RECENT TRENDS IN THOUGHT ON PLANNING LEGISLATION

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Daar is 'n groeiende belangstelling in stadsbeplanningswetgewing in Suid-Afrika soos daarin weerspieël word dat drie provinsies fundamentele veranderinge aan hul stadsbeplanningsordonnansies oorweeg. Die artikel bespreek 'n aantal van die beginsel- en dispuutpunte wat in onlangse konferensies en publikasies gelug is.

Aspekte wat bespreek word is o.a.: die noodsaak al dan nie van beplanningsbeheer, swakhede in die huidige stelsel van dorpsaanlegskemas, die wegneem van ontwikkelingsregte, ontwikkelingsplanne, die rol van die markmeganisme in statutêre beheer oor grondgebruike en devolusie van gesag.

The role and format of planning legislation have lately been discussed with unusual urgency. Three of the four provinces are contemplating major changes to their planning ordinances, with the Cape taking the lead with the recent publication of the Draft Land Use Planning Ordinance. Numerous papers, reports and books have recently been published on this subject.

The purpose of this paper is to bring together the many different thoughts and concepts recently expressed and to apply them critically to South African planning legislation. In this way weaknesses in our system will be exposed and the applicability of theories and concepts tested in relation to South African conditions.

This paper is mainly aimed at land use control as regulated by the various town planning ordinances. It is fully realized that there is a vast array of other legislation which impinges directly or indirectly on planning and land use control, but these are not discussed here.

1. HISTORICAL PERSPECTIVE

British planning legislation originated from discontent with poor living conditions in the industrial towns during the nineteenth century, while planning, or more specifically land use zoning in the USA started in 1916 after the erection of the Equitable Building on 120 Broadway, Manhattan, a 42 storey building with no setbacks from the street boundaries.

British planning was radically changed with the Town and County Planning Act of 1946 when all development rights were withdrawn and a system of "planning permission" introduced. In simple terms this meant that every development needed prior permission. The English planning system, especially the further refined Act of 1968, is widely held to be one of the best systems in the world.

Whilst in many ways it represents a fine and carefully conceived piece of legislation, it caused, in its early days, a proliferation of planning posts, and great delays in the granting of planning permission (Ratcliffe, 1974, p. 72).

The English planning syste embraces basically the formulation of two sets of plans, namely structure plans which portray broad policy on urban struc-tural elements such as population dis-tributions, services, transportation, land use, etc., and local plans which give details of intended change where change is anticipated. Of importance is that this system covers the whole field of development, not only land use as in South Africa.

The whole American political system is based on local autonomy so that planning legislation differs through the fifty states. For example in one major city, Houston, Texas, there is no zoning legislation. However, on the whole, a land use zoning system in many ways similar to the RSA's applies: the difference being that the courts are the final arbitrator whilst, in South Africa, it is the Administrator. Also, zoning schemes do not confer permanent rights as in South Africa. Both in Britain and the USA public participation in planning through public hearings is much better developed than in South Africa.

According to Verschoyle (Cameron, 1981, p. 7) South African planning legislation, in the form of the townships ordinances of the provinces, was based both on American zoning laws and British legislation of the twenties. This legislation, as represented in the Cape Province by the Town Planning Ordinance (Ord. 33 of 1934) has, in principle, changed very little. The major changes have been in the vast array of acts allowing central government intervention in local planning and development affairs, for example the Physical Planning Act (Act 88 of 1967) which, inter alia, provides for statutory guide plans. These plans must be ratified by the Minister of Constitutional Development and Planning, and by this means central government has the final say as far as broad planning issues are concerned, spatially and on policy matters. However, most of the minutiae of town planning and zoning are still handled by local authorities under surveillance of the provincial governments, through the various town planning ordinances.

2. IS PLANNING NECESSARY?

Perhaps the most basic question is whether there should be any planning legislation or zoning at all. There is a group of people, here and abroad, very much against any form of planning control by government (Louw, 1980; Furham, 1982). It is their contention that planning control impedes the free market system and is therefore counter productive and, that the market mechanism will find the best use for every piece of land.

Others (McAuslan, 1980, p. 147) question the norms for planning decisions be it by planners themselves or arbitrators such as the Administrators or the courts. After four decades of post war planning many people, including planners, wonder how much mankind did benefit by planning control (Bonett and Miller, 1983). Planning can only benefit from objective, scientific, unemotional

self appraisal.

The city of Houston, Texas, is quoted by almost all the proponents of no-zoning as a living example of what can be achieved without the hindrance of zoning. The high growth rate, low cost of houses and short processing time for proposed development are usually quoted as proof of this view (Van Tonder, 1983).

However, I have not come across one scientific study on this matter from which any objective conclusions can be drawn. Houston is in the growth belt of the USA and therefore its rapid growth can not be attributed to non-zoning. Abundant underground water and a flat topography make development almost anywhere technically possible. A glance at a land use map of Houston shows the very scattered pattern of development which occurred. For most planners this is problematic in itself.

In comparing the cost of houses in Houston and other cities which is often quoted as proof of the superiority of no-zoning the negative effect of the excessive sprawl such as higher cost of services and transportation is not taken into account.

Although the city centre is almost devoid of all retail facilities, Houston is in appearance not very much different from most US cities. The lack of control however, is apparent. One finds condominiums with hardly any building setback on highways, freeways clogged with industrial development and, according to recent indications, unsympathetic land use mixes such as "striptease joints" in residential suburbs (New York Times, 1982).

It is interesting that residential suburbs are protected from unwelcome uses by private deeds drawn up at the establishment of a suburb. Unlike South African conditions of title these deeds are of a temporary nature providing for renewal at set intervals (Benton, 1979). There are some 10 000 separate deed restriction documents on file, clearly indicating the need that people feel for protection. The proponents of no-zoning see private deeds as a better form of protection than zoning. In reality it still entails control, the only difference being that the control is at suburb level. The basic approach to planning in Houston is clearly expressed by Roscoe Jones, Director of Planning of Houston: "If you want to control the use of land you must own it. We cannot allow a handful of home owners to stop development". (Jones, 1982)

The proponents of zoning base their opinions on the well known socialistic motto that the free market is bent towards short term profits and that there are aspects of society where the short term profit may not necessarily be to the benefit of society as a whole. The use to which land is put is one such aspect.

It is difficult to prove here whether the benefits of zoning and town planning control in general outstrip the negative effects or not. However, in spite of the critisisms quoted above, it is quite clear that planning control will still be with us for a considerable time. Even in the USA (Weaver, 1979, p. 82; Smith, 1983) there is evidence that most people prefer zoning. In the socialistic European countries government control of land use is a way of life. It is therefore relevant to take a close look at our present land use control systems, to highlight their weaknesses and to explore ways in which they can be improved.

3. THE SHORTCOMINGS OF LAND USE ZONING

There is no doubt that zoning has many shortcomings and that it does not always lead to the results that planners anticipated. Of the wide range of shortcomings those listed below will be looked at in more detail.

- Lack of long term planning
- The negative approach of zoning
- Zoning constrains development
- Zonings are often at variance with reality
- Zoning fails to protect the environment

3.1 Lack of long term planning

One of the basic criticisms of present town planning schemes in South Africa is that they provide for control of development through building lines, bulk, coverage, but do not provide for an effective mechanism for long term planning (Van Tonder, 1981, p. 103; John, 1983, p. 188). One instrument, the town planning scheme, was designed to perform both these functions, and initially it was used as such. As time progressed it was found that it was difficult to change plans when it involved "downzoning" because of the permanent development rights allocated. Owners of downzoned land are entitled to compensation whereas the funds for this, that were supposed to come from betterment fees paid by owners of "upzoned" land never really materialized. Therefore most municipalities find it too costly to downzone. The practice developed to grant rezonings for a limited period only, usually 2 to 3 years. If the new use is not implemented within this time limit, the development right reverts to the previous legal zoning. With a general revision of a town planning scheme, the method of lapsing rights can not be used because it is effectively forbidden by the Financial Relations Act. Thus the long term planning ability of town planning schemes is severely curtailed, and in a way the system is reverting to *ad hoc* planning.

The guide plans introduced by the Physical Planning Act do provide for long term planning, but the process of preparing and passing these plans is so cumbersome that they are not suitable for local planning purposes. For instance, Greater Cape Town has not yet achieved an approved guide plan although the act was passed more than eight years ago, and Cape Town was, and perhaps still is, a leader in the field of metropolitan planning.

3.2 Zoning is a negative mechanism

Zoning is often critisised for being purely negative in that it is a system of restrictions (Verschoyle, 1981). It is often assumed that planning in the form of zoning will create a better environment. This is of course not the case. Zoning alone creates only the framework for others in which to develop. In the end it is the private investor who must do most of the developing. Perhaps the early planners overlooked this point.

This retarding effect is especially felt in times of economic depression and high unemployment when the profit margin is narrow. The developers who were the profit hungry "villains" in the boom are now looked upon to create development.

Price (1983) gives an exhaustive list of

methods to induce development. A number of these involve trading with development rights allocated through zoning. Trading with development rights as well as incentive zoning is widely used in the USA and also in South Africa. It consists of allowing increased bulk on height as a bonus if certain requirements are met, e.g. the provision of a pedestrian mall.

These methods have one aspect in common, that is, trading with artificially allocated rights. One could ask why a certain bulk must be bought. If a certain zoning is acceptable it could have been allocated in the first place. In some cities, such as Atlanta, Georgia, the bulk factor is so high that no trading is possible (Weaver 1979 p. 57).

Methods for inducing growth are not part of this paper, but it must be borne in mind in the design of a new planning legislative system that avenues must be left open for constructive planning and not only restrictive planning.

3.3 Zoning constrains development

There is no doubt that zoning can be very obstructive to development. In South Africa this is particularly the case as so many state departments are often involved in the granting of permission for rezoning. Again, in times of depression this is particularly felt, so the short term fluctuations of the property market make it essential for developers to act rapidly. Long delays in rezonings can greatly influence the viability of a project. In England the long delays in granting planning permission are widely blamed for the rise in development costs. In the USA zoning is blamed for preventing affordable housing from being built because of density restrictions (Planner, 1983).

There has been a constant and loud outcry from all concerned with urban development to shorten and simplify the process of rezoning and the passing of subdivision plans. This involves three aspects. One is the process in the basic ratifying body, i.e. the local government and provincial government. In some provinces this process elicits little criticism while in others inordinate delays in approvals have resulted in a considerable amount of adverse and vociferous comment. The problem seems to lie in the shortage of staff rather than in the process itself – although the process could also be more streamlined. Cases are known where local authorities have been deliberately obstructive. This should not be legally possible.

The second aspect is that of advertisement for comment and objections and the process of dealing with objections which is entwined with the ratifying process mentioned above. As with the drawing up of the zoning scheme, there are two distinct extremes in this process which must be avoided. The one is no opportunity for public participation and objection, which will lead to a very streamlined process, but is totally unacceptable as the need for public participation has been well stressed and cannot be eliminated. On the other hand the degree of the involvement of the general public can be so wide that it forms a positive obstruction to any plan being passed. In some US municipalities this process has been streamlined by having a public hearing and a planning commission meeting at the same time, the one following immediately on the other. This reduces total time for processing rezonings to 30 days (McClendon, 1983). In South Africa objections seldom go to an open meeting and are mostly dealt with in writing. With the delegation of planning decisions to local authorities as anticipated in the proposed Cape Ordinance, public hearings may become a practical proposition. This ensures greater public participation and speed of processing.

3.4 Zoning schemes have little relationship to reality

One often finds that zoning schemes have little relationship to actual development on the ground, especially the earlier schemes which allowed for large areas of business development which were seldom realized. This overzoning is one of the major critisisms of the present system. If a scheme has no chance of being realized in the near future it has little right of existence. Prof. Kantorowitz (1983) recently suggested that plans must only provide for development which has a very good chance of being implemented within a period of not more than 15 years. More than this is futile.

3.5 Zoning schemes did not succeed in protecting the environment

There is no doubt that town planning schemes failed miserably to protect nature areas, agricultural land, historical buildings and street scenes, and in providing aesthetic control. Perhaps this is as much an indictment of the early planners and the public as it is of the mechanism of the ordinances. The early planners zoned large areas for business and general residential uses irrespective of the historic value of buildings. Even today, after forty years, some of these zoning have not been exercised (although a large heritage has already been destroyed). This also indicated the gross overzonings and the inadequacy of the early plans. Today town councils are financially unable to afford the withdrawal of allocated development rights where these affect historic buildings. Similarly "agriculture" zonings on town planning schemes are meaningless as they usually mean that this land is being kept for future urban development.

Preserving the environment, be it historic buildings or nature areas, involves costs for the owner because he is deprived of the "normal" gain from growth and in the case of buildings he must also bear direct costs. The community must therefore be prepared to pay for preservation. As far as nature areas are concerned Mr. Heunis, Minister of Constitutional Development and Planning, set the correct example by ruling that owners of land which has been declared as nature areas under the Physical Planning Act can claim compensation for loss of income. As far as historic buildings are concerned, no satisfactory procedure has yet been designed. The basic problem is the cost involved. Aesthetic control has been introduced by a few municipalities, mainly in an advisory rather than mandatory form. European, and even some American cities are far more advanced in this field.

The necessity for environmental impact control has cropped up lately as a necessary exercise to decide on the merits of a project. In the past environmental impact analyses have been called for by the Administrator on an *ad hoc* basis. There is however a strong "green" lobby pressing for enforced environmental impact analyses. In official circles there is a reluctance to allow this, most probably induced by US experience. The normal planning

process is in itself an "environmental impact analysis". The new "discovery" of this process in the USA (and from there around the world) stems from concern over the detrimental effects of major federal funded projects, and not so much from a shortcoming in the normal planning processes. This concept has, in some states, been extended to include all projects which may have a harmful effect on the environment. In a way it serves the same purpose as our "desirability" norm. (Goodenough, 1983)

There is no doubt that comprehensive planning including some form of environmental impact analysis is essential, particularly where fragile areas are concerned – both urban and natural.

4. CONCEPTS FOR CONSIDERATION

Other concepts on planning legislation which have recently been expounded include the following:

4.1 Development plans

The necessity for plans to be linked with the executive system has been advocated by planners such as John (1983), Golani (1983) and others. In short, the purpose of development plans is to link town planning with an implementation time programme as well as an annual budget. This is one way of ensuring that planning relates to reality.

According to Golani the official master plans in Israel did not lead to the necessary coordination of work. Development plans with a short time span were introduced to coordinate the work and flow of funds. They were non-statutory plans and could go through the process of alteration in six months (in comparison with three years necessary to alter a master plan). It must however be borne in mind that the system as used in Israel was geared to coordinate central government activities. Israel is a highly socialistic state and most urban development is executed by central government departments. John (1983) and Adendorff (1982) suggested a development plan system on a three year rolling basis, coupled to the local government budget: accordingly finance is firmly committed as far as the executing programme and budget is concerned for the first year, while that for the next two years are estimates. John suggested that the drawing up of development plans should be mandatory but that they need not be ratified by higher authority.

Planning, and thus the community as a whole, can only benefit by the programmed execution of plans. However, it will be premature to introduce legislation to this purpose at this stage. Various possible systems must first be tested. The indicated course of action will be for the Provincial Administrations and enterprising municipalities to introduce experimental schemes.

4.2 Development rights

A controversial concept which was introduced by the Cape Draft Land Use Planning Ordinance is the "nationalization" of all development rights.

There seems to be a great deal of vagueness amongst planners as to what development rights entail. According to Floyd (1982) land owners, before the advent of zoning, had all the rights possible to do with their land whatever they wished. Zoning however pruned away many of these rights. The "development rights" of land today is what is left over after zoning. Zoning did not "give" the rights but took the rights away.

On closer inspection it is clear that very few land owners today have any development rights, over and above what they are doing on the land at present. With the introduction of town planning schemes from the early thirties most owners of land in municipalities lost all their "development rights" other than the present land use. With the promulgation of the Subdivision of Agricultural Land Act (Act 20 of 1970) owners of agricultural land outside municipal areas lost all their development rights too. The only land with rights over and above present use is land zoned for business, general residential and industry, which is at present not used for that purpose or not fully developed. Certainly a very small percentage of owners are affected and only a fraction of a percentage of land. Why then did this proposal cause such an outcry where the previous nationalization of rights did not stir up even a whisper? One reason is that it is the most expensive land belonging to the most influential people which is now at stake – the land where developers should be busy investing. The real question should therefore not be if this last vestige of development rights should be retained but whether a planning system can be devised where developers can get a quick response for their proposals to develop without reverting to an *ad hoc, laissez faire* system.

4.3 The conferrence of development rights by plans

A basic problem in long term planning is whether statutory plans can be drawn up without conferring development rights.

For instance, the Draft Land Use Planning Ordinance proposes structure plans which will not confer rights. Some planners assert that all official plans confer rights, if not directly, then by implication. This point is further stressed by the provisions of the Financial Relations Act, in that all zoning changes are liable for compensation claims. As soon as official plans are published, speculations start and expectations are created. The question is whether the public must pay for speculation made on the strength of these expectations which fail because of a change of plans. Again, there is a fine balance which must be found.

On the one hand plans must provide the necessary certainty to developers so that they can invest with confidence. On the other hand too much certainty as with the present town planning schemes prohibit long term planning. The third possibility, that is vagueness of plan, as with the present guide plans (which also do not confer rights) is of little use for investors. The new Cape ordinance tries to solve this problem with two documents, a zoning scheme for very short term planning (five years) and a structure plan for long term planning. This conforms to a lesser or greater degree with the suggestions of John (1983) and Mercer (1979) and conforms to the present West German practice (Van Tonder, 1983). What is important is that owners negatively affected by these long term plans should have some mechanism by which they can claim compensation.

4.4 The market mechanism and *ad hoc* planning

It is widely accepted, here and in the US, that the market mechanism must play a leading role in the determination of land uses. The notion that the "planner" knows best and will provide the right zonings in the right places has

long since been proven wrong. This means a move towards *ad hoc* planning or a *laissez faire* policy. A large percentage of development today is preceded by rezoning which really boils down to *ad hoc* planning, although there are no statistics to prove the extent of this phenomena. Again, some balance must be found between what is considered the best for the general good and what the investor wants. In the end it is the investor who takes the risks.

This also involves the question of individuals enriching themselves because of the actions of the community as a whole. A decade or two ago when planners were much more socialistically inclined, this was regarded as being one of the evils of private enterprise. Even the nationalization of all ownership of land was suggested (Page, 1979) the idea being that prices would be kept low by eliminating speculation. This of course is completely wrong as prices are determined by supply and demand, not ownership. The betterment fees charged on properties advantaged by rezoning was an effort to divert to the community some of this increased value caused by collective community action. For many reasons this system failed.

In a more capitalistically inclined society it is acceptable for the entrepreneur to make a profit on his investment because of the risks he takes and his insight with regard to the market. Moreover, the increased value of a property caused by development increases the tax base. What should be attained by legislation is that everybody should have an equal chance to invest in property.

4.5 Devolution of power

The government has for some time been propagating the devolution of decision taking to the lowest possible level, although on superficial observation rather the opposite has been happening. Present planning ordinances allow for delegation of certain powers to local authorities but virtually no use has been made of this option until very recently, when it was decided by the Cape Province to delegate the ratifying of small subdivisions to local authorities (CPA, 1983A). The greatest gain by the delegation of power will not only be the saving of time in the procedure of ratifying plans, but also that the public will be drawn closer to the planning process.

This process is not true devolution but delegation. The question is what will be best for the planning process. During the drafting of the proposed Cape Ordinance it became clear that many people regard the objectivity of local authorities with some suspicion and that they have much greater faith in the Administrator. Also, there are local authorities without the expertise and financial resources to handle the planning problems in their areas. Divisional councils with jurisdiction over long coastlines is a case in point. The coastal areas are of much, more than local concern.

It must also be borne in mind that in USA cities, where true devolved powers exist, the courts act as final arbitrator in cases of conflict. It will be necessary to introduce planning appeal courts if true devolution takes place. It therefore seems that what is really needed is delegation and not devolution.

5. IN CONCLUSION

Planners will never reach concensus on what is ideal planning legislation. Just as planning often is a compromise between opposing interests and divergent ideals, so is planning legislation.

It is generally agreed that the aspects noted above are indeed problem areas which need attention in any new planning legislation.

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