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THE APPLICATION OF THE PRINCIPLES OF PRECEDENT IN THE DECISION-MAKING PROCESSES OF PLANNING AND LAW

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A dissertation submitted to the Faculty of Architecture, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Science in Town and Regional Planning

Johannesburg, 1991

DECLARATION

I declare that this dissertation is my own, unaided work. It is being submitted for the degree of Masters of Science in Town and Regional Planning to the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination to any other university.

BR Liversedge

(Name of candidate)

6 day of January, 1991

ABSTRACT

This dissertaion will explore the principles of legal precedent and how they are applied in the legal decision-making process. This will take place in the framework of law and the South African legal system. The similar concerns of planning and law will be described.

The nature of planning precedent and the way in which it is set and applied in principle and practice will be described. This will be compared to legal precedent and criticised accordingly. Case studies will be used to illustrate the practical ways in which planning precedent is created.

All discussions will take place in terms of the notion of the public interest as it is viewed from the perspective of the public sector planner. The growth and development of planning and planning legislation will be traced to illustrate the public interest nature of planning.

The dissertation will conclude with a set of recommendations which serve to rationalise and formalise the way in which planning precedent is set and used.

Planning and planning legislation arose out of a need to protect the public interest. However, over time, less attention has been focussed on the public interest, and procedures set out in the planning leglisation have not acilitated public planners in their tasks of upholding the public good.

One of the major problems associated with contemporary planning practice is the inconsistent and ad hoc manner in which planning precedent is applied. This can be largely attributed to the piecemeal fashion in which decisions are taken on planning matters at the various tiers of government. Planning precedent can be criticised in many instances in that it serves to further the private interest, often at the expense of the collect e good.

The public interest is a notion frequently used, but seldom understood. As a result, its impact is weakened, and the private interest, assisted in many circumstances by the application of unhealthy planning precedent, is strengthened. The planning profession is constantly under fire and thus public planners are finding themselves in the position where they are required to defend their role in society. In light of this, it is essential that planners concentrate on the effects that their decisions will have on society, and the impact that planning precedent has on societal processes.

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DEDICATION

To all planners and legal advisors who are committed to the growing need to uphold the public interest.

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1. BACKGROUND STATEMENT

"Law is the warp and woof of social life, and so far from being concerned with a narrowly circumscribed area, is all pervasive. It is not only concerned with the pathology, but with its physiology as well".
(Hahlo and Kahn 1968, p1)

Planners working in the public sector are concerned to a large extent with preparing public policy and development plans, and considering applications for town planning permission. Their tasks involve evaluating the effects that their decisions will have on the social, economic, physical and political aspects of society. In general, planners receive rigorous training in various decision-making models, public participation, and means of undertaking extensive empirical analyses of existing social and economic trends, and applying these to the future. Certain planners extend their studies further to cover aspects of the design of urban areas and project management skills.

However, the training that planners receive deals almost exclusively with the 'what' of planning, i.e. the processes taking place in the urban environment. Few planners have a sufficient understanding of the 'how' of planning, i.e. the legal and institutional means of ensuring that all the 'what', so carefully and comprehensively prepared at the drawing board, is effectively and efficiently implemented.

2. PROBLEM STATEMENT

2.1. Planning Law - The Current State of the Art

It will be shown that statutory planning provisions have been in existence since the late nineteenth century. Despite this fact, the law pertaining to planning has only recently been recognised as a subject worthy of in depth investigation, with the result that "the law relating to planning in South Africa is still very much in its infancy" (Van Wyk 1990, p2). In addition, planning law is not comprehensively covered in many planning schools, and no general principles exist for the application of the law relating to land use planning.

In recent years much criticism has been levelled at planning legislation, and the question has been raised whether or not planning law has had any real and positive effects on societal processes. In fact, many critics of planning attribute the problems associated with the planning system to the legal framework within which planning operates.

Grant (1982, p1) suggests that planning law, and the land use planning system in post-war Britain, is the most controversial of all "regulatory machinery". He goes on to say that as a result, the planning system has in effect had very little impact on shaping urban systems and patterns. He attributes this to the fact that the existing mass of town planning legislation is highly technical and poorly co-ordinated. As a result, the planning administrative system, which relies so heavily on general public support and understanding in the public participation process, "evinces every sign of slipping farther and farther away from popular intelligibility"

(Grant 1982, p36).

A further criticism of contemporary planning law and its relation to land use planning is discussed by McAuslan (1980, p2). He states that planning law is subjective and biased in its exercise of power, "so that far from being a 'golden metawand' of planning with all other aspects in a state of disarray, the law, its administrative and official interpretation ... is itself a major contributory factor to the continuing disarray of planning."

It is submitted that contemporary South African town planning legislation is by no means exempt from the above criticisms. The legal system within which town planning decisions are made is unco-ordinated and relatively weak. As a result planning is becoming less effective and poor decisions are continually being made. In addition, it is contended that the existing body of planning legislation which developed out of a need to protect the public interest, in reality does not do so.

The South African planning system follows a specific structure of decision-making and formulation of policy guidelines. These are to be discussed in detail in Chapter Four. It could be reasonably expected that, when planners working within a local authority take decisions relating to an area under their jurisdiction, which comply with this defined structure of decision-making and policy formulation, such a decision will be binding. In practice however, due to the nature of the appeal procedure laid down in the legislation controlling the submission and consideration of town planning

applications, (e.g. the Transvaal Town-planning and Townships Ordinance, 15 of 1986) appeals against planning decisions taken at the local government level are often upheld by the Provincial Authorities and this, in certain circumstances, has had detrimental and far-reaching effects on the local community in particular, and the urban environment in general. It has therefore become necessary to investigate and expose the various reasons as to why this is taking place.

2.2. The Setting of Planning Precedent - Cause and Effect

Various problems arise as a result of the current procedures set down in the planning legislation. One of the most fundamental problems which has far-reaching effects on planning, and therefore on the land use structure and land values in urban areas, is the setting of planning precedent, and the fact that in reality, this precedent serves to uphold the private interest. By definition, legal precedent is **"the natural inclination to regard the decisions of the past as a guide to the future"** (Hahlo and Kahn 1968, p214), and as such has the binding effect of a decision. It can be said that in principle, any decision taken on an application for town planning permission could set a precedent if this decision is referred to by an applicant or a decision-maker in subsequent cases. However, in planning, unlike in law, this decision is not binding. Thus although the local authority and the Provincial Administrator are not empowered to make laws - this authority rests with Parliament - through the making of decisions and setting of precedent, they in effect declare what the law is (Garner 1981).

Precedent in planning can be created by a decision which has been taken regarding the approval or refusal of an application for planning permission to change existing land use rights. Such a decision may be taken by the decision-making body of the local authority (acting on recommendations made by town planning officials) or by the Provincial Administrator (acting on recommendations made by the Townships Board). Policy proposals formulated by planners, and approved by Council, could also have the effect of setting planning precedent. It could reasonably be expected that such decisions and policies which are taken by public decision-makers elected by the community, are made in the public interest. However, recent decisions relating to town planning applications in the Transvaal have indicated that the potential exists for the taking of decisions which on the one hand fall short of protecting the public interest, and on the other hand further the interests of the private individual. This will be shown by way of case studies in Chapter Five.

Due to the physical and spatial implications of town planning decisions, the setting of precedent very often has an impact on neutral third parties who own properties in the vicinity of, but not necessarily adjacent to, the erven on which the planning precedent has been set. The various consequences which result from the application of planning precedent will be introduced in Chapter Four, and illustrated in Chapter Five. It can be said therefore, that the degree to which the setting of planning precedent will impinge on the amenity of a neighbourhood depends on the nature of the decisions taken by those involved in the management of the urban

environment, within the framework of town planning legislation.

One of the principle advantages associated with the application of legal precedent is that it creates consistency in decision-making. However, it will be shown in this study that, in comparison to the setting and utilisation of legal precedent, planning precedent is established and applied in a random and ad hoc fashion. This can be partly attributed to the fact that planning is an inexact science operating in a highly dynamic and fluid system, and it is therefore often difficult to prove that the facts of one case are material to another. The application of planning precedent is therefore difficult to administer, opening the door for questionable decision-making, thereby creating uncertainty. As a result, property owners can not be assured that their investments are safe as there is no guard against the intrusion of incompatible land uses should an unhealthy precedent be established. Furthermore, land use decisions that appear to be relatively unimportant or which cause small scale amendments to the land use structure, may have a pronounced impact on the delicate processes occurring within an urban environment.

It is believed, however, that the main reasons for the setting and application of planning precedent, (which in many cases negatively impacts on the urban environment and the local community), is the fact that the legal system within which planning operates is unstructured and does not make provision for the organised and consistent application of planning precedent. Unlike the British

planning system, precedents set by higher authorities such as the Provincial Administrators are not binding on the lower authorities. Similarly, a decision taken by a local authority on a previous application need not necessarily influence any decision which is taken by a higher authority, or the same local authority in subsequent cases. Furthermore, in consideration of appeals at the provincial tier, decision-makers are not bound to take cognisance of precedents already set in other local authority areas which are relevant to the town planning application in question. There is no legislative or other rule which stipulates that planning decision-makers are obliged to refer to precedents set in previous cases or the outcomes of decisions taken in the past. These factors have indicated a need to investigate the current situation, and recommend ways in which it should be amended.

3. AIM OF THE STUDY

The aim of the study is threefold. The principle aims of the study are firstly to isolate the reasons for the setting and application of inappropriate planning precedent, and secondly to develop a formal and organised strategy for the application of planning precedent. This strategy will seek to overcome the present problems set out above, and to avoid the setting of planning precedent which prejudices the public interest in the future. The third aim is to gain an understanding of the relationship between planning and law and to find correlations between the roles that both disciplines play in ordering society. The application of precedent in both planning and law will be compared and critically analysed.

The study will conclude with recommendations on various means of eliminating the weaknesses of the current planning legislative system in order to ensure that South African planning legislation facilitates, rather than inhibits the process of planning in the interests of protecting the common good.

4. SCOPE AND LIMITATIONS

The scope of the study is planning, planning law and the public interest. The following aspects will therefore be researched and analysed in order to achieve the above aims:

i) the primary principles and concepts of jurisprudence

ii) the basic similarities between the concerns of planning and law

iii) the notion of the public interest and how it relates to law and planning

iv) the fundamental characteristics and principles of the doctrine of legal precedent

v) the various reasons why town planning precedent is presently negatively impacting on the urban environment

In order to expand upon the contention that planning, and therefore the setting and use of planning precedent serves to uphold the private rather than the public interest, it will be necessary to explore the growth and evolution of the notions of the public and private interests in planning and town planning legislation. Practical case studies will be used to illustrate the correlation between the theory and practice of the use of planning precedent. Experts in the fields of planning

and law will be consulted in order to gain an understanding of the fundamentals of legal theory, and how it is practiced by those involved in planning matters at the local government level.

The scope of any study gives rise to certain limitations. The nature of the planning system in South Africa is such that planning issues pertaining to the different race groups are dealt with by various bodies in terms of a separate legislation. This study is related purely to the system which governs town planning issues falling within white group areas in the Transvaal. The viewpoints expressed in this dissertation originate from the perspective of a practicing public sector planner, with emphasis throughout being placed on the need to uphold the public interest.

5. STRUCTURE

This dissertation consists of an introduction, six chapters and a conclusion.

The first chapter introduces the three concepts which together form the scope of the dissertation i.e. the public interest, law and planning, and discusses the relationships between the three.

Chapter Two serves to provide the legal context within which town planning legislation is to be discussed throughout the dissertation. The principles and application of legal precedent are detailed in this section.

The third chapter describes the origin and evolution of modern town planning legislation in both Britain and South Africa, highlighting the public interest aspect of the law relating to town planning.

Chapter Four discusses the nature and role of town planning legislation in general, and places town planning legislation in the context of the South African legislative system. The Transvaal town planning system is discussed in terms of both the public interest and the setting and application of planning precedent.

The fifth chapter discusses a series of case studies which illustrate the practical aspects of the theory presented in the preceding four chapters.

The sixth and final chapter presents a set of recommendations and proposals which attempt to overcome the present problems associated with planning precedent. Use will be made of the principles of legal precedent.

1.1. INTRODUCTION

Town planners, particularly those working in the public sector, are the duly appointed agents of society responsible for facilitating community goals such as equal access to public amenities and social services. This collective community goal is referred to as 'the public interest' or the 'common good', and is the fundamental criterion guiding the public planner's decision-making process. However, unless there is a mechanism whereby the community can be assured of enjoying these public services, the planner's efforts are to no avail. This mechanism is called 'the law' or 'legislation', and it is the relationship between planning and law, and the concern of both disciplines in protecting the public interest, which form the underlying theme throughout this dissertation.

It is essential for all planners to have a full understanding of the relationship between planning and law. This will enable the public planner to exploit the opportunities provided by the law of ensuring that the community is able to attain its fundamental goals. The similar concerns of planning and law will be highlighted in order to explain the reasons why the scope of the dissertation viz. planning, law, and the public interest, has been chosen.

1.2. THE PUBLIC INTEREST

In order to maintain an objective perspective, the notion of the public interest will be addressed in terms of both

the constraints and the points in its favour. Discussion will be restricted to the application of this notion from the standpoint of the practicing public planner working within the framework of relevant town planning legislation.

1.2.1. The 'Public Interest' Defined

The public interest, or the public good as it is also called, is a notion often bandied about by planners who attempting to rationalise their planning decisions. The term can refer to a value system, a collective community goal or a principle guiding the decision-making process. The public interest is regarded as a "standard against which to judge the different activities which make up the job of planning" (Fordham 1989, p21). It has also been extensively used as a criterion facilitating the choice between a wide range of planning alternatives.

Planning theorists and critics have defined the "public interest" in many different ways. Alexander (1976, p103) suggests that the public interest is the "aggregation of all the values of the community or the agreed upon set of goals and objectives toward which the rational planning process is expected to work". The concept of collectivity is carried further by Klosterman (1983, p223) in his idea of the "shared interests of a community", and by Makielski (1966, p182) who perceived the city as a community - "the community view argued that the city, as an entity, had an interest or a need beyond the simple collective needs of all the inhabitants, and that there was a way of expressing this interest in physical or procedural terms".

On the other hand, the public interest has been perceived as "a utilitarian notion arrived at quite simply by a summation of individual interests" (Friedmann 1973, p4). Friedmann goes on to warn that "in the social view... the idea of the public interest involves more complex issues... Every society must discover for itself a concrete meaning of the public good" (1973, p5). Friedmann thus points out that although the notion of the public interest may be a universal term, the application of this concept must take into account the different characteristics of each community. This is carried further by Hahlo and Kahn (1968, p120) who refer to the 'positive morality' - the standards of conduct, or the public interest accepted by the community.

The idea of the public interest, if contrasted with that of the private interest, is that no individual is entitled to benefit unless the result at best enhances the goals of the community, or at worst does not hinder the natural processes of society. A decision is said to be in the public interest "if it serves the ends of the whole public rather than some sector of the public" (Meyerson and Banfield 1955, p322). As a result, private rights may have to be forgone in the interests of the community, and it is here, that the public planner, striving to uphold the public interest, is most severely criticised.

1.2.2. Conceptions of the Public Interest

A decision is said to uphold the public interest if it protects the general good of the community as opposed to satisfying the needs of individual members of society. However, within this broad description, there are

different conceptions of the public interest which may be used to defend various planning and political decisions.

Meyerson and Banfield (1955, pp323-329) distinguish between five different conceptions which are categorised into either "unitary conceptions" or "individualistic conceptions".

I. Unitary Conceptions

Here the public interest seeks to attain a single end which satisfies all members of the community. The unitary public interest may be "organismic" in that the interests of the social organism are perceived as being superior to the interests of the individuals comprising the organism. In the "communalist" conception of the unitary public interest, the ends which the community seeks approximate the universal interests of the individual members of the community. Both the "organismic" and the "communalist" conceptions of the public interest emphasise common ends rather than individual ends.

II. Individualistic Conceptions

This conception views the public interest as that goal which strives to satisfy the shared or unshared interests of individuals as far as possible. The "utilitarian individualistic" conception seeks to satisfy the ends of the individual but not to the detriment of another individual's convenience. Under the "quasi-utilitarian" conception, the utility of the individual is sought, but a certain individual's utility is awarded greater importance. The "qualified individualistic" conception of the public interest also aggregates the ends of

individuals into a "whole" but is selective in its choice of ends in that certain ends are excluded if perceived to be irrelevant or inappropriate. Gans (1973) differentiates between the "majoritarian" public interest which satisfies the shared ends of the majority of the population, and the "communal" public interest which upholds the communal goals and values, and achieves a moral community.

It can be seen that each conception of the public interest requires a different type of decision-making process. The "unitary" and "majoritarian" conceptions point to the need for co-operation and experienced decision-makers who can identify the shared and common goals of the community. The "individualistic" conception necessitates a sensitive compromise amongst conflicting goals. The "communal" conception is normative in that it moves towards that which the decision-makers believe to be in the best interest of their community.

1.2.3. The Public Planner and the Public Interest

"In order to advance the claims of planning, ... planners have to accept and advance the ideology of the public service - that of the public interest".
(McAuslan 1980 p227)

Having defined the notion of the public interest, and discussed the various conceptions of this notion, it now becomes necessary to elaborate on the ideas underlying this notion as applied by the public planner. "The main concept employed by town-planners, which indicates their claim to serve altruistically the community as a whole, is that of the public interest" (Simmie 1974, p120).

Public planners are responsible for the formulation of public policy, and the allocation and redistribution of public funds. It can be said that to a certain extent, public planners obtain the legitimacy and accountability to fulfill these roles from the public interest idea which they are advocating. Furthermore, due to the ever-changing nature of the urban environment, and the fact that in most cases planning issues are unique, the public interest may be the only tool available to the public planner to justify a decision.

Other fundamental elements of the public interest idea are democracy, equity and safeguarding equal access to resources. Horowitz (1983, p45) submits that, in upholding the public interest, planners must ensure the "maximum utilisation of resources and perfect equality of economies". However, unlike the economic and social sciences, planners can achieve this goal without producing supplies which are in excess of demands.

It can be argued that the rise of interest groups and their participatory activities has resulted from the fact that public planners have not been dedicated to democratic decision-making processes which affect the public and their collective goals. As the public interest is a community-based notion, the need for democratic decision-making and public participation is fundamental. The plurality of the society's wants and desires necessitates the provision of a wide range of choices whilst equity, and equal access to resources is one of its ultimate goals. Furthermore, due to the democratic decision-making process, and diversified power structure occurring amongst the decision-making bodies,

planning authorities involved in wider issues such as environmental conservation (which in itself is a community goal to be furthered in the public interest) may differ on the fundamental principles of that which the public interest represents.

Marcuse suggests that although planners may show a concern for the public interest by acting in accordance with a code of professional ethics, "this gives them no right actually to make decisions in public matters, nor any concomitant public responsibility" (1976, p270). He goes on to say that "as professionals, however, planners could best show their concern for the public interest by representing their clients fairly, honestly and competently" (1976, p270). Finally, planners acting in the public interest have to be aware of the need for objectivity, and under no circumstances should formulate policy which would further their own goals or satisfy the convenience of some at the expense of others (Gans 1973). Meyerson and Banfield are of the opinion that "one function of planning, and especially comprehensive planning, was to assert the supremacy of the public interest over the private, partial or special interest" (1955, p54).

A fundamental role of the public planner, is that of conflict resolution. The public planner is expected to uphold the interests of the community, at the same time as attempting to satisfy the diverse needs and wants of the various groups and individuals in society. In addition, the public planner is expected to satisfy the collective concerns of the public which are often neglected by market and pluralist processes (Klosterman

1980). Therefore planners who make use of the public interest as a criterion against which public policy and decisions are evaluated, should strive to employ this notion in such a way that it deals with the inevitable conflicts between individual and shared goals. However, when such conflicts arise, and the public planner is unable to use the public interest idea to resolve these conflicts, a measure of success is achieved if individual groups, which make up society, derive some sort of benefit.

Finally, planners serve to facilitate the development of land, whilst attempting to ensure its protection and conservation for use by further generations. It is thus up to the planner to prevent the irreversible degradation of land which would be to the detriment of the public interest.

1.2.4 Limitations of the Public Interest Idea

"Those who justify their actions by claims of advancing the interest of the public are hiding in reality their interest in private gain...".
(Friedmann 1973, p2)

Decision-makers, despite attempts to remain totally objective, are unable to completely abandon a personal value system. Inevitably, therefore, decisions taken in the public interest are to a certain extent normative and are often accused of being biased. This is as a result of the fact that a personal value base, and the definition of what the public interest represents, are open-ended concepts and may therefore be open to large scale misinterpretations. Gans warns that "in the real

world, the impact of a judgement as to what is in the public interest, is not based on content, but on the power of the person making it" (1973, p11).

De Neufville discusses the crisis of contemporary planning practice and theory and attributes this crisis to a certain extent to the "values problem" facing planners. She questions "...which values should be represented, if we cannot resolve conflicts. Even more basic, how does one find out what social values are, and what does one do with one's own values - acknowledge them, ignore them or work for them" (1983, p38). Values cannot be empirically tested and therefore often perceived as being vague and lacking substance.

A further problem relating to the public interest notion is that of the pluralist society, and clarification of where the essence of the public interest actually lies. Here each interest group represents and fights for a particular "public interest" which has been defined according to its specific community goals, and strives for supremacy within a complex class structure. Community goals are difficult to identify and it is not possible to prove that actions and decisions will benefit the full spectrum of community needs. It is inevitable therefore that the goals of certain interest groups are going to be favoured and therefore the good of the public interest may be somewhat compromised.

Through the democratic process of electing politicians to make decisions in the public interest, the community believes that their goals are going to be voiced and attained. However, these politicians each represent a

different interest group and fulfil their duties with the belief that what is in the interest of a single political party, is in the interest of the public good (Meyerson and Banfield 1955, p301). Furthermore, politicians are often criticised for promoting the needs of a restricted minority i.e. the voters in their ward, and safeguarding their own political careers. It has also been said that public planners may use the notion of the public interest as a smokescreen for justifying arbitrary decisions "...it seems to be contrary to the ideals of representative government and the protection of individual liberties for non-elected professional planners to use concepts such as the public interest to impose their views on the public at large" (Klosterman 1980, p324). Furthermore, local government politics and decision-making processes are such that recommendations made by planners in the public interest, may be altered by politicians who have the ultimate decision-making ability.

In order to restore confidence in the application of the concept of the public interest, public planners and politicians must prove to their community through the implementation of appropriate policies that the public interest is being served. It is not sufficient to merely refer to this concept as a justification for decisions which have been made. Therefore, despite the fact that "the idea of the public interest has fallen on hard times" (Friedmann 1973, p2), this concept can serve as a very useful tool enabling planners to objectively assess the merits of their proposals.

1.2.5. The Public Planner and the Private Interest

"A major reason why planning decisions are perennially controversial, is that they so often involve far more than the task, difficult enough in itself, of balancing private rights against the public interest".
(Grant 1982, p7)

Modern capitalistic economies are characterised by an abundance of entrepreneurs who are encouraged to define and pursue their specific and instinctive self-interest. This idea is not new - property owners have since time immemorial believed that ownership conferred the right and freedom to use property in any way which would ensure the promotion of the individual interest. Hence the introduction of the common law principles of nuisance and bad neighbour development which are to be discussed in greater detail in Chapters Two and Four. Public intervention in the free use of property is severely criticised from a private interest perspective as this is only achieved "through the exercise of power copied from an ownership not vested in the authority themselves" (Hart 1964, p19).

Despite the popular conception that the public planner's role in society is that of protecting the public interest, it is still held amongst property developers and land owners that planning "statutes, ordinances, by-laws and other regulations, cost the property developer millions of rands every year" (Financial Mail, Aug. 21, 1987). Planning, from the private interest perspective is seen to impinge on the freedom and interests of private land owners, and as a result, "ownership of land ... carries with it nothing more than a bare right to go

on using it for its existing purposes" (Heap in Pavlich 1978, p235).

The capitalist economy assumes an equitable market mechanism which serves to correct imbalances. It is therefore felt from a private interest point of view, that public intervention in the use of property should be minimal in order not to skew the natural market mechanism or stifle private initiative and competition.

There will inevitably be conflict between public planners presuming their role of protecting the public interest, and the private land owners seeking to secure their private interests. However, it must be seen that "these two interests, whilst often in conflict, have at the same time one common interest in the development and growth of towns" (Floyd 1966, p160). It is thus submitted that the task of the public planner is to seek and attain the correct balance so that the private interest is only restricted where it is in the public interest to do so. In this way, perhaps property owners will be made aware of the fact that the perceived infringement of his property rights, in effect serves to protect his interests, and the general welfare of the community within which he lives. In the same way, the curtailment of his private interest is also justified, and hopefully, "the man in the street [will] come to appreciate the protection that zoning offers him, and planning [will] no longer [be] seen as a threat to individual rights" (Price and Cameron 1982, p48).

1.3. THE RELATIONSHIP BETWEEN PLANNING AND LAW

"The law of land use planning is - like all law - a piece of machinery designed for the use of the community so as to achieve well (or ill-) defined objectives".
(Garner 1986, p1)

Law deals with ordering and administering societal processes in order to check imbalances and ensure the efficient and effective functioning of the social system. Individuals are raised accepting that there are rules and laws to which they have to adhere, regardless of any individual goal. Nevertheless, few have an understanding of the reasons why society has introduced the concept of law into our everyday lives. Craythorne suggests three primary purposes of law which are:

i) to bring certainty into societal processes so that individuals are aware of the way in which their activities are limited

ii) to introduce and sanction suitable and expedient behaviour

iii) to ensure compliance in the interests of the stability of society and the general welfare

(undated publication, p4).

He goes on to say that the role of law is to achieve and maintain harmony and equilibrium between legal subjects.

Public planning can be said to be an "instrument of social justice" (McAuslan 1980, p2) which aims to ensure an equal distribution of life chances. It has been demonstrated over time that the normal interplay of private action and market forces "often results in situations which the nation is not willing to tolerate

and which can only be improved by means of a control mechanism - planning" (Glasson 1983, p18). The fundamental ideals of both law and planning in the public sector, i.e. achieving an equilibrium which is threatened by a laissez-faire system and ad hoc decision-making, are thus seen to be the same. Furthermore, legal science is concerned with people, the very objects to which planners channel their energies (Craythorne, undated publication p1).

The question has often been raised as to whether law is a tool of planning, i.e. a useful means to a greater end, or whether law determines the way planning functions are to be performed. Rose is of the opinion that "law is only the instrument of planning, it is not a magic wand that can be waived to be accompanied by mystic incantations to solve all urban problems or to meet all social needs" (1977, p1). It is believed that planning sets down ideals and parameters of activities which are to be undertaken, and that law is the means through which this greater end is achieved. Without law, planners could never be assured that their time and effort spent at the drawing board could ever achieve anything in reality. Furthermore, law is the means at the disposal of the public planner to guard against planning becoming "the exclusive toy of the private landowner, exercised in a state of anarchy" (Garner 1981, p19). Thus it can be said that both planning and law deal with society and its ideals, the former specifies what is desired by the community and the latter sets out to achieve it and ensure the protection of the public interest.

Certain correlations can be drawn between the characteristics of both the planning and legal decision-making processes. Firstly, both planning and legal decisions are made in terms of a logical step-by-step procedure based on detailed analyses and investigations, and the evaluation of all alternatives. Decisions are made after careful consideration has been given to the merits of the case, and the specific or material facts have been made known. Past judgements and decisions, i.e. "precedent", may be referred to where relevant, and may be influential, and binding under certain circumstances. (This will be discussed in greater detail in Chapters Two and Four). There is the opportunity in the case of both planning and law that once a decision has been made, an aggrieved party may appeal to a higher authority. Ideally, and with only few exceptions, both the planning and legal decision-making processes are open to debate and cross-examination, and may be witnessed by any interested or aggrieved party. In addition, in the gathering of data and hearing of evidence, experts in the field may be consulted and their opinions noted. Finally, the end product of the processes, i.e. the making of decisions or the passing of judgements, may be subject to conditions or restrictions laid down by one decision-maker i.e. the judge (in the case of law), or the relevant planning authority (in the case of a planning application) who has the final say.

1.4. THE NEED FOR PLANNERS AND LEGAL ADVISORS TO INTERACT

McAuslan (1980) criticises those disciplines involved in urban planning such as sociologists, economists and geographers for ignoring the impact that law has on planning. This is due to the fact that "it is law, far

more than planning, economic or social theories, or political practices that is looked to and often seized upon and adapted for use by other countries, particularly in the developing world" (McAuslan 1980, p1). This is particularly relevant in the South African context where planning law has been influenced to a large extent by political ideals, and the growth and development of both British and American planning legislation.

Due to the relationship between law and planning in society, it is essential that planners have a full understanding of the role of law in planning and the various constraints limiting both disciplines. This is so because "the law provides the constitution of the planning system" (McAuslan 1975, p31). Furthermore, it is essential that planners and lawyers become aware of the attributes of both professions, as the exchange of ideas, and knowledge is an essential element in the successful interaction between the planner and the legal advisors such as lawyers, advocates and attorneys.

Rose suggests that "the ability of the legal system to implement the planning process is frequently limited by philosophical, historical and constitutional constraints" (1977, p1). He goes on to describe the implications of these three constraints as follows. The first constraint i.e. the **PHILOSOPHICAL** concerns jurisprudence - the science of law. Philosophers of law are concerned with values and relationships in society so it would be useful for planners to understand these if they are to exploit the laws to the best advantage of society and the community for which they are planning. Planners must therefore be familiar with the body of law at their

disposal in order to exploit the appropriate and available legal concepts relevant to a particular case.

The second constraint i.e. **HISTORICAL** is important as our legal system has evolved slowly over the centuries in response to dynamic socio-economic circumstances. Planners therefore need to understand the historical evolution of our modern law as principles of land use regulation such as zoning, bye-laws and town planning schemes were derived out of historical events such as the Industrial Revolution in Britain and the discovery of gold on the Witwatersrand. Planners must also recognise when planning laws and criteria are outdated, and motivate for their revision and amendment on a continual basis.

The third constraint, i.e. **INSTITUTIONAL** deals with the broader legal and policy framework within which public planners operate. If the planner is not familiar with state policies or the hierarchy of judicial and executive authorities, policies and plans may not be approved by the ultimate decision-maker due to one basic constitutional error or irregularity.

1.5. CONCLUSION

It is essential for planners to understand the relationship between planning and law in society, and the primary concerns of both planning and law i.e. the protection of the public interest. This will ensure that planners take cognisance of the three constraints which influence planning decision-making, and ensure that the full benefits of law as a tool of planning are exploited. "Planning is no good if it is not put into legal terms.

Yet today planners seem to know nothing of legal issues, and legal men know nothing of planning" (Price 1982, p7). The limitations of the public interest motion must be acknowledged at all times, and where necessary, decisions should be made on a more sound basis, such as proven and accepted planning precedent.

2.1. INTRODUCTION

The relationship between planning and law, and the need for planners to understand the role of law in society and in their decision-making processes has been outlined in Chapter One. In order to understand the nature of South African town planning legislation, which will be discussed in the Chapter Four, it is necessary to have a basic knowledge of the nature of law, the history of the South African legal system, the hierarchy of the courts, and the divisions and sources of South African legislation. This chapter will also introduce the principle of legal precedent and the manner in which it is established and applied in the legal decision-making process.

2.2. LAW DEFINED

In general, law may be defined as a "set of rules for the ordering of society" (Garner 1981, p17). Laws represent a "statement of what invariably recurs time after time in certain given conditions or circumstances" (Gibson 1977, p1). The term 'law' refers to a body of enactment or customary rules which is certain, ordered and regular but need not necessarily be rigid or unchanging. The law is a piece of social machinery to be used by those persons who are concerned with changing or preserving the physical and social environment (Garner 1981, p11).

In order for the legal system of a country to be effective and adhered to, the laws pertaining to this legal system need to be legitimised by the community.

The laws of a country then, in principle, represent the underlying philosophies and customs of a society, and are to a certain extent formulated and sanctioned by elected representatives of the community.

Implicit in the definition of the term 'law' is the concept of power and authority. Law may therefore also be defined as the "body of rules governing human conduct which are prescribed by society, applied by the courts and enforced by the executive" (Du Plessis and Kok 1989, p4). In this respect therefore, the laws of the land impose their command in the interests of society with the backing of legal sanction being taken against any transgressor.

2.2.1. The Components of a Legal System

In all aspects of our lives there are rules, laws and accepted modes of behaviour which govern our thoughts and actions. These rules may be described as either scientific or practical. Scientific laws relate to principles and natural processes such as the law of gravity and the law of diminishing returns. Practical laws on the other hand include concepts such as the law practiced by legal advisors, ethics, morals and justice. These practical laws, unlike the scientific laws do not prescribe what 'is', but rather what society deems 'ought to be'. Furthermore, practical laws can be broken and changed, whilst scientific laws are fixed.

The legal system is the only body of law that is recognised and enforced by the state. These laws deal with the external behaviour of a person, and govern individual behaviour in order to protect the interests of

society. Thus law is only acceptable and supported if it is legitimised by society, as it is the individual members of society who are expected to obey and abide by these rules. By 'society' we mean both individual citizens and authorities involved in ordering the social mechanisms of a community such as a governmental organisation.

The rules of ethics, morals and justice on the other hand, are not enforceable, and are imposed from within for their own sake. Such rules deal with an individual's mind, thought processes, conscience and value base. Ethics is "the science of the rules of moral conduct which should be followed as being good in themselves" (Hahlo and Kahn 1968, p6). Ethics may also be described as ideal codes of behaviour resulting from an individual's philosophy and standards of conduct. The word ethics is derived from "ethos" which relates to the spirit of the community (The Concise Oxford Dictionary 1966, p416).

Morals relate to the distinction between right and wrong conduct, and are to a certain extent imposed by society rather than the individual. Morality is concerned with conscience and is used in law to guard against potential negative effects on society (Craythorne, undated publication, p3). Justice has been described as "the desire to give every man his due", and "what is due to a man can be determined only once one has decided what justice is" (Du Plessis and Kok 1989, p5). It is concerned with fairness and is quoted by authorities in motivating their power to uphold what is right and lawful. It is also applied during hearings and appeals

to ensure that every individual has the opportunity to make use of his right to be heard. This is in line with the abstract notion of 'fairness'.

One cannot fully understand the nature of law without considering the way in which the concepts of ethics, morals, justice and equity are applied by those involved in legal decision-making. Although the law has the sanction of executive enforcement, and may therefore, in principle, impose any judgement it deems fit, a final decision relating to law is based on the individual's ethics and personal conscience. In addition, courts usually take cognisance of morals in that people who have been known to be immoral, are often key suspects in subsequent cases. The principles of justice and equity, which have played a major role in the evolution of planning legislation, are applied by the courts to ensure that justice is done by inferior courts and non-judicial tribunals. Furthermore, laws which do not reflect society's sense of justice may not be accepted and individuals will take the law into their own hands. "Order maintained to the total exclusion of justice is tyranny" (Du Plessis and Kok 1989, p5).

2.3. THE HISTORY OF THE SOUTH AFRICAN LEGAL SYSTEM

The South African legal system is anchored on Roman-Dutch Law. The fundamentals of ancient Roman law appear to be custom, not legislation. Sources of Roman law included the enactments of the people, the enactments of the Senate, the enactments of the Emperor and the answers that jurists gave to problems posed to them in order to formalise and co-ordinate the legal writings. Roman law was codified into what was known as the Corpus Juris

Civilis (body of the civil law). However, over the years, in order to make the law flexible, new laws were constantly being passed and these were combined into a specific portion of the Corpus Juris Civilis, known as the Novels.

As the Roman control of western Europe weakened, and the Netherlands were invaded, Roman law had begun to influence established Germanic laws and customs being practiced in the Netherlands. Efforts were made to combine the laws of Holland with Roman law. This gave rise in the seventeenth and eighteenth centuries to a single system known as "Roman Dutch law" which forms the basis of common law brought to South Africa by Jan van Riebeeck in 1652.

As a result of the permanent occupation of South Africa by the British in 1806, the law of the Cape was strongly influenced by the English Law. Although the British allowed Roman-Dutch law to remain the common law of the Cape, new statutes passed in the Netherlands were not adopted in the Cape. A further reason for the strength of the British law in the Cape was the fact that jurists were educated in Britain and the doctrine of "stare decisis" (precedent) was initiated and applied by the British jurists. South African statute has always been greatly influenced by British law but since the 1950's, outdated English doctrines have systematically been eliminated and replaced by purified Roman-Dutch law (Du Plessis and Kok 1989, p21). English precedent is no longer applied automatically, particularly in the branches of law that were strongly influenced by the British legal system.

2.4. THE MAIN DIVISIONS OF THE SOUTH AFRICAN LEGAL SYSTEM

In order to gain an understanding of the structure, power and functions of town planning legislation, it is necessary to briefly discuss the main divisions of the South African legal system. This is depicted diagrammatically on figure 2.1. and will be discussed below. Classification of the law serves to provide a logical structure which facilitates the understanding, application and development of a legal system.

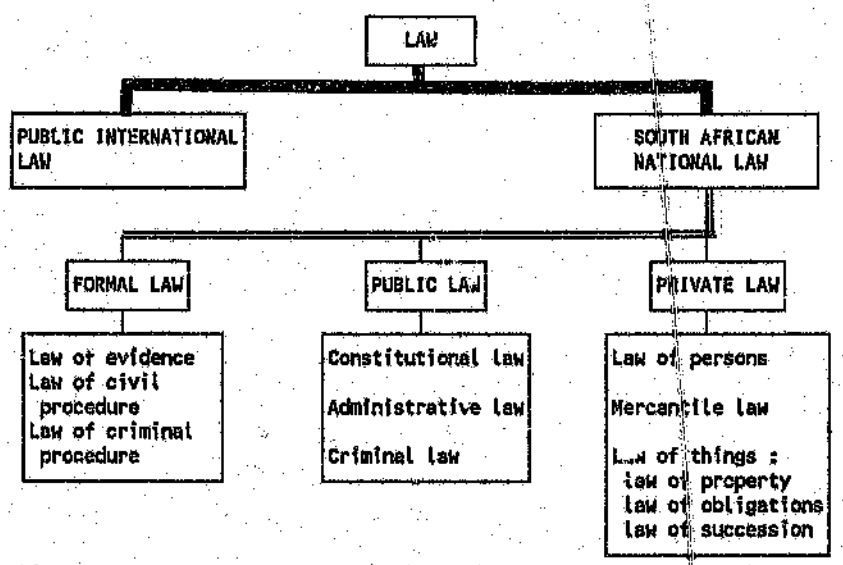

figure 2.1 : Classification of the South African Legal System

2.4.1. Public International Law

Public international law, or the law of nations as it is often called, is comprised of a body of rules governing the relationships between states in times of peace and war. The concerns of public international law include the boundaries between states, international relations such as diplomatic and consular representatives, the

regulation of economic, cultural, scientific and health affairs, the rules relating to declaration of law and the treatment of prisoners of war.

2.4.2. South African National Law

National law, or positive law as it is also called, may be described as that body of law which is specific to a particular country, and serves to maintain and preserve order. One of the main characteristics of national law is that it is binding on all the inhabitants of the state and is enforced by the government. "A nation's system of law is one of the expressions of the soul of that nation" (Du Plessis 1981, p66). This definition implies that there cannot be any body of national law that is not universally applicable and acceptable to the community. Where the law is not automatically accepted, some sort of universal compulsion or sanction is applied to a transgressor in an attempt to protect the community and induce him to obey.

South African National Law is divided into three main categories viz.

I) Formal Law
II) Public Law
III) Private Law.

Each of these will be described briefly.

I. Formal Law

Formal law is the law of procedure which is defined as "the body of rules concerning the mode, the means and the instruments for attaining the ends of justice" (Hahlo and Kahn 1968, p127). Thus formal law provides the procedure for enforcing the law and thereby ensuring that rights

are protected. The purpose of formal law is twofold; firstly to enable the plaintiff or the defendant to become familiar with the case they are presenting or defending, and secondly to ensure that trials are conducted and disputes settled effectively and efficiently (Hosten 1980).

Formal law may be divided into three main subsections, viz. criminal procedure, civil procedure and the law of evidence. Civil procedure describes the recourse available to an individual or party that is aggrieved when their rights or interests normally protected by private law are transgressed. Criminal procedure stipulates and controls the manner in which individual wrongdoers are prosecuted by the state. The law of evidence regulates the ways in which facts and issues are to be proven and witnesses may be subpoenaed.

II. Public Law

Public Law is defined as that body of law which serves to run the country and organise the community. In the broad sense, public law is concerned with the relationship between the state and the individual citizen on the one hand, and the relationship between the various governmental bodies on the other. Finally, public law serves to govern the general good of the community i.e. the public interest. South African public law falls into three categories viz. constitutional law, administrative law, and criminal law.

a). Constitutional and Administrative Law

Although constitutional and administrative law are often classified as separate categories of public law, the

distinction between the two is rather vague. In general, these branches of the law deal with the composition, power and functions of governmental bodies. The subtle differences are discussed below.

CONSTITUTIONAL LAW deals with the legal mechanism of the state. South African constitutional law is concerned with the powers, structure and functions of the administrative bodies of the state such as the ministry. It is also concerned with the way in which the various tiers of government, such as the State, provincial councils and the local authorities relate to one another.

ADMINISTRATIVE LAW cannot be distinguished from constitutional law by virtue of its principles or functions in that both deal with the powers and functions of administrative bodies. However, whereas constitutional law deals with the hierarchical relationships between the various levels of government eg. provincial and local, administrative law is the law of public administration in that it deals with the relationship between the administrative bodies themselves and with private persons. Administrative law covers the roles of state bodies, be they administrative, judicial or legislative. Administrative law also regulates the powers of the individuals or juristic persons such as tribunals and industrial councils which have delegated authority to make subordinate legislation.

The general purpose of administrative law is to control governmental activity in order to "maintain a balance between the liberty of the individual and the public interest" (Hosten 1980, p646). This idea of the "public

good" nature of public law has been taken further by Erh-Soon Tay (1978, p2) - "The machinery of administration, let alone of law is ... subtle and complex and the very people who believe that it should be operating at full steam for the speedy realisation of the common good flee from its disturbing complexities". Administrative law is a rapidly evolving field due to the complex nature of the society which it seeks to order.

b). Criminal Law

Criminal law is concerned with prosecuting and punishing individuals that commit crime - a wrongful deed which is punishable by law. Crimes can be committed against the state, the interests of the community or an individual's property. The function of criminal law is to protect the public interest by means of punishing the individual who performed the wrongful act and deterring others from committing crimes.

III. Private Law, the Law of Things and Ownership

In contrast to public law, private law regulates the relationship between private individuals or legal bodies which are capable of bearing rights and duties. Whereas public law protects the public interest, private law is primarily concerned with the protection of particular private interests.

Town planning in the public sector is to a large extent concerned with the regulation of land uses and this involves placing restrictions on the owner of a property and the manner in which he is entitled to use his property. It can be seen from Figure 2.1. that the division of law dealing specifically with the laws of

property, its ownership, and restrictions on its use, is the Law of Things which is part of Private law. The particular aspects of this division of the law and how it relates to property, and therefore to planning, will now be discussed.

The Law of Things may be defined as "a system of legal rules which regulates legal relationships between legal subjects with regard to a specific legal object, namely a 'thing'" (Van Der Merwe 1987, p3). By definition, a legal'thing' is an independent legal entity or object, external to man which is both useful and valuable in monetary terms and is susceptible to private ownership (Van der Merwe 1987, p10). The Law of Things is concerned with granting and recognising rights over objects. However, where rights exist, there are also reciprocal obligations. For example, the registration of property in a purchaser's name is associated with the obligation to pay the purchase price. The function of the Law of Things is also to reduce conflict between competing legal interest regarding 'things' resulting from their relative scarcity in relation to demand.

Land, and its associated uses, is the object of a right and therefore may defined as a 'thing'. The law of property is an aspect of the Law of Things, and thus in the town planning sense, this relationship is concerned with the restrictions placed on ownership of land in terms of which land uses are regulated, and property rights are protected. "Property rights and laws were born together and die together. Before laws there was no property" (Bentham in Floyd 1966, p139).

Private ownership is a basic principle of private law and is a fundamental characteristic and expectation of modern capitalist societies. Ownership may be defined as the sum total of all the real rights which a person can possibly have to and over corporeal (material) property" (Hosten 1980, p337). In principle the right of ownership is the most extensive real right affording the owner complete and comprehensive control over a 'thing'. This power enables the owner to use, enjoy the fruits of, consume, possess, dispose of, and reclaim the 'thing'.

However, no right is absolute and there needs to be some sort of control over ownership in order to protect the public interest. Modern society has therefore imposed certain restrictions on this right of ownership in order to prevent the owner from doing as he pleases and abusing this right. These limitations may be divided into two broad categories, viz. those imposed by public law, and those imposed by private law. Public law restrictions operate either for the benefit of the community as a whole or in the interests of certain sections of society. Such limitations are contained in legislation - statutes, ordinances and municipal bye-laws, examples of which are the Group Areas Act, 36 of 1966, provincial town planning and townships ordinances, town planning schemes and municipal bye-laws.

Private law restrictions operate in favour of the private individual and are imposed in terms of the rules of neighbour law, or by the owner himself. Examples of this are the laws of nuisance, and the granting of limited real rights such as servitudes which are intended to achieve harmony in the event of conflicting ownership

interests. The Removal of Restrictions Act, 84 of 1967 was promulgated in order to allow landowners to remove conditions in their title deeds which in their opinion unduly restricted the use of their land.

Due to the complex nature of societies, the above division of the law is not as simple as it would seem. The dividing line between public and private law is somewhat vague with the result that certain rules of law may be classified as both public law and private law.

2.5. THE HIERARCHY OF THE SOUTH AFRICAN COURTS

Having discussed the divisions of the South African legal system, it is now necessary to explain the structure of the South African courts which may be divided into two main sections viz. the superior courts and the inferior courts. The hierarchy of the courts determines the relationship between the superior and inferior courts and the right to hear appeals.

2.5.1. The Supreme Court of South Africa

The existing structure of the superior courts in South Africa dates back to the establishment of the Union in 1910 and consists of the Appellate Division and several provincial and local divisions.

The Appellate Division does not hear trials but hears appeals from the various provincial divisions of the Supreme Court of South Africa. In certain circumstances, appeals against decisions taken at the provincial tier on town planning applications may be heard by the Appellate Division of the Supreme Court. The decisions of the Appellate Division are binding, and when an appeal is

noted, it is noted against the decision of the lower court. After hearing evidence, the Appellate Division may uphold or dismiss the appeal entirely, partly uphold, partly dismiss or remit the appeal to the lower court for further evidence.

In addition to the Appellate Division, the Supreme Court of South Africa consists of a number of provincial and local divisions. The provincial divisions hear both trials and appeals i.e. trials may start at the provincial level which may also hear appeals against decisions of the magistrate courts. The provincial divisions of the Supreme Court have jurisdiction over the local division in each province.

2.5.2. The Lower Courts

The Republic of South Africa is divided into magisterial districts, each of which has a magistrates court. The lower courts are mainly the magistrates and regional magistrates courts. The regional courts are only criminal courts, and cover regional divisions which consist of a number of magisterial districts. Small claims courts are intended to bring quick relief to people wishing to press small claims against one another.

2.6. THE SOURCES OF SOUTH AFRICAN LAW

There are three main sources of South African law viz. legislation (statute), judicial precedent, and common law. Custom law is another source of law, but is not referred to very frequently. Judicial precedent will be discussed in greater detail under section 2.7. below, and therefore it is only necessary at this stage to merely introduce the concept.

2.6.1. Legislation or Statute Law

Legislation or statute law may be defined as "a generic work covering the instruments passed by the various legislative organs having authority to make laws in the country" (Hahlo and Kahn 1968, p148), and is promulgated by individuals who are specially elected by the community on account of their experience and ability. Legislation, which is characteristic of advanced legal systems, consists of three main types; statutes passed by Parliament, ordinances passed by the Provincial Councils for their respective provinces and subordinate legislation passed by subordinate law-making bodies such as municipal local authorities.

Acts of Parliament are supreme and no court has the authority to declare a statute or act invalid. Provincial ordinances are passed within the framework of Parliamentary legislation, as are municipal bye-laws and other forms of subordinate legislation.

2.6.2. Judicial Precedent

The courts are responsible for interpreting statute law. These interpretations, and decisions of the superior la.. give rise to the second major source of South African law, viz. judicial precedent which may be found in the decisions of the superior courts.

2.6.3. Common Law

The term common law can mean one of three things:

i) the law of the land i.e. South African law which is applied to all South African citizens

ii) that body of law which does not originate from legislation, i.e. the law proclaimed by Parliament. Common law in this sense may thus be defined as "that portion of South African law that has evolved from the Roman-Dutch law expounded in the works of the old writers" (Hosten 1980, p221), and as such has never been written down. In this sense, common law evolved from the consent of communities as to what should be permitted, and what should be prohibited

iii) the Anglo-American legal system which is applied in countries such as England, Australia and New Zealand

The most common perception of the common law is, however ii. above i.e. that law which is not statute law. "The common law should be seen as the central framework or core around which these three law-generative media [viz. statute, case-law and custom] revolve" (Hosten 1980, p22). Common law provides a background against which the judge can interpret statutes, and thus serves to supplement statute law. "Take away the common law and the greater bulk of our statutory law could be rendered unintelligible" (Hosten 1980, p224). In practice, judges will fall back on the common law to determine a point wherever statute law is insufficient or lacking. One of the most important characteristics of the common law is that it is flexible and capable of being molded to suit prevailing conditions.

2.6.4. Custom

Custom, which is the oldest law known to man, has played an important role in the development of South African common law, and had its origins in the habits and

interrelationships of a community. Although it is unwritten and not enacted by any legislative body, custom law can be considered to be a source of law as it evolved from customs which were universally accepted and adhered to. Custom law amounts to the law developed by communities which is generally applied locally. The application of custom law is particularly relevant amongst the South African blacks which have lived for centuries according to tribal laws and customs. In certain cases, custom law will be applied in place of statute provided that it does not contradict the public policy of South Africa or the laws of natural justice. However, most customs have today been superseded by legislation. The application of custom law in South Africa is avoided and if used, has to be proven to be long established, uniformly observed, reasonable and certain.

2.7. THE PRINCIPLE OF LEGAL PRECEDENT

"Stare decisis et non quieta movere"
(To stand by precedents and not to disturb settled points)

The principle of precedent plays a major part in the decision-making processes in both planning and law. However, the way in which this principle is applied in both disciplines differs dramatically. The application of legal precedent will be described hereunder, and planning precedent in Chapter Four.

2.7.1. A Definition of Precedent

A precedent is something which is said or done and is used as an example, reason or justification for a future

case which is being considered anew. Precedents are handed down giving decision-makers the authority to pass judgement without having to reach consensus on the essentials of a case.

2.7.2. Legal Precedent

In law, as in most decision-making processes, it is common to use decisions taken in the past as a guide to future actions (Hahlo and Kahn 1968). This is as a result of the desire to learn from past experience without having to make similar mistakes. Judges are therefore obliged to follow the legal rulings passed in previous judicial decisions of the superior courts. Although the effect of precedent is to establish a new rule, in setting precedent "the function or duty of a judge is to interpret, to declare and to apply the existing law ... and not to make new or fresh law" (Gibson 1977, p6).

"The binding quality of a judicial precedent...resides in the 'ratio decidendi' and not in any 'obiter dictum'" (Hahlo and Kahn 1968, p260). It is the reason for the decision or order of court (ratio decidendi) rather than a remark made in passing (obiter dictum) which forms the basis of a precedent. 'Ratio decidendi' is derived from the principles, not the facts, contained in a pronouncement of law. Very little attention is paid in law reports to judicial interjections which are remarks made by a judge during the course of an argument. 'Ratio decidendi' is particularly suitable where a court consists of more than one judge but when only one judgement is passed.

2.7.3. The Application of Legal Precedent

The way in which legal precedents are applied depends on the type of legal system being used in any particular country. In the United Kingdom, decisions of higher courts have a binding and coercive effect on lower courts, and the court of appeal is bound to follow its own judgements in subsequent cases. In theory, the courts in Britain cannot make law - only Parliament can promulgate laws. However, in making decision, the courts declare what the law is. Thus, "once a superior court has ruled on a question of law, this may become a precedent, which should be followed when the same question arises in a subsequent case before another court of the same or a lower status" (Garner 1981, p12). The setting of precedent occurs most often in a field where Parliament has not yet promulgated an act or any other type of legislation. A judge of the High Court is not bound to follow the decisions of another. Although in practice, unless a judge is proven wrong or there is a justification for a deviation, decisions taken by judges of high courts are regarded as precedent. It is doubtful whether county court decisions are regarded as having set a precedent; generally decisions of these courts follow those of a higher court.

In the United States of America, the courts adhere to precedent less strictly due to the large amount of reported cases. Precedent is seen as a guiding principle but the aim is to maximise flexibility. It is common in the United States for courts to overrule precedents if they are found to be unsuitable. The guiding principle to the application of precedent in the American legal system is that it should be flexible and dynamic.

The application of legal precedent in South Africa is less strict than in Britain as English law is built upon previous cases. The establishment of the Supreme Court in South Africa by the South Africa Act of 1909, made all courts bound by the decisions of the Appellate Division. There is no legislation dealing directly with the doctrine of precedent although basic settled rules of precedent have been adopte on an ad hoc basis.

Where precedent is applied in South Africa, strict rules are followed. The two main rules of precedent are as follows:

i) a court is bound by a higher court, or greater court on its level unless subsequent overriding legislation exists;

ii) a court always follows its own decision unless proven wrong in which case it is overruled.

Thus, a decision of the Appellate Division of the Supreme Court is binding on all courts, and the decision of a provincial division of the Supreme Court is binding on the local level of government. Decisions taken by one magistrates court are influential, but not necessarily binding on other courts at the same level. Whilst a Provincial Division may refer to a decision taken by the local magistrate, it may also disagree with the outcome of a trial and make a new decision. In practice however, judges and legal advisors are known to refer to all previous decisions as this may help to strengthen a case and motivate a point of logic.

In terms of the South African legal system, judges are appointed by the state to settle disputes amongst individuals who feel that their right have been attacked or infringed. In so doing, the judge will hear evidence put forward by both parties in order to determine the material facts of the case. Thereafter he will pass judgement, or make a decision.

If there is an authoritative rule of law which is appropriate and covers the facts, the judge will apply this rule and make his decision accordingly. If however, the judge is unable to find an appropriate rule of law, he is required to pass judgement on the parties in accordance with the principles of justice. After reviewing and examining various authoritative sources which have a bearing on the issue, he will deduce and apply a principle which he deems relevant to the facts he has proven. The principle is based on the reason for this decision, the 'ratio decidendi' which sets a precedent and as such creates a new law.

The importance of this procedure is that in addition to the parties being bound by this decision or principle, the resultant precedent in effect becomes binding on the whole community. Should a similar case come before the same judge, another judge of the same rank, or another court of the same standing, the same principle will be applied. It may happen that this principle will be overruled by a Court of Appeal in which case the latter precedent replaces the former. Once a decision has been passed by the highest court in the land, it becomes conclusive and can only be repealed or modified by the state itself.

2.7.4. Critique of the Application of Legal Precedent

"Certainty, predictability, reliability, equality, uniformity, convenience : these are the principle advantages to be gained by a legal system from the principle of 'stare decisis'".
(Hahlo and Kahn 1968, p215)

Precedent is adhered to in South Africa in order to maximise certainty, protect vested rights, satisfy expectations and uphold the dignity of the court. The application of legal precedent allows professionals to plan strategies with a certain assurance of the effects, and protects rights made in the belief of an existing rule of law. It reduces the prospect of litigation, provides guidance for less experienced judges, and strengthens a case presented during litigation. By maximising objectivity, prejudice is reduced and public confidence in the legal system is gained. A further advantage is that the time and money costs involved in litigation are reduced.

However, if the application of precedent becomes too strict and rigid, three problems could arise. Firstly when precedents result from decisions taken by authorities to justify opinions and are formulated before sufficient experience has been gained, precedent "allows the law to become a petrified forest of erroneous notions (and)...the first experiment becomes the last" (Hahlo and Kahn 1968, p215). A second danger is that precedents may become anachronistic and irrelevant. Thirdly, precedents could lead to casuistry - the making of exceptions, drawing distinctions and applying rules to

special cases. In addition legal precedent has been criticised in that, unlike legislation and statute, the public has no opportunity of commenting on the merits of the precedent before it is finalised. Precedent is also not comprehensive as it relates to one specific issue or case and is decided on a single point of law. Finally, whilst the legislature has the authority to repeal a law made by itself, the courts are unable to repeal statute law or improve on it, and this could lead to delays.

2.8. CONCLUSION

This chapter has traced the historical development of the South African legal system, and has described the nature of the law, the divisions and sources of South African law, and the hierarchy of the courts. The framework within which South African planning legislation will be discussed in the following chapter has been described. The application of legal precedent has been explained and critically analysed, leading to the conclusion that despite its shortfalls, it is a very useful tool assisting decision-makers in justifying their decisions in an uncertain and ever-changing society.

CHAPTER THREE : THE ORIGINS AND DEVELOPMENT OF TOWN PLANNING LEGISLATION

3.1. INTRODUCTION

It has been suggested by many town planning historians and theorists that the origins of modern town planning legislation lie in a reform movement which developed out of the need to combat the atrocious living and working conditions of the industrial city in Britain. It will be shown that the scope of planning originated out of the concern with the health, welfare and prosperity of the exploited working class and hence the public interest. In addition, the tools available to the public planner have developed from the wide range of loosely co-ordinated controls over drainage, building standards and pollution.

The following discussion will trace the origins and development of both British and South African town planning and town planning legislation, and will introduce the town planning procedures and decision-making bodies which will be discussed in detail elsewhere in the dissertation. The British town planning system has been chosen, as it is generally accepted that the British system greatly influenced the nature of contemporary South African town planning and town planning legislation.

The central theme throughout the discussion will be the consistent concern of the public planners with the public interest, and the development of the tools at the disposal of planners allowing them to perform their tasks of protecting this public interest. The shift in

emphasis of the law at certain times towards a concern with the private interest will also be shown.

In order to focus the discussion, the most important Acts, and the legislation which influenced South African planning legislation will be highlighted and the less important Acts will be touched upon.

3.2. GREAT BRITAIN

3.2.1. Introduction

The growth and development of planning in Great Britain can be divided into four main phases:

i) Industrial Revolution (1750 - 1850) - Eighteenth Century and after

ii) Post-Industrial Revolution - The Nineteenth Century

iii) The Enlightened Industrialists

iv) Twentieth Century

3.2.2. The Industrial Revolution - Eighteenth Century

The Industrial Revolution, which turned the predominantly agricultural community of Britain into an industrialised, highly sophisticated society, is renowned for creating the most appalling social and physical ills in the newly and haphazardly formed urban areas. In addition to a rapid natural population increase, the Industrial Revolution also brought about an exodus of farm labourers from the rural areas into the cities and towns, as it was perceived that the urban areas would ensure greater employment opportunities, increased wealth and thus a higher standard of living.

As a result of this urban population explosion, the social and physical conditions prevailing in the industrial town became untenable. Houses and factories were constructed adjacent to one another, partly as a result of an absence of land use controls and partly because people had to live within walking distance of their place of work as transport systems were still rudimentary and inefficient. The provision of roads, canals and bridges throughout the country were at that time the responsibility of private individuals. No attempts were made by the public authorities to control sanitation or ensure easy access to fresh water supplies, with the result that diseases such as cholera and typhoid spread rapidly in the 1830's and 1840's.

State intervention and planning were restricted to a passive surveillance, and planning was concerned merely with "the opening up of peripheral fields, owned by a few important landed families, to provide salubrious dwellings for an affluent upper crust" (Eversley 1973, p41). The needs of the poor and the general public were overlooked.

By the end of the core period of the Industrial Revolution (1750 - 1850), no formal town planning or legislative attempts had been made to ensure an acceptable standard of living for the working class in the industrial cities. "Private enterprise is left virtually free and untroubled, to do what it likes subject only to the common law remedies of nuisance and trespass" (McAuslan 1975, p42). The State depended on private entrepreneurs for the provision of public goods such as roads, services and housing, whilst the working

and living conditions of labourers were at the mercy of the industrialists.

3.2.3. Post Industrial Revolution - Late Nineteenth Century

The first recorded attempts to combat the social and physical ills resulting from the rapid industrialisation of Britain's cities were the Public Health Acts of 1848 and 1875 which gave extensive powers to the newly formed Health Boards, which were later allowed to lapse, to ensure that both new and existing houses were provided with water and drainage at an acceptable standard. The Public Health Act of 1875 widened the scope of the local authorities on planning matters in that it provided the public sector with the power to purchase and clear land, and hand it over to private enterprise to redevelop. In addition, local authorities were able to make bye-laws setting minimum standards for the size of rooms, spaces around houses, width of streets and provision of sewers on street frontages. This control of future building by the industrialists through the application of local authority bye-laws was an important step in the development of planning legislation, and the protection of the public interest by the public sector. Here "statute provided for a partnership between public and private enterprise in urban development" (McAuslan 1975, p42). The Public Health Acts arose out of extensive work by public health reformers such as Chadwick and "although very limited in scope and effect, are significant as laying the foundations of permanent statutory restrictions on the freedom of landowners to build as they pleased" (Telling 1982, p4).

Simultaneous with the developments in the fields of public health, was the promulgation of acts dealing with housing. The first such legislation was the Artisans' and Labourers' Dwellings Act of 1868 which enabled local authorities to address individual insanitary houses. The following set of housing legislation were the Artisans' and Labourers' Dwellings Acts of 1875 and 1879 which dealt with the provision of public housing and conferred on the local authority the powers to undertake slum clearance. In this way, the public sector was empowered to develop land to the total exclusion of private enterprise.

The first real and effective attempt at combatting the slum conditions was the passing of the Housing and Working Classes Act of 1890 which introduced a new type of legislation known as 'housing law'. This legislation enabled the public sector to build tenements and cottages to accommodate the working classes.

Thus it can be said that the first legislative attempts to improve the living and health conditions in the cities centered around the insistence by the local authorities that industrialists provide an acceptable standard of living for the general public, in the interests of protecting the public good. This rudimentary body of housing legislation empowered the local authorities for the first time in history to be proactive in their social responsibilities regarding the provision of subsidised public housing, rather than reactive in the case of the initial health laws.

By the end of the nineteenth century therefore, the relatively comprehensive range of health and housing legislation had the effect of providing the local authorities with the necessary tools of ensuring that the underprivileged and exploited working class were adequately catered for in terms of basic needs.

3.2.4. The Enlightened Industrialists

The Industrial Revolution is renowned for widening the gap between the wealthy capitalist industrialist and the exploited, underprivileged working class. However, due to the fact that state planning intervention lagged behind industrial development, private industrialists sought to offer an alternative to the mass, unregulated urban settlements in the form of model cities. These philanthropists, or 'enlightened industrialists' as they are often called, tried to create a balanced way of life by providing the working class with access to public amenities which were not financially rewarding. These model towns tried to instill an idea of the dignity of work and the right to an acceptable quality of life, both of which are today regarded as common community goals. Thus these private industrialists, who had in the past been accused of exploiting the poor working class in pursuit of their individual private interest, now took it upon themselves to protect and enhance the public interest by supplementing the erstwhile attempts made by the state to combat the ills of the industrial city. In order to achieve this, these specialist Enlightened Industrialists, together with certain officials, devised legalistic means to implement improvements, and this is said to have "laid the foundations of modern town planning legislation" (Benevolo 1967, pxii).

A fundamental reason for the emergence of these utopianists was a realisation that, in order to improve the quality of life for the working class and general community, it was necessary to extend the benefits of the Industrial Revolution to these working classes. The idea of shared community goals was introduced by Patrick Geddes in his view of the city as a system consisting of the individual needs of each member, and the combined, often overlooked desires of the community as a whole. Robert Owen centred his model city, New Lanark, around the idea that if poverty and unemployment existed "some formidable obstacle must have interceded to obstruct the natural improvement and progress in society" (Benevolo 1967, p42).

It has been suggested too, however, that the Enlightened Industrialists were "practical profit-seekers who perceive that their profits will be, if not necessarily greater, more secure if the whole lives of the people are improved" (Bell 1969, p176). Here we see the idea of the need to protect the collective good in the interests of securing wealth. This should not be confused with a concern for the public interest which has a socially responsible dimension to it and thus an end in itself. This idea was reinforced by Owen who believed that it was the wealth of industry, facilitated by the working class, that made possible the rebuilding of London, Newcastle and Edinburgh (Bell 1969).

To a certain extent, the modern concept of the purposes of a town planning scheme was introduced by the Enlightened Industrialists at the end of last century.

Titus Salt attempted, through the construction of his model town Saltaire, to improve the unhealthy nature of trade and create a community of healthy, happy workers. "Salt's houses showed a concern not merely for the health of the inhabitants, and the imposition of good order and cleanliness, but for their aesthetic surroundings" (Bell 1969, p193). In addition, Robert Owen's ideals were to achieve a more satisfactory distribution of human activity, and thus he set out to improve the economic and social relationships on which such activities depend (Benevolo 1967).

The Garden City concept, devised by Ebenezer Howard during the first decade of this century, employed the earliest examples of the application of systematic land use zoning, restrictions on density and preservation of public land. By restricting the use of land in the Green Belt for specific purposes, Howard introduced the idea that land should be reserved for a particular use, and produced the necessary means of ensuring this. "His garden city was a direct reaction to the minimum standards of the bye-law legislation and an expression of the distaste for the quality of the environment which private enterprise had thought suitable for ordinary folk" (Tarn 1980, p80).

Thus we see a change from the ideology of the industrial city which "implied that the creation of the urban environment could safely be entrusted to the market" (Sutcliff 1980, p2), to the self-imposed social responsibility of certain of the late nineteenth century industrialists who protected the public interest and interfered with the natural market mechanism.

3.2.5. The Twentieth Century

By the turn of the century the development of health and housing legislation had made unprecedented progress. However, the body of legislation available to the public authorities enabling them to deal with matters relating to the living and working conditions in the urban areas was at that time disjointed and unwieldy, consisting of various health and housing acts. What still had to be addressed was the problem of juxtaposing and potentially conflicting land uses. The need for a co-ordinated and comprehensive set of legislative tools dealing with all aspects of the city i.e. health, housing, standards, land uses etc. was then recognised. This is what is known today as 'town planning legislation'.

The first planning act, the Housing, Town Planning Etc. Act of 1909, broadened the scope of the previous enactments by extending local authority involvement from health and housing to the prevention of industrial intrusion into residential areas. This Act authorised local councils to prepare planning schemes for "any land which is in course of development or appears likely to be used for building purposes, with the general object of securing proper sanitary conditions, amenity and convenience in connection with the laying out and use of the land and of any neighbouring land".

This was the first enactment which curtailed the free use of private property in the interests of protecting the general good of the community. The concern with the fact that the private interest had until that time prevailed, was expressed in the circular issued by the Local

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Government Board on the 31st December 1909. The following quotation is extracted therefrom:
"Hitherto the conflicting interests of different owners and the absence of any power in the local authority to guide and control development according to the circumstances and requirements of particular cases has resulted to a considerable extent in the development of estates, whether large or small, with a sole regard to the immediate interest of the particular estate and without regard to the amenity and convenience of neighbouring land" (source : Roberts 1948, p13).

The planning scheme, which controlled not only the development of a single building, but development as a whole, was an ambitious replacement of the bye-laws restricting different land uses in specific zones. The 1909 Act shifted attention away from the provision of basic needs of the poor to the implementation of a formal set of bureaucratic rules geared to the protection of the public interest as perceived by the authorities (Muller 1983, p5).

The next major development in the evolution of planning legislation was the Town and Country Planning Act of 1932 which repealed all existing planning legislation. The effect of this Act was to extend the scope of the planning scheme from built up urban areas to undeveloped land in the interests of protecting the natural environment from the suburbanisation of the city. Certain authorities, known as 'responsible authorities', were also empowered by this Act to take action against any developer who did not obtain planning permission prior to developing his land.

The Acts to date were concerned mainly with placing restrictions on private developers in the interests of the general good of the public. The Town and Country Planning Act of 1944 granted extensive powers to the local authorities to take positive action by compulsorily purchasing land, or carrying out redevelopment schemes in areas which were either destroyed during the war or were badly laid out in the first instance. In this way, public planners were provided with the means of upgrading specific areas which, left to the discretion of the private sector, would have continued to deteriorate. In addition, by affecting direct control of land through public ownership, the scope available to public planners to protect the public interest was extended even further.

The planning acts of 1909 to 1944 had all been based on the concept of the town planning scheme. New problems such as the continued growth of the urban population, the effect that developments in transport had on the size and shape of towns and the loss in agricultural land, revealed the fact that town planning schemes were rigid, and did not provide for future demands, and could not ensure 'good' development.

The Town and Country Planning Act of 1947, which sought to address these problems, made a new start by repealing all existing planning legislation. There are two main features of this Act which are pertinent to this discussion. Firstly the new development plan concept, preventing development from taking place without planning permission was introduced, so that the public authority could protect the public interest. Secondly the local

authority was enabled to preserve the natural and built environments in the public interest. In this way, the private interest was affected in that ownership and the freedom to use land in any way was curtailed in the interests of protecting the public good. This Act did however introduce a means of protecting the private interest by inserting into the legislation complex provisions such as a 'purchase notice' which dealt with the financial problems resulting from such comprehensive development control. In addition, provision was made for aggrieved parties to appeal to the courts on points of law.

The years 1948 - 1971 in Britain revealed the fact that previous assumptions such as a static population growth were unrealistic. In 1964 the government appointed the Planning Advisory Group (PAG) whose task was to review the planning system and overcome the problem of delays and poor quality planning. The main focus of the PAG was on plan making and they were severely criticised for having "no representative of the outside public interest" amongst their membership (Roberts 1976, p87). However, the major contribution made by the PAG was the recommendation that broad structure plans should replace the existing system of development plans.

There was a distinct change in thought with the introduction of the structure plan which "is not based on what is best on technical criteria ... but rather on the selection on the best course of action out of a series of competing public values" (Roberts 1976, p236). The notion of protecting the public interest was therefore not just accepted as an ideological solution to urban problems -

the shortcomings of this concept were recognised and dealt with in the planning procedures laid down in the legislation.

The work of the PAG gave rise to the 1967 White Paper entitled "Town and Country Planning" which made recommendations on the following rationale:-

i) land must be secured to ensure its availability for the implementation of national, regional and local plans

ii) a certain percentage of the development value of land created by the community should return to the community

The first point is a further indication of the need to protect the public interest, and the second provides a fair means of doing this.

The Town and Country Planning Act of 1968 recognised the need to maintain a balance between the public and private interest. One of the objectives of this Act was to adapt the powers of the authorities relating to compulsory acquisition by introducing new development plan provisions which no longer meant that all land in development areas was subject to compulsory acquisition.

All existing legislation was then repealed and replaced by the Town and Country Planning Act of 1971. This Act was amended in 1972 to enable local authorities to carry out the statutory public participation process and ti examination in public where public values on other aspects of planning could be aired (Roberts 1978, p234). This was clearly a means of ensuring that both the public

and private interest were given a fair hearing.

The Local Government, Land and Planning Act of 1980 introduced the concept of the 'urban development area' which is an area, declared by the Secretary of State where corporations securing the rehabilitation of the area are set up "in the national interest" (Telling 1982, p13). Here the concept of the public interest is extended to protect issues of a national as well as local nature.

One of the main criticisms of the planning process in the 1940's was the arbitrary nature in which decisions, affecting the rights of the private landowner, were made. Local authorities therefore prepared a set of guidelines to structure the decision-making process which also began to refer to previous case law. Hence the introduction of the principle of precedent, and the need for consistency in the application of this concept.

3.2.6. Summary and Conclusions

The preceding discussion has traced the growth and development of town planning and planning legislation from the passing of the first Health Act of 1848 to the constant amending and updating of the Town and Country Planning Acts in the 1980's. Each new law attempted to reform the existing law and it can thus be said that "sanitary legislation was the direct forerunner of modern town planning legislation" (Benevolo 1967, p89). McAuslan suggests that "The evolution of the law can be seen in terms of three principal themes, all of which are still an issue in the 1970's" (McAuslan 1975, p37). These are as follows:

i) the steady growth of public power expanding ever outward from its initial concern with nuisance in an individual house, to embrace all aspects of development within a region

ii) a constantly shifting balance between public and private power over land use and development, with public power usually gaining over private

iii) a continuity of legal techniques and procedures to regulate land use

What has also been highlighted in this discussion is a change in planning focus from a mere concern with restricting free use of a piece of land to protect the public interest, to a wider concern of proactive public involvement in development in an attempt by the public planner to enhance and safeguard the common good. This is reflected in the broadening of focus from placing controls and restrictions on individual parcels of land, through a concern with the development of new urban areas and redevelopment of existing parts of the city, to the preparation of development and structure plans. This concern with safeguarding the natural heritage for future generations was clearly in the public interest.

It has been shown that the origins of modern planning can be traced to the first health acts and the wide range of legislation dealing with drainage, building standards and the provision of public housing. The need for this legislation arose out of the fact that a new body/authority had to be formed to address social and physical issues which had been ignored as they were not financially rewarding, and had been created in the first instance out of an unchecked growth and strengthening of

the private interest.

3.3. SOUTH AFRICA

3.3.1. Introduction

South African town planning legislation has grown and developed a great deal since the enactment of the first town planning legislation, at the turn of the century. Although "there is a clear consensus that the British legislative system was the source from which statutory planning in South Africa sprang" (Muller 1983, p17), it has been suggested by Price and Cameron (1982) that the idea of zoning came directly from the American planning system.

This section will begin with a discussion of the primary influences that shaped early South African towns, prior to the promulgation of the first town planning legislation. Thereafter, the growth and development of town planning legislation since the introduction of the first Act will be traced.

3.3.2. The Control Over Early South African Towns

The first recorded white settlement in South Africa was the fort in the Cape, where the settlers in 1652 lived and grew their produce. Before the British occupied the Cape, farming land was owned by the government, and rented to the farmers on an annual basis. Once the British had settled in the Cape, the system of land tenure changed from leasehold to freehold. This necessitated a more sophisticated system of land survey and registration than the original one whereby measurements were taken by a rider on horseback in directions from a single point.

The early towns were laid out by either the government or the Dutch Reform Church and only later by private initiative. Towns were established for administrative reasons or to cater for the social needs of the community. In 1852 the Church Council of the Dutch Reform Church led township establishment and development for spiritual reasons. The government or the Church, acting through a commission, would appoint an individual to prepare the design and layout of the town. It was thus a public body, be it the State or the Church, which would oversee township establishment in order to ensure that towns were laid out in the best interest of the public.

However, when gold was discovered on the Witwatersrand, a more orderly system of township establishment and land use allocation had to be developed to control the endeavours of the private entrepreneur. Thus, in terms of the first Gold law of the Transvaal, which was passed by the Volksraad in 1871, 'stands townships' were pegged by land surveyors thereby introducing the first statutory measures regulating aspects of town planning. It is from these 'stands townships' that the towns and cities on the Witwatersrand grew.

Act 15 of 1875 made provision for the mining commissioner to grant stands outside townships for the purposes of dwelling houses, businesses and industries at his discretion. In terms of the Orange Free State Act, 13 of 1936, which regulated gold mining, the Governor General had the authority to allocate land for public amenities such as schools, churches, roads and other social services - in the public interest.

Before 1899, suburban townships in Johannesburg and Pretoria, and extensions to towns, were planned without immediate government control. The end of the war in 1902 led to a wave of speculation by private township developers in the Cape and the Transvaal, who, freed from the control which had operated up until that time, had the idea that development of land for urban purposes was no longer a privilege, but rather the right of the private land owner. As a result of this speculation, which was particularly rife in the Transvaal, much bad planning occurred. This led to the promulgation of Ordinance, 57 of 1903 which sought to control the layout of erven and roads, and prevent the occurrence of any more evils through the passing and application of regulations regarding the proper establishment of townships.

At the turn of the century, the prevailing philosophy was that an owner could do what he wished with his land and further his own private interest. Due to the fact that the government had eminent domain, however this philosophy was never backed by law as the government retained the police power to regulate the use of property and impose taxes, presumably in the public interest.

The first attempts made in South Africa to control urban development only occurred in the early twentieth century. The government began to curb the activities of the developer who could, for the first time, no longer establish a township without prior permission from the state.

It is interesting to note at this point that, in Britain, town planning legislation originated as a response to the social and physical ills caused by the industrial revolution, and South African town planning legislation originated out of a need to control urban development resulting primarily from the discovery of gold. Although both can be classified as one or another form of 'commercial' revolution where the private entrepreneur stood to gain, there is a difference in that the first tools available to the British planner were the health and housing laws (which sought to ensure a minimum standard of living for the working class), whereas the first rules available to the South African planner were the gold laws which regulated commercial activities and pecuniary gain.

3.3.3. The Origin of Modern Town Planning Legislation in South Africa

Although it is widely acknowledged that the earliest South African town planning ordinance was the Transvaal Townships and Town Planning Ordinance, 11 of 1931, the earliest control over ad hoc township establishment was actually Ordinance, 57 of 1903. This ordinance enabled the Lieutenant Governor to make regulations controlling township establishment and proclamation, and the proper layout and design of new towns.

This power was not exercised until 1905 when the Townships Ordinance, 19 of 1905 was promulgated, creating the first Townships Board which was required to report to the government on all applications. Despite this new legislation, there was still a lack of proper control over subdivision of land, and this gave rise to the

passing of the Townships Act, 33 of 1907. This Act stipulated that any township developer had to obtain permission from the Minister who was advised by a Townships Board, before proceeding with township establishment. In addition, freehold townships became compulsory and building bye-laws had come into operation in the urban areas. The result of this Act was that the development of land became a right and not a privilege (Floyd 1960) and this was clearly an attempt by the authorities to control development and the activities of the private entrepreneur in the public interest. With the formation of the South African Union in 1910, the provincial councils received delegated authority to regulate the establishment of townships and control town planning.

As urban settlements increased in size, and activities occurring within these settlements became more complex and interdependent, a different kind of control over urban developments was introduced. This control related, inter alia, to the influx of 'non-whites' into the urban areas seeking employment, in the form of the apartheid policy.

This control was first exercised by means of restrictive conditions in the title deeds regulating racial occupation, use and density, and other matters affecting the amenity of the neighbourhood such as building lines and keeping of animals. Building bye-laws, which were formulated in terms of the various local government ordinances, were also used to control density, height, coverage and use.

These restrictive conditions are today classified as the private law rules of the Law of Things in that they had the effect of creating servitudes over the property and served to improve the marketability of the erven (Pavlich 1978). Together with the building bye-laws, these restrictive covenants resulted in a far more attractive form of township layout (Floyd 1960) and thus served to protect the public good. However, these methods of control proved to be inadequate and too rigid as the urban lifestyle became more complex and the range of land uses became more diversified. This gave rise to the introduction of town planning schemes in South Africa in terms of Act 46 of 1925 which conferred on the various provinces the power to prepare town planning schemes. As the method of control over development by means of title deeds became too rigid and unwieldy, the Removal of Restrictions Act 48 of 1946 was later passed, giving the Administrator powers to amend title deed restrictions in order to comply with the provisions of a town planning scheme. Although the Cape Province was the first province to implement these powers in terms of Ordinance 13 of 1927, it was only the Transvaal Ordinance, 11 of 1931 which made provision for the preparation of town planning schemes by all local authorities.

Price and Cameron (1982) suggest that it was in the sphere of town planning schemes that the American legislation had an influence on South African town planning ordinances. Originally, town planning schemes in South Africa were applied in the existing urban areas in an attempt to protect the residential areas from the spread of industry. However, the early schemes also played a part in the laying out of areas for future

development (Price 1982) and assisted in calculating future demand for essential services (Price 1982). However, although it is in the sphere of zoning that American town planning legislation had its greatest influence on the South African planning system "the principle of zoning in South African ordinances derived from the English Town and Country Planning Act of 1925, which in turn derived from current American practice at that time" (Price and Cameron 1982, p10). If restrictive conditions are considered to be an early form of zoning, then it can be said that zoning in South Africa and Britain were introduced simultaneously (Floyd 1960). However, it is commonly known that the concept of zoning is applied in terms of the municipal town planning scheme which was introduced in, and has been adopted from, the British town planning system. Thus it is believed that, although contemporary South African zoning may be said to be based on the American system, in effect South African zoning is derived from the British town planning legislation.

One of the reasons for introducing the idea of zoning into town planning practice in America and South Africa was to provide the property developer with a measure of certainty and predictability (Price and Cameron 1982). The concept of zoning as applied in America, related to the protection of the corporate interest (Price and Cameron 1982). This ideal has been carried through in South Africa where the public good is protected as a result of the certainty and predictability aspects associated with zoning. The concept of zoning has however been criticised in terms of its perceived infringement on the rights of the individual property

owner, and hence the private interest. Zoning is often referred to as a "police power to protect the community interest from the causes of nuisance" (Price and Cameron 1982, p19) which prevents the property owner from determining the use of his land on a speculative or purely economic basis. The private interest perspective of zoning is that it is "clearly a confiscation of property rights" (Floyd 1960, p104). However, the public interest perspective views this "confiscation of property rights" as justifiable if it will ensure the protection of the general welfare of the public.

The Transvaal Ordinance, 11 of 1931 was the model used by the other three provinces in respect of town planning schemes. Section 32 of this Ordinance sets out the original intention of a town planning scheme which is: "Every town planning scheme shall have for its general purpose a co-ordinated and harmonious development of the municipality to which it relates (including where necessary the reconstruction of any area therein which has already been subdivided and built upon) in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare as well as efficiency and economy in the process of such development."

Here one sees the introduction of the concept that town planning schemes should apply to developed as well as undeveloped urban areas. The idea that town planning schemes serve to protect the public interest still prevails today in the modern ordinances. This will be illustrated in the following chapter where the Transvaal Town-planning and Townships Ordinance, 15 of 1986 will be

discussed in greater detail.

The first Townships Board was also created in terms of this Ordinance. Its roles were to investigate the design of proposed townships, control detailed layout and zoning and deal with the suitability of the site and desirability of the township, and as such functioned as a planning authority guarding against any existing or future threat to the public interest.

The ordinance also intended the Townships Board to act as an arbitrator or quasi-court hearing objections and mediating conflict between aggrieved parties and the local authority. This supported the principle that every affected property owner or occupier of immovable property has the right to object to a provision of the town planning scheme or an application, hence the right to protect the private interest.

Although there was already a segregation of uses by title deed, the 1931 Ordinance formally introduced the concept of zoning into town planning practice and legislation, empowering the local authority to restrict the use of both land and buildings. As with title deed restrictions, zoning was later perceived as being too rigid and inflexible, hence the introduction of the consent use and the ability to rezone property. "The guiding principle of rezoning or amending a scheme would be in the public interest" (Floyd 1960, p17).

It was only in 1947 that the authorities recognised the need to protect the greater physical environment, hence the establishment of the Natural Resources Development

Council which sought to protect the public interest by "place[ing] and promote[ing] the better and more effectively co-ordinated exploitation and use of the natural resources" (Section 3). This move was followed by the introduction of statutory guide plans in terms of the Physical Planning and Utilisation of Resources Amendment Act, 73 of 1975 and the publication of the non-statutory National Physical Development Plan in the same year.

Due to the expanding economy, and the resulting demand for a more comprehensive planning legislative system to deal with town planning and township establishment, the Town-planning and Townships Ordinance, 25 of 1965 was adopted on 1 January 1966. The property booms in the 1960's and 1970's, together with the ever-increasing costs of providing essential services resulted in higher property prices. As a result of certain enquiries into these phenomena, the Ordinance was amended in 1974. A further commission of enquiry was held in 1975, which made recommendations regarding the devolution of power to the local authority, and procedures and standards relating to the cost of township establishment. This report was published in 1983 and the Ordinance was repealed and replaced by the Transvaal Town-planning and Townships Ordinance, 15 of 1986.

A draft Physical Planning Bill was published in the Government Gazette on 9 February 1990, providing, inter alia, that the Minister may determine a policy to be applied with a view to physical planning in South Africa (Section 2). In addition, this draft Bill provides that a new form and hierarchy of policies be produced. This

is depicted graphically on Figure 3.1. This draft has however been replaced by another document, as yet confidential, which is presently in the hands of a cabinet committee, and is markedly different from the Physical Planning Act, 88 of 1967. The most recent draft does away with the proposed policy provision contained in the draft Bill published in February of this year, and reintroduces the principle of dividing the country into development regions which may be subdivided into two or more planning regions. In terms of the second draft, a planning committee, instructed by the Minister, may be required to prepare a national policy plan for the whole country, or for each of the development regions. Such plans seek to direct the physical development of the area concerned. In addition, the second draft provides that the Administrator may have urban structure plans drawn up which would serve to guide the future development of the area to which they apply.

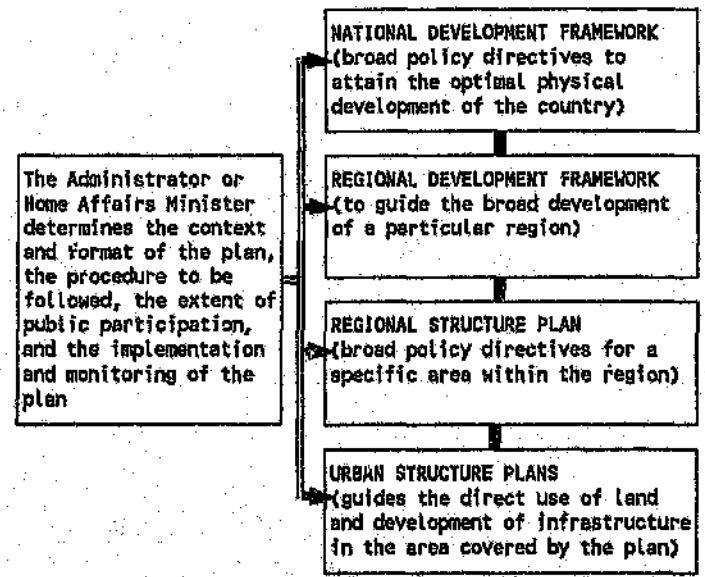


figure 3.1 : The hierarchical process of policy formulation in terms of the Draft Bill 1990

3.4. CONCLUSION

This chapter has traced the historical evolution of both British and South African town planning legislation. What has been clearly shown is that town planning legislation in both Britain and South African originated out of a need to protect the public interest. Over the years this legislation has been amended to extend control over the activities of the private developer in the interest of protecting the general good, and a "belief in the universal efficacy of central legislation in creating a better life for the community" (Eversley 1973, p57). It has also been shown is that over time the emphasis on the need to preserve the private interest has increased, hence the problems experienced today. The following chapter will discuss the specific nature of modern town planning legislation.

CHAPTER FOUR : SOUTH AFRICAN PLANNING LEGISLATION AND PLANNING PRECEDENT

4.1. INTRODUCTION

This chapter serves to put South African town planning legislation in context of the general South African legal system. There is a clear distinction between that body of law which regulates the relationship between public authorities involved in the planning decision-making process, and that body of legislation dealing with the relationship between the private land owner and the State. The former body of legislation is classified as 'public law' and will be shown to uphold the public interest, and the latter body of legislation which is classified as 'private law' upholds the private interest. In the interests of uniformity, this discussion of town planning law will take place in terms of the sources of legislation in general viz. legislation or statute, common law and precedent.

The general nature of, and the need for, town planning legislation will be described by way of introduction in order to provide a framework within which to critically analyse the contemporary planning system in South Africa. The setting and utilisation of planning precedent in a local authority context will be discussed. Thereafter, the town planning system in the Transvaal, and an authorised local authority within the Transvaal will be described.

4.2. THE NATURE OF TOWN PLANNING LEGISLATION

"Planners will have to reach consensus on what is ideal planning legislation. Just as planning often is a compromise between opposing and divergent ideals, so is planning legislation".
(Claasen 1984, p12)

It is essential for both public and private sector planners to have an understanding of the nature of planning law in order to be able to advise and make recommendations which are practical and can be soundly backed by the law.

It has been shown in Chapter One that both planning and law are mechanisms devised to order and administer societal processes and are therefore specific to a particular community. Societies are by nature complex and unique and therefore town planning and the town planning legislation applied in each system are not simple universal disciplines applied without having regard to the particular characteristics of the community in question. For this reason, the planning law of a particular country is comprised of a range of legislation. The historical account of the South African planning system and the law relating to planning given in the previous chapter has shown this.

The way in which the town planning laws are interpreted and implemented however, depends on various factors and this further complicates the laws. McAuslan (1980) suggests that the compilation and interpretation of planning law is based on specific perceptions of power and society, and this gives rise to three "distinct and

competing philosophies or ideologies which dominate or conflict at different points in the system" (1980, p2). He goes on to describe these three philosophies as follows:

- firstly that the law exists and should be used to protect private property and its institutions - this is called the traditional common law ideology
- secondly that the law exists and should be used to protect and advance the public interest, and this he calls the public administration or planning approach to the law
- thirdly planning law exists in order to advance the cause of public participation against both the private and the public interest ideologies.

In addition to being highly diverse, societies are dynamic systems which are to a certain extent unpredictable and potentially volatile. If planning law is to be of any use therefore, it should be flexible, robust and updated on a regular basis. Furthermore, due to the wide variety of professionals and individuals who constantly refer to and make use of planning law eg. architects, engineers, politicians and laymen, the procedures and regulations set out need to be concise, organised and comprehensible.

A further reason why its impact has been weakened, is that 'planning law' is generally accepted as being related to physical and land use planning. However, in reality planning legislation comprises a vast body of rules governing the social, economic, political and physical aspects of society. This is particularly true of South African town planning legislation which

includes, inter alia, statutes regulating the location of industrial developments, free movement of particular racial groups and building regulations.

Reference was made in Chapter Two to two different kinds of law viz. practical and scientific laws. Town planning legislation is a normative discipline in that it prescribes how societies should function and what urban areas ought to look like. Laws of town planning would therefore fall into the category of practical laws, particularly in relation to the fact that this law can be transgressed and changed, and interpreted in various different ways.

4.3. THE NEED FOR PLANNING LAW

"... it is a function of law not to prescribe the substance but to lay down the procedures through which conflicting views may be presented and assessed".
(Grant 1982, p7)

In general, the purpose of town planning legislation is that of any legislation in society - to check, to facilitate and to prohibit activities. Due to the nature of planning, and thus its laws, however, there is little consensus on the real purpose of such legislation. It can be said that town planning law seeks to enable the public authorities to perform their functions such as township establishment, and facilitating the democratic planning process by means of public participation. A further role of planning law is the co-ordination of public sector planning activities which are diverse due to the diffusion of power and multitude of conflicting planning objectives (Grant 1982).

The most fundamental role of planning which has such far-reaching effects, is that of regulating land uses by facilitating and ensuring proper land use planning. It is the public planner's ultimate aim to achieve the correct balance between conflicting land uses and ensure that non-profitable public amenities such as health and recreation facilities are provided. "... the purpose of planning legislation is to make a pleasant environment for the public interest" (Roberts 1976, p216). This is achieved through the preparation and implementation of development plans which ideally determine the optimal use of land and prohibition of any alterati[illegible]f local land uses without obtaining prior planning r[illegible]ion. There are various ways in which the law facilitates the planner in performing the above functions. One is by stipulating statutory procedures for township proclamation and changes in land use and the payment of contributions to engineering services which are used to upgrade public amenities and essential services. Another way is by making available to the public planner various means of taking sanction against transgress[illegible] e.g. by instituting legal action, in terms of the provisions of the town planning scheme, against property owners who are carrying out illegal activities.

The best known and most effective tool at the disposal of the public planner is the local town planning scheme which describes and prescribes the land use rights pertaining to an individual property. The general purpose of a town planning scheme relates to the protection of the public interest and this will be described in greater detail later.

"... legally, the general welfare, safety, health and morals of the people serve as the basis of zoning decision-making" (Linowes and Cullingworth 1973, p2). The necessary planning and legal powers are delegated to community governments such as local authorities, and the public planners working within these community governments make recommendations to try to ensure this.

The role that town planning law plays in regulating land uses gains its importance from the fact that land is a valuable finite resource, the intrinsic and monetary value of which can be prejudiced and compromised if the use of the land is not strictly controlled. Public planning authorities therefore make use of the law at their disposal to 'interfere' with private ownership and land use. "It is also true that without the institution of law, the institution of land ownership becomes meaningless ... The bundle of rights labeled ownership consists only of those rights which the law at any one time will enforce" (Haar 1951, p1).

4.4. THE TYPES OF PLANNING LAW

The body of legal rules known to, and used by planners will now be discussed in terms of statute, precedent and common law.

4.4.1. Planning and Statute Law

Planning legislation or statute is applied at all three tiers of government i.e. the state, province and local government. The body of statute which affects planning at national, provincial and local levels covers a wide range of physical, economic, political and social issues.

At the national level, the Physical Planning Act, 88 of 1967 regulates the location of industry, and the Group Areas Act, 36 of 1966 restricts where people of different racial groups may reside. The Slums Act, 76 of 1979 and The Removal of Illegal Squatting Act, 52 of 1952 controls health standards and the growth of informal settlements respectively. This, together with other legislation, is promulgated in terms of national policies and provides an overall framework to guide and co-ordinate planning activities.

Each province is responsible for the promulgation of a provincial town planning ordinance which regulates the submission and approval of town planning applications for change of use, and township establishment. Appeals against decisions made at the local level are heard in terms of the provincial town planning and townships ordinance at the provincial tier. Statutory guide plans which are prepared at the national level are enforced at the provincial level and these provide the framework within which regional and local structure plans are prepared.

The provincial town planning and townships ordinance empowers the local authority to prepare town planning schemes and enforce municipal bye-laws. Town planning schemes regulate the land uses and development of each erf within the municipal boundary in order to ensure that the land use components in the city are well related. Local and regional structure plans, development plans and policies for particular areas in the city are prepared and approved by the local authority within the framework

of the statutory guide plan. Local authorities are responsible for enforcing the town planning scheme, processing applications for rezonings and township establishment, and ensuring that bye-laws are implemented. This will be discussed in greater detail in section 4.5.4.

I. Public Law

The body of legislation affecting planning at all levels of government is diverse and predominantly part of public law. However, certain aspects of planning law such as the law relating to property and the concern for one's neighbour are based partly on private law, but the fundamental nature of planning law is not private.

There are certain statutory procedures contained in the town planning legislation such as the advertising, consideration of applications, and the payment of contributions to engineering services. In addition, guide plans become statutory on approval, the proposal in which have to be adhered to.

Provincial town planning and townships ordinances are akin to constitutional law in that they are concerned with the powers of the local authority in relation to the provincial government. In addition, such ordinances have elements of administrative law as they clearly spell out the powers of both tiers of government in regard to decision-making abilities.

Municipal town planning schemes may be classified as derivated legislation as they derive their powers and functions from the various provincial town planning and

townships ordinances. Local government ordinances are classified as administrative law as they have the power to promulgate subordinate legislation such as municipal bye-laws.

II. Private Law

Whereas public law imposes obligations on particular public bodies to protect society, private law gives certain powers to individuals (Lawson and Ruddon 1982). The specific branch of private law which has relevance in this discussion is the Law of Things. Planning is concerned with restricting or facilitating the exploitation of real rights attached to immovable property. The concept of ownership and its limitations was discussed in Chapter Two, and it is in the sphere of placing restrictions on the free use of immovable property, that planning derives its private law powers, and impinges on the private interest.

The Law of Things developed from a need to protect and guarantee enjoyment of objects which became scarce in relation to demand. Although the need for this protection is generally expressed by the owner of the object, in planning terms, the need for protection is extended to safeguarding the object for the enjoyment of the wider community. This is particularly important due to the permanent nature of immovable property, and is in line with the principle that, in addition to granting powers, private law also imposes corresponding obligations on the owners of 'things' to protect their substance.

Thus although planning derives its powers predominantly from public law, the principle of obligations expressed in private law can assist planners in performing their tasks of protecting the public good.

III. Formal Law

Town planning schemes may also be classified as formal law as they make use of the law of criminal procedure by virtue of the fact that the local authority is granted powers to prosecute any individual who transgresses the provisions of the town planning scheme. In the same way, the Group Areas Act, 36 of 1966 may also classified as formal law as it implements the law of criminal procedure to prosecute people who are disqualified in terms of the provisions of this Act.

4.4.2. Planning and Common Law

The common law of land use control, and thus town planning, has been defined as "those attempts made by judges to fashion a set of principles for dealing with anti-social behaviour or conflicting land uses such as nuisance" (McAuslan 1975, p48). In the past, a person owning land was permitted to use it to further his own private interest in any way as long as he did not cause a public nuisance. Since the advent of planning legislation, the common law principle has been modified by a concern with the public interest (Haar 1951).

Although common law principles, such as a concern with the convenience of one's neighbour, are presently applied to a lesser extent in contemporary planning practice, they still play a certain role in planning decision-making. The common law operates at two levels. The

first serves a direct role of determining patterns of acceptable land use activity between neighbours in terms of the law of nuisance which stipulates that, in exercising rights, one cannot materially infringe on the rights of other persons. An activity could become an actionable nuisance, even though the offending party has obtained planning permission to carry on the activity. This often occurs because planning permission is granted in terms of the nature of the activity and not the way in which it is exercised. Under these circumstances, the activity is construed as 'bad neighbour development' and is no longer sanctioned by the public authority. The common law of nuisance has been put forward as an alternative to zoning (Pavlich 1978), but has been discarded for two reasons. The first reason is that the issue of nuisance can only be debated after the damage has been done, and the second is that "if it is used alone as a device, knowledge of land use control would only be acquired after a journey into a labyrinth of precedent" (Pavlich 1978, p109).

The second level at which common law operates is more indirect. In terms of statute law an applicant is required to advertise the details of the application in order to afford his neighbour with the opportunity of objecting, if the neighbour perceives or fears a potential nuisance arising out of the proposed activity. This may occur even if the activity serves the public at large and is in the public interest. In this way the common law serves as an extra protection of the private interest.

4.4.3. Planning Precedent and Its Consequences

In short, it can be said that precedent in planning is set by a decision that has been taken regarding existing or future land use rights. Unlike legal precedent which is documented and applied in a consistent and hierarchical manner, planning precedent only becomes a strong tool in decision-making if direct reference is made to a previous decision in subsequent cases. In contrast to the simple manner in which planning precedent is established, and legal precedent is exercised, the application of planning precedent is complex, disorganised and open to large scale misinterpretation. The degree to which the use of planning precedent will impinge on the amenity of a neighbourhood depends firstly on the merit of the original decision, and secondly on the objectives of those who choose to refer to the precedent when applying for planning rights.

I. The Setting and Application of Planning Precedent

The various ways in which planning precedent is set, and the consequences which can result from the citation of this precedent, will be discussed in great detail in the following chapter. It is thus only necessary to discuss the principles at this point.

Unlike legal precedent, precedent in planning is exercised in a random and ad hoc fashion. Precedents set by higher authorities such as the Provincial Authorities are not binding on lower authorities. Similarly, a decision taken by a local authority on a previous application need not influence any decision which is taken by a higher authority or the local authority in question. Furthermore, precedents set by different local

authorities are not consistent even though a single Provincial Administrator overrides decisions taken by various local authorities in one province. There is no legislative or other rule which stipulates that decision-makers are obliged to refer to precedents established in previous cases or the outcomes of decisions taken in the past.

However in Britain, the use of planning precedent is more structured. For example, the question of what 'development' represents, is accepted as being the carrying out of building, engineering, mining, or other operations in, on, over or under the land, resulting in a material change of use, and has been the subject of many cases in the courts. Thus, each ruling on whether or not an application is deemed to be 'development', and has potential to result in a 'material change of use' sets a precedent. This ruling is only made after due consideration has been given to previous rulings on the matter. The application of planning precedent here helps to create consistency and certainty, as 'development' is "difficult to define theoretically [but] will be readily recognisable when in practice it occurs" (Heap 1987, p121). Thus, by quoting precedent when deciding whether or not development will occur, the courts are able to define and apply a relatively abstract concept in a consistent manner.

II. Critique of the Application of Planning Precedent

"The results of land use decisions may be inconvenient, ugly, uneconomical, polluting or unjust. But decisions are made everyday, and to say that one's grandchildren will suffer from them is to underestimate their reach".

(Popper 1981, p9)

Due to the fact that planning is an inexact science operating within a highly dynamic and fluid system, it is very difficult to prove that the facts of one case are material to another. This makes the exercise of the principle of planning precedent difficult to administer, reduces certainty and opens the doors for unscrupulous decision-making. As a result of this uncertainty, property owners and the community can not be assured that their interests are protected or their investments are safe, as there is no guard against the intrusion of incompatible land uses. This clearly has an effect on both the public and private interests. Furthermore, land use decisions which appear to be relatively unimportant or cause small scale amendments to the land use structure, may have a pronounced impact on the systems operating within an urban environment. The application of planning precedent in the South African context has not evolved in the same manner as legal precedent of the one hand, and planning precedent in Britain on the other. In addition, there is no mechanism within the planning system which provides for the amendment or elimination of outdated or inappropriate planning precedent. Finally, due to an absence of planning case law, there is no set of principles or criteria which can be used to guide planning at the various tiers of government in a particular province, and between the four provinces. This further contributes to the ad hoc manner in which decisions relating to planning matters are made, and has serious repercussions for the legal and planning professions (Van Wyk 1990).

However, if planning precedent were to be utilised in a more scientific and structured fashion, the certainty, efficiency, reliability, equality and convenience aspect derived from the application of legal precedent could be enjoyed by the community.

4.5. THE TRANSVAAL TOWN PLANNING SYSTEM

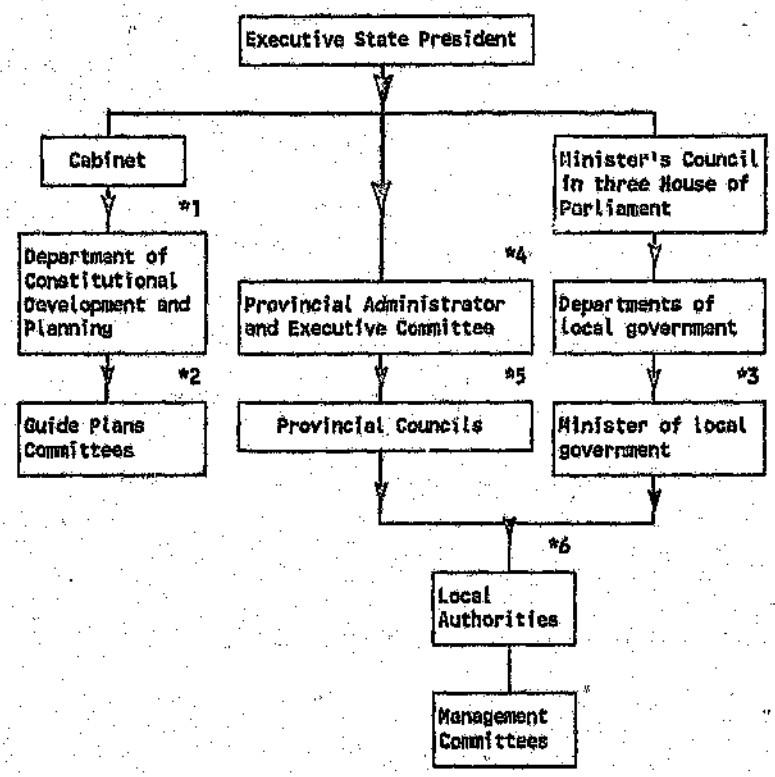
4.5.1. Introduction

This section will discuss the two primary legislative tools which regulate urban land uses in the white areas of the Transvaal, viz. the Transvaal Town-planning and Townships Ordinance, 15 of 1986 (the Ordinance), and the Removal of Restrictions Act, 84 of 1967 (the Act).

All applications for township establishment and rezonings are submitted and considered, and municipal town planning schemes prepared and amended, in terms of the Ordinance. The Act enables a property owner to apply to the provincial authorities to remove restrictive conditions contained in the title deeds which control land uses. This Act also makes provision for the simultaneous removal of restrictive conditions and rezoning, and many applications for rezoning are still submitted in terms of this Act.

The town planning system in the Transvaal and all white local authorities within this province is governed predominantly by these two legislative tools. The hierarchical system guiding decision-making and policy formulation is depicted on Figure 4.1. The system operating within an authorised local authority in the Transvaal been chosen as an example, as the case studies which will be described in the following chapter are all

drawn from this municipality. In the interests of confidentiality, the name of this local authority cannot be disclosed.



*1 : Prepare National Physical Development Plan.

*2 : Set up and co-ordinate regional sub-committees which prepare statutory guide plans.

*3 : Decide on recommendations made by Townships Board on appeals submitted in White Areas.

*4 : Defines Management Committee powers and how they are exercised; carries out the administration of the provincial affairs relating to the province; makes decisions on the recommendations of the Townships Board on appeals submitted in the Coloured and Indian Group Areas (rezonings and townships).

*5 : Implement provisions of Guide Plans; prepare and enforce provisions of Provincial Ordinances; prepare provincial policies.

*6 : Approve local policies and development plans; implement town planning scheme; process town planning applications; decide on matters delegated in terms of the Ordinance.

figure 4.1 : The Hierarchical System of Decision-Making

4.5.2. The Transvaal Town-planning and Townships Ordinance, 15 of 1986

This Ordinance consists of six chapters, a set of schedules and regulations. The first chapter deals with the constitution, functions and procedures of the Townships Board, and compensation courts. Chapter Two deals with the preparation, purpose and effect of the municipal town planning scheme for both authorised and unauthorised local authorities. Chapter Three deals with the procedures relating to the establishment of townships by private applicants in areas under the jurisdiction of both authorised and unauthorised local authorities. Chapter Four deals with the establishment of townships by local authorities, and Chapter Five regulates the provision of contributions to internal and external engineering services.

I. The Townships Board

The Townships Board serves to consider the following:

i) appeals made by the applicant against a decision of the Council in the case of an authorised local authority, and

ii) objections submitted by a local authority or any outside body/party to the Director of Local Government in the case of an unauthorised local authority.

Up until 31 March 1989, all town planning applications submitted in terms of the Ordinance were considered 'general affairs'. Appeals held in terms of this Ordinance were therefore considered by the Townships Board which made recommendations to the Provincial Administrator. The Administrator, acting in his capacity

as chairman of the Executive Committee, would decide on the matter in conjunction with the members of this Committee, basing his decisions on the recommendations of the Townships Board.

On 31 March 1989, a decision was taken to make all town planning issues 'own affairs', and appeals against applications would as a result be considered by the relevant Minister of Local Government, depending on whether the application concerned fell into a White, Coloured or Indian group area. The Coloured and Indian houses of parliament elected to revert to the old system whereby town planning issues are deemed 'general affairs', and thus appeals relating to an application in a Coloured or Indian group area are still considered by the Provincial Administrator. However, applications relating to a White group area are still considered 'own affairs', and thus appeals against decisions taken by the local authority on such applications are considered by the Minister of Local Government, House of Assembly (the Minister).

Sections 59 and 104 of the Ordinance stipulate that the Board makes recommendations to the Administrator, or the Minister, on appeals relating to applications for rezoning and township establishment respectively. The Administrator, or the Minister makes the final decision on the application, to either approve, to refuse or to approve it subject to certain amendments or conditions. This is done after hearing the case put forward by the applicant, the objectors and the local authority. Section 139 of the Ordinance states that the Board may make the final decision on appeals against the decision

of a local authority on an application in terms of the town planning scheme.

The Townships Board consists of a chairman appointed by the Administrator, a Director authorised by the Administrator to act on his behalf, and up to fifteen members who, in the Administrator's opinion, "possess qualifications necessary or useful for the purposes of this Ordinance" (section 4 (1)(a) of the Ordinance). The Board may determine the time and place of its meetings, However, when an application submitted in terms of the Ordinance is pending, the Board is required to meet at least once a month.

The Board may, subject to the provisions of the Ordinance, make its own rules regulating its procedure. A decision of the majority of the members of the Board present at the meeting is regarded as the decision of the Board. In the event of an equality of votes, the Chairman has a casting vote. The Board reports back to the Administrator on any decision referred to it by the Administrator, and may report to the Administrator on any matter to which the Ordinance relates. After receiving the recommendations of the Board, the Administrator may require the Board to hold a further inspection or hearing, or reconsider its recommendations.

Due to the fact that the Townships Board is permitted to make its own rules regarding procedure, it can be classified as a quasi-judicial court. The specific characteristics of such a quasi-judicial court are:

i) there is no right to legal representation
ii) there is no right to an oral hearing

iii) the quasi-judicial court need not follow the ordinary rules of evidence

iv) there is no right to disclosure of the records or proceedings

The recommendations of the Board guide but do not bind the Administrator. Once promulgated, the decision of the Administrator is enforceable and thus has the appearance of legislation rather than of a judicial decision (Pavlich 1978). The recommendations of the Administrator do not set a precedent which must be adhered to by the Board, or the local authority in subsequent cases. However in practice, such decisions are frequently cited as having set a precedent by those in favour of, or in opposition to, the application. Therefore because such decisions are not binding on any other decision-making body in subsequent cases, it should be questioned whether such decisions constitute legislation in practice. Often these precedents are cited out of context, without the backing of an approved body of case law which has been constituted from other such precedents.

It is submitted therefore that the way in which the Townships Board operates contributes to the ad hoc manner in which planning precedent is set and applied. The open-ended system within which the rules and regulations of the Board are set, and decisions are made, is highly unstructured. Unlike the ordered way in which judicial precedent is established and exercised, planning precedent created by a quasi-judicial tribunal such as the Transvaal Townships Board, and thus has the potential to be highly disorganised. Furthermore, due to the fact that the rights of witnesses, complainants and

respondents are limited, the public cannot be assured that evidence is led in an objective or public manner.

II. The Town Planning Scheme

Section 19 of the Ordinance defines the general purpose of a town planning scheme as being:

" ... the co-ordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote the health, safety, good order, amenity, convenience, and general welfare of an area as well as efficiency and economy in the process of such development."

The general purpose of the town planning scheme, as described here, is clearly an attempt to protect and enhance the public interest. However, the problem of consistency arises as a result of the fact that terms such as 'good order', 'amenity', and 'convenience' are open to interpretation from both the public and private interest perspectives. For example, an applicant might state that the 'amenity' and thus value of his residential property has been prejudiced by the construction of a new road and thus, in order to protect his private interest and promote 'efficiency' and 'economy', he should be permitted to rezone his property for business purposes. However, the community might argue that the road has been constructed in the interests of 'convenience' and thus the 'general welfare' of the neighbourhood, whilst the granting of business rights to an individual would mean that the private, rather than the public interest is advanced.

The Ordinance provides a system whereby a property owner is permitted to apply for an amendment to the existing conditions of the town planning scheme. Although the general purpose of a town planning scheme is clearly to uphold the public interest, the Ordinance does not stipulate anywhere that any such amendment need constitute an improvement. Despite the fact that the officials and decision-makers may attempt to ensure this, there is no guarantee that this will be done and as a result, changes to the existing situation may in effect endanger the public interest.

The town planning scheme is in many instances seen to infringe on the freedom of the private interest. The most effective and far-reaching legislative tool at the disposal of the local authority planner is the town planning scheme. It is in this way that the planner can control land uses, and the activities of property owners and developers. Viewed from the private interest perspective, it is this very tool that inhibits and restricts an individual's free right to fully exploit the potential of a finite resource such as land. It can thus be said that the town planning scheme is the pivot around which the conflict between the public and the private interest revolves. "Whether or not town planning schemes are effective as a basis for urban planning is disputed. There is no doubt however that they encroach extensively on the individual landowner's property rights. Perhaps this is for the common weal" (Lewis in Bennet 1986, p249).

III. Applications for Rezonings and Township Establishment

The Ordinance differentiates between 'authorised' and 'unauthorised' local authorities depending on the status of the local authority and the size of the area under its jurisdiction. The different procedures governing the submission and consideration of applications , both authorised and unauthorised local authorities are depicted graphically on Figures 4.2. and 4.3. respectively. Authorised local authorities are granted more autonomy to finalise applications for the amendment of their town planning schemes or the establishment of townships. The authorised local authorities are granted powers to hear objections and resolve conflicting opinions regarding the application, and decide whether the application should be approved, refused or approved subject to certain conditions.

The provision enabling an authorised local authority to have greater decision-making powers in respect of applications submitted in areas under their jurisdiction was an attempt to streamline the process and eliminate any unnecessary delays. This is clearly in the interest of the developer and private landowner whose application would be finalised in a shorter time period. In the case of an authorised local authority, the Council (or its appointed committee) has the final decision-making powers, unless the decision is taken on appeal to the Townships Board.

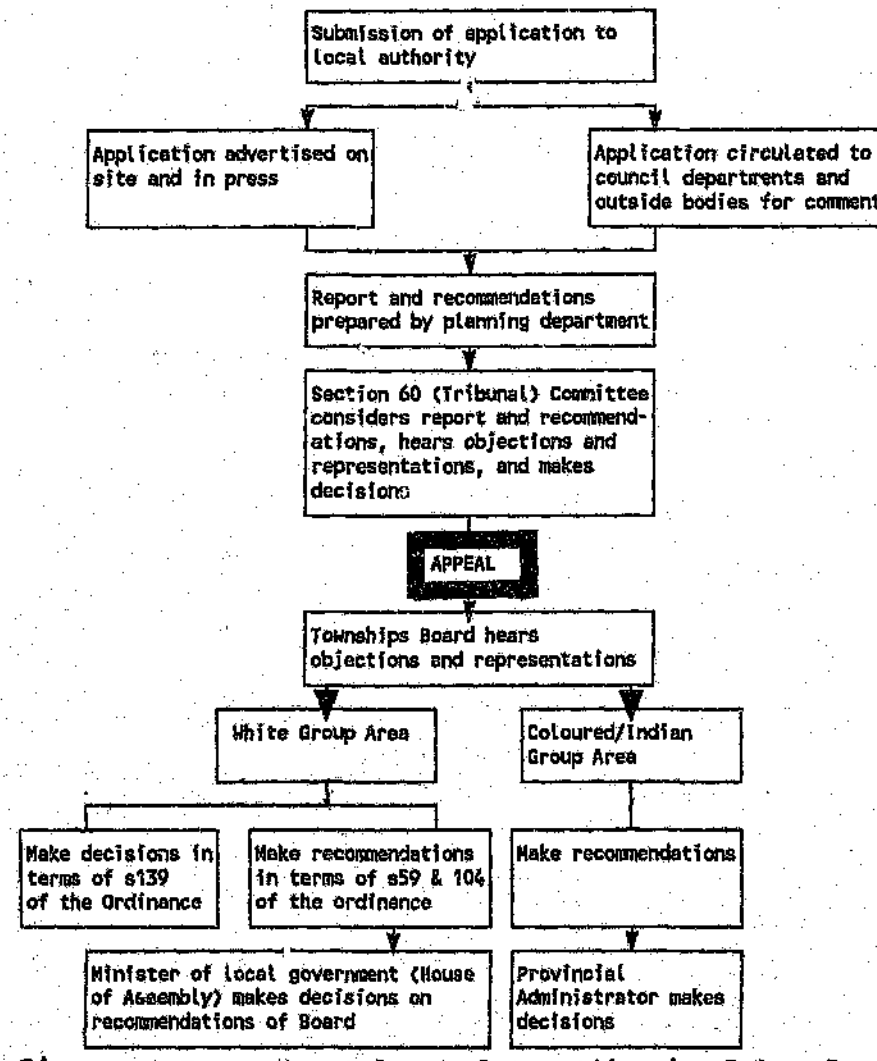


figure 4.2 : Procedure of an authorised Local Authority for the processing of applications submitted in terms of the Ordinance

However, in the case where:

i) the applicant appeals a second time against a decision made by the Council of an authorised local authority and the appeal is upheld, or

ii) the Administrator adopts the recommendation of the Townships Board to grant an application against

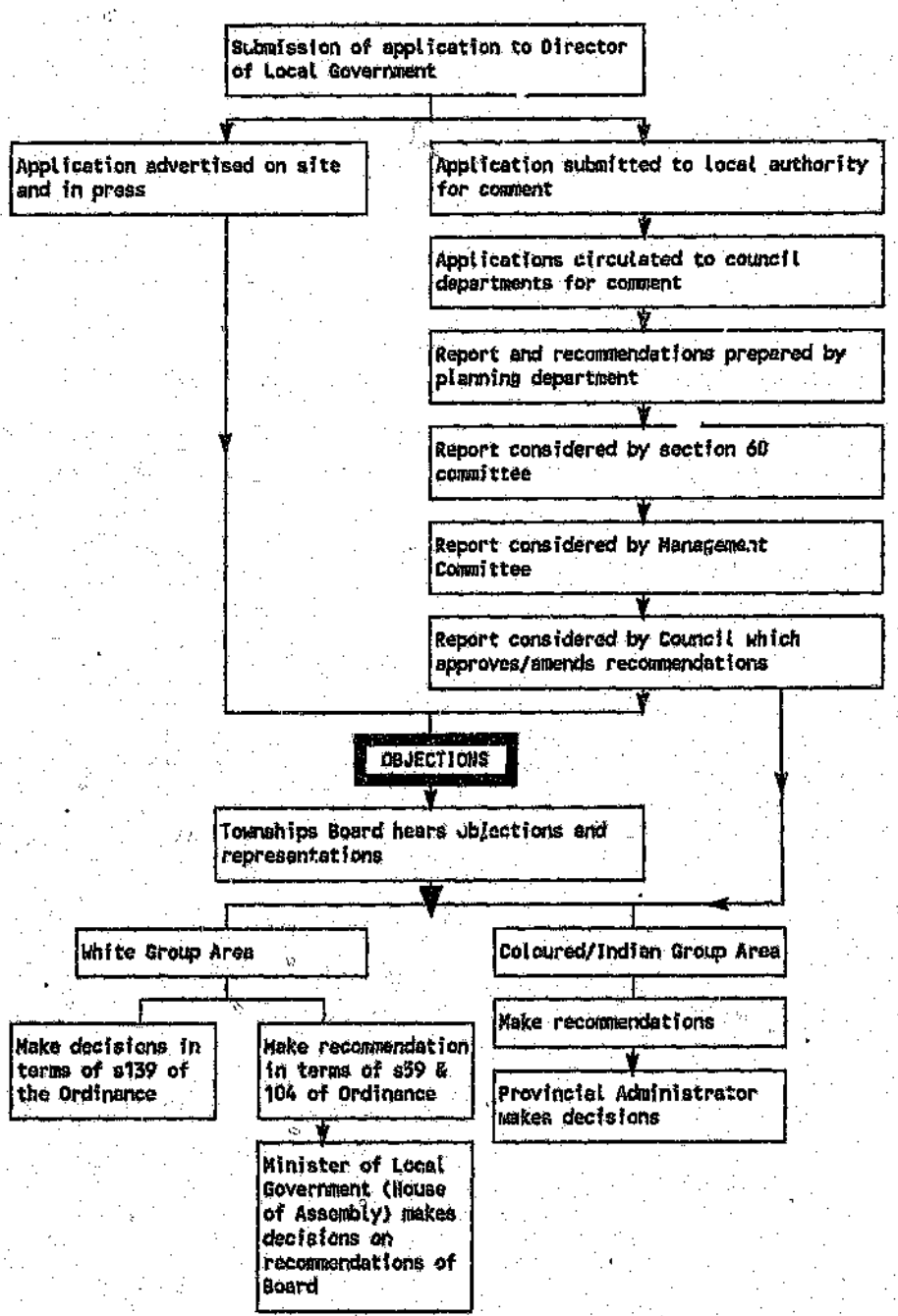


figure 4.3 : Procedure of an Unauthorised Local Authority, and all Local Authorities, for applications submitted in terms of the Act and the Ordinance respectively

the recommendation of the Council of the unauthorised local authority,

the local authority has no further decision-making powers and the Provincial Administrator, or the Minister, on the recommendations of the Townships Board, becomes the dominant decision-making bodies. Any decision made by the Administrator or the Minister sets a precedent. Within a given time period the Board may be requested to give the reasons for its decision. Although this may appear to be an attempt to ensure that all interests are protected equally, the Administrator and the Minister are not obliged to consider any comments made on the recommendations of the Board, or give reasons for their decisions.

Both authorised and unauthorised local authorities are decision-making bodies which are familiar with the nature of the local environment and serve to protect the public interest. Thus an appeal by a private developer or land owner which is upheld clearly protects the private interest. It can thus be said that the appeal procedure is open to abuse by private developers in their search to protect their private interests. A situation whereby a Provincial Administrator, or the Minister, acting on recommendations of a Townships Board (neither of which is familiar with the details of the areas under consideration) is the final decision-maker and sets the precedent should be carefully questioned and reassessed. This is particularly important as it is the local authority that is required to administer the town planning scheme and deal with the issues resulting from the setting of harmful precedent. Thus it can be said that it is the "quality of administrative hearing that

determine and affect private interests" (Pavlich 1979, p239) and create a situation whereby a local authority is required to deal with issues resulting from the setting of unhealthy precedent by higher decision-making bodies.

IV. Contributions to Engineering Services

The Ordinance provides that the successful applicant could be required to pay an amount of money to the local authority as a contribution towards the cost of installing or upgrading existing engineering services, subject to an appeal to the Services Appeals Board. The reason for this is to ensure that the community is protected against having to subsidise the costs of the installation of new services. This provision was inserted as a result of representations made by the private sector against the erstwhile 'development contributions' which increased rates and taxes, thereby retarding development and increasing the costs of erven. This provision thus serves to protect both the public and private interests.

4.5.3. The Removal of Restrictions Act, 84 of 1967

Applications submitted in terms of the Act follow the same procedure as that of an unauthorised local authority. This is depicted on Figure 4.3. This Act is applicable in the case where an applicant wishes to remove a restrictive condition of title with or without simultaneously amending the zoning of the property. The Administrator will approve the removal of a restrictive condition of title if he is satisfied that:

i) "it is desirable to do so in the interest of the establishment or development of any township or in the interest of any area, whether it is situate in

an urban area or not, or i) the public interest" (section 2a);

ii) the land in question is required " ... for ecclesiastical ... or public purposes ... " (section 2b).

The Townships Board, as described above, will hear objections made by the public and the local authority on the application.

4.5.4. The Town Planning System of an Authorised Local Authority

The system of the local authority from which the case studies presented in Chapter Five are taken will be discussed. The hierarchy of the decision-making processes described below has been simplified and is represented diagrammatically on Figure 4.4.

I. The Structure and Functions of the Planning Department

The Planning Department is one of many departments in this local authority, and is comprised of four Branches viz. Development Control, Urban Planning, Architecture and Building Survey. The Development Control Branch deals mainly with applications for rezonings submitted in terms of the Ordinance, removal of restrictive conditions and simultaneous rezonings submitted in terms of the Act, and consent uses submitted in terms of the municipal town planning scheme.

The Urban Planning Branch is responsible for dealing with applications for township establishment submitted in terms of the Ordinance, the preparation of local area development plans, city-wide policies, structure plans and urban design frameworks. The work of the Urban

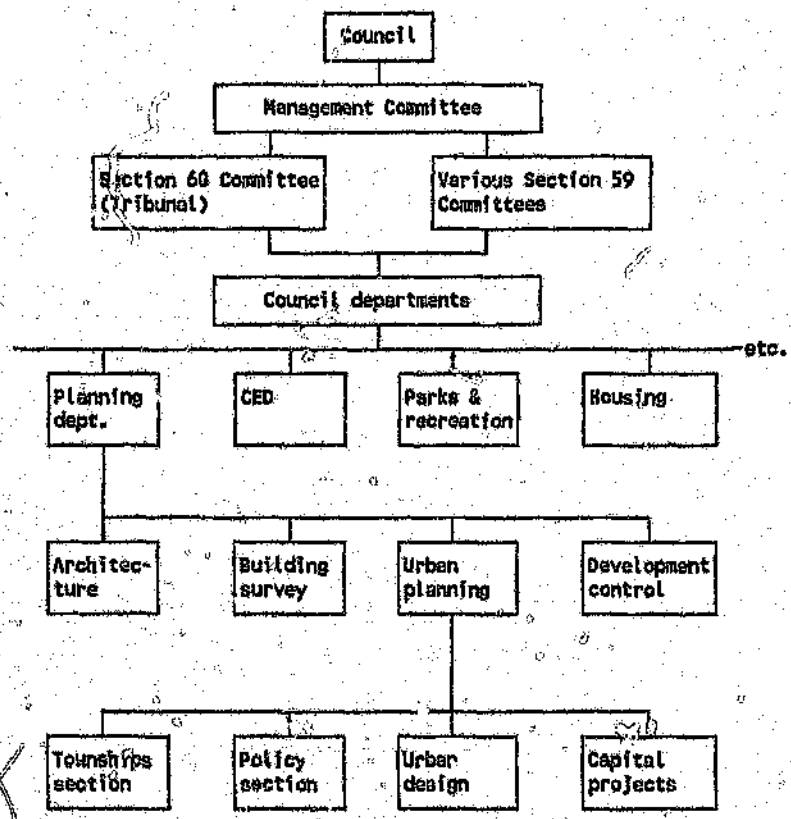


figure 4.4 : An example of the structure of an Authorised Local Authority in the Transvaal

Planning Branch is concerned with the forward planning of the city and consultations with the public. The procedure which is followed in the policy formulation process of the Planning Department is depicted on Figure 4.5. The Architectural and Building Survey Branches are not involved in the consideration of town planning applications or preparation of policies.

II. The Consideration of Applications

This process is depicted on Figure 4.2. An application is submitted by a private land owner to the local authority (in the case of the Ordinance), and to the

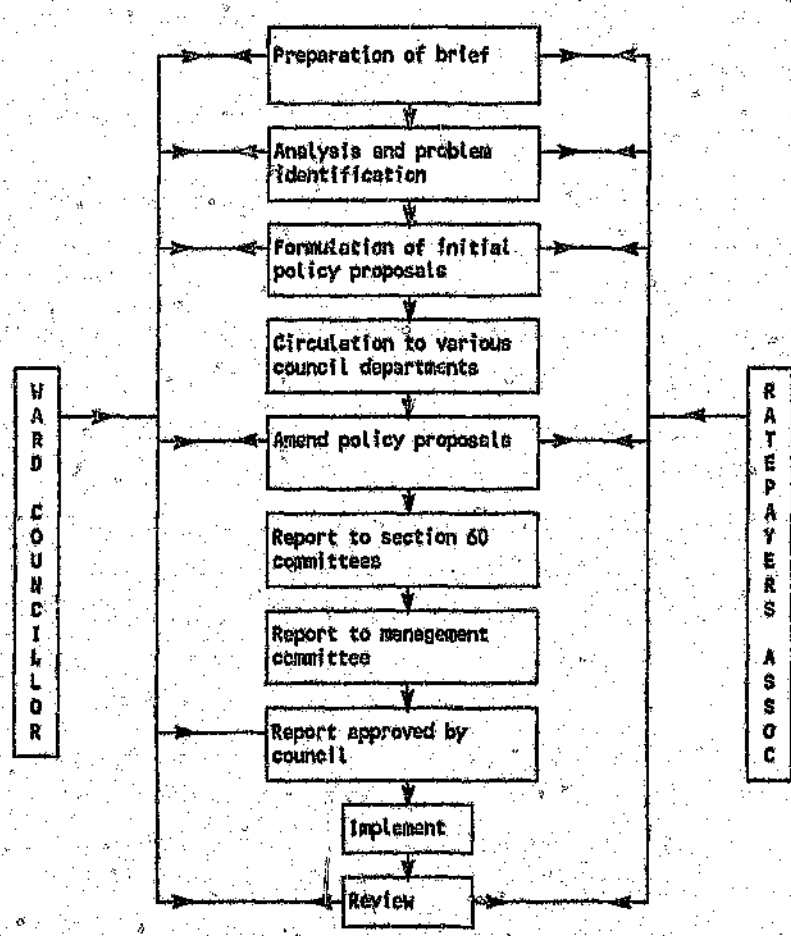


figure 4.5 : Process of policy formulation and approval by Planning Department

Director of Local Government (in the case of the Act). It is thereafter advertised on site and in the newspapers in order to notify the community of the application and provide them with the opportunity to object or make representations regarding the application. On receipt of the application, the Planning Department will circulate it to bodies outside of the Council such as ESKOM as well as various Council departments. The Urban Planning Branch will comment on the merits of the application in terms of a policy or development plan for the area in

which the site falls. These policies and development plans are approved by Council and constitute a set of guidelines for future development.

Once these comments have been received, the report is then prepared. In the case of applications submitted in terms of the Ordinance, the report would be considered by the Planning Department under delegated authority, or by a committee of the Council constituted in terms of section 60 of the Local Government (Administration and Elections) Act, 40 of 1960, taking into account objections lodged or representations made, whichever is applicable. An applicant who is aggrieved by the decision taken by any such decision has the opportunity to appeal in terms of the procedure described in section 4.5.2.(I) above.

In the case of applications submitted in terms of the Act, the Council makes a recommendation to the Townships Board which will consider it, together with any objections lodged or representations made. In this instance, the Council merely fulfills an advisory role, with the final decision being taken by the Administrator, on the recommendations made by the Board. The possibility exists that this decision-making ability in terms of the Act, could be devolved to local authorities within a few years.

Approved policies and decisions on town planning applications are available for reference by officials, members of the public and consultants. However, they cannot be classified as either 'legislation' or 'precedent' as the Council has no means of ensuring that

its decisions are adhered to at all by the higher decision-making bodies such as the Townships Board, or in any consistent manner by officials and applicants. This is especially relevant in light of the fact that town planning issues are open to large scale interpretation.

4.6. CONCLUSION

Due to the complex nature of societies and the urban environment in particular, and the multi-disciplinary nature of planning, the categorisation of planning legislation presented in the chapter should not have the effect of simplifying the system. This classification served merely to highlight the fact that the dividing line between public and private law is somewhat vague. Town planning legislation is predominantly public law, certain aspects of which are based on private law. The strong private law element in this legislation, which defines and restricts the real rights associated with full ownership is governed by the Law of Things.

This chapter has revealed the fact that different forms of planning occur at different levels of government. As there is no overall, co-ordinated planning system, planning is administered by a large number of different, autonomous, unco-ordinated authorities, further contributing to the potential for ad hoc and inconsistent decision-making. The manner in which planning precedent is set and applied, and the concern with the public interest of both the Act and the Ordinance have been highlighted. What has also been revealed are the reasons why policies approved, and decisions made, by the local authority in the public interest, in practice may have no legitimacy as they may be overruled on appeal or ignored

by higher decision-making bodies. The result of this is that a precedent which is set due to the upholding of an appeal by an applicant in the private interest, has the effect of undermining any decision made by the local authority in the public interest. This will be shown practically in the following chapter. It is clear therefore that the public interest aspect of the current planning legislation is not sufficiently strong to prevent inexpedient decision-making from taking place, or the establishment and exercise of inappropriate planning precedent.

5.1. INTRODUCTION

This chapter will present four case studies, each of which will illustrate different aspects of the setting and application of planning precedent. Although real case studies have been used, and facts, dates and quotations have not been altered, it has been necessary to change the names and places in order not to expose any particular local authority or interest group in a negative light. Due to the fact that certain recommendations and decisions which are made at various tiers within a local authority are confidential, but are central to the discussion, it has been necessary to preserve this confidentiality.

It is intended, by way of practical examples, to highlight the reasons why unhealthy planning precedent is set, and why in reality, the application of planning precedent often results in upholding the private, rather than the public interest. The inherent weaknesses in the planning system, and within the town planning legislation will be exposed, and shown to contribute to the creation and use of improper planning precedent.

5.2. PLEASURE VIEW

5.2.1. Background

Pleasure View is a unique ridge area, situated in the middle income area of Queensburg, and highly accessible to the central city area. It was originally set aside by the Queensburg Estates Company as public open space, and donated to the Perciville City Council under the proviso

that it should be reserved as such. Since 1902, more than 200 erven have been created and alienated from the Pleasure View Park. Over and above this, an average of two encroachments per year, both legal and illegal, have occurred since 1950. The reasons for encroachment applications have been security and the need for additional garden space. Up until 1985, such encroachments were approved without a single objection from any department within the Perciville City Council. What has occurred however, is that the applicants have illegally added permanent structures such as walls, carports and swimming pools onto these encroachments, and thereafter applied to the Council to purchase the affected portion of the park.

One of the points most frequently cited by individuals owning properties abutting Pleasure View Park is that a precedent for encroachment had been set. In one application, the motivation for a further encroachment was that the adjacent property had exactly the same arrangement with the Municipality as the one for which the encroachment application was being made. It was the Planning Department of the Perciville City Council that raised the first objection in this instance by stating that the granting of permission for such encroachments could establish a precedent for other land owners whose property borders public open space. This objection was in terms of a city wide policy to protect the ridges in the Perciville Municipal area, approved by the Council in 1985. However the Management Committee overruled the objection of the Planning Department, and approved this additional encroachment agreement in favour of an erf abutting the Park on a short lease basis only. A

precedent for encroachment and alienation of public open space for private purposes had thus been set by the Perciville City Council as far back as the 1950's, and has become virtually impossible to reverse.

5.2.2. Erven 8887 and 8888 Queensburg

The original owners of Erf 8887 Queensburg, which abuts Pleasure View Park, obtained Council consent in 1949 to use the existing large house on this erf as a nursing home. In 1971, the owners of Erf 8887 applied to the Perciville City Council to rezone this erf from 'Residential 1' to 'Special' for a private hotel, residential buildings and a boarding house, citing the fact that a precedent for boarding houses had already been set in the area, and that it would be in the public interest to have the site made available for such persons requiring the services provided by a boarding house.

One of the objectors to the proposed scheme questioned what will the effect of this precedent would be on the dwelling houses in the area. The planner for the Perciville City Council, representing the Council's case opposing the application had already made reference to the precedent established in the area, and the fact that this could be taken further as a case in point for rezonings in other parts of town where similar situations exist. He submitted that the town planning scheme provides a framework in which developers are meant to be guided, and in which people, buyers of properties, dwelling-houses in the area have confidence. He also pointed out that the moment the town planning scheme is changed for no real town planning purpose, then the whole concept of a town planning scheme breaks down.

Another representative of the Council addressed the issue of an unhealthy precedent for non-residential uses already having been set by the nursing home by stating that the approach that should be taken should be to start with the existing scheme, the existing rights, and we say what was wrong with them.

Further objections to the proposed rezoning was that it could potentially destroy a unique natural resource which should be conserved for the use of the wider community. It was requested that the Council acquire the erf in order to secure the whole of the Pleasure View Ridge areas for the benefit of all the residents of Perciville. However, the applicant's response to this was that economic considerations had to be taken into account.

On 2 August 1972, a notice was published in the Provincial Gazette stating that the Administrator had approved the rezoning of Erf 8887 to 'Special' for a private hotel, and board and lodging house, overruling the Perciville City Council's recommendation to refuse the application. On 19 February 1979, the applicant informed the Council, that due to the considerable delay on the rezoning, it had become uneconomical to develop the site in terms of the new rights, and that he would like to erect cluster houses commensurate with the nature of the area on which the stands were located. In a departmental circular dated 11 December 1979, the City Secretariat informed all Council Departments that the owner of Erf 8887 had approached the Council to purchase Erf 8888 Queensburg, (an erf adjacent to Erf 8887 Queensburg, and situated just south of the crest of

Pleasure View Koppies) and incorporate it into the proposed cluster housing development.

Once again, numerous objections were received from interest groups, both within and outside of the local area, to the proposed alienation of this erf by private treaty, in fear that this erf would also be developed into a higher density residential scheme. One of the suggestions put forward by an objector was that the Council should purchase Erf 8888 Queensburg in order to add it to the existing municipal land which covers most of Pleasure View. This proposal was not supported by the Electricity Department (in which Erf 8888 Queensburg was vested) or the local ward councillor.

In June 1981, the site was inspected by various officials of the Perciville City Council, and the Planning Department was instructed to negotiate with the owner of Erf 8887 Queensburg to exchange this erf, with a Council-owned erf adjacent to Erf 8887. However, due to the proposals set down in the draft policy for protecting the ridges in the Perciville Municipal area, this proposal was not supported, in view of its potential impact on the open space system. In addition, the applicant would not consider this proposal unless he received R400 000 for the land, but would however consider exchanging Erf 8887 for industrial land in a nearby township.

The City Secretariat opposed the land swop proposal and recommended to the Management Committee in March 1983 that the Council expropriate Erf 8887 Queensburg for municipal purposes in order to preserve the ridge. However, on 7 March 1986, the Management Committee

resolved to negotiate with the owner of Erf 8887 Queensburg for the proposed land swop, and this erf thereafter became vested in the Perciville City Council.

On 26 April 1989, the Council received an enquiry from the owner of Erf 8889, which is adjacent to both erven 8888 and 8887 Queensburg, and abuts the Pleasure View Park, requesting if he could purchase Erf 8887 on which he wished to erect a single dwelling. However, the Planning Department replied that the proposal could not be supported from a town planning point of view as the Council acquired Erf 8887 Queensburg in order to protect Pleasure View from development. Furthermore, and the site was on the top of the Ridge in a prominent position, and thus any development on it would be highly visible and therefore intrusive.

5.2.3. Conclusions

The original encroachments onto Pleasure View Park served to uphold the private interest through the appropriation of a portion of a public amenity which served the public good of the entire city. These events set the unhealthy precedent for further encroachments in the private interest, the dangers of which were only recognised by the Planning Department during the 1980's, when the irreversible damage had been done. The formulation and approval of the Ridge Policy in 1986 was an attempt to prevent any further destruction of a public good within the city as a whole.

The original rights for a nursing home on Erf 8887 Queensburg were for a community use, and thus served the public interest. However, this use was cited as having

created a precedent for a 'non-residential' use and as a motivation for a commercial hotel which would have served to uphold the private interest. The danger of the interpretation of precedent in this manner was recognised by both the public and the planners who feared that this precedent which was set locally, would be applied elsewhere in the city. In this way the general purpose of a town planning scheme would not be upheld, and the private interest would continue to prevail.

The end result however, was that the Perciville City Council succeeded in retaining Erf 8888 Queensburg in public ownership, and acquiring Erf 8887 in order to protect Pleasure View Ridge and uphold the public interest. The applicant, in acquiring industrial rights in exchange for a residential property, was able to protect his private interest. This was achieved despite a precedent having been established for encroachment onto Pleasure View Ridge, and a decision by the Provincial Administrator to support rights for a boarding house, and thus the private interest. This decision was contrary to the Council's decision which sought to reverse the consequences of the original precedent and resulted in the perpetuation of the unhealthy precedent which had already been set through the original encroachment agreements.

The approval of the Ridge Policy in September 1986 has assisted both the Planning Department and the various interest groups in opposing additional encroachments, and guarding against further the public interest any further. However, due to the fact that the precedent for such encroachments had already been set, the Council should

adopt the attitude expressed by one of the objectors that an unhealthy precedent, must and can be reversed by a subsequent decision which supersedes that decision which had set the harmful precedent initially. This is particularly relevant in the case where there are existing rights and the applicant seeks to merely intensify such rights. However, the Perciville City Council is today unable to reverse the effects of the precedent that was set by earlier encroachments.

This points to the need to ensure that any decision which is made sets the appropriate precedent initially, and that approved Council policies should be prepared in order to guide, rather than react to decision-making. Finally, this case study has shown that a precedent to exchange or expropriate land in order to protect the public interest, has had a positive effect on the area. In addition, of having set a healthy precedent and avoided any further mistakes, such decisions could be referred to in subsequent cases.

5.3. THE VALLEY LODGE BUSINESS NODE

5.3.1. Background

Valley Lodge is situated along a major arterial which leads directly to the Perciville City Centre. It has over the years developed into a decentralised shopping node, and is one of many which has developed along this arterial.

Prior to 1939, the Valley Lodge area was under the jurisdiction of the Peri-Urban Health Board, and consisted of a mixture of flats, and local shopping facilities. As many of the erven had been created prior

to 1919, there were no conditions in the title deeds which restricted use. As a result, the Peri-Urban Health Board had no means of controlling the spread and change of land use in the area.

However, when Valley Lodge was incorporated into he Perciville Municipal area, certain of the property owners in the adjacent townships objected to the presence of flats and businesses in their 'country' environment, and felt that the rights should be withdrawn. On the other hand, certain property owners objected from a different perspective stating that the existing land uses interfered with the residential amenity enjoyed by them in the past. They submitted that it was only right and proper therefore that an area covered by their properties should be zoned for flats, as otherwise discrimination arises and serious prejudice to the value of our holdings might result if restrictions were imposed under the town planning scheme on the land which they owned.

When the Perciville City Council prepared the town planning scheme of 1946, they noted these opinions and objections, yet granted flat rights to the remaining erven in the two blocks already containing business and flat rights. This scheme was advertised and motivated in the Provincial Gazette as follows: "As a result of applications from various property owners and residents in Valley Lodge, the Town Planning Committee considered the advisability of rezoning the remaining stands in Valley Lodge for flats". Residents within the area objected on the grounds that the scheme permitted the spread of what they perceived to be an intrusive land use. Residents in the adjacent neighbourhoods objected

on the grounds that the precedent for higher density residential rights would result in a spread of such uses along the major arterials. One of the motivations presented in these applications was that a precedent for flats had been established by the presence of two blocks of flats in the same street.

Despite these objections and representations, the Perciville City Council approved the scheme on 3 June 1945. On 14 February 1948, the Council was informed that the Town Planning Committee had recommended to the Townships Board that the scheme be approved.

In 1959 there was a joint application for townhouses in the Valley Lodge area north of the blocks with flat rights, for those erven which were still zoned 'Special Residential'. However, the Planning Department opposed the application on the grounds that the Council would be unable to resist further extensions in this or any other suburbs if it were to approve a rezoning for townhouses for no particular reason at all, except at the desire of the owners.

By 1964 the Council had received and opposed numerous applications for both business and higher density residential rights on erven in Valley Lodge, outside of the area originally set aside for flats. One of the major concerns cited by the Planning Department was that if the rezonings were to be granted by the Townships Board and the Administrator, then other property owners in Valley Lodge would have to be granted the same rights. It was also feared that the resulting development would be unco-ordinated, non-harmonious and thus not in

compliance with the general purpose of the Town Planning Scheme.

This concern was proven correct, as on 12 April 1967 the Administrator approved higher density residential rights outside of the designated area. Thus in 1967 it was decided to obtain the general views of the property owners in Valley Lodge regarding the possible extension of the zoning for flats in order to guide the Perciville City Council in its planning and to bring some measure of security to many house-owners in the area. It was decided that the final proposal should show that it could be implemented economically from a private individual's point of view.

Thus the area originally set aside for higher density residential rights was extended by the Council and sanctioned by the majority of property owners concerned. However, certain property owners stated that they did not apply for, or desire high density residential rights and therefore were not in favour of the proposal. Other property owners adjacent to the erven, which had the newly obtained higher density residential rights objected to the Council scheme. They petitioned the Provincial Administrator on the grounds that the resultant development would depreciate the value of their properties and cause an intrusion into their neighbourhood. No decision on the proposed extension of rights was made at this point.

As a result of the continuous pressure for higher density residential rights in Valley Lodge, the Planning Department recommended to the Management Committee that

the Council should adopt a policy of supporting higher density residential rights in an extended area in Valley Lodge. However, on 10 November 1981, the Management Committee resolved that no policy decision be taken at that stage.

5.3.2. The Valley Lodge Policy

In 1988, a further investigation into the future of Valley Lodge was undertaken by a firm of private consultants who looked at the area in terms of its metropolitan context. This firm recommended to the Perciville City Council that a new area should be set aside for a future office node. However, the Planning Department suggested that Valley Lodge be developed into a mixed use node consisting of both business and residential components, and prepared an in-house policy accordingly. This proposal was in line with the pressure for office uses in the surrounding areas along the major arterials leading to the Perciville City Centre. In addition, office uses had proved to be more economically viable than residential developments, thus the suggestion to introduce a mixture of land uses. However, this suggestion for incorporating residential uses into the new policy proposals was rejected by the property owners as it was seen to be financially unfeasible. However, whilst the policy recommending a mixture of both business and higher density residential land uses was in draft form, the Provincial Administrator approved a series of applications contrary to the recommendations contained in the draft policy. The Planning Department commented that the approved controls did not conform with the draft policy. The Valley Lodge policy had been formulated on town planning grounds, and decisions should therefore not

contradict the draft proposals. It was suggested that a compromise be found between market forces and ideal planning principles.

The policy for Valley Lodge, proposing a mixture of business and residential uses was approved by Council on 28 November 1989. Since then the Council has considered applications for business rights within the area covered by the policy, in terms of the approved proposals. However, the applicants have taken little cognisance of the approved policy, and applied for rights far in excess of the policy proposals. As these applications were submitted in terms of the Removal of Restrictions Act, 84 of 1967, the Council's decisions served merely as a recommendation to the Provincial Administrator. In most cases the Provincial Administrator has approved the application in terms of the rights applied for, taking no heed of the Council's approved policy, or previous decisions taken by the Provincial Administrator on other applications in the area. In response to this, the Planning Department addressed a letter to the Provincial Administrator, dated 3 May 1990 stating its displeasure that despite the Council's approved policy, which had been forwarded to them on 30 January 1990, The Provincial Administrator, had deemed fit to approve rezonings in contradiction to that policy. It was also pointed out that the rights granted for certain erven were not consistent with those granted for other erven. This was cause for concern as these erven all fall within the same policy area, and there seems to be no reason why they should not have the same rights. In addition, the rights which had been approved were excessive for that part of Valley Lodge.

At present, numerous applications for business rights in the Valley Lodge policy area are being submitted - not in terms of the proposals contained in the Council-approved Valley Lodge policy, but in terms of the highest rights approved by the Provincial Administrator. The Perciville City Council however is making recommendations to the Provincial Administrator in terms of the approved policy which was based on sound town planning principles, rather than on ad hoc decisions taken by a higher authority. In November 1990, a draft proposal to extend business rights into a wider area was presented to the Planning Department, which is in the process of commenting on the proposals.

5.3.3. Conclusions

The precedent for an intensification of land use rights was originally set at the turn of the century, as land uses had begun to change without the control or guidance of town planning legislation or policies, and thus favoured the private interest. Objectors to these changes viewed this precedent negatively, fearing a further deterioration of the amenity of their neighbourhood. On the other hand, applicants used this precedent positively motivating for additional rights. In this instance, the same precedent was cited to protect both the public and the private interest. Furthermore, the application of town planning legislation, in the light of the precedent which had been set, was seen as a severe infringement of the private interest and the rights of ownership.

The planners involved in the preparation of the town planning scheme, did however take note of the precedent that had been set, and used this to guide their decision-making and policy formulation process. The need to create certainty and ensure consistency was recognised by the planners in light of the fact that the Provincial Administrator was setting precedent for rights contrary to what the Perciville City Council viewed to be in the public interest. Both the local and wider impact of the setting of unsuitable precedent upholding the private interest was also recognised by the planners. The reason that the precedent which had been created has upheld the private rather than the public interest, is that the Provincial Administrator overruled the decisions made by the Perciville City Council in their attempts to protect the public interest.

In commenting on applications for business rights submitted during the time that the revised Valley Lodge policy was being drafted, the planners recognised the fact that a precedent, which upholds the private rather than the public interest, should be reversed and should not influence decision-making. However, at present the system is such that a local authority has the power only to formulate recommendations to a higher authority which makes the ultimate decision and thereby sets the precedent. Uncertainty and inconsistency result as there is no mechanism to ensure that previous decisions have the binding effect of a precedent. Furthermore, due to the fact that the Provincial Administrator is not forced to take cognisance of council-approved policies, future land uses are determined by decisions and precedents which uphold the private interest, rather than the

policies which are formulated in the interests of guiding land use changes in the interests of protecting the public good.

5.4. THE HIGHGATE INDUSTRIAL AREA

5.4.1. Background

Highgate is an industrial area situated in the south of the Perciville municipality, in close proximity to both the main railway line, and the freeway. In 1954, an application was submitted to the Council for industrial rights in a suburb displaying the same land use characteristics as Highgate. As a result of this, the Planning Department recognised the need to formulate a policy to deal with the industrial trend in Perciville, and to update an existing policy which had to a certain extent stimulated and guided industrial development within the city. The 1954 policy also sought to address the issue of 'misplaced industry' i.e. that industry north of the railway line which was at the time inadequately serviced and therefore should not be allowed to expand and potentially prejudice the amenity of the adjacent residential areas. In terms of this policy, Highgate was identified as a suitable area for the expansion of industrial development.

5.4.2. The Pressure for Industrial Rights

In 1965 applications for industrial rights were received from property owners in the residential area abutting Highgate. As a result, a survey was undertaken in order to ascertain the existing land uses and quality of development. It was found that the majority of houses were in a fair condition, whilst the erven directly abutting the industrial area were either vacant or

blighted. There were also a number of illegal uses. It was thus decided that these residential erven had been sufficiently prejudiced by the adjacent industrial developments to warrant the rezoning thereof for industrial purposes.

In a letter dated 16 January 1969, the Transvaal Provincial Administration informed the Council that the Minister of Physical Planning would only support the proposal to rezone certain erven in Highgate for industrial purposes if the Council would transfer an equivalent area of existing industrial rights elsewhere in the City to Highgate. This was not practical as industrial rights in the city were scarce much of the land zoned for industrial purposes had been earmarked for urban renewal purposes. The proposal was thereafter shelved.

Despite this decision, the pressure for industrial land in Highgate remained. Applications were still being received by the Council, and there were many unauthorised uses in the area. As a result the Planning Department prepared a policy in 1972, recommending that all residential properties which were no longer suited for residential purposes be rezoned 'special', permitting scrapyards, builders and storage yards. This was seen as a means of creating a transitional area between the residential and industrial components, and an alternative to pure industrial rights. This report was approved by Council on 28 November 1972, and was well-received by property-owners who then submitted applications in terms of these proposals. It was clear that the Council's objective to create better economic prospects for

developers and to ensure a more co-ordinated redevelopment in that part of Highgate had been met.

The area continued to develop according to the 1972 Council approved policy with the result that all additional industrial land, created by the policy, had been used. However, despite the Council's proposals to increase the extent of the original industrial area in Highgate, and authorise existing unauthorised uses, there was still pressure for industrial uses and the industrial area began to intrude south of the area covered by the 1972 plan. Thus, in a letter dated 16 March 1990, the Council received a request from a consultant, representing 30 property owners, to permit the erven to be used for business purposes. The reasons cited were that the area had been left to develop without a policy, and numerous illegal uses had thus intruded into the residential area. The consultant offered to prepare a development plan for Highgate at no cost because of his commitment to the owners in the area.

The Planning Department acknowledged the importance of a development plan which would serve to guide and control land uses in the area, and deal with the unacceptably high level of unauthorised uses. However, the Planning Department undertook to prepare the necessary policy in order to protect the public interest.

In a letter dated 9 April 1990, the applicant requested the City Secretariat to hold all legal action in the area in abeyance in view of the fact that firstly the Director of Planning had instructed the Planning Department to do a new development plan, and secondly that the Planning

Department has been supporting certain rezonings in the area. However, the City Secretariat would not halt the legal processes as illegal uses could not be condoned.

The revised development plan for the Highgate industrial area is presently underway. Through this development plan, the Planning Department aims to manage and control the expansion of the industrial component in such a way so as to meet market demand and protect the surrounding residential area.

5.4.3. Conclusions

In preparing the original development plan for Highgate, the Planning Department sought to address the problem of scattered industrial activity. This had resulted since the precedent for such activity had been set and was being randomly applied. In this way, the Council attempted to provide the framework within which sound decisions could be made and healthy precedent set.

However, due to speculation by the private sector, industrial activity had begun to invade the adjacent residential area. Thus, despite the attempts made by the local authority to facilitate the setting of appropriate precedent and protect the public interest, the private interest prevailed and the precedent for industrial development was again applied randomly.

Once again, the Council responded to the consequences resulting from this precedent by applying to the higher authorities to permit the controlled expansion of industry. However, the Minister of Planning opposed the application on grounds which bore no relation to the

local situation. As a result, the proposal made by the Council to manage industrial growth was not approved, and the area continued to deteriorate.

Due to increasing pressure for industrial activity in Highgate, the Council made another attempt to avoid the further establishment and exercise of unsuitable precedent by preparing a development plan which allowed limited light industrial rights. In so doing, the Council again provided the framework for the setting and application of healthy precedent. Although this was achieved within the area defined by the development plan, the result of the Council's proposals was that applications were submitted in adjacent areas. The motivations for such applications were that the Council had already set a precedent for industry in Highgate by the development plan, and that the Council had been unable to contain industrial development within the area defined by the various development plans.

The potential threat to the public interest by the ad hoc expansion of industry in Highgate, and the need for a revised policy to ensure the protection of the public interest, was recognised by a private planning consultant. The Council agreed that a policy was required, but undertook to prepare this policy departmentally to ensure that any proposals which were made, and any precedent that might result, would protect the public interest. The applicant thereafter requested the Council to cease all legal action against unauthorised uses because of the new development plan which was being prepared. This request implied that the Council should respond to the harmful precedent set in

the private interest, by incorporating the intrusive and potentially inappropriate uses into the development plan. However, by continuing to take action against offenders, the Council sought to protect the public interest, and eliminate all intrusive activities which could have been cited as having set a precedent. In this way, the Council was in the position to guide future decision-making, through the future development plan, and remove the danger of having to take cognisance of unhealthy precedents.

Thus once again, the policy which is being prepared will serve to uphold the public interest and reverse the negative consequences resulting from the setting and application of inappropriate precedent.

5.5. THE RAISENHILLS BUSINESS NODE

5.5.1. Background

Raisenhills is situated in the north of the Perciville municipal area, along two of the major arterials leading to the city centre. Raisenhills was originally laid out in 1896 as a residential suburb. The erven in the township had open title, and as there was no restriction on land uses, certain convenience stores established themselves. In 1938, the Ratepayer's and Resident's Association opposed the rezoning of a residential erf for business purposes on the grounds that there was no need for business activities in the area. This application was however approved by the Town Planning Committee.

In the early 1950's Raisenhills experienced spontaneous shopping development, extending from the convenience shops already established. The shopping node, which was

the first to offer comparison shopping, thrived due to its proximity to neighbouring municipalities and excellent accessibility. Simultaneous with the expansion of the retail node, came the development of higher density residential use, and Raisenhills began to assume the character of a diversified urban node.

By the late 1960's, the trend for decentralisation of retail and office activities from the city centre had begun in Perciville, and this resulted in the submission of twenty-one rezoning applications for business rights in Raisenhills. Despite the fact that estate agents and property-owners were spreading rumours that business rights in Raisenhills were assured, the Perciville City Council continued to oppose these applications. Nevertheless, the Townships Board approved these applications which was a matter of great concern to the Council as it could have serious repercussions for the city. On 4 May 1966, the Management Committee resolved to send a deputation to the Administrator to discuss the principles of rezoning in Raisenhills. This request was refused on the grounds that a decision from the Executive Committee of the Provincial Administration was 'functus officio' i.e. cannot be reversed.

At its meeting of 15 July 1966, the Management Committee recommended that the neighbouring local authorities discuss their experience in regard to applications for rezonings which were turned down by their Councils, and then approved on appeal to the Provincial Authorities.

5.5.2. The 1971 District Plan for Raisenhills

By the early 1970's the Council had acknowledged the need to formulate policy guidelines which would co-ordinate and manage the expansion of business on the one hand, and protect the surrounding residential areas on the other, recognising that the local authority was the best body to ensure co-ordinated planning. It was considered that such a plan was needed to correct the town planning problems found in the area, and prevent the existing problems in Raisenhills from spreading into the surrounding suburbs. The previous efforts of the Council to check changes in its character have failed or been only partly successful". The urgency of this plan was reaffirmed on approval through the Appellate Division of the Supreme Court of a major shopping centre in the study area, contrary to the Council's recommendation.

The Council undertook preliminary investigations into the existing development, and analysed the proposals for new development which had been submitted. Pressure from developers led to the creation of a specialist team to co-ordinate the planning for Raisenhills, and prevent further ad hoc decision-making.

The general outline of the proposals was submitted to Management Committee in June 1970, but consideration was held over as the need for a consistent approach by all decision-makers involved in Raisenhills was recognised. Thus a meeting was set for 5 August 1970 to discuss the Council's proposals with the Executive Committee of the Transvaal. It was agreed at this meeting that detailed plans would be submitted to the provincial authorities early in 1971.

The proposals were approved by Council on 24 April 1971. By this stage, Raisenhills was considered to be the most prestigious shopping node in the northern suburbs of Perciville, offering a wide range of public goods. However, members of the public objected to the proposals fearing a complete lack of co-ordination between the local and provincial authorities. They were under the impression that the plan favoured only a few speculators who have pressed property-owners to rezone their stands from 'residential' to 'business'.

As a result of these objections, the council resolved to carry out detailed investigations into the development proposals and explore various alternatives. Nevertheless the Council considered rezoning applications in terms of the pending 1971 plan, until the plan was reaffirmed in 1973. This plan paved the way for development and initiative to come from the private sector and to be guided by the plan.

By 1981, the area had developed along the lines of the policy proposals contained in the 1973 plan, yet certain deviations from the original proposals had taken place. It thus became necessary to review the policy and again ensure the protection of the surrounding residential areas abutting the four roads defining the policy area.

The revised plan was completed in 1983. In a letter dated 24 June 1983, the Planning Department of the Perciville City Council wrote to the Director of Local Government requesting that the Council's approach be adopted as a its policy. The Director of Local

Government replied that the Raisenhills Development Plan had been accepted by the Townships Board on 3 May 1978, and the recommendations regarding Raisenhills have been based on this development plan ever since.

The original intention of allowing Raisenhills to develop into a large scale business node was to protect the neighbouring residential suburbs from the invasion of non-residential uses. However, subsequent to the approval of the revised development plan for Raisenhills in 1983, numerous rezoning applications have been submitted to the Council for home offices and other business uses on residential erven surrounding the Raisenhills policy area. The Planning Department has been consistently refusing these applications with the confidence that the Administrator would support the Council's proposals contained in the development plan. However, in certain exceptional circumstances, the Council has approved applications for business uses outside of the policy area in terms of a city-wide policy for Home offices, citing the reasons why such a deviation should be permitted and that such rezonings should not be seen as a precedent against development in the residential zones of the development plan, or as a precedent for ribbon development.

The pressure for additional business uses in Raisenhills remains, and soon the potential for business uses within the policy area will be exploited to its fullest. The Council will therefore need to review the 1983 proposals in order to facilitate the orderly expansion of business uses in Raisenhills, and protect the adjacent residential areas.

5.5.3. Conclusions

The precedent for non-residential uses in Raisenhills was originally set at the turn of the century due to an absence of town planning controls. This led to a spate of ad hoc development in the 1950's which consolidated this precedent. The precedent for the decentralisation of business uses elsewhere in the city, such as Valley Lodge, was applied in Raisenhills and used to motivate the rezoning applications in the 1960's. By approving these applications, the Townships Board facilitated the strengthening of this precedent. The Council recognised the dangers of this, and resolved that the Provincial Authorities be requested to discuss the issue, and co-ordinate decision-making in order to avoid the setting of any further unhealthy precedent. In addition, the potential problems resulting from ad hoc decision-making by the provincial authorities throughout the metropolitan area were noted.

In preparing the 1971 development plan, the Council attempted to firstly address the problems resulting from ad hoc decision-making and the setting of inappropriate precedent, and secondly to prevent this from occurring in the future. The policy was seen to be a means of overcoming the weaknesses in the system which led to the establishment and reference to precedent initially.

Objections to the 1971 plan were based on the fact that there was a lack of co-ordination and consistency in decision-making, and that the Council was merely seeking to entrench the land use rights granted in the private interest. However, the Council recognised the strength

of the private interest in shaping land uses in Raisenhills, and the fact that it was the private interest which had caused the setting of the precedent initially. Thus, by preparing a policy together with both the developers and the Provincial Authorities, the Council endeavoured to prevent inconsistent decision-making and the further setting of unhealthy precedent. This idea led to the revision of the 1973 Plan in 1981.

The Director of Local Government informed the Council in 1983 that decisions will be made in terms of the approved policy which had been prepared in consultation with the Provincial Authorities. Since then, consistent and co-ordinated decision-making has taken place, and as a result the potential for the setting of harmful precedent has been reduced. In the case where a decision made by the Council could have been seen to have set a disadvantageous precedent, the officials have stated clearly the reasons for approving the deviation under the circumstances, and why the decision should not be seen to have established a precedent. However, a revised policy is needed in order to ensure that the policy keeps abreast of new pressures, and that applications are not approved on appeal due to the fact that the policy is considered to be redundant. This will prevent any further unhealthy precedent from being set.

5.6. CONCLUSION

This chapter has outlined in four independent cases the various events which could lead to the setting and application of planning precedent. A number of common themes run throughout this practical investigation.

In all four case studies, decisions made by the provincial authorities, overruling the recommendations or decisions of the local authority have without exception led to the setting and application of unhealthy planning precedent. In the case of Valley Lodge and Raisenhills, the absence of town planning legislation and land use controls, such as the town planning scheme and restrictive conditions of title, resulted in the establishment of inappropriate land uses. This random and inconsistent decision-making in the past has been used and interpreted by individual land owners and developers to motivate why additional land use rights should have been granted, albeit different rights to those which established the precedent initially. Furthermore, the lack of clear policy guidelines, which are constantly updated, has been shown to facilitate the creation and utilisation of unhealthy planning precedent - this was clearly illustrated in all four of the case studies presented in this chapter.

The ad hoc nature in which planning precedent is applied was illustrated in the case of Valley Lodge, where objectors viewed the precedent from varying perspectives. The effect that the localised setting of inappropriate planning precedent can have on the city as a whole can be seen in the cases of Pleasure View Park and Valley Lodge. In addition, the importance of recognising that all decisions can lead to the setting and application of unsuitable planning precedent was revealed in the case of Raisenhills, where the planner acting in the public interest clearly motivated the reasons why a certain deviation could be permitted and should not be seen as precedent for further deviations.

Although planning precedent can have a longlasting effect, it is possible to prevent the further setting of planning precedent by making new decisions which will be referred back to in the future. This was illustrated in the case of Pleasure View Park, where a new precedent for refusing encroachments was made, thereby protecting the public interest.

In the context of a capitalist society such as that which operates in Perciville, it is both possible and desirable to take cognisance of the private interest, and incorporate a certain amount of flexibility and freedom into planning policies. The planner, acting in the public interest, can monitor the market pressures created by developers, and in this way guide decision-making in such a way that it will protect both the public and the private interests, and preempt the setting of unhealthy precedent. This was shown to be possible in the cases of Highgate and Raisenhills where the setting of planning precedent has improved the environment and can therefore be deemed appropriate.

In conclusion, the importance of co-ordinating the interaction between all those involved in shaping the urban environment i.e. private consultants, objectors, developers, interest groups, land owners, estate agents, the provincial authorities, and the council cannot be stressed enough. Consistent and considerate decision-making can only assist the community in attaining all the goals described in the general purpose of the town planning scheme such as efficiency, economy, convenience, amenity, general welfare, health, safety, and good order.

6.1. INTRODUCTION

" ... in all spheres the country [South Africa] is on the threshold of reform, at the centre of which should be planning and planning law".
(van Wyk 1990, p1)

The discussion which has been presented in the preceding five chapters has gone from a conceptual outline of the scope of the dissertation i.e. planning, law and the public interest, to a description of the practical ways in which planning precedent is both set and applied. The material presented in this final chapter draws on the previous discussions, and offers a set of recommendations which if implemented, would rationalise the way in which planning precedent is currently being established and utilised.

The chapter will commence with the recommended ways in which planning precedent should be created and exercised. These recommendations will be based on the principles of legal precedent. Thereafter proposed amendments to the current planning system, which will facilitate the effective functioning of planning precedent, will be described.

6.2. PLANNING, PRECEDENT AND THE PUBLIC INTEREST

A principle function of precedent in law is that it enables judges to interpret the general provisions of the statutes in a manner which is appropriate to the specifics of a case. It is believed that precedent can

serve the same purpose in planning in that town planning applications can be considered in terms of the interpretations of policy provisions, which could then be cited as precedents. Legal precedents are cited as examples, and used as reasons and justifications for arguments. Due to the diversity and complexity of planning issues, planning precedent could be used in the same manner to motivate a specific point which may not be addressed in the legislation.

In Britain, legal precedent may be set and applied if no relevant legislation has been passed. It is common in many local authorities that there is no development plan or policy for a particular neighbourhood. In this case, the application of planning precedent, which has would have been based on accepted planning criteria, can ensure consistency and prevent time delays. The planning precedent should in this instance be used to guide the process of policy formulation as in the case of Highgate.

In the event where a judge is required to pass judgement in the absence of an appropriate rule or precedent, he would base his decision on justice. If this principle were to be applied in planning, decisions taken in the event where there is no policy, planning principle, or relevant planning precedent, would be based on justice, and the fundamental basis of planning - the public interest.

However, it has been shown that in most instances, a single definitive 'public interest' is difficult to identify. In addition, the strength of the private interest has been highlighted, and shown to override the

public interest in many instances. The use of precedent, which is based on accepted planning criteria and approved policies, (or justice where these are absent), will assist planners in motivating their recommendations and reasoning. This is because precedents are derived from proven cases rather than on the public interest which, as has been shown, is open to interpretation.

However, it can be said that precedent does serve to uphold the public interest, as it creates certainty and maximises consistency. This is in line with the general purpose of the town planning scheme which is to achieve co-ordination, good order and efficiency within the urban environment. The reason for this is that precedent, if applied in the recommended manner, would be based on sound planning criteria rather than on opinions, and would be binding on both the parties concerned and the community as a whole. Applicants would be aware of existing precedent, and would be advised to take cognisance of these when consulting and preparing their arguments, in the same manner as legal advisors. In addition, those owning and purchasing properties would be able to predict, to a certain extent, the future of the area within which these properties are situated. For example, if a precedent for home offices has been set along major arterials, this principle could be applicable on a city-wide basis, thereby offering a measure of predictability, consistency and co-ordination.

6.3. THE PRINCIPLES OF PRECEDENT

Legal precedent is based on two fundamental principles - 'ratio decidendi' and 'obiter dictum'. The way in which these two principles are to guide the setting and

application of planning precedent will now be discussed.

6.3.1. The Principle of 'Ratio Decidendi'

The principle of 'ratio decidendi' (the reason for the decision) is fundamental to the application of legal precedent, and could serve to rationalise planning precedent. In most cases a judge reviews and examines authoritative sources which have a bearing on the issue. Thereafter, he will deduce and apply a principle - the 'ratio decidendi' - which he deems relevant to the issue. This principle sets the new precedent, which in effect creates the new law.

This concern with the principles rather than the facts is very relevant in the planning decision-making process where, more often than not, the specific facts of one application may be unique, and therefore cannot be proven to be consistent with the facts of other cases. However, there are generally accepted criteria guiding planning decision-making, such as appropriate relationships between different land use components, which can be applied to different cases all over the city. It must be remembered, however, that the application of the principle of 'ratio decidendi' requires that the material facts of the case are clearly elucidated and motivated by both the planners and the legal advisors presenting the case.

It was noted that the concept of 'ratio decidendi' is useful where there is more than one judge, but where only one judgement is passed. Town planning applications and policies are almost without exception considered by more than one decision-making body, as they pass through

various committees, before reaching Council, the Townships Board, the Minister or the Administrator. Thus, the application of the principle of 'ratio decidendi' could be useful in formalising the manner in which different decision-making bodies consider the facts of a town planning application, and make the necessary recommendations or resolutions on the application.

The principle of 'ratio decidendi' could assist in isolating the underlying criteria of a case, where the facts are not clear. The previous chapter revealed that precedents for one use may be cited as a motivation for other uses. The reason for this is that the basic criteria of the issue had not been defined and identified, and the superficial facts of the case were arbitrarily cited. The broad classification of land uses into components such as 'residential', 'business', 'institutional' etc. is in many instances based on facts and not criteria. For example, a corner cafe may well be defined in terms of the town planning scheme as a 'business' and therefore cited by an applicant as having set a precedent for other business uses in the area. However, this may in fact be considered to be a community use as it serves the local population and therefore forms an integral part of the neighbourhood. Thus the classification of land uses may depend on the scale of development, rather than on the activity. The decision as to whether or not the existing activity has in fact set a precedent should be based on the fundamental planning criteria - i.e. is the activity being carried out at a sufficient scale to have altered the character of the area from residential to business and has thereby set a precedent for business uses, or does it complement

the other land use components in the neighbourhood. Thus, the concept of 'ratio decidendi' which is based on principles and reasons rather than on superficial facts and opinions, would assist in resolving whether or not the precedent has been set, and therefore whether or not the application should be approved.

Finally, the advantages of applying the principle of 'ratio decidendi' in the planning decision-making process are that planners would be required to ensure that they keep up to date with current trends, present a foolproof and well-researched argument, and be definitive in their use of terminology.

6.3.2. The Principle of 'Obiter Dictum'

The 'obiter dictum', or the remarks made in passing on a legal case being considered, do not guide decision-making, and are therefore not influential in the setting of legal precedent. Opinions and subjective interpretations of planning applications, which could be classified as 'obiter dictum' may distort the facts, or may not comply with generally accepted planning criteria. For example, the presence of high density residential developments is often quoted as having prejudiced the quality of a neighbourhood, and therefore having set a precedent for further changes in land use. In this case, the fundamentals of the case, i.e. that the use is still residential, and therefore conforms with the surrounding development should be more influential in the decision-making process, rather than the opinion that high density residential development alters the character of an area.

It is recommended that this principle be carried forward into the way by which planning precedent is established. By adhering to the rule that 'obiter dictum' does not influence the planning decision-making process, the setting of planning precedent would occur in such a way that both objectivity and consistency are maximised. This is specifically important due to the fact that planning matters are open to many interpretations, some of which may bare no relation to the point in question.

6.4. THE DOCUMENTATION OF PLANNING PRECEDENT

Much has been said about the need for flexibility in planning, and the fact that planning is an inexact science operating in a highly dynamic and uncertain environment. Despite this, it is held that a certain degree of certainty and consistency can be attained by formalising the present manner in which planning precedent operates.

The ways in which legal precedent is set have been detailed in Chapter Two. It can be said that in general, legal precedent is set once a decision has been made, and is documented in a body of case law. This however does not currently apply to planning precedent which is not documented in any formal way. A planning decision presently only becomes a precedent if it is cited elsewhere in subsequent planning applications.

It is recommended that all decisions taken on planning matters be documented in a manner similar to legal precedent, so that easy reference can be made by planners and legal advisors to the facts and rulings of previous cases. It is also recommended that judges or the

presiding officer of a tribunal such as the Townships Board, should require that planners or their legal representatives, attempt to draw on the planning precedent embodied in the case law during their presentations.

In this way, planning precedent would serve the same purpose as legal precedent - that of creating a new law through the interpretations of general principles contained in the legislation and body of policy documentation, but which are not necessarily applicable or specific to the case. The application of planning precedent in this manner could serve to ensure that decisions taken on planning-related matters are appropriate and up to date. In the case where it can be proven that no appropriate planning precedent can be found, a new precedent should be set and documented. As a result, the system can evolve together with society, and the various advantages associated with the application of legal precedent, (presented in Chapter Two), can be enjoyed by all those affected by planning decisions.

6.5. THE AMENDMENT OF PLANNING PRECEDENT

In the legal decision-making process, a new precedent is set if it can be proven that a mistake was made, or that a deviation can be justified. Accordingly, the establishment and reference to precedent is both flexible and appropriate. It is recommended that planning precedent be amended and updated in the same manner, in order to ensure that precedent remains in touch with the dynamics of societal trends, and that exceptional cases can be considered on merit. As a result the Council or

any other decision-making body such as the Townships Board will be held accountable by the community for any irresponsible decision-making which could lead to the setting of unhealthy precedent, that will have a longlasting and detrimental effect on the community.

6.6. CRITIQUE OF THE APPLICATION OF PLANNING PRECEDENT

Despite the obvious benefits which will be derived from the application of planning precedent as described above, caution must be exercised to ensure that the potential problems associated with legal precedent are avoided. It has been noted that if a precedent is set by inexperienced decision-makers, and is based on insufficient knowledge, this could lead to questionable decisions being made. However, if planning precedent is set in terms of accepted planning criteria and appropriate policy, there is very little possibility that the decision could have been based on insufficient knowledge and experience. The constant referral to the principles and proposals contained in up-to-date policies could prevent precedents becoming anachronistic and thus irrelevant.

The fact that there is the potential for existing precedents to be replaced by new ones, has been identified as creating the potential for 'casuistry'- the making of exceptions. However, this could be an advantage for planning as it could lead to appropriate decisions being made in unusual cases. The making of exceptions should only take place after discussions of the criteria have revealed that the issue is in fact unique. This is important due to the need for flexibility in an inexact science such as planning.

Precedent has also been criticised for not being comprehensive, as it is decided on a specific criterion or point of law. In planning, certain circumstances call for the application of a particular principle criterion may be inappropriate in other circumstances. For example, the intensification of residential densities may be appropriate in some, but not all areas of the city, depending on the physical, social and economic char :teristics of the area. It is thus neither possible nor desirable to be comprehensive in this sense as this could lead to rigid and inflexible decision-making. However, decision-makers must be aware of the need to be thorough in the consideration of the relevant criteria, and ensure at all times that the appropriate ones are applied.

Finally, the manner in which legal precedent is set has been criticised in that it does not provide the public with the opportunity of commenting on the merits of the principles of the decision which has been taken. This is however not true of planning precedent as it would only be set once all objections and representations have been considered. This opportunity for public participation is provided for in the provisions of the legislation and should be exploited to ensure that the public participates in the setting and application of planning precedent.

6.7. THE HIERARCHICAL SYSTEM OF POLICY FORMULATION

The Draft Physical Planning Bill, published in February 1990, envisages a hierarchy of development frameworks and structure plans which has been shown diagrammatically on figure 3.1. As the details of the second draft are still

confidential, recommendations will perforce be made in terms of this first draft.

The hierarchy of policy formulation presented in this draft Bill, i.e. that the higher authorities determine the broad policy framework without, firstly, reference being made to the activities presently being carried out by the lower authorities, and secondly comment on the policies from the lower authorities being obtained, should not be implemented. It is recommended that this proposed system be amended so that higher authorities are required to obtain comment from the lower authorities, and take cognisance of this comment prior to the approval of any regional or national policy. In addition, it is suggested that local authorities receive feedback from the national and regional tiers prior to finalising local policies. In order not to delay the process, it is recommended that such comments be received at the same time and in the same manner that inter-departmental comments are obtained. (Refer to figures 4.2. and 4.3.).

Once approval has been obtained on the draft policies by the various levels of government involved in planning, or the conflicts successfully negotiated, it can be assumed that all decision-making bodies concur with the proposals. It is therefore recommended that the following principles be adopted to guide the application of planning precedent:

i) that all decisions on town planning matters be taken by the Council in terms of approved policies (both local and national)

ii) that local authorities within and the province take cognisance of existing approved policies of

other local authorities in the same province

iii) that higher authorities adhere to the proposals and stated criteria contained in the policies and only deviate from principles under exceptional circumstances, stating the specific reasons ('ratio decidendi') for the deviation and why the deviation should or should not be seen to have set a precedent.

If the formulation and application of policies are adhered to in this structured fashion, there is no need to make their provisions statutory. The policies can therefore keep pace with the changing nature of society, and can serve a useful predictive function. Furthermore, the present complex nature of the town planning scheme, which in many cases is inappropriate for specific communities, could be simplified thereby speeding up the planning process at the local government level. All necessary details could be contained within these relevant, flexible and up-to-date policy plans. In the event where exceptions need to be made to the policy proposals, the reasons for the deviation should be explained in detail and clearly motivated.

6.8. THE CONSTITUTION OF THE TOWNSHIPS BOARD

Chapter One of the Transvaal Town-planning and Townships Ordinance, 15 of 1986, provides that the Administrator appoints the members of the Townships Board. No reference is made to the minimum professional or academic credentials of the members. A recent enquiry into the identity and qualifications of the members of the Transvaal Townships Board (The Saturday Star, 3 November 1990 'Faceless Five Control Jo'burg's Future') was met at first with a complete refusal to disclose this

information - "It is not in the public interest to say". Later, after much probing, the qualifications of two of the five members were reluctantly revealed. In order to address the problem that the Townships Board consists of the "faceless few [which] mastermind a town planning system which is as democratic as an Iraqi tank (The Saturday Star 3 November 1990), the following recommendations are made:

i) that the members of the Board be qualified in the theory and practice of either planning or law, or preferably both

ii) that at least one member of the Board is a qualified legal advisor, and another is a qualified planner

iii) that at least one member of the Board has an understanding of the local authority from which the application is submitted

iv) that the constitution of the Board be made public knowledge

v) that the Chairman of the Board be trained in the procedures relating to a judicial enquiry, and local authority administration

The relevant members of the Board would be seconded to sit on the Board for each appeal, ensuring at all times that the Board consists of at least five members at any one time. Points (i) to (iii) should be noted when deciding which members of the Board are elected to consider a particular application.

These recommendations will serve to open up the presently confidential system. As a result of thus, the decisions which lead to the establishment of planning precedent

would be appropriate and realistic, and this would ensure that healthy planning precedent is both set and applied.

6.9. THE APPEAL PROCEDURE

The Ordinance makes provision for an aggrieved party to appeal against a decision taken by the local authority. This appeal is heard by the Townships Board in terms of the rules and procedures described in Section 4.5.2.(I). The Administrator or the Minister makes a decision on the recommendations of the Board, but is not, in terms of the Ordinance, impelled to give reasons for his decision.

It is recommended that the system be amended in such a way that the Townships Board makes the final decision on all appeals. This would rationalise the current situation whereby, depending on the nature of the application, and in which group area it falls, the Administrator, or the Minister of Local Government (House of Assembly) or the Townships Board makes the final decision (refer to section 4.5.2.(I) and Figures 4.2. and 4.3.). As a result, the appeal procedure would become more clear and consistent, as one decision-making body would be responsible for handling all appeals. The process would be streamlined thereby reducing time delays, and facilitating development. By maximising consistency in decision-making and the hearing of appeals, the establishment of precedent by a single decision-making body would occur in a clear and consistent manner. This would in turn ensure the co-ordinated citation of planning precedent.

The fundamental principles relating to the hierarchical application of legal precedent have been described in

Section 2.7.3. It is suggested that the principle whereby a court always follows its own decisions, unless proven wrong in which case it is overruled, be applied in planning precedent. This will go a long way towards creating consistency and certainty, and should be applied at all tiers of government which are involved in the planning decision-making process, and the setting and application of planning precedent.

It is also recommended that the Townships Board be impelled to give reasons for their decision. Firstly this would open up the decision-making process, and secondly, if the local authority is overruled, the reasons for this must be clearly stated and recorded. This is necessary, as in terms of the proposals contained in this section, such a decision could have the effect of setting a planning precedent, and thus all principles and criteria guiding the decision-making process must be made available to the public for reference.

In terms of the proposed hierarchical system of policy formulation and approval, the number of potential appeals would be reduced. Appeals against decisions taken by the local authority should only be heard where the applicant is of the opinion, and can prove the following:

i) that the local authority has not adhered to the proposals contained in the approved policies

ii) that the material facts of the [illegible] are such that an exception can be made and that the exception will not have the effect of setting an unhealthy precedent

This will ensure that appeals are only allowed when necessary so that the current situation whereby

applicants often abuse the appeal procedure and establish unhealthy planning precedent in their private interest, is rationalised. However, point two ensures that a degree of flexibility is built into the proposed system to provide for the consideration of unusual cases.

In an event where the applicant is dissatisfied with the decision taken by the Townships Board and appeals to the Supreme Court, it is recommended that the judge take cognisance of existing planning precedent and approved policies in order to decide whether or not the appeal should be upheld. This is necessary due to the importance of remaining up-to-date with current trends and with decisions taken at the various tiers of government on planning issues. It is also recommended that the Townships Board be bound by its previous decisions, when appropriate, in order to maximise consistency.

6.10. THE PROCEDURE OF THE TOWNSHIPS BOARD HEARING

At present the Board may, subject to the provisions of the Ordinance, make its own rules regarding its procedure. Although the Board, as an administrative tribunal, has to comply with the principles of natural justice, it is submitted that this phenomenon has been a contributing factor to the ad hoc and inconsistent manner in which town planning decisions, taken within a single province and municipality, are made.

It is recommended that the quasi-judicial procedures of the Townships Board be altered to that of a judicial court. Some characteristics of judicial decision-making are as follows:

i) the parties to the dispute present their case either verbally or in writing

ii) if dispute between the parties is a question of fact, the facts are ascertained by means of evidence with or without the use of witnesses

iii) if the dispute between the parties is a question of law, then the parties submit a legal argument

The judicial decision-making process of a Townships Board is essential as appeals against decisions on town planning-related matters are held and heard in terms of both statute and administrative law. Furthermore, it is often the case that a planning dispute originates, and is settled, on a point of law. However, as the dispute between the parties is most often a question of planning criteria and planning precedent, it is recommended that an additional point be added to the three presented above. This would read:

iv) if the dispute between the parties is a question of planning criteria, then the parties submit a suitable planning-related argument, drawing on a set of formal and appropriate planning precedents.

6.11. THE LOCAL AUTHORITY PLANNING PROCESS

All local authorities use different planning and decision-making processes. Nevertheless, it is possible to make general recommendations which would ensure a more rational and effective planning and decision-making processes within the local government system. These are:

i) that all local authority departments liaise closely during the planning process

ii) that the officials of both the Planning and City Secretary's Departments liaise closely on all legal

matters pertaining to planning issues

iii) that current approved policies be constantly amended to keep pace with the dynamics of the city

iv) that cognisance be taken of national policy proposals to ensure consistency

v) that politicians who are required to make decisions on planning matters undertake to gain an understanding of planning criteria, and understand the need for objectivity and impartiality

vi) that in the case of a dispute, the public interest criterion be used as a base for the mediation conflict

vii) that the full range of interest groups be consulted prior to the approval of any policy

viii) that a general goal for the management of the city be identified to guide decision-making and retain a measure of consistency

These recommendations would maximise consistency within the decision-making processes taking place within local government and would ensure that any decision, which could have the effect of setting planning precedent are both sound and well-grounded. In addition, politicians would be required to remaining neutral and to motivate for decisions which uphold the public interest, rather than protecting a minority desire or opinion.

6.12. THE REMOVAL OF RESTRICTIONS ACT, 84 OF 1967

It is recommended that the Act be amended so that the local authority gain delegated powers to approve or refuse applications submitted in terms of this Act. This would eliminate the current loophole which allows consultants to obtain approval on a rezoning application

through the provincial authorities by simultaneously applying for the removal of a restrictive condition of title which would only be necessary under exceptional circumstances. In this way, all decisions on planning-related matters would be made by a single planning authority, thus facilitating consistency in decision-making and preventing the establishment of improper precedent. In addition, the process would be speeded up, and the entire system rationalised.

6.13. SUMMARY

It has been shown that the public interest has been the primary concerns of planners working within the public sector since the inception of the profession and its related body of legislation.

However, the discussion presented in Chapter One revealed that there is no single or conclusive definition of the 'public interest'. It is therefore recommended that public sector planners redefine their specific role in terms of the nature of the issues they are addressing, and the particular client. In this way, an appropriate conception of the public interest can be applied and the notion retains flexibility. In dedicating themselves to protecting the public good, it is nevertheless necessary for planners to constantly remind themselves of the need to overcome the limitations of this concept.

A major aspect guiding the reform of planning law in Britain in the 1960's was the recognition of the need for community involvement in the interests of protecting the public good. In South Africa, however, the provisions contained in the legislation requiring the involvement of

the public have firstly excluded the majority of the population and have secondly, resulted in the protection of the private, rather than the public interest. This was illustrated in Chapter Five.

At present a system exists whereby decisions taken by the Council in the public interest are frequently overruled by higher authorities on the basis of an applicant's right to object in his personal interest. It is therefore recommended that the legislative system, which is intended for use by planners, should be formulated by legal advisors, ensuring that the legal system facilitates the planning process. Planners should be represented in this process so that the philosophy of planning, and public interest criterion are facilitated by the legislation. In short, planning law should be a means to an end, and not an end in itself. These two professions work hand in hand to uphold the general welfare of society, and therefore should be in agreement on the fundamentals of jurisprudence, and how they relate to planning and planning legislation.

Planners are inevitably required to find a correct balance between the opposing values of the public and private interest. It is therefore essential that planning legislation incorporate an effective means of ensuring that neither the public, nor the private interest is favoured.

Planners must be aware that the decisions that they make have both immediate and long term, and direct and indirect effects on society. This can be compared to the law of physics which states that for every action, there

will be an equal reaction. In planning, this principle is less simplistic, but each decision a planner makes will have a set of consequences attached to it. Thus prior to finalising a decision, planners should consider a comprehensive set of alternatives, and evaluate these alternatives according to the nature of the potential consequences. It has been shown that the setting and application of planning precedent is potentially the most significant of all consequences resulting from planning decisions. However, there are few, if any examples where planners have incorporated the principles of precedent into their decision-making processes, or evaluation of alternatives. It is therefore recommended that planners consider each proposal and decision which they make in terms of the precedent it could set, and the effect that this precedent would have on the public interest. It is essential therefore, that planners go beyond the application of conventional decision-making models, and arbitrary use of the public interest criterion by integrating the principles of precedent, and its consequences, into the process of planning.

6.14. CONCLUSION

"Planning legislation does not solve problems, it only provides a framework within which solutions can be found".
(Burrell 1990, p11)

The changes that are proposed to the town planning legislative and decision-making systems presented in this chapter should not be seen as piecemeal, but should be perceived rather in terms of an overall need to reform the law in South Africa. The specific recommendations

which have been made should be incorporated into a broad reform of the statutory town planning system.

In general it can be said that any amendments which are made should serve to simplify and rationalise, rather than complicate the system. The formal, and informal education of students, practicing planners and legal advisors on the principles and practical aspects presented in this concluding chapter should be undertaken.

Finally, the scope of the amended process and legislation should be strengthened so that the consistent setting and application of planning precedent is ensured. Thus the implementation of the proposals and recommendations presented herein would facilitate society in attaining its fundamental goal of upholding the public interest.

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