PATTERNS IN THE USE OF DEVELOPMENT CONTROL IN AUSTRALIA

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> Mr Campion resumed his spectacles. "It must be something to do with officialdom", he said. "Everything in the free world is, today. It'll pass, but at the moment we're in the midst of it. I know, I've lived through the Jazz Age, the Age of Appeasement, the Battle Age. Now it's the Age of the Official. By the law of averages we ought to move on to something more cheerful next time. Meanwhile, my sweet, I fear we have a more immediate problem." He hesitated and his eyes grew dark behind his spectacles. "It's Uncle William. I can't prove anything yet but I'm terribly afraid someone meant him to go when he did."
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> Margery Allingham, *The Beckoning Lady,* (Penguin ed.) 67

Albert Campion was quite right about Uncle William, who was done to death in an untimely and illegal way. He was, however, considerably less accurate about the stamina of the Age of the Official. The controlling of private development in the public interest is *par excellence* the area of town planning which most irritates private interests because of the inherent veto power over development intentions. Cries of excessive bureaucracy are much more likely to be raised against an expanded development control system than they are against what is frequently regarded as the flimsy and largely irrelevant activity of producing plans. Development control is the cutting edge of town planning and brings the developer and third party objector into contact with officials, whether it be at state or local level, and the "permit explosion" which exemplifies the theme of this conference increases that contact.[1]

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1 The phrase "permit explosion" is taken from dialogue in the United States concerning the proliferations of requirements for permits, notably permits arising out of environmental legislation On this last aspect see D.R. Mandelker, *Environmental and Land Control Legislation* (1976) chap. iv.

1. Some Philosophy?

It is rare to find lawyers arguing for and about a basic philosophy in relation to town planning. In part this is because town planning is now properly accepted as a necessary redress to market forces operating within a community, and in part because the choices between and among appropriate philosophies are multitudinous and puzzling. It is tempting, for example, to say that the choice between the cynicism of Unger who considers the rule-of-law idea a failed attempt to legitimate domination[2] and the classical liberalism of Hayek[3] is simply one of personal preference.

But every argument should have its peg. More than forty years ago in *The Road to Serfdom*[4] Friedrich Hayek published a work which now inspires economists of the right to argue that governments should be brought closer to the underlying realities of supply and demand from which postwar governments have separated it for forty years by subsidies to decaying industries, privileges for organised trade unions and other interests, acquiescence in restrictive practices, vindictive taxation, and a welfare state that is increasingly seen as benefiting the relatively rich at the expense of the relatively poor. Those are arguments which are not our direct concern at this conference. It is, however, poignant to recall two passages from Hayek's seminal work. First, the objectional feature of delegation of law-making powers from central to local levels is that the matter in hand cannot be regulated by general rules, but only by the exercise of discretion in the decision of particular cases. In these instances, delegation means that some authority is given power to make "with the force of law what to all intents and purposes are arbitrary decisions (usually described as 'judging the case on its merits')".[5] Second, and more generally, according to Hayek the "Rule of Law" implies limits to the scope of legislation. Among other things it means that not everything is regulated by law, but, on the contrary, that the coercive power of the state can be used only in cases defined in advance by the law and in such a way that it can be foreseen how it will be used.[6] Otherwise, discretion becomes a little gap through which in time every man's liberty may go out.[7]

2 R M Unger, *Law in Modern Society* (1976)

3 F A Hayek, *The Road to Serfdom* (1944). See also *The Constitution of Liberty* (1960), and the three volumes of *Law, Legislation and Liberty*, (1973, 1976 and 1979).

4 Supra n 3

5 Supra n 3, at 49

6 Supra n 3, at 62

7 This sentence is adapted from John Selden's speech in the 'Proceedings in Parliament Relating to the Liberty of the Subject, 1627-1628', in T.B. Howell, *A Complete Collection of State Trials* (1816), chap III, at 170 It is also used by Hayek as a quotation at the head of chap. 14 titled 'The Safeguards of Individual Liberty' in *The Constitution of Liberty* (1960)

I do not suggest that these passages supply either a complete or even an implicit answer with which a considerable corpus of entrenched professional opinion would agree. Nevertheless, they supply yardsticks by which to judge the thrust and scope of discretion exercised in development control, and offer sentiments which may chime with those inarticulate major premises which inform lawyer's attitudes towards particular governmental decsisions. Having said that, even Hayek acknowledges that there is a distinction to be made between mobile property (where the advantages or disadvantages arising from its use are usually confined to those who control it) and the use made of a piece of land (which often necessarily affects the usefulness of neighbouring pieces).[8] He recognises that the framework of rules within which the decisions of the private owner are likely to agree with the public interest will have to be more detailed in this area, and more adjusted to particular local circumstances than is necessary with other kinds of property.[9] In *The Constitution of Liberty* he accepts that "[s]uch 'town planning', which operates largely through its effect on the market and through the establishing of general conditions to which all developments of a district or neighbourhood must conform but which, within these conditions, leaves the decision for the individual owner, is part of the effort to make the market mechanism more effective."[10] To that extent, propositions in *The Road to Serfdom* are modified, and to that extent discretionary development control is legitimised even by a critic who is classical Whig in political orientation.

What remains is to decide the proper scope for the exercise of discretion within a planning system.

2. The Australian Legislative Experience

At the level of superficial models, the United Kingdom system of development control would seem to be a prime target for Hayek's first criticism, while the conventional Australian town planning scheme would seem to go at least some distance towards avoiding the second. But comparison of superficial modesl does not give the whole answer. To do that we must sketch the history of Australian town planning legislation and schemes produced under it. There is no doubt that these schemes began as the progeny of the schemes produced under either the British *Town Planning Act 1925* or the better-known *Town and Country Planning Act 1932*. In essence, such schemes are originated by individual local authorities and centrally approved by the Governor-in-council in each State following a political vet-

8 *The Constitution of Liberty* (1960) at 349
9 Id at 350
10 Id

ting procedure at that level. Once gazetted they are binding in law on the local authority as well as the general public. Only infrequently is the relevant State government similarly bound, and the Federal government is constitutionally exempt. Central to the conventional schemes which mark the first stages of Australian town planning control is the table of zones which shows whether a particular use or development is permitted absolutely, permitted with consent, or totally prohibited. Only the second category requires an application to the local authority. Different zones are listed in the table of zones and the location of land affected by a particular zoning is found in large-scale maps forming part of the scheme. Although a number of sophistications have been engrafted upon this basic model, it still represents the central perception of, and platform for, development control in a number of States.[11]

Criticisms have been numerous of this kind of community control of private development. The following is a compendium of views offered in recent times in Australia and in the United Kingdom prior to substantial changes after the Second World War. There are at least seven major objections to the traditional town planning scheme,[12] of which the *first* is that they do not deliver what they appear to promise, since lack of certainty becomes obvious almost immediately. One example of obsolescence entrenched by rigidly exclusive zoning is in the field of industry, where today there are factories which can actually enhance the amenities of a residential area provided they meet performance standards. *Second,* zoning settles floating values on land; before zoning a particular activity can be established virtually anywhere, and because so many properties are suitable the over-supply of land available for the particular purpose keeps prices down. Once land uses are segregated and assigned to particular individuals by a planning scheme, however, the supply of properties lawfully capable of being used is reduced, and their values consequently rise. Although the land market in recent years has not demonstrated the huge windfalls of the early 1970s, the system is still not apt for preventing the fortunate few from gaining an unearned increment.

Third, when the community wishes to buy land zoned for a higher use in order to implement planning proposals, it has to acquire it at an inflated price created by the very community seeking to buy. *Fourth,* town planning schemes seriously prejudice the collection of betterment, since this may be much more easily assessed, collected and accepted by the public if the developer is required to obtain a special permission from the plan-

11. For a more detailed explanation of the summarised points in this paragraph see A.S. Fogg, *Australian Town Planning Law* rev. ed. (1982) chap. 6.

12 Sources for these compliants are various and include the Expert Committee on Compensation and Betterment (U K) *Final Report* ("Uthwatt Committee"), (Cmnd 6386) 9, and Commission of Inquiry into Land Tenures, *Final Report* (Feb. 1976) ("Else-Mitchell Commission") para 4 1

ning authority before he can put his land to a use which is more valuable than the existing activity. In other words, the community's bargaining position is prejudiced in advance by giving such rights, and by settling floating values long before development.

Fifth, a comparatively small proportion of the total area of Australia is covered by operative planning schemes or equivalent regulations. *Sixth,* it is a static system. A Planning scheme has the force of the law, and may only be altered by a long and cumbersome process. *Seventh,* planning powers, particularly of local authorities, are largely regulatory in character and do not, except to a limited degree, enable them to undertake or secure positive development. A planning scheme secures that, if development takes place, it shall take place only in certain ways; it does not secure that in any particular part of the area of the scheme it will in fact take place. The system is, therefore, to a large extent a negative one, and can, with difficulty, prevent development. It cannot secure good development, apart from any which a planning authority may undertake in the exercise of statutory functions, and outside the category the scheme merely indicates what development may be carried out, assuming someone is willing to develop in that way.

3. The British Alternative

Town planners frequently argue that there is a better way of doing things. This derives from the abandonment of a zoning system of planning in the United Kingdom on the 1st July 1948.[13] Not only current legislation in South Australia,[14] but a series of draft Bills and a report in Tasmania,[15] and an official committee report in Western Australia[16] follow the pattern of the British approach, even if this is not always freely and frankly acknowledged. Essentially it amounts to this:[17] Development plans replace town planning schemes, but do *not* have the force of law. They are no more that indications of intention, which can be set aside in particular cases by the planning authority itself, or by the relevant Minister or planning appeal body on appeals made against the refusal of planning permission.

A second point is that in the United Kingdom no building, engineering or other operations may be carried out on land and no material change made in the use of that land *as of right.* There is a universal obligation

13 The "appointed day" for commencement in operation of the Town and Country Planning Act 1947.

14 Planning Act 1982 (S A)

15 See, e g , Planning and Development Bill 1974; also J.H. Mant, *Land Use Management Administrative Review A Report for the Tasmanian Government* (June 1981) esp ch. 16

16 *Proposals for an integrated planning system for Western Australia*, Report of the Committee to Review Planning Authorities, W A , June 1977, esp 3 52 and 4 13

17 The main legislation in the United Kingdom is now the Town and Country Planning Act 1971

to obtain planning permission for any of the foregoing. Development and change of use are defined in planning legislation, but the effect of those definitions is modified in detail by Ministerial orders made from time to time which either liberate innocuous changes of uses from the difinition of development or grant deemed permission for trivialities. Apart from these concessions, the planning authority can legally refuse permission for applications for "development" which appear to comply with its policies or standards, or can give permission to those which appear to violate them. The only exception is that a permission for development flatly in conflict with use allocations in a Development Plan requires the agreement of the Minister. In Britain the concept is easier to understand and implement because there is no subdivision control. Land can be split up or sold or let in any way desired without permission being required, but this does not affect any fundamental principle of development control.

Finally, an important difference between British and Australian planning law illustrates distinctions in basic philosophies. In the former, it is not a legal offence to carry out development without having obtained permission to do so. The penalty is not prosecution, or not immediately so. If what has been done is challenged by the planning authority through a notice procedure, the developer (if on appeal, the Minister agrees with the authority) has to pull down the building or restore the land to its previous use at his own expense. This discourages people from doing anything important without obtaining permission, but enables them to ignore petty-minded obstruction by a planning authority.

Of all the substantive aspects of the *Town and Country Planning Act 1948,* development control has lasted the longest without major change. It would seem to have attracted no notable criticism during the early years of its operation when compared to nationalisation of development value and the Development Plan system, and its main features recur in the *Town and Country Planning Act 1971.* It is an arrangement which relies heavily upon the professional case-worker, who in Britain is an employee of the local planning authority, but who in Australia could also be employed by State government. This is one consequence of the federal system, because certain interventionist powers are required to be reserved at the central level of State government due to differences in local governments' powers, responsibilities and capacities when the two jurisdictions are compared.

There seems to be growing enthusiasm in some parts of Australia for the British alternative. Examination of the *Development Control Regulations 1982,* made under the authority of the *Planning Act 1982,* in South Australia and the 1982 Act itself demonstrates that the British model has been substantially imitated in that jurisdiction. Subject to defined exceptions, all development requires planning consent. Specified relaxations are acts or activities which are declared not to be development in the First Sched-

ule of the Development Control Regulations, or else are declared not to be development in areas excluded from the regulations which are listed the Second Schedule. Given the paramount importance of the wide-ranging definition of "development" in s. 4(1) of the *Planning Act 1982,* these concessions in delegated legislation are comparatively minor. They include advertisement, council works, demolition, mining production tenements, replacement of existing buildings, sundry minor operations, temporary buildings, tree felling, and use of land or buildings and work within a building.[18] None of the exemptions seriously derogates from the essential conversion to the British system. It is a system which has been covertly urged without acknowledgment in a number of Bills for Tasmania and proposed by the Mant Report in that State, and is found in the 1977 report of the *Committee to Review Planning Authorities* in Western Australia.[19]

4. The Silent Revolution

It is not necessary to adopt the British definition of "development" to bring about a revolution in the idea of control over private development of land. There are various pragmatic devices which may be employed by governments which wish to relax the apparent certainty of Australian town planning schemes, without going through the politically divisive and dangerous exercise of introducing new and wide-ranging legislation in Parliament. The history of most planning jurisdictions in Australia demonstrates no precipitate move to imitate the radical example that the British introduced on the 1st July 1948. Instead, a series of different devices have gradually been adopted to overcome the perceived faults of the conventional town planning scheme. Most of these are intended to strengthen the hand of the planning authority against the developer. They include the addition of a right to apply for rezoning, incorporation of statutory strategic and regional plans expressing background policies, and express reliance on social and economic policies as material planning considerations. No doubt these do not exhaust the possibilities for sophistications of the original system.

Most of these changes take place without seriously disturbing the appearance of State town planning systems, but not always so. In New South Wales the legislative changes introduced in 1979 were based upon a comprehensive exercise in public relations whereby comments were solicited and incorporated in the Green Book, the Blue Book and the White Book, eventually resulting in apparently monumental change to the face of the statute book by the introduction of no less than five separate pieces of legis-

18. 'Development' is defined in generous terms in s.4(1) of the 1982 Act and by s.47(1) all 'development' requires the consent of the relevant planning authority. Exceptions are essentially contained in regulations made under the Act, notably in the Development Control Regulations 1982, reg. 5 and the First and Second Schedules.

19. See sources listed supra n.15 and n.16.

lation forming, when taken together, an elaborate reformist package.[20] Despite superficialities, at least one legal commentator has found that the multiplicity of planning requirements and criteria in New South Wales has resulted in what Hayek calls 'say-so".[21] That conclusion is vividly illustrated by a scenario, common in Sydney, concerning a fictional proposal for a multi-storey residential flat building on a waterfront site. The site is hypothesised as being presently occupied by a single residence classified for preservation by the National Trust, and established trees are the subject of a restrictive covenant against lopping in favour of an adjoining residential site. The proposal technically complies with development standards (relating to height, site occupation, boundary setbacks, density, access, on-site parking and the like) set out in the local council's deemed environmental planning instrument gazetted some time after the commencement of the *Environmental Planning and Assessment Act.* The proposal, however, breaches council's current policy, particularly with respect to height and density controls, as resolved prior to the receipt of the development appliation. It also departs from some technical requirements in Schedule 7 of the *Local Government Act 1919.* The proposal is advertised and numerous objections received with regard to adverse effect on existing residential amenity. As the commentator points out, the development will ultimately be won or lost on its merits, but these merits must be considered in a complex framework of planning controls. It would be tedious to outline the details, but the conclusion is worth recording.

> If the scenario case finally went to court on appeal, it would therefore not be determined according to a finely tuned set of legal, or even planning principles. Instead, it would be determined against a mass of competing philosophies about what is 'best'. Even a large number of objectors will have no finite bearing on the outcome. Typically, for a non-'designated' development such as residential flats, they do not even have a right to present a case in court.[22]

And this, mark the occasion, is the most deliberately engineered and widely propagandised change in Australian planning law in a State jurisdiction since town planning was first introduced in this country. If the conclusion is that what we are left with is "say-so", then one tends to question why the elaboration was necessary.

In other States the revolution has not been so blatantly advertised. For example, in Queensland central and local decision-makers have co-operated in a largely clandestine expansion of the scope and incidence of discretion since the Brisbane Town Plan and other town planning schemes first became effectively entrenched in the mid 1960's. Three strands of this expansion can be identified. First, there is the opportunity available in other

20 Environmental Planning and Assessment Act 1979, Land and Environment Court Act 1979 Height of Buildings (Amendment) Act 1979, Heritage (Amendment) Act 1979, Miscellaneous Acts (Planning) Repeal and Amendment Act 1979

21 Ryan (ed), 'Land Use and Urban Planning - New South Wales' (1984) 1 E P L J , 72 at 74-77

22 Id at 77

jurisdictions to cut down the list of "as of right" and prohibited uses in a particular zone, thereby increasing the number of uses in the consent column of the table of zones for which express permission is required. That opportunity is regularly sought to be exploited by Queensland local authorities in the schemes they submit, and where they are successful has the effect of increasingly making their decisions subject only to the control exercised by the relevant appeal body, the Local Government Court.

This thrust for flexibility through an enlargement of the need to make planning applications can no doubt be identified in other jurisdictions. What makes it especially relevant in Queensland is its practical association with the second strand — the right of the developer to make an application to the council to have land taken from one zone in the scheme and placed in another. That right has been available under both the *City of Brisbane Town Planning Act* and the *Local Government Act* for nearly twenty years.[23] In one sense it provides an additional incentive for local authorities to expand the discretionary column in their schemes because all rezoning applications approved by the council, or an appeal by the Court, require a second-stage application to the Minister with ultimate approval vested in the Governor-in-Council. By packing column IV, the discretionary column, local authorities can avoid the patrolling of the exercise of their discretions by political authorities at State level. Beyond this issue, the ability for individual landowners and developers to apply for rezoning consent is a *prima facie* derogation from the apparent certainties delivered to neighbouring residents by the "as of right" and "prohibited" columns in the table of zones which is subjected in the first place to the semi-legislative process of objections and State governmental approval. In other words, it is a blurring of the essential conceptual distinction maintained elsewhere between the making of the scheme and the implementation of that scheme through a series of development control decisions necessitated by the discretionary column in the table of zones.

This leads to the third point. There is mounting evidence in Queensland that where the discretionary column remains tightly drawn, a rezoning application is now becoming the paramount avenue whereby developers guarantee their projects through a single approval. In part this is due to the desire of local authorities to secure all developmental conditions at the rezoning stage either by way of conditions, or a rezoning agreement, or both. The High Court decision in *Brisbane City Council v. Group Projects Pty. Ltd.*[24] illustrates the kind of agreement which is conventionally sought on a rezoning approval and equally conventionally assented to by a developer. Where rezoning results in the proposed development falling within the "as the right" column of the new zone, then a later subdivision application is the only discretionary platform for local authorities to exact either financial contributions or contributions in kind relating to public aspects of the

23 See now City of Brisbane Town Planning Act 1964, s 8, Local Government Act 1936, s 33 (6A)
24 (1979) 54 A L J R 25; 26 A L R 525

development. That subdivisional stage is increasingly becoming a formality because of the content of rezoning agreements. In the recent rezoning appeal *Too World Holiday Pty. Ltd. v. Cairns City Council*[25] in the local Government Court, Ambrose D.C.J. considered that rezoning approval ought not to be given until subdivisional considerations were agreed, because "acceptable working drawings for the ultimate subdivision of the appeal site ought to be prepared and accepted in principle by the respondent before any order is made that the respondent make the necessary application for rezoning."[26] The effective subsumption of the subdivisional stage into the rezoning stage was made clear by the following passage from the *Too World Holiday* case.

> Local authorities in Queensland have endeavoured for a very significant period of time to exercise some degree of control over the nature of the subdivision that will follow a rezoning of land by insisting on the preparation of subdivisional plan in acceptable form prior to the rezoning and the obtaining from the applicant for rezoning an agreement to implement the approved subdivision, performance of which agreement is secured by bonds, bank guarantees ect.[27]

In a later passage in the same judgment, Ambrose D.C.J. particularised this general statement:

> In effect it is my view that the ultimate subdivisional plan together with all the working drawings, cost estimates etc. to implement it ought to be determined before the application for rezoning is made. The Council should be ordered to make the application for rezoning only if the developer agrees to implement that plan should the application be approved by the Minister, and only if the performance of that agreement involving the subdivision of the rezoned land according to the standards and according to the design approved by the Council is secured in an appropriate way. This course is commonly taken in other Local Authority areas and the execution of an acceptable plan of subdivision and the performance of works external to the site is commonly secured by an agreement or guarantee....[28]

Without more, these passages would merely rehearse the increasing emphasis on rezoning applications as a major vehicle for consideration of planning, design, and financial factors. But there is a further complicating level of concern evidenced in the *Too World Holiday* decision.[29] In 1980 State

25 Local Government Court, Appeal No 14 of 1983, 8 March 1985 (unreported)
26 Id at 28
27 Id at 26
28 Id at 28
29 supra n 25

Parliament legislated to insist that local authorities outside Brisbane produce strategic plans as part of their official scheme,[30] and also permitted all local authorities to make variety of development control plans at a more precise level of detail.[31] Two such centrally approved development control plans were in issue in the *Too World Holiday* appeal.[32] Their joint effort was to reinforce the thrust of the argument outlined above that the details of the subdivision stage of the breaking up of the land into residential allotments be fixed at the prior rezoning stage. Relevant provisions in these development control plans laid down criteria as to housing type and density of development, consideration of them was an explicit statutory criterion on rezoning, and to that extent preempted detailed consideration at the later subdivisional exercise.

It is the rezoning application which most clearly differentiates Queensland from other jurisdictions where old-style 1925 and 1932-type plans still prevail as the public face of planning control, and the increasing practical importance of the rezoning application brings that State ever closer to the British model of a single type of planning permission divided only into outline and detail stages. Yet it may plausibly be argued that this change of emphasis, which further subtracts from the superficial certainties of the zoning scheme, simply marks in more obvious manner what is happening more quietly in other jurisdictions where there has been no over commitment to conceptual reform such as has occurred in South Australia and New South Wales.

There is no need for a tucket of legislative trumpets. Expansions of discretion, allied to pragmatic advances towards identification of only one type of application as being of paramount importance, can occur either in the interstices of local schemes or in the influence of other changes in the statutory system which multiply the criteria to which a local authority must have regard.

5. Possible Reforms

The catchcry of property developers is often "We don't care what the rules are so long as they are clear and implementation is uniform". Property development is a high risk industry and is highly capitalised. The developer's task is to invest his shareholders' funds commensurate with a reasonable profit for the risk, and the areas of risk have to be minimised. To the developer significant areas of risk are the "permit explosion", proliferation of policy documents couched either in jargon or vague abstractions or both, and inconsistently in the implementation of policy, all resulting

30 See now Local Government Act 1938, s 33(1), s 33(2A), s 33(2C) and s 33(2D)

31 City of Brisbane Town Planning Act 1964, s 3, s 4(4), s 4(4b), Local Government Act 1936, s 33(1), s.33(2A), s 33(2C), s 33(2E).

32 Supra n.25

in protracted lead time before commencement of the development.[33] Of course, the developer's view is not the only one to be considered, but since land is a commodity as well as a resource, it is an importanct view.

Ten years ago K.H. Gifford Q.C. suggested some practical reforms.[34] They included planning schemes in a more positive and self-enforcing form by cutting down the number of discretionary areas, the giving of automatic approval where there are no objections registered following public notice of the application; the setting out of standard conditions on the face of the planning scheme; where third party rights exist, the serving of adjoining owners and occupiers of a copy of the planning application itself together with a copy of any statement of reasons in support; and the requirement that planning authorities should decide applications within a month after their receipt, subject only to the opportunity for the authority to apply to the planning appeal body for an extension of time with the onus on the authority to establish that more time is needed because of the complexity of the proposal. The principle has been adopted in California where an application is deemed approved unless a decision is given within a specified time, subject to the granting of a continuance with the consent of the landowner.[35]

That these sensible suggestions have been largely ignored is shown by the theme adopted by the organisers of this conference. Another problem with close practical relationships to the "permit explosion" is that of poor drafting of planning schemes and associated documents. Speaking of the situation in Victoria, Leonie Kelleher says this:

> Criticisms frequently made of ordinances refer to basic grammatical and punctuational errors, unnecessary definitions and unneces-

33 See, e g , R.A. Fortune, 'Regulation - Underdone or Overdone?', a paper presented to the First National Environmental Law Symposium, Sydney, 22-23 Oct. 1982 Moreover, a developer also finds that where a plan is ineptly prepared by the planning authority he has no redress in an action for negligence for any losses he may incur if he relies upon it. In Minister Administering The Environmental Planning and Assessment Act 1979 v San Sebastian Pty. Ltd. [1983] 2 N.S.W.L.R. 268, the Court of Appeal (N S W) rejected a developer's claims This was despite the deliberate encouragement offered by the Sydney City Council to developers to participate in the Woolloomooloo plan of 1969 The plan was abandoned by the council in 1972; it was inherently defective since it would have resulted in the bringing of a workforce into the area which was far in excess of existing or contemplated transportation facilities. San Sebastian suffered heavy losses through investment in property in the area, investment encouraged by the abandoned plan The following passage from the judgment of Hutley J A. (at 279) is illuminating "The plan for Woolloomooloo was a social plan, it was a plan for changing the face of Woolloomooloo and involved complex evaluation of the public interest The pursuit of the public interest involves the disregard or, perhaps, the crushing of other interests In this situation it is, in my opinion, impossible to impose a duty of care to those who may be affected." And later on the same page "Where, as here, the plan was worked out for the benefit of the council, which had to consider the public interest, any duty to consider the interests of individuals must be excluded."

34 Gifford, 'Town Planning Practice - A Reappraisal' [1975] 24 *Town- Planning and Local Government Guide* 341

35. California Government Code, paras 65950-65954, (West Supp 1980). The legislation mandates decisions on development projects within time periods ranging from six to eighteen months.

> sary verbiage within definitions, inexact and unclear definitions, definitions working at cross purposes to each other, confusion between uses and structure within definitions, definitions encompassing a wider area than required, words being defined by their own terms, definitions which make no sense or are too vague, definitions using terms which are themselves undefined and have no ordinary meaning, definitions requiring reference to one or several Acts of Parliament or, alternatively, tortuous new definitions contrived for words which have been conveniently defined elsewhere. It is not uncommon to find a definition which creates substantive power to include conditions in permits where, clearly, such power should appear in the body of the document rather than in its glossary of terms.[36]

It is sobering to read that most of defects in this awesome indictment were alleged in a letter of objection by a firm of solicitors to a single draft Victorian planning scheme.[37]

Obscure and unintelligent drafting reaches beyond definitions alone and not limited to Victoria. Queensland has its fair share of unnecessary complexities. In *Italian Investments Pty. Ltd. v. Brisbane City Council*[38] Row D.C.J. declined to rely on a draft development control plan on the basis that in many instances the plan was unintelligible and incapable of being read and construed other than with extreme difficulty. In *Gatehouse v. Brisbane City Council*[39] Quirk D.C.J. referred to "the regrettable lack of clear expression in and the difficulty experienced by those interested in construing and understanding planning provisions for which the respondent is responsible", and identified an "obvious need for a clearer and better drafting of these important public documents."[40]Again, in *Too World Holiday Pty. Ltd. v. Cairns City Council*[41] Ambrose D.C.J. conducted an earnest and lengthy search for the meaning of the phrases "single dwelling" and "attached accommodation units" which were not defined in the plan although central to that plan's propositions. In the circumstances, Ambrose D.C.J.'s reflection that it was a pity that the terms used were not defined in any of the authority's official planning documents seems mild reaction indeed.

Such clumsy incompetences magnify the uncertainty and unpredictability of planning systems, which then compound their effects by covert or explicit increases in the incidence of necessities for discretionary decisions. Part of the fault can be placed at the door of State governments.

36. Kelleher, 'Aspects of planning in rural Victoria' (1982) 56(II) *Law Institute Journal* 919 at 927
37 Id at note 63
38 [1982] Q.P.L R., 65
39 [1984] Q.P.L.R., 90.
40 [1984] Q.P.L R , 90, at 94
41. Supra n.25.

It is their duty to vet planning schemes before they are approved and given binding force of local law. A great deal more time, effort and high quality drafting consideration should be devoted to rationalising and making internally coherent these important public documents which so closely affect local communities and the development industry.

6. Planning Gain.

It would be wrong to assume that town planners and the planning authorities they serve are deliberately disobedient to the rule of law in the senses addressed by Hayek. They are municipal pragmatists not philosophers, and one significant object of their pragmatism is the reducing of financial charges on ratepayers by transfer of substantial portions of the burden of public expenditure associated with private building projects to developers, and hence in large part to the end users of land. Realisation of that ambition has obvious connections with the permit system. Expanded discretions necessitate an increase in the number and type of applications and proliferate opportunities for bargaining about the conditions to be attached to any consent. It is the power to attach conditions which is at the heart of the drive to convert Australian planning systems to an "ad hoc" basis.

Yet the ambit of conditions is controlled by the courts. Conditions must be relevant to planning purposes, must not be so unreasonable that no reasonable planning authority duly appreciating its statutory duties could have imposed them, and must fairly and reasonably relate to the permitted development.[42] All that seems perfectly clear and fair, but there are powerful reasons for thinking that the reality of hard bargaining at the local level does not always, or perhaps frequently, mirror these generalised judicial tests. Sophisticated developers can find persuasive practical reasons for accepting unmeritorious conditions.

First, there is the inevitable delay in obtaining an appeal deicision. The costs of landholding (loan interest and holding charges) during those months can exceed the amount of planning advantage sought by the planning authority. Where, as in Queensland, the appeal body is prohibited from awarding costs save in exceptional circumstances,[43] legal costs must also be computed as an ingredient. Second, to launch an appeal may result in the developer forfeiting the goodwill of the planning authority in rela-

42 The standard authority for these propositions is now Newbury District Council v Secretary of State for the Environment and Synthetic Rubber Co Ltd [1980] 2 W L.R 379. Although the tests put forward by the House of Lords were obiter, their Lordships attended to this aspect with great care. For an analysis see Alder, 'The Validity of a Planning Permission' (1981) *Conveyancer and Property Lawyer* 269

43 City of Brisbane Town Planning Act 1964 s 31.

tion to future applications. A standard tactic in Queensland is for a planning authority to refuse applications, sometimes on flimsy planning grounds, if agreements satisfactory to that authority are not forthcoming or proposed conditions are indicated to be unacceptable by the developer. Characteristically, these "requirements" relate to the provision of, or financial contribution towards, public services such as water supply, sewerage, roads and public open space. Development companies are responsible to their shareholders for profits and dividends, and may understandably flinch at the prospect of a Pyrrhic victory on appeal which may prejudice the authority and cause obstruction in the future. Third, a proposed development may be genuinely premature in planning terms unless advantages are offered by the developer, notably in relation to physical infrastructure. Here the developer voluntarily dangles the bait, but the possibility still exists that if imposed as conditions the offers would be unlawful.

The British have coined the phrase "planning gain" to identify requirements imposed by local authorities when approving of planning applications, requirements (or conditions) which are not sanctioned by existing legal tests and are therefore strictly unlawful.[44] This is a reasonably recent discovery by the British, who had hitherto largely been protected against such widespread practices by a system of local government legislation which has assumed that the infrastructure of local services is properly providable from the public purse. Economic conditions have falsified that comfortable principle, and discovery of the modern truths of the bargaining underpinning the gaining of planing permission has produced moral outrage in some quarters similar to the reaction of a maiden aunt who discovers a burglar under the bed at midnight. In Australia one suspects there has been for many years a resigned recognition in many quarters of the "rough-and-tumble" of obtaining a plannning permission, so that either one can say civic virtue is already compromised or that reality was recognised a long time ago.

That it is a reality is shown by Professor Jeffrey Jowell, Professor of Public Law at University College, London, in the following passage which

44 There is a growing volume of literature on the topic, in which the official 'Report of the Property Advisory Group on Planning Gain' [1982] J P E L 1, is a sensible starting point Other contributions include Jowell, 'The Limits of Law in Urban Planning' (1977) 30 C L P 63, 'Bargaining in Development Control' [1977] J P E L. 414; 'Giving Planning a Bad Name' (1982) *Local Government Chronicle* 155; Jowell and Grant, 'Guidelines for Planning Gain?' [1983] J P.E.L 427, Loughlin, 'Planning Gain · Law, Policy and Practice' (1981) I *Oxford Journal of Legal Studies* 61, 'Planning Gain - Another Viewpoint' [1982] J P E L 352 Most of the literature listed above contains views which acknowledge that some planning gain will inevitably occur, and considers appropriate guidelines to control that occurrence. On the other hand, outright opposition is expressed in the following. Heap and Ward, 'Planning Bargaining - The Pros and Cons · or, How Much Can The System Stand?' [1980] J P E L 631; Ward, 'Planning Bargaining . Where Do We Stand?' [1982] J P E.L 74, 'Planning Gain . The Law Society's Observations' [1982] J P E L. 346, Glidewell, 'Development - Some Current Legal Problems' J P E L Occasional Paper, *Development Control - 30 Years On* (1979) 9

identifies reasons for illegal bargains between developers and councils:

> These reasons can be summarised as being based on what game theorists call the 'minimax' principle. Both sides, through a bargain, achieve the minimum risk of maximum loss. Had the matter been fought through to the appeal, each side would have risked losing entirely. Meanwhile, delay is avoided...Ideally developer, planner and the public are better off for the deal.[45]

Australia is clearly progressing towards vagueness and uncertainty in existing planning rules in approved schemes and in the inherently subjective social, economic and environmental factors now relevant to consideration of an application. This encourages concealed moves towards the contract model of what are formally discretionary decisions.

There are aspects to such a trend which are fundamentally distasteful to many lawyers; council officers and developer make deals behind closed doors; publicly determined standards may be compromised for a temporary advantage; public participation (including sometimes the participation of elected councillors) is diminished; the statutory discretion of the authority may be fettered; and opportunities are enhanced for graft and corruption. In sum, planning gradually moves towards the contract model and away from the model of rules. Stern critics of this trend include Sir Desmond Heap and A.J. Ward:

> Bargaining in the field of statutory controls is inherently objectionable. Development control is a regulatory function — and it is no more than that — the powers available to a local planning authority being, like it or not, negative in nature. The system was not designed, nor is it suitable, for achieving the ulterior object of sharing out development profits in land.[46]

But a fully discretional planning system encourages the bargaining process, a legalistic view is unlikely to prevail if checks and balances are not written into the system to expose and control what is inherently a secretive exercise.

7. Conclusions

The purist views of Havek are already tempered by his own concessions to natural reality. these views are further compromised by persistent and subterranean bargaining processes masked by the apparent certainties entrenched in town planning schemes. It is idle to seek wholly

45 Jowell, 'Giving Planning a Bad Name' (1982) *Local Government Chronicle* 155 at 156.

46 Heap and Ward, 'Planning Bargaining - The Pros and Cons : or How Much Can the System Stand?' [1980] J P E.L 631 at 637

to expel the exercise of discretion from implementation of planning schemes. It is equally idle to expect that the exercise of discretion within those schemes will always conventionally adhere to legal tests for lawful and valid conditions established in the courts.

But lawyers are not necessarily hobbled by these practicalities of life, and should contemplate how to constrain the most offensive effects of secret bargaining by lateral political thought. The most fruitful areas to attend to are those of process and procedures. There should be a sufficiency of participatory devices such as third party objections and appeals, planning advisory centres and other deliberate communications by public authorities, and motivations for delay and obstruction, which are essentially the concern of neighbouring residents and other more formalised special-interest groups. New procedures and objection and appeal entitlements will not resolve these conflicts, but will allow them to be ventilated. They will also serve as vehicles for a learning process whereby the public gains facts and understanding through a system which emphasises openness and impartiality; and if those entitlements create delay for the major players in the development process, then so be it.

There is also a genuine opportunity to press for some of the reforms put forward by K.H. Gifford Q.C. ten years ago. Uniformity and certainty are public values which will disappear in town planning unless their advantages are emphasised. In this connection it is interesting to note even in the United Kingdom, the progenitor of wide discretions and the thoroughgoing permit system, there are signs that economic and political pragmatists are beginning to renege on the existing system, the Secretary of State has recently announced a proposal for a system of Simplified Planning Zones (SPZs) whereby local authorities can given automatic permission for specified categories of development in defined parts of their areas. As the comment in the *Journal of Planning and Environmental Law* says: Instead of subjecting all development proposals to the uncertainty and delay inherit in our discretionary planning control system. SPZs would operate in a manner similar to Special Development Orders made by central government in allowing local planning authorities to grant deemed planning permission for those types of development which are specified as allowed within the zone. As in the United States, the zoning of land for a particular use or range of uses will henceforth carry with it an automatic right to use the land for that purpose.[47]

The proposal offers to developers the certainty of a planning permission, prior knowledge of its terms and relief from payment of application

47 'The Americans are Coming - Simplified Planning Zones' [1984] J.P E L 469 at 469

fees. The proposal will also require legislation to implement it, but it would seem that the pendulum has begun to swing back.

It is these kinds of techniques and devices to which lawyers should pay close heed if they wish to check the rampant expansion of discretions in town planning instruments. The current Australian situation constitutes a major challenge to lawyerly values based on openness, fairness and equal treatment. If there is even partial success, then Albert Campion's Age of the Official will by that proportion be rolled back on itself.