibiting specific development proposals. This last phenomenon, known as spot rezonings, has become the affliction of planning in New South Wales, where the spots are so numerous that they obscure completely the instrument they affect. It is worthwhile to reflect upon some of the reasons why planning in New South Wales, despite specific legislative encouragement of a policy based approach, has become submerged in spot rezonings and ad hoc development control. I suppose there are four broad categories as to why this has occurred in New South Wales.

First and foremost of these is the historical legacy of a former plann-

ing system. Planning schemes and interim development orders of the old planning system in New South Wales were given new and continuing life in the transitional provisions of the new legislation. However, they have become an albatross around the neck of the new system, with day to day planning decision making constrained by the former instruments and where planning authorities are unable to attract sufficient and adequate resources to direct their attention towards developing new policy based environmental planning instruments, whilst at the same time, keeping pace with the flow of planning casework.

Second, the plan making process has been unable to keep pace with the speed and extent of change in a society which more and more demands expeditious decision-making by public authorities. This is particularly so in an era of limited economic growth, high unemployment and widespread public support for deregulation and constraints upon the extent to which government intervenes in private sector decision making. In planning, the speed of decision making has hardly been a virtue. Under the former planning system in New South Wales, prescribed planning schemes often took between 20 and 20 years from their commencement to their final making, at which time the end product is hardly relevant to the community upon which it is thrust. Such delay directly resulted in a splurge of spot rezoning by interim development orders. Although the efficiency of the plan making process in New South wales has been improved dramatically with major Regional Environmental Plans being prepared in approximately two years and Local environmental Plans being processed within four to twelve months, such a time scale is still looked upon with disdain by a community ever anxious for results and performance.

Third, the New South Wales planning system has become increasingly legalistic with an excessive reliance upon litigation regarding procedures and interpretation rather than focusing on the planning merits of issues.

Fourth, there has been an inability or reluctance on the part of the planning profession to develop planning policies, in the field of State Policies and Regional Plans, which are substantive and meaningful, rather than broad generalisations incapable of being translated into specific effects.

A further feature of the New South Wales planning system, which is shared by planning systems in other States in Australia but is not the case in the United Kimgdom, is its statutory effect whereby plans can prohibit development as a matter of law. Thus, section 31 of the *Environmental Planning and Assessment Act* provides specifically that an environmental planning instrument may provide that development is prohibited. The ability of environmental instruments to statutorily prohibit development is the cause of the spot rezoning syndrome which plagues

Australian planning systems. Under a system which relies upon statutory prohibitions, attention is focused to a great extent on the legal interpretation of the planning instrument rather than the planning ideas and substance contained therein. In the English planning system all development is permissible and no development is prohibited. This non-statutory approach to plans is in marked contrast to the Australian planning tradition, in which development may be statutorily prohibited by plans.

The experience of the past four years under the *Environmental Planning and Assessment Act* in New South Wales has confirmed the earlier planning practice of spot rezonings of specific sites being the overwhelming focus of planning effort, with virtually no time or energy left for comprehensive planning. But an ad hoc approach continues to dominate planning decisions in New South Wales. In my view, it is time in Australia to reconsider seriously the state of the current statutory zoning system of planning instruments which embody and enforce strict statutory zonings. We need to examine whether a more flexible system, under which plans would be incapable of prohibiting development as a matter of law, would result in a more flexible and policy based system where attention would be focused upon the planning merits rather than the legal interpretation of plans.

Within the development control system itself section 90 of the *Environmental Planning and Assessment Act* provides some 19 heads of consideration which a consent authority is obliged to take into consideration in determining a development application. These heads of consideration relate to a broad range of planning issues including the provisions of any environmental planning instrument or draft instruments, a development control plan, the impact of development on the environment, landscape and scenic impacts, social and economics effects, whether the land is subject to natural hazards, traffic and transport considerations, the availability and adequacy of utility services, the existing and likely future amenity of the neighbourhood, the relationship of a development proposal to adjoining development, the character, scale, height, density, design and external appearance of development and any public submissions made where the development application is publicly advertised.

Of note is the provision within section 90 that a consent authority shall take into account the social and economic effect of a development proposal, a consideration which was not permitted under the former planning law in New South Wales. The exercise of a consent authority's discretion under this section must be serious and conscientious. This is well demonstrated by the decision in *Hale v. Parramatta City Council*[1] where the Courts invalidated a decision by Parramatta City Council due to the Council's failure to properly take into account the heads of consideration under section 90 of the Act.

1 (1982) 47 L G R A 319