LEGAL CONTROLS OVER PLANNING THE USE OF LAND IN VICTORIA

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[*Mr Ricketson examines in this article the various authorities responsible for the planning of land use in Victoria. He probes the concepts underlying planning including the contribution of the common law in the tort of nuisance. After describing the statutory machinery established by the Local Government and Town and Country Planning Acts he concludes that the planning system operative in Victoria is a 'half-way house' between the regime of private property and collectivism.*]

Without doubt, the growth of cities and the concurrent population explosion are becoming two of the most pressing problems facing modern society. The mass urban phenomena, now becoming a reality in the megaloptic conurbations of the early 1970s, bear out the dire prophetic warnings of writers like Lewis Mumford concerned at the nearness of a mass society where man becomes machine and the only thing human left is the machine itself.[1] Figuratively, the city becomes an uncontrolled, living organism, spilling out in all directions, fingers of urbanisation eating up dwindling assets of land, space, fresh air and water, while the heart and vital inner organs are slowly killed by cancerous overcrowding and pollution.

The object of this article is to examine some aspects of man's response to these problems, and in particular, to look at the way in which land is used and the legal controls that exist to modify or direct such activities. Of necessity, such a study involves an analysis of certain fundamental ideologies which are directly related to land in a system such as ours, namely private property and planning. Because of the wide scope of such a study, our consideration here will be limited to land in the State of Victoria and more particularly the metropolitan area of Melbourne.

The starting point in the following discussion on land use is the concept of private property. Blackstone once referred to property as the:

> sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[2]

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[1] Mumford, *The City in History* (1964).

This implies that man may do whatever he likes with whatever is his property. Essential to this is the notion of 'exclusion': if X owns property, then no one else can interfere with or usurp his rights over it. X has an unfettered discretion to do what he likes with it. The subject-matter of things which constitute 'property' extends to include intangible objects, such as song copyrights, choses in action, patents and so on, as well as concrete objects such as land or chattels. Thus, the determining element of 'propertyness' is based on the power of 'exclusion' as against the whole world, whether or not the particular property is tangible or intangible by nature. Where there is 'property', then the business of the law is to back up this power, by laying down appropriate procedures and sanctions to define the situations in which such rights arise. Thus the law establishes the rules and conditions whereby ownership of property is created and passes, including, for instance, such mechanisms as gifts *inter vivos,* testamentary dispositions and sales made *bona fide* for good consideration.

The above is, of course, a classical description of the nature of property. A ready contrast to proprietary rights is provided by the example of contractual rights which only arise as against other parties to the particular contract. Some modern writers such as Felix Cohen and Harold Laski have defined property in different terms, looking at it in the sense of a set of relationships between them.[3] The notion of exclusion is still implicit in this approach, but it is the existence of property (or in Marxian terminology, the organisation of the ownership of the means of production[4]) which determines the nature of the relationships, whether between landlord and tenant, employer and employee or principal and agent, to mention only a few of the more important ones.[5]

Nevertheless, if property is taken to represent a set of social relationships, then the degree of exclusiveness in its use cannot be total. For this predicates a completely free society where people do not interact at all, or if they do, then very little. While this may have been very nearly the case in the *laissez-faire* nineteenth century, such a state of unfettered competition where people use their property as they wish has a profound impact on the rest of society. A salutary example of this is provided by the rapid uncontrolled growth of industry in rural villages like Birmingham and Manchester during the Industrial Revolution, with its accompanying side effects of pollution, overcrowding and shocking working conditions.

Thus while Blackstone could write 200 years ago '[r]egard of the law for private property is so great that it will not authorise the least violation,

[2] Sackville & Neave, *Property Law Cases & Materials* (1971) 36.
[3] Lawson, *Introduction to The Law of Property* (1958) 5.
[4] Marx & Engels, *Communist Manifesto* (1848).
[5] Sackville & Neave, *op. cit.* 33, 50.

not even for the general good of the whole community . . .'[6] such statements, if indeed they were ever wholly true, were becoming far less accurate by the beginning of the present century. The responsibility of property owners to the remainder of the community was becoming defined in various ways and ownership was becoming increasingly hedged around by all sorts of controls. Factory Acts had been passed, laws prohibiting combinations had been repealed and the franchise extended. Labour had become organised and entered politics. Increasingly, the role of government in the regulation of property relationships was becoming recognised, and it soon became a legislative commonplace that the ownership of property implied corresponding responsibilities to the community in general.[7] The introduction of income tax and estate duties was only one aspect of this development, as were social service payments. The most important for our purposes here were restrictions on the free use of land, where the principle of exclusion was steadily eroded. Pursuant to a large number of Acts of Parliament today government officials may enter land without the owner's permission for certain specified purposes.[8] Large amounts of real property are vested in the Crown as well as other public authorities and bodies, and governments can exercise powers of resumption on private property if needed for public purposes.[9] In addition a large number of statutes, regulations and by-laws lay down minimum health requirements, residential building standards and direct controls on certain land usages through extensive town planning powers.

Thus ownership of property, particularly land, is no longer subject to the owner's unfettered discretion. If exclusive power still remains, it is much more limited in scope today than formerly, and the reality of private property is diminishing, although the ethos still remains. The purpose of this study in the following sections will be to examine in detail how land usage has been controlled in the Victorian situation and whether or not a suitable resolution of the tension between the private property ethos and general community needs has been attained with the aid of modern statutory controls.

Even before the occurrence of large-scale governmental restrictions on the use of private property, certain common law and equitable controls had arisen which are important to look at first. Examples were the doctrines of restrictive covenants and easements which provided some limitations on the free use of land long before the development of town planning and other modern residential and health requirements. Technical rules were associated with both doctrines, but they did impose some control

[6] Haar, *Land-Use Planning: A Casebook on the Use, Misuse and Re-Use of Urban Land* (2nd ed. 1971) 1.
[7] Lawson, *op. cit.* 5.
[8] *Ibid.*
[9] *E.g.* Town & Country Planning Act 1961, s. 40.

over the use of real property. Restrictive covenants could forbid the construction of a tall building, or indeed anything at all, on an adjacent block of land, and thus could be used to promote the amenity of a neighbourhood by a series of private agreements which the law turned into a sort of transmissible property right, binding on successors in title.[10]

Likewise, easements could affect the use of any piece of land, creating, for instance, a right of way which would limit the owner's ability to do totally as he wished.[11] Some of these devices could be extended to cover different matters such as easements of light or air, or even restrictive covenants to prevent negroes moving into a white neighbourhood.[12] Detailed rules covered the application of each doctrine and largely today they are superseded by more comprehensive statutory controls. They were essentially of a private nature, and therefore their operation was only piecemeal and *ad hoc,* relying on agreement between the parties, or, if in dispute, relying on one of them to bring the matter to court (in an age where litigation was, and perhaps still is, beyond the range of many groups in society). Their scope was thus limited and provided no overall plan or guarantee that private property would be used to the best advantage of all, although in individual cases they could be extremely effective.

Another common law control over the use of land came from the doctrines of private and public nuisance in the law of torts. The precise nature and extent of both forms of nuisance is unclear, despite a large volume of decided cases. The first traditionally was, and still is, confined to invasions of an occupier's interest in the beneficial use and enjoyment of his land, although occasionally he may also recover for incidental injury sustained by him in the exercise of an interest in land, such as for illness caused by noxious gases from an adjoining factory.[13] It is essentially an action based on property rights, because only the owner or occupier of the land affected by the so-called 'nuisance' has title to sue.[14] It seems generally that some element of fault must be found on the part of the tortfeasor, although formerly strict liability was the case.[15]

The variety of nuisance is great: generally it must be something which unreasonably interferes with the plaintiff's beneficial use of his land. Besides physical intrusions like water or other objects (which may also be trespasses), nuisance extends to invasions by noise, smell, vibration,

[10] Megarry & Wade, *Law of Real Property* (3rd ed. 1966) 753 ff.
[11] *Ibid.* 802 ff.
[12] Sackville & Neave, *op. cit.* 867 ff; Megarry & Wade, *op. cit.* 802 ff.
[13] Fleming, *Law of Torts* (4th ed. 1971) 340.
[14] *Malone v. Laskey* [1907] 2 K.B. 141.
[15] *Torette House Pty Ltd v. Berkman* (1939) 62 C.L.R. 637; *Hargrave v. Goldman* (1963) 110 C.L.R. 40.

smoke or dust.[16] A recent case has held that a nuisance is created where one person uses his land so as to create a subsidence on his neighbour's property and that 'each successive subsidence gives rise to a fresh cause of action even though there has been no new excavation'.[17] The interference must be unreasonable and substantial,[18] and the notion of 'beneficial' use is broad and comprehensive, including not only the occupier's claim to the actual use of the soil for residential, agricultural, commercial or industrial purposes, but equally the comfort, pleasure and enjoyment which a person normally derives from occupancy of land.[19] Nevertheless, it does not seem that the doctrine of nuisance extends to cover certain beneficial uses of land which might be protected by a restrictive covenant or easement under property law, such as an unimpaired view from one's home[20] or freedom from being spied upon from a vantage point.[21]

Essentially then, private nuisance is an action open to an individual whose rights to enjoy his property as he wishes are interfered with. With public nuisance on the other hand, it seems that anyone sustaining personal injury or other loss may take advantage of this action although no rights or privileges in land of his have been invaded at all.[22] The latter situation, often a street accident, is barely distinguishable from ordinary negligence cases and provides a series of difficult distinctions in that part of the law. It contains similar elements to private nuisance in that the plaintiff must prove particular damage to himself above the ordinary inconvenience or annoyance suffered by the public at large as well as the unreasonableness of the interference.[23]

The essential element of both nuisance actions, particularly private nuisance is that they provide some means of controlling the use that adjoining landowners make of their land. It is a crude form of judicial planning control, and has a certain potential for meeting pollution and health dangers. Nevertheless, as it is an individual action, it depends on individual parties bringing it to court, and thus it provides only a piecemeal solution in providing an overall regulation of the use of land in a particular area. Some advances in the U.S. with statutory formulation of the common law action have erected nuisance into quite a significant

[16] *Don Brass Foundry Pty Ltd v. Stead* (1948) 48 S.R. (N.S.W.) 482; *Munro v. Southern Dairies Ltd* [1955] V.L.R. 332 (noise, smell and flies emanating from dairy), *Daily Telegraph Co. Ltd v. Stuart* (1928) 28 S.R. (N.S.W.) 291 (noise from drills).

[17] *Public Trustee v. Hermann* (1968) 88 W.N. (Pt. 1) (N.S.W.) 447.

[18] *Rushmer v. Polsue of Alferi, Ltd* [1906] 1 Ch. 234 at 243-6; *Bamford v. Turnley* (1862) 3 B. & S. 66, 83-4; *Don Brass Foundry Pty Ltd v. Stead* (1948) 48 S.R. (N.S.W.) 482.

[19] *Walter v. Selfe* (1851) 4 De G. & Gex 315, 322.

[20] *William Hebrods Case* (1611) 9 Co. Rep. 57B, 58B.

[21] *Victoria Park Racing & Recreation Grounds Co. Ltd v. Taylor* (1937) 58 C.L.R. 479.

[22] *Attorney-General v. Abraham and Williams Ltd* [1949] N.Z.L.R. 461.

[23] *Walsh v. Ervin* [1952] V.L.R. 361.

supplement to other planning methods, but these developments have certainly not been paralleled in Australia.[24]

The primary importance of the discussion so far is to raise the important question of private property and the need for regulation in its uses, if it is not to become truly despotic and unheeding of the rights of others. As has been seen, the common law provides no general remedy to ensure that property is used beneficially for all in the community and that conflicting uses are reconciled. Thus, given the need for such regulation, our attention must now switch to an examination of statutory methods of control, namely through town planning techniques, which have been developed over the last 60 years in response to the need for ordering private land uses in a systematic way. Such an approach, it will be seen, can comprehend a far wider set of considerations than the limited common law devices. At the same time, other problems are created thereby and these may severely handicap the success of even the most carefully organised planning scheme.

The prime objective, therefore, remains to establish how the use of private property can be made 'responsible' and 'responsive' to the needs and general amenity of the rest of the community.

TOWN PLANNING—PRINCIPLES AND OBJECTIVES

It is now timely to consider statutory methods of controlling the use of land. Broadly these may be comprehended under the general rubric of 'town planning' or, perhaps, more accurately, 'town and country planning'. It is important to emphasise the use of the word 'planning', for this implies that it is a conscious, directed effort, a programmed series of 'steps'. The relevance of 'town and country' lies in the fact that a coherent planning policy must cover both urban and rural areas, and, as will be shown later, even planning for one city must taken into account the regional, state and federal context.

There are many definitions of town planning, its aims and objectives. John Burns, the author of the first English town planning statute in 1909, described the objectives and possibilities of town planning as follows:

> [w]hat is our modest object? Comfort in the house; health in the home; dignity in our streets; and a lessening of the noises, the smoke, the smells, the advertisements, the nuisances that accompany a city that is without a plan, because its rulers are governors without ideas, and its citizens without hopeful outlook and imagination. Industry is the condition of a city's being: health, convenience and beauty the conditions of its well-being.[24a]

A U.S. court in 1948 put it this way:

[24] Wilson, 'Nuisance as a Modern Mode of Land Use Control' 86 *University of Pennsylvania Law Review* 691.

[24a] Quoted in the 1929 Town Planning Commission on Melbourne *Report*, 20.

> the accommodation, through unity of construction, of the variant interests seeking expression in the local physical life to the interest of the community as a social unit. Planning is a science and an art concerned with land economics and land policies in terms of social and economic betterment.[25]

The emphasis now turns from individualism and exclusiveness to community responsibility and the good of the social unit. As Brown and Sherrard put it:

> Town and Country planning is the direction of the development and use of land to serve the economic and social welfare of a community in respect of convenience, health and amenity.[26]

Planning therefore, has profound effects on the use of private property, particularly when it specifies the type of development allowed in particular areas. As Lord Justice Diplock (as he then was) said: '[t]he whole purpose of planning control . . . is to take away private rights or property. Any refusal of planning permission does just this.'[27]

Thus town and country planning is a systematic method of adopting the physical landscape to meet the varying demands of a community, whether these be economic, social, cultural or aesthetic. What is implied is a balancing process: one end of the balance being represented by private property and the other by the public or community interest. Thus town planning is a very positive instrument of social and economic policy and consequently is susceptible to influence from any vested interest group, particularly those with money or political power, such as land developers and manufacturers and, more recently, citizen action groups.

The notion of 'community' is closely identified with this conception of planning: the use and ownership of land should ideally be for the benefit of all. Industry, for instance, should no longer be able to locate where it wishes and to pollute poorer residential areas with impunity. Highrise flats, which scar the landscape, should not be built without adequate open space for children to play. Sprawling suburbs should not be allowed, if they outstrip essential services and eat into surrounding natural features. No man can be an island unto himself, if the community of man within a large city is to survive and each individual is to lead a balanced life.

Accepting this as a rationale for planning, it is then readily apparent that planning land use, particularly in cities, is a complex matter and many factors interrelate, each changing in significance from area to

[25] *Grosser v. Board of Adjustment of Millburn Township* (1948) 137 N.J.L. 630, 631, 661; A. 2d 168.
[26] Brown and Sherrard, *An Introduction to Town and Country Planning* (1969) 3.
[27] *Westminster Bank Ltd v. Beverley Borough Council* [1969] 1 Q.B. 499, 526.

area.[28] For instance, under section 7A(3) of the Victorian Town and Country Planning Act 1961,[29] the Town and Country Planning Board has power to prepare statements of planning policy to be adopted by the government in relation to the major components of urban and rural development. In doing so, it must have regard to such things as:

(a) demographic, social and economic factors and influences;
(b) conservation of natural resources for social, economic, environmental, ecological and scientific purposes;
(c) characteristics of land;
(d) characteristics and disposition of land uses;
(e) amenity and environment;
(f) communication; and
(g) development requirements of public authorities.

As regards urban planning in particular, it must be recognised that an urban area is not a single conglomerate or monolithic system of social and economic relationships, but consists of many differing subsystems and groups of relationships which the planner must identify and provide for in his plan. These include the national and sectional context in which the city is located; the physiography of the area, including many subsystems such as its natural resources, physical features, water supply and so on; its man-made structures, including buildings, bridges, roads and so on; the demographic pattern; the pattern of production, distribution and consumption (*i.e.* the whole set of relationships involved in commercial, industrial, governmental and other establishments) and their geographical distribution; the spatial use of land (where various urban activities tend to concentrate); communication and transport; cultural facilities; aesthetic design; and the pattern of land ownership.[30]

This list is obviously not exhaustive, but it indicates something of the intricate calculus of interacting systems and sets of relationships within an urban environment. The planner must be aware of all these before proceeding with a blueprint for development. It is simply the cautious step of saying, that before one changes anything, one must look to what already exists. Strategically, changes can be best effected in the weaker parts of the system, while those most entrenched will offer the greatest resistance. Planners generally do not start from scratch, but at a time when city development has long since been out of control. They have no clean slate on which to put their plans, and thus must adapt their material as best they can. Consequently, overnight change may be impos-

[28] See Else-Mitchell J. in *Rio Pioneer Gravel Co. Pty Ltd v. Warringah Shire Council* (1969) 17 L.G.R.A. 153, 162. 15 *Town Planning and Local Government Guide* 141, para 381.
[29] Inserted 1968. Town & Country Planning (Amendments) Act 1968 (No. 7676).
[30] Derived from Fagin, 'Planning for Future Urban Growth' 30 *Law and Contemporary Problems* 9, 19-20.

sible and even undesirable. This brings into focus the ideology of planners themselves and the way in which they conceive their roles. Some may be prepared to let things go on as they are with some overall modification, while others may try to create entirely new directions for growth to correct the mistakes of the past.

At this stage, it is appropriate to note the legal definition that has been given to town planning powers conferred by statute (such as the Victorian Town and Country Planning Act 1961). Where such a power is exercised by a planning authority, it must remember that while it may have regard to allied considerations, such as those mentioned above, it may only do this in so far as they affect planning the use of land.[31] As Sugerman J. has observed, there is a distinction between

> 'town planning considerations' and on the other hand, social or economic considerations of a general character, not specifically related to town planning; between, that is to say, on the one hand, the responsible authority, which is the local municipal or shire council . . . directing its mind to considerations which go beyond town planning and are of a general social or economic nature, more appropriate to be dealt with by the central government . . .[32]

The Town and Country Planning Act 1961 contains a schedule of matters which can be said to be town planning matters[33] and this includes such things as the reservation of land for streets, parks and other public purposes, the prescription of various uses of land in specific areas, the provision of essential services and the preservation of objects and areas of historical or scientific interest. This is now an exhaustive list,[34] although its ambit is very wide, and section 7A(3) (quoted above) provides a further series of factors to be considered in the planning process. But even in respect to these matters it must always be ascertained whether a provision concerning any of them is properly said to be based on town planning considerations or on considerations outside the scope of town planning. As Gifford says, there is no statutory provision or judicial decision that clearly draws a distinction between these.[35] Whilst these things will be examined in more detail below, it should be noted that it is very hard to draw any real dividing line between 'town planning matters', on one hand, and 'other matters', on the other hand. In the light of our discussion above, it is clear that numerous factors affect town planning, and *prima facie,* if these can be connected to planning the use of land, then they are quite in place. While the law tries to keep town planning away from the areas of political or social controversy, obviously

[31] Gifford, *The Victorian Town Planning Handbook* (4th ed. 1973) 6.
[32] *Ampol Petroleum Ltd v. Warringah Shire Council* (1956) 1 L.G.R.A. 276, 279.
[33] Town and Country Planning Act 1961. 3rd Schedule.
[34] *Ibid.* s. 9(2)(a).
[35] Gifford, *op. cit.* 7; See Sugarman J. in *Greenberg v. Sydney City Council; Snelling v. Sydney City Council* (1958) 3 L.G.R.A. 223, 231.

it has a profound effect in either and it is hard to 'depoliticise' or 'de-socialise' it, without being left with nothing.

Nevertheless, there are certain judicial guidelines as to the exercise of town planning powers. A planning authority cannot use its authority to suppress or discourage activities objectionable on broad moral grounds.[36] Nor can such an authority use its powers for an ulterior object, 'however desirable that object may seem to them to be in the public interest.'[37] While planning may seem a useful means of achieving an economic rationalisation of various activities, such as manufacturing or retailing, by the use of appropriate zonings, if this was a paramount objective it would be an invalid exercise of town planning powers.[38] But clearly the regulation of such activities by various zonings may be an integral part of land-use planning. The important point seems to be that town planning considerations must be primary, and other allied matters, such as rationalising the spatial distribution of certain activities or, to quote a more specific example, determining the number of service stations in a particular locality,[39] must be subsidiary to or attendant upon the main exercise of the planning power.

Thus, in practice, there may be little real difference between the sorts of considerations that judges and lawyers, on one hand, regard as proper and ancilliary to town planning powers, as expressed in statutory form, and those of planners, on the other hand. Nevertheless, it is clear that the latter are far more likely to place their conception of planning and its purpose in a much wider framework of overall policy concerns, while the lawyer, both by profession and inclination, is more confined to interpreting the way these broader objects have been translated into concrete legislative provisions.

In this context, it is worth noting several issues which become very germane in any examination of the inter-reaction between the rights of private property and the objectives of town planning. The most important of these is the tension between controls and freedom inherent in any planning scheme. Private property implies a certain set of rights, not the least of which is the freedom to use one's property as one wishes. Yet, as suggested above, the exercise of this freedom, particularly in an urban context, can have a profound impact on other people who possess only a little property or none at all. The only rationale for a planning scheme

[36] *Abbey Investments Pty Ltd v. Sydney City Council* (1965) 12 L.G.R.A. 51.
[37] *Pyx Granite Co. Ltd v. Ministry of Housing & Local Government* [1958] 1 Q.B. 554, 572.
[38] *Ampol Petroleum Pty Ltd v. Warringah Shire Council* (1956) 1 L.G.R.A. 276, 279.
[39] *Amoco Australia Pty Ltd v. Randwick Municipal Council* (1968) 16 L.G.R.A. 121, 124; *Neptune Oil Pty Ltd v. Ku-Ring-Gai Municipal Council* 3 L.G.R.A. 316, 322.

in a democratic society must be whether, in restricting the freedom of some property owners, it thereby promotes the freedom of the majority —for instance, by confining the areas where industry can locate or by providing essential services in newly developing areas. Otherwise, a situation of totalitarian controls can arise where people are forced to live, work and relax as the plan directs. It remains to be seen below how effective the organisation of planning in Victoria is in achieving this end.

Ancilliary issues arise also in considering this basic question. To what extent is public participation allowed for in any planning scheme? What rights do property owners have to object to any proposed scheme? What priorities do conservation, pollution control and urban renewal receive? How much do the ideologies of planners affect the outcome of any completed scheme? Do planners, for instance, see themselves as having all the answers or do they merely 'rubberstamp' the decisions of political masters? Most of these questions fall outside the ambit of this paper, but they are well worth bearing in mind during the following discussion.

THE FRAMEWORK OF PLANNING LEGISLATION IN VICTORIA

The major enactment embodying the legislative framework for planning in Victoria is the Town and Country Planning Act 1961 as amended up to May, 1974. This Act is the successor to the first planning statute passed in 1944, but contains some very major amendments introduced in 1968,[40] along with numerous amendments prior and subsequent to that date. Up to that year, the organisation of planning in the State represented a sorry picture with many different bodies having some sort of planning function, but without any significant co-ordination between them. The prime responsibility for metropolitan planning since 1949 had lain with the Melbourne Metropolitan Board of Works (the MMBW), which had prepared a planning scheme for the metropolitan area in 1954, but up to 1966 was still receiving objections to it.[41] Indeed, by that time it was widely recognised that the assumptions of this plan were becoming rapidly dated, as the city had spread beyond the limits of the 1954 planning area and the population of the city by the end of the century was predicted to grow to between 4 and 5 million—nearly 3 times the population in 1954.[42]

On the State level, responsibility lay theoretically with the Town and

[40] Town and Country Planning (Amendments) Act 1968.

[41] MMBW, *The First 75 Years—A Review of the Activities of the Board of Works 1891-1966* 7. See generally also: Ledgar, *Town Planning in Victoria with Particular Reference to the Aim and Scope of the Melbourne Metropolitan Planning Scheme* (1960) 2 *M.U.L.R.* 281 ff.

[42] See MMBW, *Problem of Urban Expansion in the Melbourne Metropolitan Area* (1959).

Country Planning Board (TCPB) and the individual shire and municipal councils. But by 1966 little had been achieved in the way of completed planning schemes by either the Board or councils, while a large number of schemes were only in the early stages and nearly half the councils had carried out no planning at all.[43] The TCPB had been prevented from carrying out any real effective co-ordinating role by shortage of staff and resources and in any case the legislation only provided it with an advisory function.[44] In addition there were many different government departments and instrumentalities which had some influence on planning. These included, *inter alia,* the following:

Education Department
Public Works Department
State Rivers Commission
Country Roads Board
State Electricity Commission
Victorian Railways Commission
Housing Commission
Land Utilisation Advisory Council
Metropolitan Tramways Board
Port Phillip Authority
Harbor Trust
Dandenong Valley Authority
Soil Conservation Authority
Department of Lands and Agriculture
Forests Commission
State Development and Decentralisation Department.[45]

As most of the above are concerned with the provision of public works and services, their relevance to planning land use, particularly in developing areas, can be readily appreciated.[46]

Thus in 1966 the State Government requested the MMBW and TCPB to investigate likely future patterns of development, especially for the city of Melbourne, and to make recommendations on the most desirable metropolitan planning policy in the future.[47] In addition, they were asked to make submissions on the type of planning organisation needed to attain this. The findings of both bodies are contained in two reports pub-

[43] Town and Country Planning Board of Victoria, *Twenty Fourth Annual Report, 1968-69* (1969). Appendices III & IV.
[44] Stretton, *Ideas for Australian Cities* (1970) 197.
[45] Derived from *Victorian Yearbook 1966.*
[46] After 1967, consideration must also be given to the Land Conservation Council (Land Conservation Act 1970), the Environment Protection Authority (Environment Protection Act 1970) and the Cities Commission (Cities Commission Act 1973 (Cth)).
[47] See Town and Country Planning Board of Victoria, *Organisation for Strategic Planning* (1967) 5.

lished the following year.[48] Both were largely similar in content though differing in emphasis. The TCPB, in particular, recommended that there be a strategic approach to planning, organising it on a local, regional and state level and co-ordinating it with the programmes of the government departments and instrumentalities mentioned above, especially those concerned with public transportation and the provision of services like electricity and sewage.[49] As a result these recommendations along with many others were incorporated in the Town and Country Planning Act in 1968, provision being made for a State Planning Council to be set up to co-ordinate planning on a general level,[50] as well as regional planning authorities[51] and a more decisive role for the TCPB itself,[52] which is now responsible for preparing general statements of planning policy for the State.[53]

In addition, both of the 1967 reports recommended that Melbourne in the future be planned to follow a corridor type of development outward from the centre with green wedges in between and a few satellite towns further out.[54] By and large, other alternatives, such as equal concentric growth outwards, a green belt surrounding the city or extensive satellite town development, were rejected as either too costly or socially unacceptable. Since 1967, the corridor concept has been refined and modified in subsequent reports by the MMBW and has been incorporated in two proposed amendments to the 1954 planning scheme (finally approved in 1968). These are Amendment Numbers 3 and 21 and their effect is to enlarge the metropolitan planning area considerably. They contain new zonings to enable the corridor development, with rigid controls on different land uses in each zone and strict limits on subdivision. Until such time as these amendments are fully approved, the areas concerned are covered by Interim Development Orders (see later)[55] while objections from the public are being heard.

At the time of writing, the period for objections had finished in early 1973 and in February 1974 the MMBW presented its report thereon.[56] Despite considerable criticism of particular aspects of the corridor concept, the MMBW has said it will retain this policy with several modifications

[48] MMBW, *Future Growth of Melbourne* (1967); TCPB *op. cit.*
[49] TCPB *op. cit.* 14.
[50] Town and Country Planning Act 1961 (as amended up to December 1972) S. 8B.
[51] *Ibid.* s. 12.
[52] *Ibid.* ss. 4-7A.
[53] *Ibid.* s. 7A.
[54] TCPB *op. cit.* MMBW, *Future Growth* 3-4.
[55] Melbourne Metropolitan Area Interim Development Order (Extension Area No. 1) 1 December 1971 and I.D.O. (Extension Area No. 2) 11 August 1972, 23 April 1972 and 16 December 1970.
[56] MMBW, *Report on General Concept Objections Planning Policies for the Melbourne Metropolitan Region and Amending Planning Schemes 3 and 21.* February, 1974.

and will encourage satellite towns at Melton or Sunbury to offset the unbalanced development of the metropolitan area.[57] As regards corridor zones, the MMBW has made clearer the technique it intends to adopt. Certain portions of the corridor zones, considered potentially suitable for future development have now been declared Investigation Areas pursuant to section 4 of the Development Areas Act 1973.[58] Joint studies between the State and Commonwealth governments together with the MMBW will be carried out to determine the implications of development within such areas and to determine which parts thereof should be developed first and which should be set aside as deferred development areas, earmarked for future urban use.[59] Declaration of such areas under the Development Areas Act 1973 enables the Government to acquire land wherever it wishes to encourage or contain future development and the MMBW believes that this will act as a restraint on increasing land prices, as well as encouraging greater community debate before policy decisions are taken.[60] It is also clear from the same Report that it will place a far greater emphasis on social, economic and environmental factors in its future planning.[61]

The following discussion deals only with the principal features of the Act, as it covers many different areas and many of these would require too much detail to be treated herein. The approach, therefore, will be to look at the broad planning structure set up by the Act and the mechanisms by which planning schemes come into existence and are operated.

It is best to begin by looking at the major bodies responsible for planning in Victoria.

i) THE TOWN AND COUNTRY PLANNING BOARD

The name of this body has been retained from the original 1944 Act, but section 4(1), inserted in 1968, has enlarged its membership from three to four. The members are appointed for a renewable term of 5 years by the Governor in Council. Like most other statutory bodies, it is a body corporate, with perpetual succession and a common seal. Thus it is capable of suing in law and of being sued, and of purchasing and otherwise disposing of real and personal property and of doing and suffering all such acts and things as bodies corporate may by law do and suffer.[62]

Its chairman is to be skilled in town and country planning and both the chairman and deputy chairman are full-time.[63]

[57] *Ibid.* 26.
[58] *Ibid.* 23. 'Investigation Areas' are declared pursuant to s. 4 of the Development Areas Act 1973.
[59] *Ibid.* 23.
[60] *Ibid.*
[61] *Ibid.* Part C.
[62] Town and Country Planning Act, s. 4(1).
[63] S. 4(2).

By section 5(1) the Board is required to report and advise the Minister on any matters or disputes arising out of the provisions of the Act, or the administration thereof, as well as on any matter relating to town and country planning. An annual report is to be presented to the Minister and laid before Parliament.[64]

Section 6(1) outlines the Board's responsibility as 'promoting and co-ordinating town and country planning within the State': thus it is empowered to prepare and administer planning schemes and interim developments orders.[65] In addition it must report to the Minister upon planning schemes prepared by other authorities.[66] These functions of initiation and review will be examined in detail below.

Under section 7A statutory recognition has been given to the Board's role in overall strategic planning. It may prepare a statement of planning policy with respect to any portion of Victoria whether or not a planning scheme has been or is being prepared for that area by any responsible authority.[67] Such a statement of planning policy may provide for any of the things normally the subject matter of planning schemes under the Act, but the legislation provides that it shall be directed primarily towards broad general planning to facilitate the co-ordination of planning throughout the State by all responsible authorities.[68] Such a planning policy should have regard to the matters listed in section 7A(3) (quoted above), which, *prima facie,* gives effect to the recommendations of the Town and Country Planning Board's 1967 Report as regards overall strategic planning. Section 8E gives force to this by stating that every responsible authority in preparing or amending any planning scheme shall have due regard to any approved statement of planning policy which affects its planning area. Other provisions of the Act, to be examined below, ensure that the Board has some control over local planning schemes which are submitted for approval by the Governor in Council, through its function of review.[69]

To date, seven statements of planning policy have been prepared and approved by the Board. These include general statements on desirable developments in such areas as the Yarra Valley, the Mornington Peninsula, Westernport and the Dandenong Ranges.[70] They pay special attention to the need for conservation of natural features in these areas, pollution control (particularly in Westernport) and careful regulation of tourist and

[64] S. 5(2).
[65] Ss 13-16.
[66] S. 30(2).
[67] S. 7A(1), 'Responsible authority' is used throughout the Act to refer to any body empowered to prepare a planning scheme under the Act—see s. 3(1).
[68] S. 7A(2).
[69] S. 30(2).
[70] *Statement of Policy No. 1. Westernport Area 1970; No. 2. Mornington Peninsula Area; No. 3. Dandenong Ranges. May 1971; No. 4. River Yarra. Sept. 1971.*

recreational facilities. Another two have also been approved, but on more specialised aspects of town planning. These cover land use near aerodromes (especially Tullamarine) and near highways,[71] drawing attention to the dangers of pollution and noise nuisance, unless land use is carefully regulated in such areas. A final statement of planning policy deals with the development of Geelong, giving general guidelines for growth in this centre, particularly as an outlet for major metropolitan population increase and a desirable location for new industrial and commercial establishments, building in a long-settled and thriving centre.[72] Each of these statements is accompanied by a detailed introductory report giving the justification behind the general principles enunciated. In producing seven such major statements in just over 3 years, it certainly does not seem that the Board has been idle in its work on strategic planning for the metropolitan area (although these still only cover a minute portion of the entire State).

ii) THE STATE PLANNING COUNCIL

Following the recommendations of the TCPB Report of 1967, this body was set up in 1968 and consists of heads of various public authorities concerned with planning.[73] Its functions are:

> (a) to co-ordinate planning by State instrumentalities and semi-government authorities of future works and developments for which they are responsible;
>
> (b) to act as consultant and adviser to the Town and Country Planning Board with respect to the preparation and adoption of any statement of planning policy prepared by the Board with respect to any other matter necessary to be provided for in the interests of the State in the preparation of regional or other planning schemes.[74]

It thus provides an essential forum for the co-ordination of planning by public authorities and government departments in the development of essential services to meet the needs of future planned land use, although there are certain notable exceptions in its membership.[75] How effective this has been is hard to say: it is noteworthy, perhaps, that the Council has met on an average of 4 times a year since its inauguration, and these have been mainly to consider the statements of planning policy referred to above.[76] But in 1970, in recognition of the need for closer contact between

[71] *Statement of Planning Policy No. 5. Highway Areas. Feb. 1972*; *No. 6. Land Use near Aerodromes. Feb. 1973.*

[72] *Statement of Planning Policy No. 7. Geelong. Aug. 1973.*

[73] S. 8B(2)—The State Planning Council consists of the following: Chairmen of the TCPB, MMBW, State Rivers and Water Supply Commission, Country Roads Board, State Electricity Commission, Victorian Railways Board, Housing Commission, the Secretary to the Premier's Department, the Directors General of the Education and Public Works, the Director of Conservation, the Under Secretary, the Secretary for State Development and the Secretary for Lands or their nominees. It does not include, for instance, a representative from the Social Welfare Department or the Forest Commission.

[74] S. 8B(7).

[75] See n. 73 above.

[76] *Town and Country Planning Board of Victoria, 24th, 25th, 26th and 27th Annual Reports* (1968-1972).

public authorities, the Council set up a State Planning Advisory Committee to investigate and advise the Council on the co-ordination of the planning of future developments in the departments and authorities represented in the Council.[77] It has held regular monthly meetings since September 1970 and has investigated such problems as the need for additional major airport facilities in the Port Phillip area and the provision of access and services to French Island.[78]

As to relations between the Board and the Council, the Board must confer with the Council concerning the preparation of every statement of planning policy and must submit a draft of every such proposed statement to the Council (and to every responsible planning authority likely to be affected) for consideration and comment.[79] Any statement prepared by the Board must be forwarded to the Minister of Local Government together with any comments of the Council (and of any responsible authority) thereon.[80] The Governor in Council has power to approve or make any modification of such statement or approve it subject to such conditions as he thinks fit.[81] Notice of every approval of a statement of planning policy must be published in the *Government Gazette*,[82] and in like fashion can be revoked or varied by notice published in the *Gazette*.[83]

Under section 8D copies of any approved statements of planning policy are to be forwarded by the Minister to any regional planning authority or any other responsible authority likely to be affected by the statement and under section 8E such bodies must have 'due regard to any approved statement which affects its planning area'. Finally, section 8F provides that every department, authority or body represented on the Council shall from time to time as the Council determines submit to the Board its proposals for future works or developments for consideration with respect to statements of planning policy or for incorporation in any necessary maps or plans. This at least provides some minimum machinery to achieve a greater degree of co-ordination than the piecemeal situation prior to 1968 allowed.

iii) THE AMBIT OF PLANNING SCHEMES

It is provided generally that a planning scheme may be made with respect to any area.[84] The planning scheme may make provision for all or any of the matters listed in the Third Schedule of the Act but not for any other matter.[85] These include the reservation of land for public purposes,

[77] *26th Annual Report (1971-72)* 7.
[78] *27th Annual Report (1971-72)* 8.
[79] S. 8C(1).
[80] S. 8C(2).
[81] S. 8C(3).
[82] S. 8C(4).
[83] S. 8C(5).
[84] S. 9(1).
[85] S. 9(2).

provision for pedestrian thoroughfares and the control of traffic, regulation of subdivision, prohibition or restrictions on advertising hoardings, drainage and other essential services, the preservation of areas of scenic beauty and buildings of historical interest, and the regulation of areas in which land or buildings are to be used for certain purposes (*i.e.* zoning).[86]

Under section 9(2)(aa), added in May 1971, it is further provided that a planning scheme: 'may specify in relation to the use or development of land that any specified matter or thing be done to the satisfaction of the responsible authority.'

Adequate sanctions are provided in other parts of the Act against persons who contravene or fail to comply with any provision of the Act or of any interim development order or planning scheme or any condition of a permit under such an order or scheme.[87] Again, under section 9(2)(b), planning schemes are to be prepared in accordance with the regulations which the Governor in Council can make under section 60 (subject to disallowance by Parliament). Among other things these regulations cover the preparation, submission and approval of planning schemes and the granting of permits thereunder.[88]

In addition, under section 10(1) the Governor in Council is empowered to make sets of general provisions for carrying out the general objects of planning schemes, and in particular for dealing with matters set out in the Third Schedule of the Act. Any such general provision may be incorporated with such adoptions as are necessary or desirable into any planning scheme.[89] Apparently, it is optional for planning authorities to take such provisions into account, as they are distinct from regulations under the Act (which deal with the procedures to be adopted) and are more in the nature of guidelines. But presumably, statements of planning policy would also come under the heading of general provisions, in which case under section 8E a responsible authority must have 'due regard' to them.

iv) REGIONAL PLANNING AUTHORITIES

Under amendments inserted in 1968 an order of the Governor in Council may establish a regional planning authority for the purpose of preparing and submitting for approval a planning scheme for any specified area extending beyond the limits of any one municipal district.[90] Such an

[86] 3rd Schedule.

[87] S. 49(1) and (2). S. 49(1) provides for fines of not more than $200 for any contravention or failure to comply with the provisions of the Act, or any planning scheme or with the conditions of any permit under an I.D.O. or scheme and for a $20 fine every day such offence continues. S. 49(2) empowers the responsible authority to apply to the Supreme Court for an injunction to restrain any such breach.

[88] Town and Country Planning Regulations 1962.

[89] S. 10(2). Town and Country Planning Act 1961.

[90] S. 12(1)(a).

authority is also responsible for the enforcement and carrying out of the scheme in that area.[91] Where there is any interim development order or planning scheme already in force in respect of any part or the whole of the specified area under the new authority's control, then it may be constituted the sole responsible authority in respect of the existing order or scheme.[92]

The number of members of the authority should be specified in the Order establishing it,[93] and these should include councillors representing every municipality which wholly or partly falls within the proposed planning scheme area as well as any person approved by a majority of these councillors and appearing to the Governor in Council to be specially qualified by reason of knowledge or experience to serve on the authority.[94] Provision is also made for the continuance of any joint planning scheme (between two or more councils) under the auspices of the new authority.[95]

The legal position of a regional planning authority is similar to that of the Town and Country Planning Board or any other statutory authority.[96] It must prepare a planning scheme for the area in respect of which it was established within a period specified by the Minister of Local Government.[97] In doing so, it should request such municipalities, government or public authorities, as it thinks fit to submit details of any matters they desire to be given consideration during the preparation of the scheme.[98] This therefore allows the regional planning authority to take into account any proposed public works or essential services within its planning area.[99]

Under section 12(13), the MMBW is recognised as the regional planning authority for the metropolitan area, although it is dealt with separately under Part III of the Act. Up to date, two other regional planning authorities have been set up. In February 1969, the Mornington Peninsula and Western Port Regional Planning Authority was approved by the Governor in Council. This covers an area of 648 square miles, including 4 shires (Flinders, Hastings, Mornington and Phillip Island),

[91] *Ibid.*
[92] S. 12(1)(b)—also see *Attorney-General v. B.P. (Australia) Ltd.* (1964) 12 L.G.R.A. 209.
[93] S. 12(2)(a).
[94] S. 12(2)(b).
[95] S. 12(3).
[96] S. 12(5).
[97] S. 12(9).
[98] Cl. 10. Town and Country Planning Regulations 1962.
[99] Recent amendments to the Act (s. 12A) inserted in December, 1972, made provision that any member of a regional planning authority who has any direct or indirect pecuniary interest in any matter before the authority, must declare his interest and refrain from discussion or voting on it. Exceptions are allowed for councillors from a particular municipality which may be involved in contracts with the authority (s. 12A(4)). The rest of the section sets out more precise details as to what constitutes an 'indirect pecuniary interest' (s. 12A(5)-(11)) and penalties of $500 provided for any offence against the section.

the parish of French Island and parts of 2 other shires (Cranbourne and Bass).[1] This authority has already made considerable progress with planning proposals, trying to give effect to Statements of Planning Policy No. 1 and No. 2 and has in force a stringent I.D.O. restricting use of land for industrial purposes and non-urban uses, including proposed national park areas.[2] It has appointed technical committees to advise on such matters as industrial development, tourism and recreation, conservation and pollution.[3]

A second regional planning authority was also set up in early 1969 for Geelong, and covers an area of 973 square miles, consisting of 3 cities (Geelong, Geelong West and Newtown), 5 shires (Barrabool, Bellarine, Bannockburn, Corio and South Barwon) and the Borough of Queenscliff.[4] The development of Geelong itself is under an approved planning scheme already (since 1962), but the authority has carried out studies concerning transportation needs for the region, the establishment of a major airport and new university as well as the increasing subdivision of rural land and the advising of member councils on local planning schemes.[5] In May 1972, an I.D.O. was approved for the whole region (except for Geelong), aimed at controlling the carrying out of subdivision. Also a code of residential planning standards has been prepared to assist member councils. At the same time, preparations for a regional planning scheme are under way, with several studies of regional environment and land resources being carried out by private consultants.[6]

Thus, in accordance with the Board's 1967 proposals the components of a broad planning framework for the Port Phillip district have been established with the MMBW (for the metropolitan area), the Geelong and Westernport authorities. Attempts to set up other regional planning authorities elsewhere in the State have been less successful. In 1971, the Board reported that interest in regional planning had been keen, and discussions had been held with councils in the LaTrobe Valley, the Upper Murray area and the Loddon/Campaspe basins.[7] Nevertheless, although all the formal steps were taken to establish a regional planning authority for the last mentioned area, this move was unsuccessful due to lack of substantial support from some councils there.[8] Thus, overall, the development of regional planning in the State has been extremely slow, although recent newspaper reports indicate that a further regional planning authority in the Port Phillip area for the Dandenongs and Yarra Valley may be

[1] *24th Annual Report* 11.
[2] *27th Annual Report* 7.
[3] *25th Annual Report* 9.
[4] *24th Annual Report* 12.
[5] *26th Annual Report* 8.
[6] *27th Annual Report* 8.
[7] *20th Annual Report* 9.
[8] *27th Annual Report* 8-9.

set up in the near future.[9] Otherwise, it appears that it has been hard to arouse local awareness of the need for such planning, although all the necessary machinery for this is provided in the Act. In this context, it is interesting to note recent amendments to the Act introduced in December 1972 giving greater financial autonomy to regional planning authorities.[10]

v.) PREPARATION OF PLANNING SCHEMES

The following bodies have power to prepare and submit planning schemes for approval:

(a) the council of any municipality[11] in Victoria. Municipalities are divided into cities, towns, boroughs and shires,[12] but these categories, based on population and rateable property, are not relevant to the following discussion;

(b) a regional planning authority;[13]

(c) the Melbourne and Metropolitan Board of Works which comprises a chairman and commissioners elected from the various councils within the metropolitan area of Melbourne;[14]

(d) the Town and Country Planning Board.[15]

In the case of the first two bodies, they are required to prepare and submit schemes within a period specified by the Minister.[16] If either body does not do this, then the Minister may request the Town and Country Planning Board to prepare the scheme for approval at the expense of the municipality or the regional planning authority, as the case may be.[17] Nevertheless, if either body takes longer than the period specified to prepare its scheme, the fact that it has exceeded its time limit does not invalidate the scheme.[18] In any case, the Minister may request the Board to prepare a planning scheme for any area of land whether or not a scheme has been or is being prepared for that area by any other responsible authority.[19] Section 15 also allows the Board to enter into agreements

[9] *Age* 27 June 1974, 3.
[10] S. 12B(2) & (3) (providing that regional planning authorities are now authorised to prepare estimates of moneys required for a forthcoming year of expenditure which are to be submitted to each member council); s. 12C(3) (member councils are liable to contribute money to the regional planning authority on such basis as may be agreed; it is also provided that this may be done by levying a rate on all rateable property within the municipal area); s. 12F(1) and s. 12G(1) (regional planning authorities are permitted to raise money by borrowing); s. 12H(1) (also through bank overdraft).
[11] S. 11(a).
[12] Gifford, *op. cit.* 24; *Victorian Year Book 1973* 453-4.
[13] S. 12(1) and s. 12(9).
[14] S. 53(1).
[15] S. 14.
[16] S. 11(b) and s. 12(9).
[17] S. 13.
[18] *Ampol Petroleum Ltd v. Warringah Shire Council* (1956) 1 L.G.R.A. 276.
[19] S. 14.

with responsible authorities to prepare and submit planning schemes for their area at their expense.[20]

It is clear that such bodies when exercising their planning powers do so as 'delegates from the central government . . . of the duty of town planning and the administration of the system of town planning . . .'.[21] Consequently, unless expressly authorized by statute to do so, a planning authority cannot exercise its powers beyond its boundaries, or take into account circumstances arising outside the planning area.[22] Thus Else-Mitchell J. of the N.S.W. Supreme Court has held, where the ground for refusing a permit by a local authority related to the possibility of causing traffic congestion outside the area of that authority, then this was 'no concern of the council'.[23]

As of 30 June 1972, the following numbers of planning schemes had been approved:[24]

(i) 22 by cities between 1949 and 1971, including 8 within the metropolitan planning area and 3 within the extended metropolitan planning area;
(ii) 2 by boroughs (Kyabram 1967 and Port Fairy 1968);
(iii) 1 by a town (Stawell, 1969);
(iv) 27 by shires between 1950 and 1971 including 5 in the extended metropolitan planning area;
(v) 13 by the Board between 1951 and 1972 pusuant to section 14;
(vi) 1 by the Board of Works (the Master Plan) approved in 1968 with 23 amendments approved between 1968 and 1972;
(vii) 3 by joint committees between 1960 and 1964.[25]

At the same time, the following numbers of planning schemes were in the process of preparation: 19 by cities (including 11 within the metropolitan area), 3 by towns, 92 by shires (mostly for parts thereof), 3 by joint committees, 2 by regional planning authorities, 20 by the Board and 11 proposed amendments by the Melbourne and Metropolitan Board of Works.[26] Most of these were under Interim Development Orders (see below) and a marked increase in the number of schemes under preparation (as well as approved) since the 1968 amendments to the Act was noticeable.[27] Also it was apparent that many had suffered considerable

[20] S. 15.
[21] *Attorney-General v. B.P. (Aust.) Ltd* (1964) 12 L.G.R.A. 209, 219.
[22] *Rio Pioneer Gravel Co. Pty Ltd v. Warringah Shire Council* (1969) 17 L.G.R.A. 153, 166.
[23] *Ibid.*
[24] The 1972-3 Report of the TCPB was not yet available at the time of writing.
[25] TCPB, *27th Annual Report* 36-7, Appendix II. Note that 'Joint committees' refers to joint planning schemes carried out by 2 or more councils together.
[26] TCPB *27th Annual Report* 33-4, Appendix I.
[27] Of the cities all but 3 were under I.D.Os. and of the shires all but 19; *ibid.* Again, since 1968 there had been 100% increase in the number of city planning

delay in moving through the various stages of the planning process toward final approval.[28] Again, most proposed schemes still covered only limited areas within the various planning districts.

Planning on a regional basis has also been slow to evolve and as of June 1974 there were only 3 regional planning authorities and all of these are within the Port Phillip District.[29] Even the Town and Country Planning Board with its State-wide jurisdiction has been severely limited through lack of staff and finance, and its planning schemes, apart from general statements of planning policy, have usually been confined to small areas either of scenic, historical or recreational note.[30]

Perhaps the most constructive planning body has been the MMBW with constant amendments updating its 1968 scheme and reconciling this with planning schemes prepared by individual municipalities within its planning area. Certainly, the translation into reality of the broader, strategic concepts outlined by the TCPB in its 1967 report still seem a long way off.

vi.) THE PROCESS OF STATUTORY PLANNING

The following section will briefly sketch the stages through which a planning scheme must pass before receiving final approval.

(a) INTERIM DEVELOPMENT ORDERS

After commencement of preparation of a planning scheme and before its final approval, the responsible authority, with the approval of the Governor in Council,[31] may make an Interim Development Order covering all or any of the area under planning consideration. This Order may 'restrict, restrain or prohibit' the use of any land within any area to which the scheme relates to 'the extent that it would be lawful for the scheme so to do'.[32]

The effect of an I.D.O. briefly, is to protect the planning scheme, when finally approved, so that its provisions can be effective, *i.e.* so that other uses do intervene in the meantime. This can be seen as 'freezing' the use of land in this interim period. The implications for 'freedom' here are great. The I.D.O. does not have to go through the same processes of

schemes approved and a 33% increase in the number of shire planning schemes approved. *Ibid.*

[28] For instance, the Castlemaine scheme, begun in 1946 and put under an I.D.O. in 1947, as of 1972 had still not completed its exhibition period. Similarly with the Euroa plan, commenced in 1946 with an I.D.O. in 1947 and no substantial development since then. One of the shortest in getting approval was the Heywood Township Plan commenced in March 1968 and received for approval by the Minister in June 1972. *Ibid.*

[29] Namely, the Geelong, Westernport and MMBW authorities.

[30] For example, the Eildon Reservoir and Lake Buffalo schemes, and the Maldon, Lorne and Phillip Island schemes. TCPB *27th Annual Report* 33-5, Appendix I.

[31] S. 17(1A).

[32] S. 17(1A).

public exhibition or receiving of objections as does a planning scheme and the only safeguard provided is that it must be examined by the TCPB prior to approval by the Governor in Council.[33] *Prima facie* then, such an Order may impose considerable controls on the use long before an approved scheme is in force. On the other hand, the need for interim controls is obvious: planning schemes take time in preparation and require great attention to detail, the hearing of objections may be protracted and many interrelating technical factors must be considered. If there was no form of control in the meantime, speculators and property developers could rush in and develop land long before the scheme came into force.

Thus, section 17(1B) provides that during the operation of an I.D.O. the responsible authority may grant permits in accordance therewith allowing any use or development of any land within the area covered by the order. No such use or development may be commenced unless that use or development is permitted by the Order or under a permit granted by the responsible authority.[34]

Nevertheless, an I.D.O. cannot affect the continuance of the use of any land for the purposes for which it was being lawfully used prior to the operation of that Order (or any modification or amendment thereof) or, again, the use of any building or work for any purpose for which it was being lawfully erected or carried on before that time.[35] These are called non-conforming uses and are allowed to continue after the I.D.O. (or planning scheme) commences, although the particular use in a given area may be forbidden under the general provisions of the order or scheme. It has been said that the purpose of non-conforming use provisions are to ensure that prohibitions and restrictions in a planning scheme or I.D.O. do not 'press too harshly or unreasonably upon the rights and reasonable expectations of owners of properties having regard to the then existing uses being made of their properties.'[36] At the same time, courts have taken the approach that the effect of a non-conforming use provision is to protect existing rights, not to create new ones.[37] Nowhere in the Act are the legal rights of a non-conforming user defined: these will depend on the particular provisions of the particular planning scheme or Order and the conditions set out therein concerning the continuance, changing and determination of such uses,[38] although there is a growing body of judicial decisions on the sort of conditions most commonly found.[39]

[33] S. 17(1A).
[34] S. 17(1A).
[35] S. 17(1D).
[36] *Woollahra Municipal Council v. Hinton* (1967) 13 L.G.R.A. 417, 420 *per* Hardie J.
[37] *Ex parte Tooth & So. Ltd re Sydney City Council* (1962) 8 L.G.R.A. 273, 283.
[38] See, for example, the City of Melbourne Planning Scheme Ordinance 1964, cl. 6, 7, 8 & 9.
[39] See generally Gifford *op. cit.* Chapters 49 & 50, 204 ff.

In addition, an I.D.O. does not operate to prevent any dealing (or the registration thereof) with any land in any subdivision approved by a council or confirmed by an arbitrator pursuant to the provisions of the Local Government Act 1958 or the Strata Titles Act 1967 before the coming into operation of the order.[40] On the other hand, any provision of an I.D.O. reserving land for any public purpose, *e.g.* roads, water works *etc.*, is deemed a valid exercise of the power 'to regulate, restrict, restrain or prohibit' the use of that land during the currency of the order.[41] Such reservations for public purposes, therefore, can override the protection afforded by the above non-conforming use provisions.

After the I.D.O. has been prepared, copies thereof must be forwarded to the Board for examination before it is submitted to the Governor in Council for approval.[42] This now gives the Board decisive influence over the way in which I.D.Os are prepared by responsible authorities. After approval, provision is made for publicity of the I.D.O. in one daily and one local newspaper, saying also where copies of the Order and map(s) may be examined.[43]

If a responsible authority wishes to amend an existing I.D.O. to introduce a new one, certain requirements must be observed.[44] Copies of the proposed amendment or I.D.O. must be deposited for public inspection and notice thereof published in the same way as is provided for the exhibition provisions with respect to planning schemes under section 28(1)(a) and (c).[45] If the proposed amendment or I.D.O. reserves land for a public purpose, notice of this must also be given to any person appearing to have or to be a claimant of any interest in the land to be reserved.[46] Also, the responsible authority must call for objections to the proposed amendment or I.D.O. in the same way as is provided under section 28(1)(d) for planning schemes, but only a period of one month is necessary, compared with the three months allowed for the latter.[47]

Thus some protection is given under these provisions to property owners whose land may be affected by proposed changes under an amended or new I.D.O. But it seems that they do not enjoy the same protection at the time when an I.D.O. first comes into operation under section 17(1) and at that stage, the only safeguard rests in the examination of the order by

[40] S. 17(1E)(a).
[41] S. 17(2).
[42] Cl. 15(1) Regulations.
[43] S. 17(3).
[44] S. 17(5).
[45] S. 17(5)(a).
[46] S. 17(5)(b)—'Notice in writing of the proposed amendment or interim development order to every person appearing from any deed conveyance or instrument registered under the Property Law Act 1958 or from the register book kept under the Transfer of Land Act 1958 to have or to be a claimant of any interest in the land to be reserved.'
[47] S. 17(4).

the TCPB. While their previous use is protected under section 17(1D), any other future proposals for private development may be strictly regulated or prohibited altogether by the I.D.O. long before the planning scheme comes into effect. Thus, the impact of an I.D.O. may be quite far-reaching, even if this is only seen as a temporary stage in the planning process.

Two final matters concerning I.D.Os must be considered: their effect on public works and their revocation, amendment or variation.

Where an area is under an I.D.O. prior to approval of a planning scheme, the situation may arise that a public authority or municipal council is proposing to carry out works or development within the area affected which will not be in conformity with the scheme if and when it is duly approved. In such circumstances, the public authority or council must notify the responsible authority of its proposal and provision is made for both parties to consult together to reach agreement as to the co-ordination of the proposed works or development with the planning scheme provisions. If agreement is not reached, then the Governor in Council becomes the final arbiter.[48] It is clear from this provision, that the I.D.O. provisions contained in sections 17-22 'do not bind public authorities in relation to the carrying out of works or undertakings'.[49]

It should be noted, however, that where a planning scheme is in operation, its provisions are binding on them.[50]

Finally, section 26 provides for the revocation, amendment or variation of any I.D.O., either wholly or in part, by the Governor in Council after there has been consultation by the Minister with the responsible authority and the Board. Also, where a new I.D.O. is made in respect of an area, any earlier Order ceases to have any effect in so far as it related to such area.[51]

(b) EXHIBITION OF PLANNING SCHEMES

A planning scheme, once prepared, will normally consist of an ordinance and map(s). The former is a document setting out a series of provisions relating, *inter alia,* to:

(a) the type of land uses permitted, prohibited or allowed according to certain conditions in different parts of the planning area (*i.e.* zoning);

(b) those areas which are reserved for public purposes, *e.g.* parks, open space, public works, roads, *etc.*;

[48] S. 25.
[49] *Paddle v. State Electricity Commission of Victoria* (1967) 17 L.G.R.A. 213, 232 *per* Menhennitt J.
[50] S. 35(d).
[51] S. 17(4).

(c) regulating certain other land uses such as subdivision, advertising, parking and trees.

The latter presents these provisions cartographically, usually with different colours or shadings for different zones or public purposes reservations.

As explained above, a completed planning scheme is the result of a great amount of work and its fundamental effect, of course, is to change the property rights of landowners or land-users within the planning area. As one English planner has said: '[t]own planning is the determination by public authority of the legal quality of land areas for the purpose of adapting their use to community needs'.[52]

Therefore, before any planning scheme is adopted it is important it allow for objections from the public to be made to any part of it.

Provision therefore is made under section 28 for the public exhibition of any planning scheme that has been prepared as well as of any amending scheme extending the area of an existing scheme. Copies thereof must be lodged at the offices of the responsible authority, the Board and of any municipality affected (so far as it relates to that municipality).[53] In addition, notice must be given in writing to every public authority affected, and also, where the scheme amends or varies an existing scheme to provide for the reservation of land for any public purpose, notice thereof must be given to every person having or claiming a registered interest under the Property Law Act 1958 or the Transfer of Land Act 1958.[54]

Notice of the proposed scheme, with a brief description thereof, must be published in the *Government Gazette* and twice in 'some newspaper generally circulating in the neighbourhood', giving details of where the scheme may be inspected and calling for all persons affected thereby to lodge in writing any objections they may have, stating whether they wish to be heard in respect of these.[55] Broadly, it seems that any person affected by a proposed planning scheme may object to it and objections may be made in respect of a particular piece of land, in respect of a particular zoning, or in respect of some general aspect of the scheme.[56] It is not necessary to be the owner or tenant of any land within the planning area for a person to have a right to object. Gifford cites the instances of a bus line proprietor whose route passes through the area, a trade union whose members work there, banks, life assurance societies, progress associations and other bodies—all of which would have a right to object.[57] Objections

[52] Bassett.
[53] S. 28(1)(a).
[54] S. 28(1)(b)—notice is not necessary in the case of an amendment or variation specified by the Minister.
[55] S. 28(1)(c).
[56] Gifford *op. cit.* 248.
[57] *Ibid.*

must be lodged, it should be noted, within three months of the notice in the *Government Gazette*.[58]

The responsible authority must take into account all such objections. Thus it is provided that no objection is to be disallowed unless the person making it has 'first been given a reasonable opportunity of being heard by the authority'.[59] There is, however, no provision for an independent arbitrator to hear objections as it is enacted that

> 28(1)(d)(ii) . . . in all cases the decision on any objection shall be made by the responsible authority.
>
> (2) The responsible authority may adopt the scheme for submission to the Governor in Council with or without modifications or alterations.

It should be noted that the decision to allow or disallow an objection in whole or in part must be made by the planning authority itself, and not by any of its subcommittees or officers, although these may hear the objections.[60] Although a responsible authority is not obliged to proceed as in a court of law, observing the formal rules of evidence when it hears objections, it is bound by the rules of natural justice like any other administrative tribunal.[61] Accordingly, it should give reasonable notice of the date of hearing and not interfere with anyone's right to attend. While there are few statutory requirements to be observed in hearing objections, it is clear that a responsible authority can act *ultra vires,* not only in doing something it is not entitled to do, but by doing it in a manner different from that prescribed in the legislation. This particularly applies where responsible authorities have power to interfere with property rights: 'such powers will be rigidly interpreted by the Courts'.[62]

English and Victorian planning appeals have held that generally where a change to a planning scheme is sought, it should be allowed unless there is some compelling planning reason to the contrary. By analogy, Gifford argues that the same principle should apply equally to the hearing of objections and flexibility should be shown unless this means contravening the whole scheme.[63] A study of the MMBW's 1974 report on objections received to its proposed amendments to the 1968 planning scheme (concerning corridor zones and the extended planning area) provides a good example of the careful consideration given to objections received and the subsequent substantial modification of the proposed scheme in the light

[58] S. 28(1)(c)(iii).
[59] S. 28(1)(d)(i)—see also *Palfreyman v. Southern Metropolitan Master Planning Authority* (1963) 15 L.G.R.A. 38.
[60] S. 48.
[61] *Wilson v. Long Branch* (1958) 142 A.2d 837; *Renton v. Auckland City* [1969] N.Z.L.R. 257.
[62] Jennings, *Principles of Local Government Law* (3rd ed. 1948) 150 quoted in Gifford *op. cit.* 255.
[63] Gifford *op. cit.* 256.

of these, although the basic principles remained intact.[64] At its most effective, the exhibition period for a planning scheme can provide for an essential interaction between planners and community aspirations and therefore result in a much more effective plan. While a planning scheme may be invalid if it goes beyond the powers of the responsible authority, it is clear that its validity cannot be challenged on the ground of unreasonableness alone[65] or the uncertainty of the planning proposals or provisions in the scheme.[66] As a scheme is essentially one integrated whole, particularly as regards the reconciliation of zoning requirements and non-conforming uses, the invalidity of any one clause in the planning scheme ordinance may mean the invalidity of the whole scheme, and this militates strongly against any challenges.[67]

Finally, the provisions of the Local Government Act 1958 and Town and Country Planning Act 1961 concerning the disqualification of members of planning authorities from voting in certain circumstances should be noted, *e.g.* if the objection or provision of the planning scheme affects land in which a member (or members) has an interest.[68] However, it does not seem to affect decisions on objections if the membership of the authority changes between the time when consideration of objections is commenced and the time when the final decisions upon them are made.[69]

(c) SUBMISSION AND APPROVAL OF SCHEMES

Every planning scheme adopted by a responsible authority must be submitted to the Minister for approval by the Governor in Council. This must be accompanied by a copy of any written objections to the scheme.[70] Presumably, as submitted, the scheme will contain various modifications and variations made in the light of the objections received. But before it can then be approved by the Governor in Council, the Minister must first obtain and consider a report by the TCPB (except, of course, in the case of a scheme prepared by that body).[71] Where such a scheme is referred to the Board, under the Regulations it is provided that the Board may request the responsible authority to confer with it on any matters included in the planning scheme and to supply any additional information considered necessary.[72] Also, before the Board makes any report to the Minister, it must consider all objections made to the scheme.[73]

[64] MMBW *op. cit.*, February, 1974.
[65] *Ideal Laundry Ltd v. Peters Borough* [1957] N.Z.L.R. 1038.
[66] *Pearse v. City of South Perth* (1967) 16 L.G.R.A. 71, 74.
[67] *Dunkerley v. City of Nunawading* (1956) 3 L.G.R.A. 47.
[68] S. 181; s. 12A; if a member does vote upon a matter when he is disqualified from voting on it, the resolution is a nullity: *R. v. Hendon Rural District Council* [1933] 2 K.B. 696.
[69] Gifford *op. cit.* 257.
[70] S. 28(2), s. 30(1).
[71] S. 30(2).
[72] Regulations—Cl. 39(a) and (c).
[73] *Ibid.* Cl. 32.

Where a responsible authority has recommended any modifications or amendments to an existing scheme, before submitting the scheme to the Governor in Council, the Minister may require the responsible authority to go through the procedures under section 28 for public exhibition, publicity in the newspapers and the lodging of objections, if in his opinion the modifications or amendments proposed are of such a substantial nature as to warrant such a course.[74]

The same applies where the Minister himself has any modification or alterations which he proposes to recommend to the Governor in Council.[75]

Apart from this, the Governor in Council may approve any scheme adopted by a responsible authority with or without modifications or alterations, and subject to such conditions as he thinks fit.[76] It does not have effect until notice of approval is published in the *Government Gazette*.[77] After this notice of approval, it must be published also in some newspaper circulating generally in the neighbourhood of the area covered by the scheme, stating where a copy of the scheme is available for inspection.[78]

A final subsection provides that a planning scheme approved by the Governor in Council shall not be invalidated or affected by reason only that any omission, defect, failure, irregularity or informality in or in relation to the preparations, exhibition or submission thereof is subsequently discovered.[79]

(d) RIGHT OF INSPECTION OF APPROVED SCHEMES

A copy of every planning scheme must be lodged within three months after publication of approval thereof in the *Government Gazette* (or within any further period as the Minister directs) at the offices of the responsible authority, the Board, the Office of Titles and the Central Plan Office, and, where the responsible authority is not the council of a municipality, so much of it as relates to land within the municipal district, at the office of the municipality concerned. Similarly, copies of any amendments or variations of existing schemes, or copies of any new ones must also be kept, and all must be available for inspection at each place during office hours.[80]

(e) REVOCATION AND AMENDMENT OF SCHEMES

There are various ways in which revocation may be effected. Every

[74] Town and Country Planning Act 1961, s. 30(3).
[75] S. 30(3)—it should be noted in this second exhibition objections are to be made directly to the Minister.
[76] S. 30(4).
[77] S. 30(5). See also *Shire of Flinders v. T. W. Maw & Sons (Quarries) Proprietary Limited & Hillview Quarries Pty Ltd* (1970) 19 L.G.R.A. 1.
[78] S. 30(5).
[79] S. 30(4).
[80] S. 31(1) & (2) & (3).

planning scheme must be laid before both Houses of Parliament as soon as may be after its approval,[81] and within 24 days of this may be revoked by resolution of either House.[82] Also, any planning scheme may be revoked either wholly or in part or amended or varied by a subsequent or successive subsequent schemes prepared and submitted in accordance with the Act and regulations. This may be done whether or not the first scheme has been approved.[83]

Again, the Board, the responsible authority or any other person or body of persons may apply to the Governor in Council to revoke the whole or part of any planning scheme.[84] This may then be revoked, if the Governor in Council thinks, that under the special circumstances of the case, this should be done. If such an application is made, except in the case of an application by the Board, the Minister must obtain a report on the proposed revocation from the Board.[85] Except in the case of an application by the responsible authority, the Minister also has to consult with the responsible authority.[86] After all this has been done, the Minister may submit the proposal, with his recommendations thereon, to the Governor in Council who may revoke the scheme or part thereof if he thinks that this should be done in the special circumstances of the case.[87] Where such a revocation occurs, the Governor in Council at the same time or subsequently may make an order prohibiting the use or development of any land to which the revoked scheme or part related (except with the consent of the responsible authority) until such time as a notice of approval of a further planning scheme affecting the land is published in the *Government Gazette*.[88]

Again, where an application is made by the responsible authority, the Board or any other person, and after the Minister has considered a report thereon by the Board and consulted the responsible authority, the Governor in Council may, where he is satisfied that the circumstances do not warrant an amending scheme, amend the existing planning scheme giving due publicity to the approval thereof as provided in subsection (4C).[89] In such a situation, the Minister may also require the responsible authority to give notice of the proposed amendment to such persons as he (the Minister) directs and may further require that any person who may be affected by the proposed amendment be afforded an opportunity of

[81] S. 32(2).
[82] S. 32(4).
[83] S. 32(1).
[84] S. 32(3).
[85] S. 32(4A).
[86] S. 32(4B).
[87] S. 32(4C).
[88] S. 32(5)(5A).
[89] S. 32(6).

notifying the Minister in writing of his objections to the proposed amendment.[90]

Thus, it appears that approved planning schemes will be fairly hard to revoke or amend, unless the initiative for this comes from the Board or the responsible authority itself. Although such a proposal may come from private persons or bodies of persons (under section 4) it is hard to imagine such a move would be successful if either of the former were against it.

(f) EFFECT OF SCHEMES

The first effect of a planning scheme coming into operation is to revoke any by-law made under section 197(1)(xxxviii)(a) of the Local Government Act 1958 to the extent that it relates to the area of the planning scheme. This section states that municipaliies may make by-laws for various purposes including

> (xxxviii)(a) Prescribing areas within the municipal district as residential areas and prohibiting or regulating within the whole or any part of any such residential area the use of any land or the erection (including adaptation for use) or the use of any building for the purposes of such classes of trades, industries, manufacturers, businesses, or public amusements as specified in the by-law and prescribing areas within the municipal district as business areas and prohibiting or regulating within the whole or any part of any business area the use of any land or the erection (including adaptation for use) or the use of any building or portion of a building for the purposes of a dwelling or for the purpses of such classes of trade, industries, manufactures, business or public amusements as are specified in the by-law.

This sub-section provided the main town planning powers possessed by municipal councils prior to and apart from the Town and Country Planning Act of 1944.[91] They enabled councils to pass zoning by-laws prohibiting or regulating the uses of land within their districts, although such by-laws had to be approved by the Governor in Council.[92] The powers conferred in municipal councils under the Town and Country Planning Act 1961 are much wider, allowing for the formation of a proper land-use plan, as contained in an overall planning scheme, so it is only logical that by-laws made under section 197(1)(xixviii)(a) should be revoked when a planning scheme comes into operation. This is not the effect where an I.D.O. is in force, but there is power to appeal to the Town Planning Appeals Tribunal against the operation of such a by-law, if it conflicts with something permitted or not prohibited by an I.D.O.[93]

The second effect of a planning scheme is that any I.D.O. already in force is revoked only as relates to that area, but this does not affect any

[90] S. 32(7).
[91] Conferred on councils in 1921. Gifford *op. cit.* 288.
[92] Local Government Act 1958 s. 197(9)(iii).
[93] Town and Country Planning Act 1961, s. 19(1)(c).

right, liability or penalty or legal proceedings accrued, incurred or instituted by virtue of or in relation to that order.[94]

The third effect is that where any scheme includes land permanently reserved for any of the purposes specified in section 14 of the Land Act 1958, the scheme to the extent to which it is expressed or purports to deal with that reservation or any portion thereof in any manner inconsistent with that reservation, does not take effect unless and until the reservation of that land or portion is revoked by or pursuant to an Act of Parliament.[95]

The final effect concerns the duties of responsible authorities after the approval of an I.D.O. or a planning scheme.[96] It is their duty to observe the requirements of the order or scheme and to enforce the observance of these requirements by every other person;[97] thereafter all use and development of land within the area included in the order or scheme must be in conformity therewith.[98] No person thereafter is to undertake or permit any use or development of land otherwise than in conformity with the order or scheme.[99] Most important is the provision that the order or scheme is binding upon every public authority and municipality, unless the Governor in Council on the recommendation of the Minister directs otherwise.[1]

Certain other ramifications of a planning scheme as regards reservations for streets are dealt with under sections 36 and 37.

vii) THE OPERATION OF INTERIM DEVELOPMENT ORDERS AND PLANNING SCHEMES

This section looks briefly at the way in which both I.D.Os and planning schemes operate. These are almost identical and thus what is said in relation to I.D.Os applies, except where stated otherwise, to planning schemes.

(a) PERMITS UNDER ORDERS

It will be recalled that under section 17(1B) the responsible authority has power to issue permits to use or develop any land within the area to which an I.D.O. relates. No permit can be granted with respect to any use or development which is expressly prohibited by the Order, unless the Minister after considering a report from the Board approves of this.[2] No

[94] S. 33(2).
[95] S. 34. S. 14(a) of the Land Act, 1958 says that the Governor in Council may by notice published in the *Government Gazette* reserve either temporarily or permanently from being sold or leased any Crown lands required for any public purposes, *e.g.* docks, railways, schools, *etc.*
[96] I.D.Os were added to the ambit of this provision in December 1971 Town and Country Planning (Amendment) Act 1972.
[97] S. 35(a).
[98] S. 35(c).
[99] S. 35(b).
[1] S. 35(d).
[2] S. 17(1B).

use or development of any land can commence unless that use or development is either permitted by the Order or a permit for it has been granted by the responsible authority.[3]

The general format of an I.D.O. or planning scheme as regards the prohibition or regulation of land use is to do so by the device of zoning. This means specifying certain activities which may be undertaken in certain specified areas of land. These 'zones' are designated on the planning scheme map. There may be many types of zoning created,[4] but

[3] S. 17(1C).

[4] The zonings used by the MMBW in the Melbourne Metropolitan Planning Ordinance 1968 14-50 provide a good example and include the following:

Rural
Stream and Floodway
Village
Residential A
Residential A1
Residential A2
Residential B
Residential C
Residential D
Reserved Living
Central Business
District Business
Local Business
Service Business
Light Industrial
General Industrial
Special Industrial
Reserved Light Industrial
Reserved General Industrial
Reserved Special Industrial
Commercial and Industrial
Service Industrial
Extractive Industrial
Offensive Industrial
Dangerous Industrial
Transportation

Special Use Zones:

No. 1. Religious and Educational Institutions or Private Sports Grounds
No. 2. Racecourses and Showgrounds
No. 3. Training Stables
No. 5. Boat Building
No. 6. Arts Centre Locality
No. 7. Stock Sales Yards and Abattoirs
No. 8 and 8A. Shrine Locality
No. 9. Civil Centre Broadmeadows
No. 10. Monash University Locality

These are fairly self-explanatory, although note that the different grades of residential areas refer to the range between low density (Residential D) to high density (Residential A) areas of housing.

Amendment No. 21 (not yet approved) sets out a number of new zonings for the metropolitan planning area: 'Rural', zones are replaced by 'corridor' zones and 'village' zones by 'township A' zones as well as the following new categories:

General Farming A
Intensive Agriculture A
Special Extractive A
Landscape Interest A
Conservation A

These are included in Amendment No. 3 (the extended planning area) which introduces a new zoning for 'Local Authority Development' (areas subject to planning control by the local municipal authority).

Section 3		*Purpose*	*Conditions*		
RESIDENTIAL "A" ZONE	Detached House Home Occupation Passive Recreation Railway Road Semi-detached House Tramway	Apartment House—except within the following municipalities: Melbourne, Prahran, St. Kilda. Flat—except within the following municipalities: Melbourne, Prahran, St. Kilda. Residential Building—except within the following municipalities: Melbourne, Prahran, St. Kilda.	Provided that the open area per habitable room is not less than 180 square feet. Provided that the open area per flat is not less than 300 square feet. Provided that the open area is not less in area than 30 per centum of the floor area.	Apartment House—within the following municipalities: Melbourne, Prahran, St. Kilda. Cafe Car Park Caretaker's House Consulting Rooms Dog Breeding Educational Establishments Flat—within the following municipalities: Melbourne, Prahran, St. Kilda. Funeral Parlour General Hospital Health Centre Hotel Institutional Home Major Transmission Line Motel Petrol Filling Station Place of Assembly Place of Worship Public Administration Residential Building—within the following municipalities: Melbourne, Prahran, St. Kilda. Restaurant Self Service Laundrette Service Premises Veterinary Surgery Any purpose not specified or included in any other Column of this Table. * See Clause 25(2)	Animal Hospital Bank Boarding Kennels Car Sales Dangerous Industry Extractive Industry Freezing and Cool Storage Fuel Depot General Industry Generating Works Greyhound Training Establishment Hospital for Infectious Disease Industrial Sales Junk Yard Light Industry Liquid Fuel Depot Major Sports Ground Major Utility Installation Market Mental Institution Milk Depot Mining Motor Repair Station Motor Vehicle Racing Track Offensive Industry Office Open Air Cinema Pig Raising Poultry Farming Racing Stables Reformative Institution Service Industry (other than Self Service Laundrette) Shop (not being Service Premises) Stock Saleyard Store Timber Yard—Retail Timber Yard—Wholesale

the uses permitted or prohibited are usually set out in a standard form as follows.

Each zone is divided into five main columns. The first states the nature of the zone (*e.g.* residential, industrial, commercial *etc.*). The second lists purposes for which the land, or a building or works thereon, may be used, or built, in that particular zone without obtaining a planning permit. The third sets out those purposes for which land *etc.* may be used if certain conditions are complied with. This is usually divided into two sub-columns, one headed 'purposes' and the other 'conditions'. If the conditions set out are fulfilled, then no planning permit is required for these particular purposes. The fourth column lists those purposes for which a permit must be obtained and the fifth column sets out those purposes which are entirely prohibited within that zone. It should be noted that these provisions do not affect the rights of the non-conforming user of land, if that use was commenced before the coming into operation of the I.D.O. or the planning scheme.[5]

An extract from a planning scheme (the MMBW Planning Ordinance) is set out below to demonstrate the way land use is regulated by zoning under a typical scheme.

As regards an I.D.O., this will usually contain zoning provisions similar to those of a planning scheme (although these may well be different from those ultimately adopted). The purpose of these interim controls, and the granting of permits thereunder, should be to preserve the integrity of the planning area before the planning scheme, when finally approved, comes into operation. Sections 17, 18A, 18B and 18C contain the general provisions of the Act relating to the application for, and granting of, permits under an I.D.O. More detailed procedures are laid down in clauses 17 to 23 of the Regulations. The responsible authority has to consider every application subject to these provisions and should do so within two months after the application is made.[6] After doing so, it may refuse to grant the permit or grant it subject to any such conditions as it may think proper.[7]

Such permits are discretionary and in granting them the responsible authority must 'weigh up the competing considerations and strike a balance which will best serve the economic and social needs of a community'.[8]

If a permit is granted subject to certain conditions these must be set out therein,[9] and, similarly, where a permit is refused, it is mandatory to include a statement of the specific ground or grounds on which it is

[5] S. 17(10), s. 27.
[6] *Edwick v. Sunbury-on-Thames Urban District Council* [1962] 1 Q.B. 229.
[7] S. 18(2); Regulations Cl. 18, 6th Schedule.
[8] *Rio Pioneer Gravel Co. Pty Ltd v. Warringah Shire Council* (1969) 17 L.G.R.A. 153, 162.
[9] S. 18(3).

refused.[10] If this is not done, a planning authority can be compelled to do so.[11] If the reason or reasons stated for refusal are *ultra vires,* then it can be compelled to grant a permit.[12] If a time limit is imposed, then the permit will lapse for the use or development therein authorised unless the authority agrees to an extension of time.[13]

If a permit is granted subject to conditions these must comply with certain fundamental requirements. It goes without saying that they must be imposed in good faith,[14] and must not be such as to effect a profound alteration in the general law affecting the rights of the persons on whom they are imposed unless this is clearly authorised by statute. They must be restricted to 'town planning matters'.[15] Again they must not be uncertain[16] or unreasonable,[17] although it should be noted here that while the Town Planning Appeals Tribunal has power to set aside a condition which it regards as unreasonable, a court can only do so if no reasonable body could have imposed such a condition.[18] It is not enough, in this latter context, if the condition is simply ineffective.[18] It is also clear that a condition in a permit must relate to the permitted development and its site and not to anything else.[19] Again, no condition can be imposed if its effect is to take away non-conforming use rights unless compensation is provided therefor.[20]

Some planning schemes state specific factors that the planning authority must have regard to when refusing or granting permits or granting them subject to conditions. For instance, in the Melbourne and Metropolitan Planning Scheme Ordinance, the MMBW must have regard to:

(a) the primary purpose for which the land in respect of which the permission is sought is zoned or reserved (as the case may be);
(b) the orderly and proper planning of the area within which such land is situated;
(c) the proximity of such land to any reservation;
(d) the amenity of the neighborhood.[21]

[10] S. 18(4) and s. 18C(b)(i); Regs. Cl. 21.
[11] *Brayhead (Ascot) Ltd v. Berkshire County Council* [1964] 2 Q.B. 303. This means 'all their reasons and not some': *Hamilton v. West Sussex County Council* [1958] 2 Q.B. 286.
[12] *Hamilton v. West Sussex County Council* [1958] 2 Q.B. 286: it appears from this that the planning authority will not be given a second opportunity to consider the application in order to state valid reasons for refusal.
[13] S. 18(4).
[14] *Mixman's Properties Ltd v. Chertsey Urban District Council* [1964] 1 Q.B. 214.
[15] *Ampol Petroleum Ltd v. Warringah Shire Council* (1956) 1 L.G.R.A. 276, 279.
[16] *Fawcett Properties Ltd v. Buckingham County Council* [1961] A.C. 636; ambiguity, however, is not the same as uncertainty and courts will endeavour to give a meaning to an ambiguous condition: *Carnall v. Jones* (1966) 65 L.G.R. (U.K.) 217, 222-3.
[17] *Mixman's Properties Ltd v. Chertsey Urban District Council* [1964] 1 Q.B. 214.
[18] *Lange v. Town and Country Planning Appeal Board (No. 2)* [1967] N.Z.L.R. 898, 902.
[19] *Pearse v. City of South Perth* (1967) 16 L.G.R.A. 71, 76.
[20] *Hartnell v. Minister of Housing and Local Government* [1963] 1 W.L.R. 1142.
[21] Melbourne Metropolitan Planning Ordinance 1968 Cl. 5.

The last term poses some problems. There is no general agreement as to what constitutes 'amenity', although basically: '"amenity" may be taken to express that element in the appearance and layout of town and country which makes for a comfortable and pleasant life rather than a mere existence.'

The concept is thus a wide one and courts have adopted a flexible approach in interpreting it: aesthetic considerations are ranked equally with purely physical ones. The age of the houses in a particular area may be a good reason for holding that the grant of a permit for some new development would adversely affect the amenity of such an area.[23] Other factors which may affect the amenity of an area have included uses which would increase the traffic flow in that area; or interfere with existing areas of open space;[24] similarly, applications to build a garage[25] and car sale-yard[26] in a residential area have been held to affect its amenity. These are a few examples of what courts have seen as detracting from the amenity of a neighbourhood.

From the above, it can be seen that a planning authority has to consider a wide number of factors when deciding on which conditions to grant a permit for development. In addition, where it appears to the authority that the grant of a permit might cause a substantial detriment to any person other than the applicant, the permit shall not be granted until notice thereof has been given to such persons, allowing them the opportunity to object if they wish.[26a] It is clear from authority that the words 'substantial detriment' do not mean that the person affected need have any proprietary interest in the land which is the subject of the application. An I.D.O. has nothing to do with title[27] and therefore any person affected in any way by the application may object. In this situation 'the responsible authority must look at the neighbourhood and ask itself, would any particular person suffer some detriment if a permit was granted and acted upon.'[28]

This provision reveals an explicit desire by the legislature to balance the use of private property against the community interest.

[22] Report of the Minister of Local Government and Planning on Town and Country Planning 1943-1951 (U.K.) quoted in 37 *Town Planning and Local Government Guide* para. 467.

[23] *Vacuum Oil Co. Pty Ltd v. Ashfield Municipal Council* (1956) 2 L.G.R.A. 10; *Smith v. Hornsbury Shire Council* (1954) 19 L.G.R.A. (N.S.W.) 287, 297-8.

[24] *Straven Services Ltd v. Waimairi County* [1966] N.Z.L.R. 996, 1002 (application to build a service station in a residential area), *Sydney (N.S.W.) Congregation of Jehovah's Witnessess Pty Ltd v. Ku-Ring-Gai Municipal Council* (1965) 11 L.G.R.A. 280, 286-7. (Application to build a lecture hall.)

[25] (1960) T.P.L. 135 (U.K.).

[26] (1960) T.P.L. 137 (U.K.).

[26a] Town and Country Planning Act 1961 s. 18B(1).

[27] *Yammouni v. Condidorio* [1959] V.L.R. 679; *Re Forsey & Hollebone's Contract* [1927] 2 Ch. 379.

[28] *S.S. Constructions Pty Ltd v. Ventura Motors Pty Ltd* (1963) 10 L.G.R.A. 210, 220.

Further to this, where objections are lodged against the granting of a particular permit, the responsible authority must notify the 'objector' as well as the applicant of its decision when made.[29] Nevertheless, if a permit is granted, then it does not come into force until the expiration of seven days during which the 'objector' may appeal. If such appeal is lodged by the objector or any other person aggrieved during that period, then the permit is not granted until the matter has been determined by the Appeals Tribunal.[30]

A final point relates to the question of whom may apply for a planning permit. It was held in the English case of *Hanily v. Minister of Local Government and Planning*[31] that this right is not confined to the owner of the land in question. It appears that a person may apply for a permit even if he has neither a legal nor equitable interest in the particular land. In principle, this approach would seem sensible, covering, for instance, the case of a prospective purchaser who will only purchase if he obtains a permit for a particular development.

(b) APPEALS RELATING TO PERMITS

It is provided that any person feeling aggrieved by the refusal of a responsible authority to grant him a permit[32] or delay in the granting of such a permit[33] or any of the conditions in the permit[34] may appeal to the Town Planning Appeals Tribunal. Similarly, any person aggrieved by any restriction resulting from by-law under section 97(1)(xxxviii)(a) of the Local Government Act 1958 (although the rise or development he proposes is not prohibited by the I.D.O. or is expressly authorised by a permit granted thereunder) may appeal.[35] Rights of appeal are also allowed in the case of a determination by a responsible authority refusing to consider an application on the ground that it requires further information.[36] Finally, any 'objector' or any other person, not being an objector, who feels similarly aggrieved, may appeal against an authority's decision to grant a permit.[37]

The Town Planning Appeal Tribunal was set up in 1968; prior to this, all appeals were heard by the Minister or his delegates. The Tribunal's function is to hear and determine all appeals against decisions of responsible authorities with respect to applications for permits under I.D.Os and planning schemes.[38]

[29] S. 18C(b).
[30] S. 18C(c).
[31] [1952] 2 Q.B. 444.
[32] S. 19(a)(i).
[33] S. 19(a)(ii).
[34] S. 19(b).
[35] S. 19(c).
[36] S. 19(1a).
[37] S. 19(d) & (e).
[38] S. 19A(1).

The members of the Tribunal are appointed by the Governor in Council for non-renewable terms of three years[39] and one third are lawyers, one third persons with experience in town and country planning and the final third, persons with experience in public administration, commerce or industry.[40] It is further provided that the Tribunal may sit in divisions and that the chairman of each division is to be a lawyer.[41]

Section 21(1) states that:

> 21(1). In the hearing of any appeal the Appeals Tribunal shall act according to equity and good conscience and the substantial merits of the case without regard to technicalities or legal forms and shall not be bound by the rules of evidence but subject to the requirements of justice may inform itself in any matter in such manner as it thinks fit.

Thus, the procedure of the Tribunal is quite informal. It is useful to note the observation of the New Zealand Supreme Court that such a body

> should . . . not be preoccupied with procedural detail and the dignity with which it is properly treated in discharging an important function is not lessened by a liberal attitude to things which really do not matter in the end . . . The realities and merits of the case are of transcending importance.[42]

Section 21(2) also means that the Tribunal is not bound by the usual rules of evidence and thus may admit hearsay evidence, although in accordance with the rules of natural justice it should ensure that the other side has opportunity to reply to such evidence.[43]

The general practice adopted in hearing appeals is for the planning authority to present its argument first, then for any objectors to be heard and finally the applicant.[44]

Gifford comments that there is a 'great deal of discontent' with the present planning appeal procedure in Victoria. The amounts at stake in any appeal may be enormous—usually far in excess of the amounts at stake in cases before the County and Supreme Courts. Planning authorities tend to state formal reasons for their decisions, conveying little or nothing to the applicant or objector as to the actual grounds for the authority's decision on a particular matter.[45] Again, the planning authority tends to be represented by an officer (usually a planner) and there are inadequate opportunities to address questions to him, although it is open to any party to an appeal to be represented by a solicitor or barrister.[46] Gifford notes

[39] S. 19A(3).
[40] S. 19A(2).
[41] S. 19A(7A).
[42] *Wilson Rothery Ltd v. Mt Wellington Borough* [1967] N.Z.L.R. 116, 121.
[43] *T. A. Miller v. Minister of Housing and Local Government* [1968] 1 W.L.R. 992, 995; *Wajnberg v. Raynor & Melbourne and Metropolitan Board of Works* (1970) 22 L.G.R.A. 130.
[44] Gifford, *op. cit.* 310.
[45] Gifford *op. cit.* 311.
[46] Town and Country Planning Act 1961, s. 21(3).

that there is a strong and growing body of opinion in favour of requiring the parties to notify each other in advance of what really is in issue between them and that the appeal be heard and decided by a person with the status of a Supreme Court Judge. The procedure should still remain informal, but these measures would ensure that town planning appeals which often concern property worth millions of dollars would receive the greatest possible consideration.[47]

Other provisions concerning the hearing of appeals are contained in sections 21-22D of the Town and Country Planning Act 1961. Section 21(5) says that the appellant is not confined to the grounds stated in his notice of appeal nor is the responsible authority restricted to the grounds for a refusal to grant a permit stated in the notice of its determination. Opportunity is provided for the other party to have time to consider such a new ground if it is brought up in argument before the Tribunal. Again, it is provided that submissions to the Tribunal may be made either orally or in writing or both,[48] and the Tribunal also has power to enter into and inspect land or buildings to which the appeal relates.[49]

Section 21(4A) (inserted in December 1972) says where it appears to the Tribunal that any appeal may be determined in a way which will have a substantial effect on the future planning of the area in which the land the subject of the appeal is situated, the Tribunal may invite the Minister to make a submission as to matters he considers to be relevant to the issues before the Tribunal. Section 21(4B) provides that the Minister, on his own initiative, may make a similar submission to the Tribunal wherever it appears to him that such a substantial matter is in issue. If such a submission is made in accordance with this provision, the Tribunal must afford the parties concerned further opportunity of addressing the Tribunal.[50] Finally, in determining the appeal the Tribunal must have due regard to any submission by the Minister.[51] These recent amendments, therefore, enable wider planning considerations to be brought before the Tribunal when it is hearing a particular appeal. This objective is also aided by the provisions allowing objectors to address the Tribunal.[52]

In making its determinations, which are final,[53] (subject to section 22B) the Tribunal may direct that the permit shall or shall not be issued, that it be issued subject or not subject to any specified condition, and where the appeal concerns a restrictive by-law under section 197(1)(xxxviii)(a) of the Local Government Act 1958, that the by-law shall have no effect as

[47] Gifford *op. cit.*
[48] Town and Country Planning Act 1961, s. 21(4).
[49] Town and Country Planning Act 1961, s. 21(2).
[50] S. 21(4L).
[51] S. 21(4F).
[52] S. 19(d), s. 19(e).
[53] S. 22(3).

regards the use or development of land to which the appeal relates.[54] It must give each party a statement of its reasons for decision in writing and provision is made for the publication of 'important or typical' decisions.[55] It may also refer any question of law to the Supreme Court for its opinion thereon[56] and any party may appeal to the latter on a question of law.[57] The Tribunal cannot make any decision which the planning authority itself has no power to make;[58] if it does, then it acts *ultra vires* and its decision can be set aside by the Supreme Court,[59] which may also quash a decision if there is no evidence to support it.[60]

As regards onus of proof in planning appeals, it appears that the onus of proving the particular fact relied upon rests upon the party seeking to establish that fact; for instance, it seems that the Tribunal, in balancing private rights and the public interest, will require an appellant to advance cogent reasons displacing that public interest if the latter is the reason for the authority's decision.[61]

While planning appeal decisions provide useful precedents, there is great flexibility in following them. As a N.S.W. court has said, the granting of even one permit can create such a self-generating force that it may become impossible to refuse permits for similar developments or use on adjoining land.[62] Thus a planning authority which has made a wrong decision is not obliged to treat it as a binding precedent;[63] otherwise it would be difficult to avoid being caught in a cast iron planning situation where there is little opportunity for varying or diversifying land use.

(d) CONTINUITY OF PERMITS

Any permit that is in force under an existing I.D.O. or planning scheme continues in force under a subsequent I.D.O. or planning scheme in the same way as if it had been granted under the subsequent order or scheme.[64]

(e) REVOCATION OF PERMITS

It is important to note the circumstances under which a permit may be revoked, for this naturally has an effect on the way a person is using his property, particularly if that use has been allowed by a permit.

[54] S. 22(1).
[55] S. 22A—see the *Victorian Planning Appeal Decisions.*
[56] S. 22B(1).
[57] S. 22B(3).
[58] *George Ward Distributors Ltd v. Cumberland County Council* (1958) 5 L.G.R.A. 24.
[59] *Errington v. Minister of Health* [1935] 1 K.B. 249.
[60] *Bendles Motors Ltd v. Bristol Corporation* [1963] 1 W.L.R. 247.
[61] *Slough Estates Australia Pty Ltd v. Melbourne and Metropolitan Board of Works* [1969] V.P.A.; *Foreman v. Sutherland Shire Council* (1964) 10 L.G.R.A. 261, 269.
[62] *Milstern Holdings Pty Ltd v. Blacktown Municipal Council* (1971) 23 L.G.R.A. 8, 13.
[63] *Park v. Warringah Shire Council* (1970) 20 L.G.R.A. 312.
[64] S. 23.

Briefly the grounds on which a responsible authority may revoke or modify a permit granted by it under an I.D.O. are as follows:

(i) Any material mis-statement or concealment of fact made in the application for the permit;
(ii) any substantial failure to comply with the conditions of the permit; and
(iii) any material change of circumstances occurring since the grant of the permit.[65]

This last provides a fairly broad ground on which revocation or modification may be allowed, although the onus of proof would be on the responsible authority or a planning appeal to show how 'material' the change of circumstances has been in any particular case.

Nevertheless, there are other statutory safeguards against unilateral action by the responsible authority in such situations. First, reasonable notice must be given to the person(s) affected of its intention to revoke or modify and a reasonable opportunity must be allowed for that person to be heard. Then a recommendation stating the grounds for its decision must be submitted to the Minister who must authorise the revocation or modification.[66] If the person(s) concerned consent to this, then the Minister may revoke or modify the permit as desired,[67] otherwise, the matter must be referred to the Appeals Tribunal for determination.[68] In either case, the authority may only act after it has received direction from the Minister or the Tribunal.[69]

(f) PERMITS UNDER SCHEMES

In the same way as section 18(1) does in relation to I.D.Os, section 27(1) provides that permits for the use and development of land for specified purposes under a planning scheme may be granted subject to such conditions as the responsible authority may deem appropriate.[70] Otherwise, the same provisions as regards applications for permits, objections thereto, appeals, revocations and modifications under an I.D.O. apply to planning scheme permits, with such necessary modifications and adaptations as have been noted above.[71]

CONCLUSIONS

In conclusion, it must first be noted that the above discussion has omitted or only mentioned cursorily many important matters, most of

[65] S. 24(1).
[66] S. 24(1).
[67] S. 24(2).
[68] S. 24(2A).
[69] S. 24(3).
[70] S. 27(2).
[71] S. 27(4).

which in themselves would form the basis of a complete study. Briefly, these include the powers of compulsory acquisition exercised by planning authorities, the problem of compensation, the enforcement of I.D.Os and planning schemes and the scope for challenging these, the operation of the non-conforming use provisions, the question of reserved land and the relationship of Victorian planning bodies with other State instrumentalities[72] and the growing involvement of the federal government in town planning through its Department of Urban and Regional Development and the Cities' Commission.[73] An appreciation of all these matters is essential for a more complete understanding of the law relating to this area.

The main purpose of this study has been to examine the ways in which the use of private property is regulated and restricted by statutory planning controls. If private property is seen as a bundle of rights, then the sticks in that bundle have been severely reduced in number. It may be quite validly asked, just how far can controls go before the concept of private property becomes utterly meaningless. The Victorian legislation provides a significant example of an attempt to balance the various interests involved. On the one hand private property rights are greatly limited by such devices as zoning and reservations for public purposes. On the other hand an elaborate system of appeals and public exhibition procedures endeavours to provide a means of respect for individual rights.

Essentially, all this raises a question unanswerable in the present context: namely, how far can one go with controls and, at the same time, accord equal consideration to the rights of private property? Fundamentally, the two are quite exclusive and any perfect compromise seems, frankly, out of the question. In an age where the mass society looms ever closer, the days of private property seem numbered: town planning as an attempt to rationalise land use in the public interest, ironically, may prove the one way in which the individuality, formerly associated with the private property ethos, may be preserved. Given the inescapable interdependence of all persons in an urban community and the problems of pollution and population growth, the only logical outcome seems to be ever increasing controls on the use of property, if mankind is to survive at all. Seen this way, the Victorian Town and Country Planning Act 1961 marks a significant step in the transformation of our attitudes towards the historical property basis of our society—a half-way house on the way to the emergence of a truly collectivist society.

[72] In this context, the potential importance of such bodies as the Environment Protection Authority, the Land Conservation Council and the recently created Historic Buildings Preservation Council should be particularly noted.

[73] In this context, the importance of such Commonwealth-State ventures as the Albury-Wodonga development and the creation of State Lands Commissions should be particularly noted.