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THE EFFECT OF PUBLIC PARTICIPATION

IN LAND-USE PLANNING

ON THE CONCEPT OF OWNERSHIP IN SOUTH AFRICA

by

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CHAPTER 1

INTRODUCTION

1.1 THE EMERGENCE OF PUBLIC PARTICIPATION IN SOUTH AFRICA

Ten years ago it was a commonly held belief that in South Africa the right of the public to participate in land-use planning was being paid lip service only.[1] Even if this were still the view today, recent occurrences in the field of physical planning suggest that the situation may be changing.

Two important developments stand out, both concerned with major pieces of land-use planning legislation. The first is the shelving, on 10 February 1987, of what had become known as the 'Norweto scheme'.[2] In a report on the rejection of the scheme it was stated that

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1 Pavlich, DJ "Zoning law and administration in the United States of America and the Republic of South Africa" 1978 SALJ 102; 228; 404; 412.

2 See the Press statement dated regarding the draft guide plan for the Central Witwatersrand dated 10 February 1987 by the Minister of Constitutional Development and Planning. The view is held that the Government was forced to bow to political pressure in shelving the scheme.

> there is no substitute for sound planning - and that includes taking cognisance of the feelings of the people who have to live with it, and in it.[3] (my emphasis)

The second is the decision in Johannesburg City Council v Tugendhaft[4] where Nicholas AJA held that

> the giving of notice of an amendment scheme is calculated to produce uncertainty regarding the proprietary rights and interests affected thereby, which uncertainty should not be allowed to continue indefinitely.[5]

In both these situations members of the public were granted the right to make representations regarding certain planning provisions which affected them. Both developments, by stressing the rights of and the part played by the citizens involved in these participatory procedures[6], have paved the way for an enlightened approach to full participation by the public in planning decisions which affect them.

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3 Pretoria News 11 February 1987 Editorial Comment 16.

4 1987 1 SA 16 (A).

5 24 F.

6 It should be noted that participatory procedures have been in existence for the past 20 years in the case of town-planning, and for the past 12 years in the case of guide plans. However, their significance has generally been underestimated and underutilised.

1.2 NORWETO

On 9 May 1978 the Minister of Planning and the Environment gave his approval[7] for the establishment of a statutory guide plan committee for the Central Witwatersrand.[8] In terms of a supplementary notice a guide plan committee for the same area was established, written proposals for inclusion in the plan to be drafted called for and an announcement made that all proposals received as a result of the first government notice would also be submitted.[9]

The annexure to this government notice indicated the area encompassed by the plan, namely the municipal areas of Alberton, Alexandra, Bedfordview, Diepmeadow, Dobsonville, Edenvale, Germiston, Johannesburg, Katlehong, Randburg, Roodepoort, Sandton, Soweto and Tokoza, a part of the municipal areas of Midrand and Modderfontein, the area of the Muldersdrif Local Area Committee and certain areas situated in the general area of jurisdiction of the former Transvaal Board for the Development of Peri-Urban Areas.

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7 In terms of section 6A of the Physical Planning Act 88 of 1967.

8 Government Notice 1376 Government Gazette 6086 dated 30 June 1978. Written proposals for inclusion in the proposed plan were called for.

9 Government Notice 2213 Government Gazette 7832 dated 16 October 1981.

The first meeting of the committee took place on 27 May 1982. Delegates included, inter alia, representatives from most government departments, the local authorities in the area, members of the provincial administration, the South African Transport Services, the South African Defence Force, ESCOM and the Rand Water Board.[10] Preparation of the draft guide plan took almost five years. It was released on 8 August 1986.[11] From the exposition in the draft guide plan of the spatial requirements for township development[12] and the guidelines for future development of the area[13] it is evident that emphasis was placed on new residential areas, especially

> to provide for the ... needs of the black population.[14]

Necessary for the implementation of the positive urbanisation policy[15] was the crucial provision in the draft guide plan which created

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10 Central Witwatersrand draft guide plan Department of Constitutional Development and Planning 1986 Tv.

11 See Press release of the draft guide plan for the Central Witwatersrand by the Minister of Constitutional Development and Planning date 8 August 1986.

12 Central Witwatersrand draft guide plan 162-174.

13 Op cit 208-224.

14 Op cit 174.

15 As accepted by the government in the White paper on urbanisation Pretoria Department of Constitutional Development and Planning 1986.

> a residential area for blacks within a reasonable distance of the employment opportunities in Verwoerdburg, Midrand, Sandton and Randburg ... on the eastern and northern sides of the Diepsloot Nature Area. In selecting a site, factors such as the existing development axis along the Ben Schoeman Highway, other existing and planned transport routes, the provision of services, and existing development were considered.[16]

An invitation was issued to all interested parties, including the general public, to direct written representations and comments, within sixty days, to the Director-General of the Department of Constitutional Development and Planning.[17]

In a later Press release[18] the period for the submission of representations was extended by sixty days.[19] Once again a request was made to everyone with an interest in the development of the guide plan area to submit comments and proposals, but this time what was stressed were

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16 Press release of 8 August 1986 2.

17 In terms of section 6A(6)(a) of the Physical Planning Act 88 of 1967. See also the Press release of 8 August 1986 by the Minister of Constitutional Development and Planning 3.

18 By the Minister of Constitutional Development and Planning, dated 20 September 1986. See also the Press release of the same date by the Director-General of the Department of Constitutional Development and Planning.

19 In terms of section 6A(6)(b) of the Physical Planning Act 88 of 1967.

the urban housing needs of the black population in particular.[20]

Residents living in these areas circulated petitions and arranged meetings to protest the plan. So vehement were the objections that it became necessary for the Minister of Constitutional Development and Planning to issue a further statement in which the conduct of all parties was deplored, and a request made to allow

> the prescribed and proven procedures to run their normal course.[21]

Submitted to the Department of Constitutional Development and Planning were

> a large number of divergent representations, especially with regard to the identification of land for the residential and related needs of the various population groups ... by various bodies, interest groups and individuals.[22]

In shelving the guide plan on 10 February 1987, the Minister stated that at that stage no further consideration could be given to the

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20 Press release dated 20 September 1986 2.

21 Press statement regarding the draft guide plan for the Central Witwatersrand dated 7 December 1986 3.

22 Press statement by the Minister of Constitutional Development and Planning dated 10 February 1987. The exact number of representations received cannot be given for I was informed by the Department that the matter is sub judice.

proposals regarding a new town for blacks in the vicinity of Diepsloot. Once again the White Paper on urbanisation[23] was referred to in terms of which it was obligatory for all alternatives to be thoroughly investigated and considered. In this regard the Minister announced

> the appointment of consultants to assist in evaluating possible sites which can be considered for black township development in the wider regional context. Considerations such as the socio-economic structure of the area, road and rail transportation, employment opportunities, pollution, environmental protection, soil conditions and development costs, will ... have to receive attention.[24]

This being a politically sensitive issue, justification can perhaps be found for the Minister's shelving of the draft guide plan until such time as the consultative committee has examined the broader issues. What is important to note, however, is the stress which has been placed on the participation of interested parties.

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23 See note 14 above.

24 Press release of 10 February 1987 2.

1.3 JOHANNESBURG CITY COUNCIL v TUGENDHAFT[25]

Fearing considerable traffic congestion, the developer of the Cheltondale Park hypermarket, in 1978, became interested in building a link road which would provide additional access to the complex. This road would bisect a large, attractive park which offered amenities for both old and young alike. The developer was prepared to pay the costs of such construction and on 30 May 1978 the management committee of the Johannesburg city council

> with fine disregard for legality ... (agreed) 'that the developer could proceed with the roadworks at its own risk prior to the completion of the legal requirements'.[26]

Immediate construction of the road commenced resulting in vehement objections from the local residents. The management committee, on 5 June 1978, rescinded its previous resolution and resolved to accept the developer's offer on condition that the road construction across the park be undertaken only after compliance with legal formalities.[27] An action committee, including Mr A Tugendhaft, was formed by residents opposing the construction of the proposed road which they

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25 1987 1 SA 16 (A).

26 20 I.

27 21 A-B.

feared would create a safety hazard and would interfere with the amenities of the park.

The city council then advertised its intention to close permanently a section of the park for the road. [28] Several hundred objections were lodged and the action committee made representations at an inquiry.[29]

In May 1981 the Administrator authorised the closing of the park.

In November of the same year a proposed amendment to the Johannesburg town-planning scheme[30] was advertised. Such amendment was necessary so that the park, zoned as 'public open space', could be rezoned as 'existing public road'.

Several hundred objections to the scheme were lodged by residents in the area.[31] At a hearing before the town-planning committee on 2 April 1982, which was attended by many wishing to lodge objections a

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28 In terms of section 68 of the Local Government Ordinance 17 of 1939 (T).

29 Appointed in terms of section 67(7) of Ordinance 17 of 1939 (T).

30 Amendment scheme 624.

31 The Town-planning and Townships Ordinance 25 of 1965(T) provides, in section 28, that any owner or occupier may in writing lodge an objection or make representations to the local authority within a specified period. He may also request in writing that he be heard by the local authority concerned. The local authority, in terms of section 29(1) read with section 29(2)-(4), shall fix a time, day and place for the hearing of such objection or representations and shall notify every person or local authority accordingly.

recommendation was made that the amendment scheme be adopted.[32] The rezoning was then considered by the management committee of the council at its meeting of 27 April 1982.[33] After a debate the issue was voted on, the result being that the amendment scheme was not approved.[34]

The developer refused to accept defeat and the matter was again brought before the management committee, which, on 30 November 1982, adopted the recommendation to rezone the land occupied by the park.

Thereupon the residents made application for an order declaring invalid and setting aside the resolution of 30 November 1982. The main ground for the relief sought was that the purported adoption of the scheme was a nullity, in that the council, having rejected the scheme on 27 April 1982, was functus officio.

The decision of the court a quo (Kirk Cohen J) was that

> the provisions of s29(6) are peremptory - as are the obligations laid upon the local authority to arrange a hearing of objections

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32 21 F-G.

33 The Town-planning and Townships Ordinance 25 of 1965(T) provides, in section 29(5), that after a hearing in terms of section 29(1), the local authority shall consider any objections and representations which have been received by it, and, after consideration, shall, in terms of section 29(6) either reject or adopt the scheme.

34 22 C-D.

> to consider them .... Subject to the right of postponement, a local authority ... is enjoined and obliged either to reject or adopt the draft scheme. If it votes to adopt the draft scheme, with or without amendment, then it becomes an interim scheme .... If, however, the local authority rejects the draft scheme, then cadit quaestio. The draft scheme comes to an end. There is no provision or procedure whereby a draft scheme, once rejected, may be reconsidered by local authority.[35]

The Appellate Division applied this decision, Nicholas AJA stating that

> there is no room in that provision for the consignment of a scheme to limbo, there to lie, possibly for years, until it should be resurrected and again brought before the council. In its terms s 29(6) requires finality. The reason is obvious. The giving of notice of an amendment scheme is calculated to produce uncertainty regarding the proprietary rights and interests affected thereby, which uncertainty should not be allowed to continue indefinitely.[36]

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35 23 B-C.

36 24 F.

1.4 PURPOSE AND OUTLINE OF STUDY

The decision to shelve the Norweto scheme[37] and the finding by Nicholas AJA in the Tugendhaft case[38], indicate that recognition is now being given to the rights of citizens to participate in planning decisions which affect them and their property. The clear acceptance of this principle indicates a turning point towards the more complete enjoyment of one's right of ownership than has been possible during the past century. In this light the effect on the concept of ownership in South Africa of public participation in land-use planning will be examined,[39] the method and division of the study taking the following form:

- a discussion of the concept of public participation in planning - historically, contextually, comparatively and critically;
- the determination of the role public participation plays in the planning process;
- an examination of the history and concept of land ownership in South Africa; and

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37 Supra 6.

38 Supra 11.

39 What needs to be kept in mind is the race differentiation in planning as it exists in South Africa. Relevant provisions will be referred to in this study.

- a decision as to the effect of public participation on the South African concept of ownership.

CHAPTER 2

PUBLIC PARTICIPATION

2.1 DEFINITION

Authors generally have difficulty in defining the concept of public participation.[1] One of the reasons for this could be the varying approaches to both planning and its terminology of the different professions involved, namely lawyers, planners and developers.[2] Moreover, synonyms for the term are often used, variations including 'citizen involvement', 'citizen control' or 'maximum feasible involvement of the poor'.

As a definition is imperative, the following is submitted:

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1 Roberts NA The reform of planning law MacMillan 1976 103; Alder J Development control Sweet and Maxwell 1979 3; Boden R "Public participation and the planning process" 1979 Planning and Building Developments 14.

2 McAuslan P Land, law and planning Weidenfeld and Nicholson 1975 1-33.

Public participation is the right of all members of an informed community to be actively involved in the planning process which affects them.

This definition requires explanation:

- **right:** The question of participation does not even arise unless *a right or opportunity* to participate is first identified or established.[3] Kahn[4] states that from both the individual and the *public point of view participation is the basis of democracy.* There are three basic rights which are inherent in the democratic process and which form the *framework for public participation.* These are

  - the right to be informed of the issues which require decision;
  - the right to influence the decision-making process;
  - the right to a reply from those elected when they have taken decisions.[5]

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3 Lucas AR "Legal foundations for public participation in environmental decisionmaking" 1976 *Natural Resources Journal* 73 76.

4 Planning, process and participation Inaugural lecture University of Natal 1982.

5 Op cit 9.

- **all members of a community:** We should be careful in applying this definition in our South African situation, since we have a diverse society consisting of 'many publics'.[6] A large portion of the general public is not involved in planning decisions at all, nor it seems will they be in the near future. Yet, vital planning decisions, especially those affecting the environment, concern directly or indirectly all population groups, all age groups and all income groups.[7]

- **informed:** In certain areas where public participation in planning is relevant, especially in the issue of environmental policies, emotional and irrelevant arguments are often raised and prove to be counter-productive.[8] For public participation to be effective there are two prerequisites:

  - planning authorities should always be ready and willing to accept ideas and representations from the public;
  - the public should be adequately and timeously informed of the relevant facts. This presupposes that information is provided at an early stage as to what is being planned and

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6 Cowen DV "Public participation in the planning process" 1980 Planning and Building Developments 11 13.

7 Ibid.

8 Cowen op cit 13; Kahn op cit 9.

why, and also that public disclosure of reasons for proceeding (or otherwise) with a project is given.[9]

- **planning process:** The planning process is invariably a lengthy one. Proper citizen participation presupposes involvement during all stages, from i tial planning and representation, to implementation and completion.

- **which affect them:** 'Them' is stressed to indicate that only those citizens who are affected by a particular project should be involved. Should outside parties interfere 'public participation' would become the long, wieldy, costly process it is often criticised of being.[10]

Should the term still retain some confusion, especially in the process of its being put into practice, an examination of Arnstein's[11] 'ladder of citizen participation' is proposed. This description of public participation is most well-known and widely used in understanding the various nuances inherent in the term.[12]

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9 Cowen op cit 14.

10 Infra 3.4.

11 Arnstein S "A ladder of citizen participation" 1969 American Institute of Planners Journal 216.

12 Roberts op cit 108; Fagence M Citizen participation in planning Pergamon Press 1977 122.

In order to encourage a more enlightened and rational debate on the theory, purpose and practice of citizen participation, Arnstein[13] devised her 'ladder of citizen participation'. Eight levels of participation were determined and for illustrative purposes these eight types were arranged in a paradigm with each rung corresponding to the degree of participation, namely:

8 Citizen Control	Degrees of Citizen Power
7 Delegated Power	
6 Partnership	
5 Placation	Degrees of Tokenism
4 Consultation	
3 Informing	
2 Therapy	Non participation
1 Manipulation	

13 Op cit 21.

The two bottom rungs, constituting the grade of least effectiveness, describe levels of non-participation. Their real objective is not to enable people to participate in planning or to conduct programmes, but to enable powerholders to 'educate' or 'cure' the participants. The technique of these two rungs is loosely to inform the citizenry of possible future action and, subsequently, tacitly to assume citizen support because of the lack of substantial opposition. The next three rungs (3, 4 and 5) are described as degrees of tokenism and are used to describe increased levels of potential involvement, the parameters of which are drawn by the paternalistic power elite. The last three rungs (6, 7 and 8) denote increasing levels of a revolutionary transformation of the prevailing conservative power pyramid.[14] Although this ladder is a simplistically stated framework, it is a useful tool in understanding the concept and degrees of public participation[15].

2.2 DEVELOPMENT

Public participation evolved essentially from the democratisation of society which was the hallmark of the 1950's and the 1960's.[16] This

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14 Fagence op cit (1.77) 123; Arnstein op cit 217-224.

15 Roberts op cit 108; Fagence op cit (1977) 122-125.

16 Boden op cit 14; Arnstein op cit 216; Fagence op cit (1977) 258.

occurred firstly in the United States of America and only later in the United Kingdom. During this period criticism of traditional planning arose, including, inter alia, that planning was insensitive to, and at times uncaring of, the community's needs and wishes. The response to much of this criticism consisted in attempts to ascertain public goals, and to allow the public veto of plans.[17] Specific regional solutions were the following:

2.2.1 United States of America

In the United States legislation for federal programmes in the 1950's required that, in order to qualify for urban renewal funds, a citizen's advisory committee should be set up to examine constructively the workable programme goals.[18] By the mid 1960's attempts were being made to establish local programmes which would not only be consultative with existing local governments, but would also be represented and administered by the population. These early programmes resulted in conflict, mainly because the citizens believed that federal and local governments were not really willing to share power.[19] One of the earliest exercises in citizen participation - the

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17 Tomlinson R "Some doubts regarding planning theory and professionalism" 1983 Se/pa 64 67.

18 Roberts op cit 104.

19 Roberts op cit 105.

Model Cities programmes[20] ended, in most instances, in a stalemate between the different authorities,[21] even though the Model Cities guidelines called for a balanced partnership composed of the city's political leaders, neighbourhood leaders and leaders of interested organisations.[22]

It became apparent that very little real planning was being done by the people whom the programmes were supposed to serve and that this was the actual cause of all the dispute. A second type of participation was attempted, whereby planning was done with the people.[23] The archetypal model was that used in Los Angeles,[24] where the approach was to

> go directly to the people and find out what kind of things they would like to see and have.[25]

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20 Fagence M "Citizen participation in the planning process (United States)" 1973 Journal of the Royal Town Planning Institute 188.

21 Roberts op cit 105.

22 Fagence op cit (1973) 188-189.

23 Roberts op cit 106.

24 Ibid. See further Fagence op cit (1977) 190.

25 Fagence op cit (1977) 190.

Although this plan was never enacted, it had a very positive effect in that it led to the publication of the English Skeffington Report.[26]

Participation practices in the United States are so many and so varied that it is impossible to give any detailed exposition of all areas where they are applicable or of the methods involved.[27]

However, what may be seen as the high point of citizen participation is the so-called Charette.[28] This takes the form of a simulation game where a symposium of some ten days duration is convened. Participants include district planners, community leaders, citizen representatives and leaders representing business, welfare, education and religious groups. At such a symposium the problems, opportunities, funds and the role of the citizens are discussed. These Charettes have been most successful in that they are

> the concentrated effort, genius and expertise of the neighbourhood residents. The rôle of the attendant officials is to set the operational context and to advise of contextual restraints and opportunities.[29]

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26 Skeffington MA People and planning: Report of the committee on public participation in planning HMSO 1969. For a discussion of the Report see 2.2.2 infra.

27 Fagence op cit (1977) 229.

28 Fagence op cit (1977) 301; Kahn op cit 11.

29 Fagence op cit (1973) 190.

2.2.2 United Kingdom

The stage for the development of public participation in the United Kingdom was set by:

- the evolution of planning as a social ideology;
- the growth of the idea that participation could act as a substitute for electoral democracy;
- the experience of continual dissatisfaction with the inefficiency of the administrative process;
- the increase of interest in the environment;[30] and
- the enactment of the 1954 Housing Act in the United States of America.[31]

The first modern planning statute to include participatory opportunities, *although of a passive kind, was the 1947 Town and Country* Planning Act.[32] Relevant provisions were that local planning authorities were required to substantiate their planning cases through

30 Fagence op cit (1977) 258; Roberts op cit 107.

31 Haar CM "Public v private interest in the land and the 1959 Act" 1961 Town Planning Review 95 97.

32 Chapter 51. This Act was largely repealed by the 1962 Town and *Country Planning* Act Chapter 38. See also Garner JF "Some aspects of planning law in England" 1957 University of Toronto Law Journal 49 for a discussion of the innovations under the 1947 Act.

public inquiries;[33] specific planning matters had to be publicised and public scrutiny planning registers and approved plans had to be made available.[34] Aggrieved persons had the right to make representations.[35]

In 1964 the Ministry of Housing and Local Government set up the Planning Advisory Group, whose main objectives included

> to ensure that the planning system serves its purpose satisfactorily both as an instrument of planning policy and as a means of public participation in the planning process.[36]

The recommendations of the Planning Advisory Group found substance in the 1968 Town and Country Planning Act.[37] During the preparation of this Act, however, the Skeffington committee was set up

> to consider and report on the best methods, including publicity, of seeking the participation of the public at the formative stage in the making of development plans for their area[38]

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33 Section 4 read with section 104.

34 Section 11(1).

35 Section 11(2).

36 Planning Advisory Group. The future of development plans HMSO 1965 paragraph 1.1.

37 Chapter 72.

38 Skeffington op cit paragraph I.1. See further Fagence op cit (1977) 265-267 for commentary on this report.

The main recommendations which emanated from this committee were that[39]

- the public should be kept informed;
- the public should be advised of the availability of information;
- public comment and representations should be continuously forthcoming;
- the local planning authorities should convene community forums;
- proposals should be publicised widely;
- community development officers should be appointed to secure the involvement of the traditional non-joiners;
- participants should be informed of the success or otherwise of their representations;
- a general effort should be made to educate the public about planning matters and procedures.

The spirit of the Skeffington report is contained in the 1971 Town and Country Planning Act.[40] Important provisions of this statute are that when devising a structure plan

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39 There were over 40 recommendations. See Skeffington op cit paragraphs IX.1-IX.

40 Chapter 78 Part II section 8 (structure plans); section 12 (local plans).

the local planning authority shall take such steps as will in their opinion secure

- that adequate publicity is given in their area to the report of the survey ... and to the matters which they propose to include in the plan;
- that persons who may be expected to desire an opportunity of making representations to the authority with respect to those matters are made aware that they are entitled to do so; and
- that such persons are given an adequate opportunity of making such representations.[41]

Furthermore the Minister may reserve the right[42] to require further publicity and public involvement in respect of plans submitted to him before he would be willing to consider them. If the Minister returns the structure plan to the local planning authority for additions and rectifications, he must inform the authority of his reasons for doing so.[43]

A broad spectrum of views on these provisions has come to the fore. Sir Desmond Heap, sceptical of citizen participation, states that the only need and requirement for citizen participation is the section

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41 Section 8(1). Section 12(1), in similar vein, provides for the preparation of local plans.

42 Section 8(4) and section 12(4).

43 Section 8(5).

referred to above. This section, he says, applies only to the making and bringing into operation of development plans, and therefore, as far as the law is concerned,

> citizen participation has nothing whatever to do with the day to day control of development by the granting or witholding of planning permissions.[44]

On the other hand there is the view that

> the Skeffington report is ... an 'inspirational' publication: that is, the prime intention is to urge upon both local planning authorities, the Department of the Environment and the general public alike, (a) the need for a greater understanding of the meaning of any stated policy and of the technical requirements involved; (b) the need for a more frequent, and more thorough *exchange of views; and (c) the need for an increase in the* active participation of members of the general public.[45]

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44 "Ambience and the environment - the shape of things to be" 1973 Journal of Planning and Environmental Law 201 209.

45 Bingham A "The shaping of our environment: problems of public participation" 1973 Journal of Planning and Environmental Law 6 10.

2.3 METHODS OF PUBLIC PARTICIPATION

2.3.1 Introduction

Referred to earlier was the development of public participation as a result of the democratisation of society.[46] If we examine the methods or forms which public participation can take, one of the first which comes to mind[47] is that of the ballot box.[48]

Just as there is variety in the content of public participation[49] so is there variety in the form, method or means by which it takes place. Two broad areas are discernable, namely

- conventional (or extra-judicial) participatory procedures; and
- judicial participatory procedures - those provided by the legal system.

2.3.2 Conventional means of public participation

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46 Supra 2.2.

47 Although not specifically relevant to planning, it facilitates an understanding of the concept.

48 Lucas op cit 73-75; Baxter L Administrative law Juta 1984 218.

49 Referring to Arnstein's 'ladder of participation' supra 2.1.

The most conventional and well-known means of public participation include exhibitions and displays, public meetings, the dissemination of information through leaflets, brochures and questionnaires. These methods are of little value, as citizens do not really take part in the planning process and there is little of the interaction between planners and citizens,[50] essential in any effective form of public participation.[51]

Numerous other methods are applicable, each with varying degrees of participation. These are interest groups,[52] public attitude samples[53] and feedback,[54] consultation,[55] and public representation,[56] with education providing an important basis for all of these.[57] Practical applications of these methods will be identified when public participatory possibilities which exist in this country are examined. At present the purpose is merely to categorise.

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50 Fagence op cit (1977) 275-287; McMillan CM "The engineer, the environment and public participation" 1982 The Civil Engineering Contractor 59.

51 Cowen op cit 13.

52 McMillan op cit 59.

53 McMillan op cit 60.

54 Sewell WR and Phillips S "Models for the evaluation of public participation programmes" 1979 Natural Resources Journal 337 343.

55 Ibid.

56 McMillan op cit 60.

57 McMillan op cit 60; Sewell op cit 343.

Other methods which have proven successful in the United Kingdom and the United States, for example the Delphi Method,[58] the Nominal Group Method,[59] the Charette[60] and many others,[61] will not be discussed: they are infrequently applied in South Africa and more stress should, of necessity, be placed on the vehicles for public participation created by the legal process.

2.3.3 Participation procedures provided by the legal process

Baxter[62] distinguishes a number of procedures which allow for a degree of participation, namely contracts and agreements; mediation; adjudication; investigation and consultation. Other methods include investigatory and advisory bodies;[63] statutory boards and councils;[64] government bodies;[65] and coordinating bodies.[66]

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58 See further Fagence op cit (1977) 292-297.

59 See Fagence op cit (1977) 297-301.

60 See supra 2.2.1 Fagence op cit (1977) 301-304.

61 Over fifty four means have been identified.

62 Op cit 217-225.

63 Baxter op cit 176-183.

64 Boulle L "Administrative justice and public participation in American and South African law" 1986 TSAR 136 149.

65 Baxter op cit 183.

66 Baxter op cit 184.

It is clear that there are a variety of methods according to which public participation may take place. A question which must be answered is how effective is public participation. To this end attention should be given to the simultaneous application of safeguards whereby objective evaluations can take place.[67] In the United States and Canada the past few years have seen the introduction of frameworks for the evaluation of public participation programmes.[68]

67 Sewell op cit 338.

68 Ibid.

CHAPTER 3

PUBLIC PARTICIPATION IN SOUTH AFRICAN LAND-USE PLANNING

3.1 PHYSICAL PLANNING - A DEFINITION

In his definition of physical planning Milton says that

> planning is a phenomenon of the present century. Previously government played only the smallest role in the regulation of the economic, social and physical organisation of society. Today it is accepted that it is a principal responsibility of the state to make provision for the proper planning of various and particular parts of an organised society. Physical planning is one of these particular functions, relating to the organisation of the physical environment and more specifically the use of land within the state.[1]

Physical, or land-use planning therefore relates to the control and use of land for various purposes[2] and activities. The principle of

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1 "Planning and property" 1986 Acta Juridica 267.

2 Since the scope of land-use planning is very wide only the major provisions, and those directly concerned with public participatory aspects will be discussed here. For a further discussion see Van Aswegen A "Land" in Joubert WA (ed) 14 The Law of South Africa Butterworth 1981 paragraphs 61-95.

zoning is the basis on which physical planning rests. This principle relates to the division of available land into specific areas and the placing of restrictions on the use of land within these areas. Taken into consideration are factors regarding inter alia geology, topography, population, climate, vegetation, *economic structure*, locality of natural resources and environmental concerns.

3.2 THE INTEGRATION OF CONSERVATION INTO LAND-USE PLANNING

The law regarding environmental conservation is, in most countries, of fairly recent origin; the integration of land-use *planning in* environmental conservation is of even more recent origin. Yet, in so many countries, the latter approach has been adopted, mostly with favourable *consequences and reaction*.[3]

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3 See, for example the Preface to 1978 Land Use and Environment Law Review where, in explaining the altered title, the editor states that recognition should be given to the fact that environmental law and land-use law are converging, both as a matter of substance and as a matter of administration. Darin-Drabkin H "Land use planning measures" 1976 Earth Law Journal 133 discusses the most important new policies of land-use management. *Here* environmental conservation is seen as being included in long-term national and regional land-use planning. See also Fisher DE "Environmental planning in New South Wales" 1982 Australian Law Journal 399; Loo Ed "State land-use statutes: a comparative analysis" 1977 Fordham Law Review 1154; Schroth P "The impact of environmentalism on *land-use control*" 1982 American Journal of Comparative Law 491; Deupsteen TL "Ontwikkelingen in het milieurecht gedurende de jaren zeventig" 1981 Nederlands *Juristenblad 879*.

In the control of new developments environmental considerations cannot be overlooked. Only consultation and cooperation in design can reduce waste and lessen the possible pressure placed on developers where either pollution from a new development cannot be readily reduced, or where a new development[4] poses a threat to ecological considerations.

On the basis of comparative study,[5] it is clear that the development of land-use planning, which has traditionally been effected at regional and local levels, should include more than the mere urban environment. Environment conservation on a broader level must form an essential part of any national planning process.

In South Africa, the position at present is that insufficient consideration of environmental issues occurs in the planning of land usage. It is therefore important that

> in the light of the many serious local environmental problems illustrated by the recent drought, the growing shortage of fresh water, soil erosion, desertification, overgrazing and the worsening scarcity of fuelwood in rural areas, there is an urgent need for conservation to be integrated into all

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4 Grant M Urban planning law Sweet and Maxwell 1982 431.

5 Research done in respect of Proposals for the amendment of the Environment Conservation Act 100 of 1982 by the Environmental Legislation Committee of the Wildlife Society of Southern Africa. The situation in the United Kingdom; United States; Canada; West Germany; the Netherlands was investigated - see references in note 3 supra.

development programmes.[6]

In 1980 a White paper on a national policy regarding environmental conservation,[7] which was regarded as a major commitment by the government to attempt to recognise and resolve some of the more serious environmental issues that faced and were to face South Africa, was published.[8] Giving obvious support to the principle that environment planning forms part of land-use planning, the report stated that

> In order to implement the broad environmental policy it is the aim of the government that new development projects should be undertaken in the light of environmental considerations. The impact of such projects on both the natural and the man-made environment should become a normal consideration in the planning, development and operational phases of projects.[9]

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6 "The great disasters of the world" Our living world 7 September 1986 7.

7 WP 0-1980. Department of Water Affairs, Forestry and Environmental Conservation. 1980. See infra 3.3.2.4.1 for an indication of its purpose as identifying participatory procedures.

8 Malan JGS Rabie MA and Fuggle RF "Official administration of environmental affairs" in Fuggle RF and Rabie MA Environmental concerns in South Africa Juta 1983 111 115.

9 Paragraph 3.1.

This is stressed by Page and Rabie[10] and by Van Meurs.[11] All are in agreement that the development of a comprehensive policy for environmental protection, in which environmental affairs are integrated with the planning function, has become a necessity in South Africa.

3.3 PUBLIC PARTICIPATION IN PHYSICAL PLANNING

3.3.1 Introduction

South Africa is presently witnessing a fundamental reassessment of the forms of democratic government at all levels. We are continually made aware of the evolving patterns of democracy by negotiation and consultation[12] and of a participatory as distinct from a representative democracy.[13] The Westminster system of representative

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10 "Land-use planning and control" in Fuggle RF and Rabie MA Environmental concerns in South Africa Juta 1983 445 467.

11 "Private recourse for environmental harm - South Africa" in McCaffrey SC and Lutz RE (eds) Environmental pollution and individual rights: an international symposium Kluwer 1978 103 113.

12 What comes to mind is the KwaZulu Natal/Indaba issue. A discussion of the situation prior to this is contained in Natal and KwaZulu: constitutional and political options by Boulle L and Baxter L Juta 1981.

13 Cowen DV "Public participation in the planning process" 1980 Planning and Building Developments 11 13.

democracy has been largely abandoned,[14] although one view is that this abandonment is nominal only.[15]

The United Kingdom[16] and United States of America[17] witnessed the evolutionary move towards effective public participation in the *ongoing planning process at all levels. So too in South Africa, where* the concept is still in the developmental stage, efforts are being made to increase opportunities for public comment.

The procedures which exist at present should be examined and, in the light of world-wide trends, cognisance taken of possibilities for the future.

3.3.2 Statutory participatory procedures

3.3.2.1 Introduction

Land-use planning takes place on the national,[18] regional and local levels of government. It originated at the local level with township

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14 Cowen op cit 13.

15 Van Wyk DH "Westminsterstelsel - requiescat in pace? of: kan 'n luiperd sy kolle verander?" 1981 THRHR 105.

16 Supra 2.2.2.

17 Supra 2.2.1.

18 See for example Floyd TB "National planning of land-use" 1943 Minutes of the Proceedings of the SA Society of Civil Engineers 93; 157.

establishment and only during the period immediately prior to World War II did any form of land-use planning on a national level come to the fore.[19]

This discussion of statutory participatory measures will not be divided on a chronological basis but the division will instead be according to principal and subsidiary legislation.

On the regional and local levels it is important to take note of the Provincial Government Act,[20] which provides for the dissolution of the four provincial councils.[21] In this way the provincial legislatures have become redundant, the legislative powers of the provincial councils having been transferred to the Administrator.[22] Any Ordinance which was in force in the province prior to the commencement of the Act remains in force.[23] Legislative powers in respect of the enactment of any new Ordinance, or the amendment or repeal of any existing Ordinance are in the hands of the

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19 Lewis C "The modern concept of ownership of land" 1985 Acta Juridica 241 248; Milton op cit 270.

20 69 of 1986.

21 Section 2.

22 Section 14. An important provision, in terms of subsection 2(a) is that the proclamation by the Administrator, of Ordinances, be approved by a joint committee of Parliament before it is issued. See further Basson DA and Viljoen HP Suid-Afrikaanse staatsreg Juta 1987 296-297.

23 Section 4.

Administrator. Before issuing any proclamation[24] the Administrator is required to publish details of the matter in a newspaper and to allow twenty-eight days for 'interested persons' to comment.[25] Basson and Viljoen welcome the introduction of this participatory procedure - the first in constitutional matters. By allowing interested persons the possibility of taking part in the legislative process, the destruction of the democratic process which resulted from the abolition of the provincial councils is being reversed.[26]

3.3.2.2 Group Areas Act[27]

Central in planning legislation is the Group Areas Act. Its purpose is

> to consolidate the law relating to the establishment of group areas, the control and acquisition of immovable property and the occupation of land and premises.[28]

Although it was initially not meant to regulate physical planning as such, retrospectively it is obvious that this statute can be regarded

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24 In terms of section 14(2)(a).

25 Section 16(b).

26 Op cit 297-298.

27 36 of 1966. For a discussion of the provisions of the Act see d'Oliviera J "Group areas" in Joubert WA (ed) 10 The Law of South Africa Butterworth 1980 paragraphs 492-494.

28 Long title of the Act.

as the first statutory provision in which the policy of physical planning is manifested.[29] Furthermore, its provisions have a significant influence on the physical environment. The mere fact that residential areas are denoted results in the regulation of their physical use. This is also recognised by Barker in his statement that

> in a democratic and multi-racial country like South Africa, physical planning must necessarily take place against the political background of the racial policy of the government-of-the-day. Group areas planning is, therefore, not merely an exercise in town and regional planning, but must be based on a combination of the principles of physical and political planning in which the racial policy of the government must be given full recognition.[30]

The Act provides for the establishment of a Group Areas Board,[31] appointed by the Minister, having as his responsibility the investigation of areas suitable for group areas, which are then established by proclamation.[32] Notice of an investigation is placed in newspapers circulating in the area, inviting all persons

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29 Grübe JGG "Metgewing vir fisiese beplanning" 1979 Beplanning 16 18.

30 Barker MCVT "The Group Areas Board and its functions" 1974 Tydskrif vir Beplanning 22 29-30. Besides indicating the physical planning aspect, this statement is indicative of the government's racial policies and should therefore be rejected.

31 Section 2.

32 Section 23.

who have an interest therein

to lodge any representations with the Board.[33] Proposals may also be made by interested persons with regard to any area to be included in the notice which sets forth the matter which is being investigated.[34] These inquiries held are supposed to be public,[35] yet there is no obligation to hold such an inquiry.[36]

The Group Areas Board is therefore a type of commission of inquiry created by statute. It is Baxter's view that such a permanent body generally plays more than an investigatory and advisory role, for it provides members of the public with an opportunity to air their views. In this way public participation in the determination of official policy could be enhanced.[37]

By its very nature the Board effects separation of racial groups in this country. Yet vital planning decisions, especially those affecting the environment, affect all population groups. Planning legislation, and particularly land-use planning dare not be

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33 Section 5(2).

34 Section 5(3).

35 Section 5(4).

36 Section 5(4). See also Schoombee JT "Group areas legislation - the political control of ownership and occupation of land" 1986 Acta Juridica 77 81.

37 Baxter L Administrative law Juta 1984 178.

discriminatory,[38] nor may it differentiate between the separate national and independent states in South Africa.[39] For these reasons and also because of the many recent calls for its repeal, it will not be given any further consideration here.

3.3.2.3 *Physical Planning Act*[40]

As regards proper planning legislation the first phase was the Natural Resources Development Act[41] which had as its purpose

> to promote the better and more effectively coordinated exploitation, development and use of the natural resources of the Union.[42]

To implement this principle the Natural Resources Development Council was created,[43] having as its functions, inter alia:

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38 Cowen op cit 13.

39 See especially the statement by Visagie, text to note 258 infra.

40 88 of 1967.

41 51 of 1947.

42 Long title of the Act.

43 In terms of sections 2 and 3. This Council was later renamed the Natural Resources and Planning Advisory Council.

- the investigation of the manner in which the natural resources could best be exploited, developed or used;
- the planning and promotion of the exploitation and implementation thereof;
- advising the Minister;
- research.[44]

The importance of this Act lies in the fact that it officially recognised that land-use planning was national in character and had to be controlled and coordinated at the highest level if effective and orderly planning were to ensue. This Act was repealed in 1967 and replaced by the Physical Planning and Utilisation of Resources Act,[45] the present title of which is the Physical Planning Act. The purpose of this Act is

> to promote coordinated physical planning and the utilisation of the Republic's resources.[46]

In order to fulfil this purpose, the Act provides for the control of the zoning and subdivision of land for industrial purposes;[47] the

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44 Section 4.

45 88 of 1967.

46 Long title of the Act.

47 Section 2.

establishment and extension of factories;[48] the reservation of land for either the utilisation of a specific natural resource[49] or as a nature area;[50] the establishment and disestablishment of a so-called controlled area[51] and restrictions on the use of land in these areas;[52] guide plans;[53] restrictions on the use of land for either brickmaking, stonecrushing and sandwashing[54] or the construction of a public road or railway line, for the purposes of a quarry,[55] or for the processing of any mineral.[56]

The most important section of the Act is that dealing with guide plans, defined as follows:

> in a South African context (it) aims to be a broad scale organisational framework with statutory backing which is intended to coordinate planning of and policies for the land-use, transportation and infrastructure of regions or

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48 Section 3. This section has now been repealed by section 3 of Act 92 of 1985.

49 Section 4(1)(a).

50 Section 4(1)(b).

51 Section 5.

52 Section 6.

53 Section 6A.

54 Section 6B(1)(a).

55 Section 6B(1)(b).

56 Section 6B(1)(c).

sub-regions for a period of up to 25 years.[57]

Operating with ministerial and cabinet authority only the earliest guide plans in South Africa were not statutory plans. From 1971[58] onwards the guide plan committees initiated and formulated the policy and modus operandi for all future guide plans. However, these early plans had certain weaknesses. Firstly they were not sufficiently binding on the constituent authorities and secondly they

> ' not give sufficient opportunity for public participation in that the existing procedure permitted only for duly elected bodies to participate.[59]

To obviate these shortcomings and to ensure that guide plans were to be binding on both the public and government bodies, the Physical Planning and Utilisation of Resources Amendment Act[60] was enacted, whereby the guide plan action was accorded legal status.[61] This action had as a consequence the most important statutory provision

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57 Jaspan SC "A critical evaluation of the guide plan procedure" 1979 Municipal Engineer 9.

58 Otto JF "Die rol van die Departement van Beplanning en die Omgewing in die beplanning van stedelike gebiede in die Republiek" 1974 S A Journal of Sociology 1 4.

59 Van Tonder JJ "The guide plan and its application in practice" April 1978 IMIESA 12 14. But see Jaspan op cit 10.

60 73 of 1975.

61 Section 6 of Act 73 of 1975.

relating to comprehensive land-use planning[62] - guide plans - planned eventually to be applicable to the whole of South Africa. The procedure in compiling a guide plan is as follows:

> The Minister of Constitutional Development and Planning may, after consultation with the Minister of Agriculture and the Administrator of the province concerned, by notice in the Government Gazette, establish a guide plan committee whose task it is to complete a draft guide for the area defined in the notice.[63] Although the guide plan committee is the body appointed to produce the draft guide plan, an opportunity is given to any person, including a local authority, who has an interest in the draft guide plan, to submit, within a specified period, written proposals regarding the plan.[64] Hereafter, the committee may make investigations and submit to the Director-General a draft guide plan.[65]
>
> Notice is given that the draft plan is available for inspection at the office of the Director-General. Furthermore, interested persons may, within a specified date, make more representations

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62 Page and Rabie op cit 473; Jaspan op cit 11.

63 Section 6A(1)(a). See section 6A(2) for provisions regarding membership of the committee.

64 Section 6A(4)(a).

65 Section 6A(5).

regarding the plan,[66] and are also afforded the opportunity of submitting evidence in support of such representations.[67] After receipt of the advice of the investigation committee, the Director-General must submit to the Administrator such advice, and all comments and representations received in connection with the draft guide plan, as well as his own comments.[68] The Minister may approve the draft guide plan with or without amendments.[69] Thereafter copies of the plan are made available for inspection and a notice is placed in the Government Gazette that a guide plan in respect of the area defined has been approved.[70] The Minister may at the request of any person, by notice in the Government Gazette, amend or withdraw a guide plan.[71]

Criticism of the guide plan procedure is that the plan is really only a policy document;[72] its administration is in the hands of various government departments, which traditionally do not readily cooperate with one another;[73] and large areas of land are excluded from the

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66 Section 6A(6).

67 Section 6A(8).

68 Section 6A(9).

69 Section 6A(10).

70 Section 6A(11).

71 Section 6A(19).

72 Gräbe op cit (1979) 24.

73 Page and Rabie op cit 477-478.

workings of the Act by wide exclusionary clauses.[74] Concerning the guide plan committee, it seems that practical limitations often hamper the appointment of deserving individuals. The committee is heavily loaded against the public at large and against the private sector.[75] Furthermore the largely negative attitude on the part of both public and officials hampers any positive development.

On the positive side it should be noted that this very procedure enabled residents to submit proposals on the Morweto issue, with the far-reaching effect that the plans to develop the area for township development were shelved.[76] As this is one of the few areas where direct involvement is sanctioned,[77] it should be protected and expanded. Within a process where the public is properly educated[78] as to its implications, it could become a most powerful tool.

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74 Section 13 provides for the exclusion of black areas.

75 Jaspan op cit 11.

76 Supra 1.2.

77 Boulle L "Administrative justice and public participation in American and South African law" 1986 TSAR 136 150.

78 Education of the public is largely absent. That it should not be underestimated is certain. See further the White paper on a national policy regarding environmental conservation paragraph 3.2; Sewell WR and Phillips S "Models for the evaluation of public participation programmes" 1979 Natural Resources Journal 337 343; McMillan CH "The engineer, the environment and public participation" 1982 The Civil Engineering Contractor 89 60; Jaspan op cit 10-11.

As a standard work of reference the guide plan document is receiving widespread recognition from persons in all walks of life - intending industrialists, business executives, government and semi-government agencies and public organisations.

The National Physical Development Plan,[79] as the broader framework, and the town-planning schemes,[80] as the narrower framework, are all brought into the picture to constitute a national planning procedure.[81]

3.3.2.4. Environment Conservation Act[82]

It is not without reason that the Environment Conservation Act has been the subject of much criticism.[83] What have been called 'its

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79 Infra 3.3.3.1.

80 Infra 3.3.2.12.2.

81 See further Jaspan op cit 9.

82 100 of 1982.

83 See eg Rabie MA "Codification of environmental law and the Environment Conservation Act" 1983 De Rebus 235; Cowen DV "Planning for both development and environmental conservation: a broad overview of the South African scene" 1981 Planning and Building Developments (Supplement) 1; Malan Rabie and Poggie op cit 115. In response to proposals submitted to the Minister of Environment Affairs the Draft Bill on Environment Conservation was published on 29 May 1987 - Notice 353 Government Gazette 10752. Drastic changes are envisaged in this Draft Bill. These are not discussed here. See however, " Thoughts and comments on the Draft Bill on Environmental Conservation 1987" 1987 (4) THRHR.

most important provisions[84] regulate the establishment of the Council for the Environment,[85] its objects and functions.[86] As far as membership of the Council is concerned, it was stated by the Minister during the second reading of the Bill that

> members will ... mainly be appointed on the ground of their expertise on any aspect of the environment or for the contribution that they will be able to make towards the conservation of the environment.[87]

However the Council remains an advisory body[88] merely giving advice to the relevant Minister without [illegible] course of action should be taken. Advisory committees generally identify problems and furnish advice of a more technical nature involving questions of efficiency and factual matters.[89]

Even though the Minister or cabinet is essentially the decision maker, the Council as advisory body is influential in the policy-formation process. A degree of public participation in the

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84 Rabie op cit (1983) 235.

85 Section 2. The Council for the Environment had already been in existence for almost a decade.

86 Section 4.

87 House of Assembly Debates 11 June 1982 col 9311.

88 Baxter op cit 177; Rabie op cit (1983) 237.

89 Baxter op cit 177.

decision-making process is facilitated by the Council and, when experts are included, this is only enhanced.[90] The Environment Conservation Act is of further significance to public participation in terms of its heritage, namely the White paper on a national policy regarding environmental conservation,[91] and the Commission of inquiry into environmental legislation.[92]

3.3.2.4.1 White paper on a national policy regarding environmental conservation

Two aspects are relevant here. Firstly environment impact assessment,[93] which assists the decision maker in evaluating environmental considerations effectively, and secondly education,[94] since

> public awareness of all the environmental factors is stimulated[95]

and because man

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90 Baxter op cit 177.

91 WP 0-1980.

92 Department of Planning and the Environment RP 10/1982.

93 As recommended in paragraph 3.1. These assessments form the most significant type of participatory procedure and are discussed separately infra 3.3.3.7.

94 Also a participatory procedure discussed infra 3.3.3.6.

95 Paragraph 3.2.2.

> forms an integral part of the environment and ... must contribute positively to this interaction.[96]

However, the White paper is of little value since it is merely a declaration of a particular government's intention and is in no way legally binding.[97] Moreover, it cannot ever be used in the interpretation of the Act which flowed from it.[98]

3.3.2.4.2 Commission of inquiry into environmental legislation

The 1980 White paper was seen as constituting a first step in the rationalisation of environmental legislation, for the Act which it proposed was to provide for the creation of a statutory Council for the Environment as well as the necessary machinery for the combating of noise and litter and the control of solid waste.[99] In the same year a Bill provided

> for the coordination of all conduct directed at or which may have an influence upon the environment.[100]

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96 Paragraph 3.2.3.

97 Malan Rabie and Fuggle op cit 116.

98 Glavovic PD "The legal status of the Wilderness: aspects of the 1984 Forest Act" 1985 SALJ 162 165.

99 Paragraph 5.

100 Government Notice 521 Government Gazette 7139 of 25 July 1980.

This bill was referred to a select committee. This committee, later the commission of inquiry into environmental legislation,[101] had as its terms of reference

> to inquire into and report on legislation to provide for the coordination of all action which is intended to or which may have an influence upon the environment and to formulate such legislation.[102]

This commission of inquiry drew up an Environmental Conservation Bill very similar to the 1980 Bill. The 1982 Act is also substantially in agreement with these two Bills.[103]

The dissenting 'Comments and Motivation'[104] although ignored at the time, are still relevant today, namely, that the Council for the Environment, consisting of a limited number of members cannot adequately deal with the complex and variable range of issues covered by Environment. The Council has no 'teeth' since the real powers are vested in the hands of the Minister and Director-General. Furthermore, these powers do not achieve coordination.[105]

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101 Appointed in terms of Proclamation 90 Government Gazette 7565 of 1 May 1981.

102 Ibid.

103 On this matter see also Pabie op cit 236.

104 By Wood NB Report of the commission of inquiry into environmental legislation RP 10/1982 20.

105 Report op cit 20.

Generally commissions of inquiry are important channels whereby individual and collective representations may be transmitted to decision makers.[106] However, South African courts[107] have shown that they are reluctant to apply the principles of fairness which are designed to facilitate participation. Baxter[108] refers to the position in both Canada and New Zealand. Here recommendations have been made for legislation governing commissions of inquiry to make adequate provision for the right of representations by individuals who may be adversely affected as a result of investigations. Furthermore proceedings should be held in public. He advocates similar reforms for South Africa.

In the passage through Parliament of the Bills which became the 1982 Environment Conservation Act there is little evidence of any alterations having been made and the question may be asked whether in fact changes failed to be made or people failed to request them.[109]

3.3.2.5 Conservation of Agricultural Resources Act[110]

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106 Baxter op cit 222.

107 See eg South African Defence and Aid Fund v Minister of Justice 1967 1 SA 263 (A); Bell v Van Rensburg 1971 3 SA 693 (C).

108 Op cit 223.

109 Which would be a case for education. See supra 3.3.3.6.

110 43 of 1983.

This Act provides for the

> control over the utilisation of t natural agricultural resources in order to promote the conservation of the soil, the water sources and the vegetation.[111]

In order to achieve these aims conservation committees may be established[112] by the Minister in order to promote the conservation of the natural agricultural resources[113] and to advise the department.[114] These committees consist of persons, appointed by the Minister, who have a knowledge of or interest in[115] the conservation of the Republ natural agricultural resources and who are land users in the area.[116] The possibility for delegation by the Minister exists.[117] A *regional conservation committee*[118] *has* the task of advising each conservation committee as well as advising the department. A conservation *advisory board*[119] *has the function of* advising the

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111 Long title of the Act.

112 In terms of section 15.

113 Section 15(2)(a).

114 Section 15(2)(b).

115 *Section* 15(3).

116 Section 15(3)(e).

117 *Section* 15(2)(c).

118 Section 16.

119 Established in terms of *section* 17.

Minister. Besides departmental members,[120] members of the board represent, inter alia, the regional conservation committees.[121] Similar to the Council for the Environment,[122] these conservation committees, which are essentially advisory bodies, do facilitate some means of public participation in the planning process.[123]

3.3.2.6 Atmospheric Pollution Prevention Act[124]

This Act has as its purpose

> to provide for the prevention of the pollution of the atmosphere and for the establishment of a National Air Pollution Advisory Committee.[125]

This Committee[126] has as its functions, inter alia, to advise the Minister on all matters relating to the control, abatement and prevention of air pollution;[127] to study and report to the Minister

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120 Section 17(3)(a)(ii).

121 Section 17(3)(a)(iii).

122 Supra 3.3.2.4.

123 Baxter op cit 177.

124 45 of 1965.

125 Long title of the Act.

126 Established in terms of section 2.

127 Section 3(a).

on measures outside the Republic;[128] to stimulate interest in the problem of air pollution and for that purpose to arrange for lectures, films, exhibitions, etcetera.[129] Provision is also made in the Act for the establishment of the Air Pollution Appeal Board,[130] whose function it is to hear and determine appeals from decisions of the chief officer,[131] or from decisions of any regional appeal board.[132] Regional appeal boards consist, inter alia, of persons appointed by the Minister and, after consultation, other persons who are suitably qualified.[133] Although in most cases there is no provision for consultation between the Minister and members of a board, this Act does provide for that positive possibility.[134]

The type of appeal[135] applicable here is a wide appeal

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128 Section 3(b).

129 Section 3(c). This section is particularly relevant as it stresses the need for education. See especially 3.3.3.6 supra and compare the education provisions of the White paper.

130 Section 5(1)(a). See also Rabie MA "Administratiefregtelike appelle" 1979 De Jure 128 153-154.

131 In terms of section 13.

132 In terms of section 25. A regional appeal board is established in terms of section 5(1)(b).

133 Section 5(2).

134 Rabie op cit (1979) 153.

135 See Baxter op cit 256 et seq for a distinction. See particularly Rabie MA "Appel deur Yskor ingevolge die Wet op Voorkoming van Lugbesoedeling" 1974 THRHR 186.

> wat inhou dat die raad nie beperk word tot 'n oorweging van die korrektheid al dan nie van die hoofbeampte se beslissing ingevolge die getuienis en ander gegewens wat hy ... tot sy beskikking gehad het.[136]

Since these boards (regional and appeal) are indicative of some sort of adjudicative process, a form of participation is present.[137]

A further form of participation evidenced by the Act is that type of consultation,[138] in terms of which the Minister of Health and Welfare[139] may, after consultation with the Minister of Mineral and Energy Affairs[140] or the Minister of Industries, Commerce and Tourism,[141] authorise certain actions. Furthermore the Minister may consult[142] with the chief officer[143] in order to authorise a certain person[144] to perform particular actions.

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136 Rabie op cit (1974) 188.

137 Baxter op cit 220; Rabie op cit (1979) 153.

138 Baxter op cit 223.

139 See definition of 'Minister' in section 1.

140 Section 6(2)(a).

141 Section 6(2)(b).

142 Section 6(2)(a) and section 6(2)(b).

143 Appointed in terms of section 6(1).

144 Section 6(2)(c).

This type of consultation complies with Baxter's definition of 'consultation between administrative officers',[145] one of the procedures which he indicates as allowing for a degree of participation.[146]

3.3.2.7 Lake Areas Development Act[147]

The Lake Areas Development Act has as its purpose

> to provide for the establishment of lake areas under the control of a Lake Areas Development Board.[148]

This definition does not say too much and, judging by the debate on the Bill,[149] the purpose is actually to make provision for the orderly and coordinated development and utilisation of various river mouths, lagoons and lakes. The Act itself empowers the State President, by proclamation to

> declare any land comprising or adjoining a tidal lagoon, a tidal river or any part thereof, or any other land comprising or adjoining a natural lake or a river or any part thereof which is within the immediate vicinity of a tidal lagoon or a tidal

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145 Op cit 223.

146 Op cit 217.

147 39 of 1975.

148 Long title of the Act.

149 House of Assembly Debates vol 56 col 4143 15 April 1975.

river, to be a lake area.[150]

Furthermore a Lake Areas Development Board is established,[151] consisting of members appointed by the Minister of Agriculture.[152] The objects and powers[153] of the Board are to control, manage and develop any state land situated within any lake area. Delegation of powers by the Minister to any officer in the public service is possible.[154] Regulations may be made as to

- the control over such state land within any lake area;[155]
- the siting, construction, erection and maintenance of and control over buildings and other improvements within any lake area;[156]
- the regulation of the use of amenities provided for visitors to any lake area.[157]

Despite these provisions for delegation, it has been stated that

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150 Section 2(1)(a).

151 Section 3.

152 Section 4.

153 Section 11.

154 Section 21.

155 Section 23(1)(a).

156 Section 23(1)(b).

157 Section 23(1)(g).

> the Minister is in truth a planning authority for lake areas.[158]

Together with the fact that only the public sector seems to be involved in constituting the Board[159] and the question of delegation, this criticism of the Minister's capacity indicates that no effective possibilities for public involvement exist, despite provisions to the contrary.[160]

3.3.2.8 Mountain Catchment Areas Act[161]

This Act provides for

> the conservation, use, management and control of land situated in mountain catchment areas.[162]

The Minister of Water Affairs, Forestry and Environmental Conservation may declare certain land to be a mountain catchment area.[163] He may issue directives[164] to the landowner regarding the

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158 Blecher MD "Law of property" 1975 Annual Survey of South African Law 214 222.

159 Jaspan op cit 11.

160 For example the Lake Areas Development Board.

161 7 of 1970.

162 Long title of the Act.

163 Section 2.

164 Section 3.

use of the land which may include restrictions on agricultural activity, conservation or eradication of existing vegetation and the prevention of soil erosion.

The Minister may furthermore establish in any such area an advisory committee,[165] at least two thirds of whose members are to be appointed by the Minister,[166] or any body, institution, group or association which has an interest in the area in question.[167] The remaining third of the members are elected from landowners who are affected and private persons,[168] a step in the right direction of some involvement by the public.

3.3.2.9 Forest Act[169]

The main purpose of this Act is to provide for the protection, management and utilisation of forests.[170] This is a lengthy Act, consisting of ninety sections and divided into twelve parts.

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165 Section 6.

166 Section 6(2)(b)(i)(aa).

167 Section 6(2)(b)(i)(bb).

168 Section 6(2)(b)(ii).

169 122 of 1984.

170 Long title of the Act.

As regards land-use planning, the provisions in the Act which touch on this are: control over afforestation;[171] control over state forests;[172] protection of biota and ecosystems;[173] and, to a lesser extent, the Forestry Council;[174] the National Botanic Gardens;[175] and the National Hiking Way System.[176] The latter two parts will not be examined as they are not concerned with the planning of land-use on a national level.

Those aspects dealing with land-use planning where involvement by the public is possible are the following:

> an owner who wishes to establish a commercial timber plantation may apply for approval to the Director-General.[177] Where such owner is aggrieved, he may appeal to the Minister.[178] In the case of control over forests the Minister must give notice in the Government Gazette of his intention to demarcate a

171 Part II sections 7-9.

172 Part III sections 10-12.

173 Part IV sections 13-15.

174 Part VIII sections 47-56.

175 Part IX sections 57-72.

176 Part VII sections 28-46.

177 Section 7(2).

178 Section 7(3).

forest[179] and also cause a copy of such notice to be served on the body which represents organised agriculture in the specified district.[180] Should any person wish to object, he may do so, in writing, to the Minister.[181]

The Minister may declare a particular tree, or group of trees to be protected.[182] In order to perform this function he may establish consultative committees[183] to advise him, and local control committees[184] to perform functions prescribed by him.

Further consultation is possible where, on the recommendation of the Council for the Environment, the Minister may, by notice in the Government Gazette, set aside any state forest[185] as a wilderness area for the preservation of an ecosystem or the scenic beauty.[186]

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179 Section 10(1)(a)(i).

180 Section 10(1)(a)(ii).

181 Section 10(1)(b).

182 Section 13(1).

183 Section 13(4)(a)(i).

184 Section 13(4)(a)(ii).

185 Section 15(1)(a).

186 Section 15(1)(a)(ii).

The Forestry Council has as its object the promotion and encouragement of the development of the forest and timber industry.[187] The Council consists of members[188] appointed by the Minister to represent timber growers, timber processors and other persons who can assist the Council in achieving its objects. The functions of the Council are generally concerned with the timber industry. As far as the Forestry Council is concerned, a possibility of participation in land-use planning exists only where

> by itself or in cooperation with any department of State or any person (the Council may) undertake research, research development and timber technology promotion, and provide training ... which affects the forest or timber industry.[189]

3.3.2.10 National Parks Act[190]

One of the more important provisions of the National Parks Act is the establishment of the National Parks Board of Trustees[191] which is responsible for the control, management and maintenance of parks. The members of the Board consist of the Administrators and eight other

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187 Section 48.

188 Section 49.

189 Section 50(a).

190 57 of 1976.

191 Section 5.

members, included among which is one nominated by the Wildlife Society.[192]

The Board has a variety of functions,[193] an important one being that, if authorised to do so by the Minister, it may investigate the question of whether or not it is desirable to have any area declared a national park or to have any land included in a national park. An important board such as this should have more independent representatives, in order to comply with full participatory requirements.

3.3.2.11 Regional Services Councils Act[194]

The Regional Services Council Act provides for the establishment of Regional Services Councils[195] which may perform various functions.[196] These functions include, inter alia, land-usage and transport *planning in the region, environment conservation, refuse dumps,* recreation, etcetera - all important physical planning matters. This Act makes participation possible on a number of levels. Where a region is delimited, the Administrator may concur with other cabinet

192 Section 5(3)(a)(i).

193 Section 12.

194 109 of 1985. See also Basson and Viljoen op cit 304-306.

195 Section 3.

196 Listed in Schedule 2.

ministers[197] and consult with the local bodies in the region, the Council of each region *and 'any other body or person'*.[198] *The* Administrator is then in a position to establish a Regional Services *Council*[199] *whose* constitution allows for proportional representation[200] by all the different race groups. The Act provides further for 'representative bodies'[201] consisting of elected members who manage the interests of the relevant persons or communities.

3.3.2.12 Township establishment and town-planning

It is necessary to distinguish between township establishment or development on the one hand and town-planning on the other. Township establishment refers to the development and layout of new towns, taking into account particularly the services to be provided. Town-planning is the use to which certain areas are *put within an existing* town - in other words zoning.

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197 Section 2(2)(a).

198 Section 2(2)(b).

199 Section 3.

200 Section 6.

201 Section 1.

3.3.2.12.1 Township establishment

Township establishment is concerned with the development of new towns, which is regulated in terms of the various Ordinances.[202] The most important aspect of township development is the procedure involved, and all the Ordinances provide that no township may be established other than in accordance with the provisions of the relevant Ordinances.[203]

Each of the Ordinances contains detailed provisions regarding township development. There are significant differences between them,[204] but in very broad outline the procedure is as follows:

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202 Town-planning and Townships Ordinance 25 of 1965 (T) Chapter III; Townships Ordinance 33 of 1934 (C) Chapter II; Townships Ordinance 9 of 1969 (O) Chapter II; Town Planning Ordinance 27 of 1949 (N) Chapter III. See also the Town-planning and Townships Ordinance (T) 18 of 1986 published by Administrator's Notice 42 in Extraordinary Provincial Gazette of 10 June 1987 Chapter III. Since this Ordinance was published after completion of this report , it will not be discussed in detail . References to the 1965 and 1986 Ordinances will therefore appear together. Section 35 of the Black Communities Development Act 4 of 1984 as amended, particularly by Act 74 of 1986, provides that, for black communities in so-called development areas, townships may be established by a development board, a local authority or a township developer.

203 Section 57 (T); section 6 (C); section 7 (O); section 11 (N). See also section 66 of 1986 Ordinance (T).

204 For a detailed exposition see the relevant Ordinances and also De Jager T Alienation of Land data 1982 90-162. Since the public enjoys little involvement it is unnecessary, within the context of this report, to provide a detailed discussion.

- a Townships Board should be established;[205]
- the owner of land on which the proposed township is to be established must apply to the administration for permission;[206]
- the application should be supported by relevant documents and information;[207]
- the Board must advise the Administrator as to the necessity of township establishment;[208]
- the application must be advertised, such advertisement calling for objections;[209]
- detailed plans are required as to how the township is to be laid out, setting out the nature of conditions of establishment;[210]
- particulars of the plan and conditions must be submitted to the Townships Board;[211]

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205 Section 3 (T); section 2 (C); section 2 (O); section 8 (N); section 3 of 1986 Ordinance (T).

206 Section 5B (T); section 11 (C); section 7 (O); section 12(1) (N); section 69 of 1986 Ordinance (T).

207 Section 5B(1) (T); section 11(1)(a) (C); section 8(1) (O); section 12(5) (N); section 69(2) of 1986 Ordinance (T).

208 *Section 18 (C); section 9(6) (O).*

209 Section 5B(6) (T); section 11(5) (C); section 9(1) (O); sections 14 and 15 (N); section 69(6) of 1986 Ordinance (T).

210 Section 16 (N).

211 Section 19 (N).

- The Board must report to the Administrator. If the report is favourable a diagram of the township is submitted to the Surveyor-General for final approval;[212]
- the plans are then registered in the Deeds Office;[213]
- the Registrar informs the Administrator of the opening of a *register, whereupon the township is proclaimed* in the Official Gazette together with the conditions of establishment.[214]

Important differences in procedure are that the Cape Province makes a distinction between three procedures, namely where there is a minor subdivision;[215] where a township is established either on the direction of the Administrator;[216] or on the general application by the owner of the land.[217]

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212 Section 60 (T); section 19 (C); section 11 (O); section 21 (N); sections 71-72 of 1986 Ordinance (T).

213 In terms of sections 46-49 of the Deeds Registries Act 47 of 1937 as provided for by section 68 (T); section 20(1) (C); section 13(1) (O); section 22 (N); section 76 of 1986 Ordinance (T).

214 Section 69 (T); section 20(6)(b) (C); section 14 (O); section 23 (N); section 79 of 1986 Ordinance(T).

215 Section 9 (C).

216 Section 10 bis (C).

217 Section 11 (C).

The Transvaal distinguishes the procedure where either someone other than the Local Authority,[218] or the Local Authority[219] takes the initiative.

In Natal the procedure applies to towns established outside the borders of Pietermaritzburg, Durban and other exempted local authorities.[220]

3.3.2.12.2 Town-planning

Town-planning - where the use of the land is controlled by the application of a particular use category - was a logical successor to *township establishment*, for it was only later that residential and business purposes could be identified and that the population became less self-sufficient and more interdependent. A stage was reached where control in the mixture of uses became necessary.

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218 Chapter III 1986 Ordinance (T).

219 Chapter IV 1986 Ordinance (T).

220 Section 33 (N).

The initial forms of control were by means of restrictive covenants on racial occupation,[221] density and use.[222] The latter two have been retained in the purpose of town-planning, namely zoning.[223]

Each of the Ordinances[224] provides that town-planning schemes have as their purpose or objective the

> coordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote health, safety, good order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development.[225]

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221 An example is section 29 of the 33 Articles of the South African Republic approved on 23 May 1849. Town-planning in black areas is at present regulated by other statutory measures - see eg sections 38-45 of the Black Communities Development Act 4 of 1984.

222 See eg the provisions of the 1858 Regulatie voor de dorpen in de Zuid-Afrikaansche Republiek.

223 For example, residential, business, industrial etc.

224 Ordinance 15 of 1986 (T); Ordinance 33 of 1934 (C); Ordinance 9 of 1969 (O); Ordinance 27 of 1949 (N). The Black Communities Development Act 4 of 1984, provides, in section 36, that a development board may carry out a town-planning scheme. Land may also be sold, let or hypothecated in terms of sections 36(1)(d) and (f).

225 Section 17(1) (T); section 35(1) (C); section 25(1) (O); section 40(1) (N). The word 'amenity' does not appear in the Natal Ordinance and 'beauty' replaces 'amenity' in the Orange Free State Ordinance. See also section 19 of the 1986 Ordinance(T). The purpose as stated in the Ordinances is relevant in that it indicates that the purpose of town-planning is in the public interest. See infra 4.2 for the implications hereof and the changes in the concept of ownership envisaged by the public participation provisions of the Ordinances.

In every case the Ordinances provide that the relevant town-planning scheme should include provisions to

- regulate, restrict or prohibit the development of the area to which it applies;
- *achieve the objects of the scheme, including regulations as to* the provision of a scheme;
- deal with the matters specified (mentioned in the Schedules).

Each Ordinance[226] contains detailed provisions regarding town-planning schemes. Although the Ordinances do evidence minor differences in procedure, they have all been enacted along similar lines.

Only in the Transvaal is there a major difference where provision is made for the approval of a draft scheme.[227] The procedure in respect of a draft scheme is that it must first be open for inspection by the public,[228] during which time interested parties may lodge objections and make representations.[229] Thereafter there is the possibility of

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226 Ordinance 25 of 1965 (T) Chapter II; Ordinance 33 of 1934 (C) Chapter IV; Ordinance 9 of 1959 (O) Chapter III; Ordinance 27 of 1949 (N) Chapter IV. See the 1986 Ordinance (T) Chapter II.

227 Sections 26-29 (T). See sections 28-30 of 1986 Ordinance(T).

228 Section 26(1).

229 Section 28; section 28(2) of 1986 Ordinance (T).

hearing objections and giving evidence.[230] The scheme should be open to the public[231] before it is either rejected or adopted by the local authority.[232] Upon adoption the scheme is known as an interim scheme,[233] which is presented to the Director of Local Government for approval.[234]

From this stage onwards the procedure in all the provinces is similar. The first step is that the scheme is submitted for consideration and comment to a Townships Board,[235] or as it is known in Natal, the Town and Regional Planning Commission.[236] These Boards then call for public representation[237] and hold public hearings[238] regarding the scheme.

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230 Section 29(1)-(3); section 29(1) of 1986 Ordinance (T).

231 Section 29(4).

232 Section 29(6); section 29(2) of 1986 Ordinance (T).

233 Section 29(7); section 29(3) of 1986 Ordinance (T).

234 Section 29(8); section 30(1) of 1986 Ordinance (T).

235 Section 31(1) (T); section 37(1) (C); section 27(1) (O); section 37(1) of 1986 Ordinance (T).

236 Section 51 (N).

237 Sections 31-32 (T); section 37(1) (C); section 27(2) (O); sections 51-52 (N). See section 33 of 1986 Ordinance.

238 Section 33 (T); section 38 (C); section 27(3) (O); section 53 (N). See section 35 of 1986 Ordinance (T).

Thereafter the Board is required to consider the scheme in relation to the representations it has received,[239] and submit a report on the scheme to the Administrator.[240] The Administrator's approval must be gazetted after which the scheme comes into operation as an approved scheme.[241]

Public participation is furthermore possible in the imposition of town planning conditions. These have both a contractual and legislative basis,[242] often being the result of bargaining and negotiation between the developer, local authority and provincial administration.[243] Town-planning conditions are subject to approval by the Administrator, often after a certain amount of negotiation.[244] This process of public participation is necessary for the collection of all the relevant information: even though it may be defective it

> is still a price that ought to be paid for the virtue of acceptability,[245]

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239 Section 34(1) (T); section 39(1) (C). See section 36 of 1986 Ordinance (T).

240 Section 34 (T); section 41(1) (C); section 29 (O); section 53(3) (N). See section 36(6) of 1986 Ordinance (T).

241 Section 36(1) (T); section 41(2) (C); section 29(2) (O); section 54(1) (N). See section 39(1) of 1986 Ordinance (T).

242 Wiechers M Administratiefreg Butterworth 2ed 1984 132.

243 Baxter op cit 218.

244 Baxter op cit 352.

245 Baxter op cit 155.

for when

> public participation is denied ... all the undesirable consequences of a system of closed and rigid administrative control ensue.[246]

In Natal the Town Planning Appeal Board[247] is an independent body staffed by private persons appointed by the Administrator.[248] Proceedings are conducted in an adversary manner, under legal chairmanship and reasons for decisions are given, which decisions are subject to automatic review by the Administrator.[249] Baxter calls this

> an intriguing compromise between the need for justice in the administrative process and the desire for some form of political control over policy decisions.[250]

Planning issues, he says

> have a substantial policy content; and by means of this appeal/review mechanism the appellate system is made politically

246 McCarthy v Musthefghts (Pty) Ltd 1974 4 SA 627 (C) 631 A.

247 Established in terms of section 73 bis.

248 Section 73 bis (1)(a).

249 Section 73 sex.

250 Op cit 182.

responsive.[251]

3.3.3 Non-statutory participatory possibilities

3.3.3.1 National Physical Developme . Plan[252]

In 1970 the Pretorius Committee was appointed[253] to investigate and report on, inter alia, the division of the planning functions among the several planning bodies on the different administrative levels. The report, which appeared in 1971, recommended that a National Physical Development Plan be compiled, indicating, on a regional basis, the resources of the country and identifying national development policies for the future.[254]

The plan itself, which was published in 1975, indicated that it was an attempt to regulate the population distribution in South Africa so

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251 Ibid.

252 Department of *Planning and the Environment 1975.*

253 PJVE Pretorius was the chairman of the subsidiary committee of the Planning Advisory Council which published the Report and recommendations on the relations between the government, provincial and local authorities in the field of physical planning Department of Planning 1970.

254 Op cit 14.

as to be of the greatest advantage to everyone.[255] The means whereby this was to be achieved was to divide the country into forty-two socio-economic development areas and four metropolitan areas, taking into consideration the following criteria:

- the nodal core with its sphere of influence; population distribution; natural resources; infrastructure; physical attributes; economic activities and administrative and political boundaries.

A feature on which the plan is based is that of population concentration. As a result the plan distinguishes, on a *macro level, metro*politan areas and growth points. On the micro or regional level, the plan indicates main towns, growth points and growth poles.[256]

A major flaw of the National Physical Development Plan is that in its preparation no cognisance was taken of economic factors. This problem is at present being remedied by the Department of Constitutional Development and Planning,[257] through the incorporation of the Regional Economic Development Plan.

An erstwhile Chief Director of Physical Planning has stated that

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255 National Physical Development Plan (Foreword).

256 National Physical Development Plan 15.

257 A revised Plan is in preparation.

> *planning on the scale* of the NPDP must take full cognisance and form part of spatial planning for the whole of Southern Africa, including not only our own bantu homelands but also neighbouring *independent states*.[258]

His statement is relevant in view of the fact that the Group Areas Act[259] still regulates overhead land-use planning on a racial basis in South Africa.

The appointment of the Pretorius Committee, which recommended the creation of the Plan, was important in that it represented a channel through which representations to decision makers became possible.[260] Furthermore the regions as demarcated in the National Physical Development Plan were the result of many years of research and were influenced by the work of many people. By means of congresses which were attended by all the regional development associations in the country, the proposals were *tested and approved*.[261] *This process is* part and parcel of the democratic decision-making process which *implies involvement by a fully informed society*.[262] Only once

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258 Visagie WF "The place of the NPDP in physical planning" 1976 Beplanning 29 31.

259 36 of 1966. See further the discussion of this Act supra 3.3.2.2.

260 Baxter op cit 222.

261 Visagie op cit 34.

262 Gröbe JGG "Governmental planning in South Africa: the development of planning methods and techniques" 1980 Beplanning 12 26.

everyone comes to realise that there are very definite limits to the overall rate of growth, and becomes fully aware of what part each centre is to play in the national striving towards development, then, to use a word that has almost become a cliché in these times, meaningful dialogue can take place between the decision maker, the planner and the public.[263]

This statement is particularly relevant in the light of the underlying principle of public participation.

3.3.3.2 Regional development associations

Planning and development is not possible without a knowledge of the basic needs, potential and problems of a certain area. Through the creation of associations or public bodies normally consisting of municipalities, publicity associations, farmers' unions, chambers of commerce and industry, etcetera, it becomes possible to provide opportunities where contributions are made voluntarily and collectively towards improving the welfare of the region.[264]

The concept of development regions as units for planning natural resources is now universally accepted. In South Africa this concept

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263 Visagie op cit 35-36.

264 Fourie P "The role of regional development associations in the promotion of development in rural areas" 1978 Beplanning 31; Fourie P "Enkele gedagtes oor streekontwikkeling" 1968 Satpa 175; Emanuel A and Page D "Public participation in regional planning: the role of regional development associations in South Africa" 1969 Plan 33 34.

arose from the need for basic services, as well as to assist the Natural Resources Development Council.[265]

Generally the constitutions of the regional development associations provide for the following functions:

- integration and coordination of the activities of the constituent local bodies and the liaison between rural and urban communities;
- collection, publication and distribution of information;
- encouragement of the proper development of the region's resources and the establishment of industrial enterprises;
- assistance with the formulation of plans;
- fostering of the interests of the region.[266]

The general view of these associations is a negative one. They are not statutory bodies and cannot attempt any planning themselves.[267] Yet, their strength lies in the fact that they represent a very large number of interested persons. As a result, and also for the sake of the public interest, many research projects have been undertaken, problems discussed and schemes initiated.[268] By virtue of the fact

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265 Page and Rabie op cit 454.

266 Emanuel and Page op cit 34; Visagie op cit 32-33.

267 Emanuel and Page op cit 35; Visagie op cit 33.

268 Emanuel and Page op cit 34.

that these bodies are independent and free from political pressure or state control,[269] they play a very important role in the planning sphere, since they are seen as

> pressure groups endeavouring to strengthen their claims on government action.[270]

3.3.3.3 National Regional Development Advisory Council

The predecessor to this Council, the Planning Advisory Council, became operative on 1 January 1968 by cabinet decision. The purpose for creating the Council was to provide more centralised direction and coordination in the area of physical planning. It was directly answerable to the Prime Minister and its functions included

- determining how the country's natural resources could be applied in the interests of the population;
- examining the relationship between the various levels of government;
- advising the government in order to properly regulate the physical environment.[271]

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269 Emanuel and Page op cit 35.

270 Ibid.

271 Gräbe JGG "Organisatoriese reëlings vir fisiese beplanning" 1979 Journal for Regional Planning 1.

In 1983 the Planning Advisory Council was dissolved and replaced by the National Regional Development Advisory Council which was established to advise the government on the promotion of regional development. It aims to be an effective communications channel between the government and the various sectors and was specifically constituted to

- serve coordination between development regions;
- ensure involvement by both public and private sectors;
- demonstrate a democratic representation.[272]

3.3.3.4 *Department of Planning and the Environment*

Closely associated with the National Regional Development Advisory Council is the Department of Planning and the Environment. As a result of the growing concern regarding joint planning and coordination, the Department of Environmental Planning and Energy was created in 1964,[273] initially to coordinate planning matters. At present, the Department, known as the Department of Constitutional Development and Planning, is divided into two branches, namely Physical Planning and Coordination, and Urbanisation and

272 South Africa 1985: Official Yearbook of the Republic of South Africa Department of Foreign Affairs 11ed 1985 334.

273 By Government Notice 1239 Government Gazette 876 of 14 August 1964; see also Grabe op cit (1979) 2; Otto op cit 4-5.

Administration. The main function of the former concerns the organisation and production of guide plans.[274]

3.3.3.5 Interest Groups

In practice, the position of powerful and informed interest groups is relevant in the participation process.[275] Examples of such organisations are the Wildlife Society; the Habitat Council; the National Veld Trust and the South African Property Owners Association.

By making it their business to be informed and to represent the particular interests of their members, these organisations make a vital contribution to the public involvement process.[276]

3.3.3.6 Education

Education in the planning process is necessary for a variety of reasons, the first of which is to enhance effectiveness of existing governmental programmes.[277] This was recognised in the 1980 White

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274 In terms of section 6A of the Physical Planning Act 88 of 1967. See supra 3.3.2.3.

275 Schweizer CD and Cooper KH "Voluntary organisations and the environment" in Fuggle RF and Rabie MA Environmental concerns in South Africa Juta 1983 133; McMillan op cit 89.

276 Schweizer and Cooper op cit 134. But see McMillan op cit 60 who states that bias is a negative factor.

277 Sewell and Phillips op cit 343.

paper on a national policy regarding environmental legislation,[278] where the view was held that

> an understanding is instilled of the most important contemporary environmental problems for which policy makers are endeavouring to find solutions so that steps taken by the government are understood against that background. Such an understanding will also lead to community involvement and participation in decision-making processes conducive to a better quality of life.[279]

Secondly, education is necessary to strengthen environmental consciousness and to effect behaviour changes.[280] The White paper also recognises this point, stating that

> a better general understanding is instilled and public awareness of all the environmental factors is stimulated, as well as of their complex interaction and dependence on constant equilibrium and harmony in the environment.[281]

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278 WP 0-1980.

279 Paragraph 3.2.4.

280 Sewell and Phillips op cit 343.

281 Op cit paragraph 3.2.2.

In the third place, education is necessary to create a foundation for future public involvement.[282] McMillan, who is in agreement, states that

> education in the issues related to planning and the environment should be included in the school curriculum.[283]

3.3.3.7 Environment impact assessment[284]

Two aspects concerning environment impact assessments (EIA)[285] are certain: firstly that there is no universally accepted definition;[286] and secondly that their implementation, which is accepted as necessary world-wide,[287] should find legislative application in South Africa.[288]

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282 Sewell and Phillips op cit 343.

283 Op cit 60.

284 This issue is the subject of much comprehensive study. Only aspects relevant to public participation are discussed here.

285 *Or: environment impact statement (EIS) or environment* impact report (EIR).

286 Schweizer CD (comp) Working document for the development of a *national* policy on environmental impact assessment in South Africa Council for the Environment 1985 2.

287 See Schweizer op cit 55-505 for a comprehensive review of EIA procedures and methodologies in twenty-five countries.

288 Rabie A "Strategies for the implementation of environmental impact assessment in South Africa" 1986 SA Public Law 18; Rabie MA "Disclosure and evaluation of potential environment impact of proposed governmental *administrative action*" 1976 THRHR 40; White

(Footnote Continued)

The purpose of an environment impact assessment is to identify, prescribe and predict the impact of a proposed development on the physical environment and on man's health and well-being. This presupposes the gathering and communication of information by all parties involved, in understandable terms, to both the community and the decision makers. Reasons for all decisions must be given. Since the underlying principle of an environment impact assessment is involvement by all parties involved in the project, this is the most comprehensive and sophisticated form of public participation in the planning process.

In South Africa, the issue of EIA has been under consideration only since the late 1970's.[289] By 1979 enough support and interest had been gained to hold a symposium[290] where the conclusions which were reached indicated

- the acceptance as necessary by a wide spectrum of environmental considerations in planning processes;
- the need to involve the public in the planning process;
- the general acceptance that development should continue;

(Footnote Continued)
paper op cit paragraph 3.1, Schweizer op cit 618-639; McMillan op cit 59.

289 Schweizer op cit 618.

290 Symposium on Shaping our Environment Pretoria 1-2 August 1979.

- the realisation that environmental considerations may necessitate the modification, adaptation or even abandonment of projects.[291]

The use of environment impact assessments is not foreign to this country - certain institutions, for example ISCOR and ESCOM, claim to carry out this procedure.[292] Even the government has taken notice[293] of the procedure, implementation and detail directives, particularly in the areas of forestry, roads, dams, marine development, coastal zone, siting of power stations etcetera. An organisation established specifically to foster the implementation of environment impact assessments - the Environmental Planning Professions Interdisciplinary Committee (Eppic) - aims to improve communications and create more effective interaction between the professions involved in the planning process so that a more balanced concern for the environment can be achieved.[294] Such voluntary involvement takes

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291 Schweizer op cit 622.

292 See, however, the criticism by Rabie MA "Administrative law reform and environmental law" 1981 THRHR 46 48 and the examples of disregard for environmental issues he mentions there.

293 Bepaling en evaluering van invloede van ontwikkelingsprojekte op die omgewing. Verslag Department of Planning and the Environment 1976.

294 "The Way Ahead Conference: a special report" 1981 The Civil Engineer in South Africa 341 408.

on a form similar to interest groups,[295] with both positive and negative implications for planning.[296]

The environment impact assessment is the base information document against the background of which the public, the planners and the decision makers communicate.[297] The fact that so many persons are involved calls for very specialized procedures in order to make the decision an informed one. It is generally agreed[298] that more public participation in the early stages of project initiation and planning is necessary. However, the crucial question remains as to the quantity and quality of participation and how best it may be effected. The solution, as seen by Cowen[299] is that of 'reasons for reasons' the essentials of which are:

> the concept of justice is that of certainty: that decisions are made consistently, on the same or similar principles and equally at different times, in different cases and between different people. One cannot be certain that this is being done if the decisions are made secretly, and if the reasons for decisions

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295 Supra 3.3.3.5.

296 McMillan op cit 62-63.

297 McMillan op cit 59.

298 Hall EJ et al "Environmental protection: a practical procedure" 1980 Ekos (Supplement) 1 5.

299 Hall op cit 11-12.

are not disclosed and published.[300]

The giving of reasons enhances credibility, and more care is taken in decision-making, thereby providing better results. The failure to give reasons on the other hand generates suspicion especially where a discretionary act is exercised.[301]

3.3.4 'Judicial' participation

Planning in South Africa is generally a governmental matter. Public participation by way of the statutory[302] and non-statutory[303] methods discussed is a means of supervision of governmental activities, 'extra-judicially' as it were.

Forms of judicial supervision also exist, the most important being judicial review of the proceedings or decisions of administrative officials, tribunals and authorities.[304] Any person whose interests have been prejudicially affected can have those proceedings or decisions reviewed. However, that person should comply with the locus

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300 Rose-Innes J Judicial review of administrative tribunals in South Africa Juta 1963 189.

301 Cowen op cit (1981) 10 - 11.

302 Supra 3.3.2.

303 Supra 3.3.3.

304 Rabie MA "Legal remedies for environmental protection" 1972 CILSA 247 267; See also Chaskalson A "Legal control of the administrative process" 1985 SALJ 419.

standi[305] requirement. This requirement is concerned with the question of who may bring a cause of action before the courts in order to enforce a statute. A long line of decisions in our courts has established the principle that a statute enacted in the public interest may only be enforced by way of civil action at the instance of a person personally affected by the infringement thereof.[306] Such person should have a sufficient interest in the proceedings, interest which must be a 'direct' interest.[307] Rabie and Eckard[308] have shown that the application of this principle is not possible in environmental matters. Concrete adverse effects on particular individuals may be impossible to prove on a balance of probabilities, which means that no one will succeed in enforcing the statute, even though the infringement may be clearly established. The illegal action will continue unchecked. There must be acceptance of the principle that we are all potentially affected by a failure to comply with planning decisions, and that any person has the right to enforce it in his own interest and in the interest of the public.

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305 Rabie MA and Eckard C "Locus Standi: the administration's shield and the environmentalist's shackle" 1976 CILSA 141. This is an extensive subject which cannot be done justice here, and only the briefest of outlines will be given.

306 Patz v Greene and Co 1907 TS 427; Dalrymple v Colonial Treasurer 1910 TS 372; Director of Education, Transvaal v McCagie 1918 AD 616; Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd 1933 AD 87.

307 Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council 1971 1 SA 56 (A) 69.

308 Op cit 144.

The decision in Bamford v Minister of Community Development and State Auxiliary Services[309] may be significant with regard to locus standi to enforce environmental statutes and, by analogy, planning statutes. In this case the court held that the plaintiff did have locus standi, because the statute confers a right of access on all members of the public, and any unlawful interference with that right can be restrained by any member of the public without proof of special damages.[310] This decision is a bold one, showing the way to a liberal attitude with regard to standing in the enforcement of environmental statutes. It should, however, be remembered that the Bamford decision is on the periphery of environmental law. The broader planning aspects were not in any respect at issue and it would be all too easy to distinguish the case.

The liberalisation of the locus standi requirements has been examined world-wide,[311] and suggestions tend towards the feeling that private citizens should have standing to sue to vindicate the public interest in the protection of the environment. In this way citizens would be involved. The need[312] to participate is there because

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309 1981 3 SA 1054 (C).

310 1060 A.

311 See eg: Kodwo Bentil J "General recourse to the courts for environmental protection purposes and the problem of legal standing" 1982 Anglo American Law Review 286.

312 Glavovic PD "The need for legislative adoption of a conservation ethic" 1984 CILSA 144 152; Lucas AR "Legal foundations for public participation in environmental decisionmaking" 1976 Natural Resources Journal 73 102.

administrative bodies cannot carry the entire burden of restoring and maintaining the public domain.[313]

The conclusion is that

> the avenue of citizen participation ' one rich with possibility. Allowing citizen standing will place the responsibility of our environment where it should be - with the people.[314]

3.4 ADVANTAGES AND DISADVANTAGES OF PUBLIC PARTICIPATION IN SOUTH AFRICA

The principle of public participation as encountered in the United Kingdom and the United States of America has afforded South Africa sufficient time for judging and evaluating, not only the many programmes but also the principles involved.[315]

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313 Lutz R and McCaffrey S "Standing on the side of the environment: a statutory prescription for citizen participation" 1971 Ecology Law Quarterly 561 576.

314 Lutz and McCaffrey op cit 649.

315 See eg Burke E "Citizen participation is a necessity: how can we make it work?" 1969 Journal of Housing 599; Dixon J "How can public participation become real?" 1975 Public Administration Review 69; Fagence M Citizen participation in planning Pergamon Press 1977 334-368; Stewart R "The reformation of American administrative Law" 1975 Harvard Law Review 1669 1760-1790; Sewell and Phillips op cit 355-358.

Relevant to the position in South Africa are the positive as well as the negative aspects. In South Africa, however, we are faced with further pitfalls, which may well provide insurmountable obstacles to a more complete implementation of public participation procedures.

The nature of South African society is an ethnically diverse one, with a relatively small, yet wealthy and highly educated population group on the one hand, and a very large population group still in the early stages of development on the other.[316] Public participation necessitates a high standard of education amongst participants, as techniques involved in the planning process require knowledge and skill. *To understand* the contents of a plan necessitates education, but to understand the implications of a policy statement of a guide *plan, for example, requires a far higher degree* of sophistication.[317]

Planning decisions affect all members of society.[318] There is no requirement for individuals to take part in planning decisions, but

316 Faccio R "The development of planning controls in Britain and South Africa" 1975 Planning and Building Developments 33 39.

317 Kahn M Planning, process and participation Inaugural lecture University of Natal 1982 12: Faccio op cit 39.

318 Cowen op cit (1980) 13. See however, Boden R "Public participation and the planning process" 1979 Planning and Building Developments 14 17 who states that the community's future depends on the active participation of its individual members.

as members of a society each individual should be allowed opportunity to make an input and thereby 'feel involved'.[319]

In the definition[320] of public participation an essential element was shown to be that those taking part should be 'informed' as well as being 'disciplined';[321] the latter

> is a very different matter from airing emotional grievances, and it differs as day from night from the futility of attributing wrong motives to individuals.[322]

Often members of the community show unwillingness and apathy[323] about involvement in community affairs, and no balanced result is seen to be achieved. Education of the public is relevant here, for a community's sense of its own worth is enhanced by its ability to shape its own future.[324] One of the reasons for this unwilling attitude is the fear that the involvement of other participants is

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319 Stewart op cit 1761.

320 *Supra 2.1.*

321 "Review: the Way Ahead Conference" 1981 Municipal Engineer 16 32; Hall op cit 14; see also Schweizer op cit 627-629.

322 Hall op cit 3.

323 *See Fagence op cit (1977) 346 for the reasons - and solutions to* the apathy problem and Schweizer op cit 564 who states that 'citizens other than those with an intense personal interest are not likely to maintain active participation for long periods'.

324 Emond DP "Participation and the environment: a strategy for democratising Canada's environmental protection laws" 1975 Osgoode Hall Law Journal *783 787; Boden op cit* 17.

afforded more weight in the final decision making.[325] Here the principle of 'reasons for reasons'[326] becomes relevant and public disclosure as to why a certain decision has been taken creates a climate of security.

A major concern in public participation is the cost factor, coupled to which is the time factor. *In the United States programmes of* public hearings or opinion surveys involve expenditure of many *thousands of dollars*,[327] *and take far longer to complete than would* otherwise be the case.[328] Fear has been expressed of the same happening in South Africa, mainly in respect of costs which follow on from the additional time which is required to complete the process.[329] The solution to this particular problem as seen by Sewell and Phillips

> is to determine which issues require inputs from the public, what segments of the public should be consulted, and how the necessary inputs can be obtained most effectively.[330]

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325 Sewell and Phillips op cit 357; Kahn op cit 12.

326 See the discussion of 'reasons for reasons' supra 3.3.3.7 and also Schweizer op cit 629.

327 Sewell and Phillips op cit 358. Fagence op cit (1977) 359-362.

328 Fagence op cit (1977) 362-365; Emond op cit 786.

329 Jaspan op cit 10; Boden op cit 17; Schweizer op cit 563.

330 Op cit 358.

A properly planned public participation programme need not represent a major funding item, nor need it cause an extensive period of delay in the process of decision making.[331]

A benefit of public participation is that a record of decision making is provided. This ensures both judicial[332] and public examination of the relevant factors and considerations. This 'openness' or 'giving reasons' exerts pressure on administrators to adhere to required procedures in decision making.[333]

Essentially though, it is the citizen who is involved and benefits accrue when persons who are affected, unlikely to be represented otherwise, are provided an opportunity of presenting their views. Public confidence is enhanced when citizens can clearly see that all issues have been fully and carefully considered.[334]

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331 Schweizer op cit 563; Emond op cit 786.

332 But limited by the locus standi question supra 3.3.4.

333 Schweizer op cit 563.

334 Schweizer op cit 24.

3.5 CONCLUSION

It has been established that aspects of public participation exist in our land-use planning process. Moreover, the need for an extension of its principles is necessary, despite obvious criticism. Since it is the citizens themselves and their property which are at the centre of the process, one crucial question remains - what is the effect on the individual's right of ownership of public participation in the planning process?

CHAPTER 4

THE IMPACT OF PUBLIC PARTICIPATION ON THE SOUTH AFRICAN CONCEPT OF OWNERSHIP

4.1 INTRODUCTION

The imposition of planning controls in South Africa was one of the direct causes of the erosion of ownership from widely extensive control over a thing[1] to a

> paltry right ... so whittled away by legislation in the past

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1 Cowen DV New patterns of landownership: the transformation of the concept of ownership as plena in re potestas University of the Witwatersrand Law Students Council 1984; Milton JRL "Planning and property" 1985 Acta Juridica 267.This was a universal development. See for example Vandevelde KJ "The new property of the nineteenth century: the development of the modern concept of property" 1980 Buffalo Law Review 325 328; Dunham A "Property, city planning and liberty" in Haar CM Law and land: Anglo-American planning practice Harvard UP 1964 28-43; Philbrick FS "Changing conceptions of property in law" 1938 University of Pennsylvania Law Review 691; Haar CM "Public v private interest in the land and the 1959 Act" 1961 Town Planning Review 95-104.

century,[2]

that it has, in the process, become an instrument in the hands, not of the individual but of the state.[3]

With the recent introduction of possibilities for involvement by citizens in the planning of developments which affect them, a change of a different nature has taken place. No longer are decisions made by the administration 'in the public interest' - now the public have a right to partake in those decisions 'in their own interest', as it were.

By examining the changes in the concept of ownership and particularly the effect of participatory aspects on these changes, it will be shown that a turning point has been reached in realising a fuller enjoyment of one's right of ownership.

A movement stressing the content, meaning and concept of ownership, particularly of land ownership, both in South Africa[4] and elsewhere,[5]

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2 Lewis C "The modern concept of ownership of land" 1985 Acta Juridica 241 242.

3 Lewis op cit 260.

4 Cowen op cit 7-15; Lewis op cit 241-266; Milton op cit 267-288.

5 Haar CM Law and land: Anglo American planning practice Harvard UP 1964; Kamenka E and Neale RS Feudalism, capitalism and beyond Arnold 1975; Philbrick op cit 591-732; Vandevelde op cit 323-367.

has been discerned of late. Although the forms or manifestations of *ownership* [5] differ from jurisdiction to jurisdiction, the actual concept of ownership shows distinct similarities.[7] This is evident particularly when the development of the concept of ownership is examined.

In South Africa, England and the United States of America, this development, though not entirely chronologically comparable, indicates ownership in these major jurisdictions as having been transformed from the unlimited to one eroded by countless restrictions, particularly of a legislative nature, which have been placed upon it.[8]

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6 Or 'property' described by Philbrick op cit 691 as 'including the rights that a man has in or over things with which the law deals' - therefore, ownership as we know it .

7 The traditional view is that the South African concept of ownership is derived from the Roman concept. However Visser DP "The 'absoluteness' of ownership:the South African common law in *perspective*" 1985 *Acta Juridica* 39 47 shows that as far as the unrestrictedness of ownership is concerned 'its roots are more firmly in nineteenth century Germany than in seventeenth- and eighteenth-century Holland'. This would find support with Morice G English and Roman-Dutch law African Book Company 1903 32 that 'the essential idea of ownership is ... the same under the English and Roman-Dutch systems of law'.

8 Works dealing specifically with planning restrictions are concentrated on here. See eg Hart WO "Control of *the use of land* in English law" in Haar CM Law and land: Anglo American planning practice Harvard UP 1-9; Milton op cit 273-274; Lewis 248-250.

4.2 TRANSFORMATION OF OWNERSHIP FROM 'UNLIMITED' TO 'PUBLIC INTEREST'

During the early period of South Africa's history - up until the latter half of the 19th century, the spirit in both the Colonies and the Republics was one of supreme command over property generally not subject to any restrictions imposed by the authorities.[9] The attitude towards any type of holdership[10] over property was one of mastership, which was understood as being the Roman law 'dominium'.[11]

Even where there were restrictions, for example, as to sale or subdivision, these prohibitions were frequently ignored. On land which was neither rented nor owned, dwellings were erected.[12]

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9 Page D and Rabie MA "Land-use planning and control" in Fuggle RF and Rabie MA Environmental concerns in South Africa Juta 1983 445 449.

10 The forms of holdership were various, viz loan tenure, quittent tenure and loan freehold. Freehold title was the only full ownership in existence, but found limited application. For detailed information regarding land holding and ownership in early South Africa see: Visagie GG Regsopleging en reg aan die Kaap van 1652 tot 1806 Juta 1969 79-88; Graham Botha C "Early Cape land tenure" in History of law, medicine and place names in the Cape of Good Hope Struik 1962 82-100; Van der Merwe CG Sakereg Butterworth 1979 226-228; Fisher RC "Land and land tenure" in Fuggle RF and Rabie MA Environmental concerns in South Africa Juta 1983 435 440-443; Wessels JW History of the Roman-Dutch law African Book Company 1908 490-501.

11 VS "Property" 1886 Cape Law Journal 234.

12 Davenport TRH "Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control" 1985 Acta Juridica 53 54.

Particularly in the field of planning there were no restrictive title conditions over erven in towns and no attempt was made to regulate type or intensity of use.

Outside of these interests and obligations an owner's right enabled him to

> do exactly as he pleases with his possessions ... *The idea of* mastership is here in full swing. An owner is allowed the gross rights of destruction so long as he endangers no rights but his *own; he is protected* in the minutest fruits of the power which he enjoys.[13]

This view of ownership corresponds with that of the laissez-faire doctrines expounded by John Locke, Adam Smith and William Blackstone, indicating an essentially individualistic conception of the nature of the rights of a landowner,[14] so much so that John Locke defined property to include

> life, liberty and estate.[15]

So absolute were these rights that the law would not permit even the smallest infringement of them, not even for the good of the entire

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13 VS op cit 238; Page and Rabie op cit 449.

14 Milton op cit 275; Vandevelde op cit 330; Philbrick op cit 713.

15 Philbrick op cit 713, especially note 69 and the authorities cited there.

community.[16] Included was the possibility of recourse to court, not only because this institution provided for the resolution of conflicts, but also because the

> lawyers and the common law that they had fashioned over the centuries were very much concerned with the protection and preservation of rights of property.[17]

Wessels,[18] however, indicates that this state of affairs was not co last and that

> a considerable change has been made in the law of ownership.

These changes were introduced by legislation consequent upon the discovery of gold, precious stones and other minerals, which occurred in the latter half of the nineteenth century. These discoveries also led to the introduction of controlling measures for the orderly settlement of the mining population.[19]

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16 This is particularly relevant in view of the later 'public interest' development.

17 *Herein lies essentially the common law approach to the law (or* ideology) as expounded by McAuslan P The ideologies of planning law Pergamon Press 1980 4.

18 Op cit 486.

19 An example of which is section 17 of the Wet op het delven van en handeldrijven in edele metalen en edelgesteenten in de ZA Republiek 3 of 1885.

The influx of miners made the provision of living-space and essential services necessary. Johannesburg and the mining towns on the Witwatersrand were laid out according to statutory requirements.[20] The other provinces followed suit, but it was only in 1907 that the Townships Act[21] was promulgated, resulting in the attitude that the development of land be viewed as a privilege and no longer as a right of the landowner.[22]

This view that the development of land be seen more as a privilege than a right contains essentially the idea,[23] which was to be a central concept for a long time to come, that the

> applicant for a township '... must also be assumed to know that the State, in placing the restrictions against his alieneas, did

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20 Page and Rabie op cit 449.

21 33 of 1907.

22 See Milton op cit 275 - '... planning law confronted the consequences of the laissez-faire concept ... and its premises became not its rights but its duties.'

23 The term 'public interest' is one difficult to define, particularly in planning matters. See Reich C "The law of the planned society" 1966 Yale Law Journal 1227 1234; Fagence op cit 79-84. *The court in Argus Printing and Publishing Co Ltd v Darby's Artware (Pty) Ltd* 1952 2 SA 1 (C) distinguished the words 'general interest of the public' from 'the public interest'. In Leicester Properties (Pty) Ltd v Farran 1976 1 SA 492 (D&C) 495 B, Muller J stated that 'the public interest could no doubt properly be determined with reference to the requirements of the inhabitants of the area within which the scheme is to be carried out.'

so in the public interest.'[24] (my emphasis)

Just how far-reaching the limitations 'in the public interest' are, is obvious from both statutory[25] and case law sources.[26]

As regards major planning issues where clarification was required, two judgments stand out:

- where the court was required to consider an objection to a draft town-planning scheme, it held that

  > the only persons entitled to receive notice and to be heard at the stage when objections are considered are the

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24 Administrator (Transvaal) v Industrial and Commercial Timber and Supply Co Ltd 1932 AD 25 35.

25 For example, all four town-planning and townships ordinances provide that the object of a town-planning scheme is the 'coordinated and harmonious development...' - see 3.3.2.12.2 supra. The Removal of Restrictions Act 84 of 1967 section 2(1)(a) recognises the removal of a condition in a township where this is in the public interest. See also section 2 of the Expropriation Act 63 of 1975.

26 Almost invariably dealing with the removal of restrictive conditions. See Administrator (Transvaal) v Industrial and Commercial Timber and Supply Co Ltd 1932 AD 25; Ex parte Jerrard 1934 WLD 87; Ex parte Evenwel 1937 WLD 1 4; Eiffel Mansions (Pty) Ltd v Cohen 1945 WLD 200 205; Rossmauer Mansions (Pty) Ltd v Brilley Court (Pty) Ltd 1945 AD 217 229; Norbreck (Pty) Ltd v 2nd Townships Registrar 1948 1 SA 1037 (W) 1047; Ex parte Zimba Holdings (Pty) Ltd 1948 4 SA 774 (T) 777; Obermolzer Hotels (Pty) Ltd v Peri-Urban Areas Health Board (Pty) Ltd 1953 1 SA 512 (T) 517 D; Blanckenberg v Forbes 1955 3 SA 170 (C) 173 D; Ex parte Gold 1956 2 SA 642 (T) 649 G; Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 4 SA 362 (T) 367 B; Ex parte Novian Trust (Pty) Ltd 1983 3 SA 209 (D&C) 213 D-F.

> objectors and the local authority, and ... the local authority is regarded as the representative of all the lotholders who agree with the provisions of the scheme.[27]

- where defects in notices and advertisements of the submission of amendments for approval by the Administrator[28] were examined,[29] it was held that the relevant provisions were peremptory.[30] However, it was held that, even though the notices did not furnish the exact particulars prescribed, the object of making the provisions that the advertisements should be published and the notices given was to afford such notice.[31]

The imposition of such far reaching restrictions by planning legislation on the concept of ownership is seen to be justified in the light of the fact that these restrictions are

> for the common weal.[32]

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27 Markus v Impey 1959 3 SA 627 (W) 631 C-D.

28 In terms of section 26(1) and 26(2) of Ordinance 25 of 1965 (T).

29 Stadsraad van Vanderbijlpark v Administrateur, Transvaal 1982 3 SA 166 (T).

30 193 A.

31 193 B-C.

32 Lewis op cit 249. See also Milton op cit 275; Van der Walt AJ The conservation of buildings and townscapes in South African law Pretoria 1987 106-107.

If, however, one examines McAuslan's criticism of what he calls the 'public administration approach to planning',[33] Reich's indication of the inadequacy of the 'public interest' standard,[34] and Haar's call for the complete withdrawal of governmental controls in land-use and a transference of all decision making back to property owners,[35] such unqualified acceptance of this justification is not possible.

The so-called 'public interest ideology' of McAuslan is derived from the writings of Jeremy Bentham and has as its central theme that

> the courts accepted that administration was different to adjudication; that the public interest was a legitimate concern for administrators to advance and have regard to; that public officials must be presumed to act in good faith and in the final analysis were accountable to Parliament for their actions and policies.[36]

Criticism of this is that the administration allows officials to act at will, there being little provision for review, and then only within the administrative system. Furthermore the landowner

> need be told little or nothing of the reasons for decisions in

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33 Op cit 4.

34 Op cit 1238-1240.

35 Op cit (1961) 119.

36 McAuslan op cit 4.

respect of property and (his) objections could be ignored.[37]

Reich indicates that the public interest standard is not a satisfactory basis for planning. Firstly it is ad hoc, since the balance is struck individually and general policy is correspondingly difficult to ascertain.[38] *Secondly the prevailing notion of the* public interest allows large private interests undue power and, furthermore, emphasis is placed on those interests which have a pecuniary or commercial value as against intangible interests such as scenery or recreation.[39]

Hart states that the law of land-use control is largely exercised by purely administrative bodies following in great measure no prescribed procedure and bound in their decisions only by the extra-legal concepts of policy and expediency. It is not possible, says Hart, to

> reconcile the irreconcilable by permitting public authorities to control the use of land through the exercise of powers copied from an ownership not vested in these authorities themselves.[40]

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37 Ibid. See also Hall EJ et al "Environmental protection: a practical procedure" 1980 Ekos (Supplement) 5 11-12.

38 Op cit 1238.

39 Op cit 1239.

40 Op cit 19.

Friedmann[41] also rejects this philosophy of

> property menaced or even destroyed by statutory welfare obligations, curbs on the employers' freedom in labour contracts, taxation, zoning or conservation, not to speak of powers of expropriation in the public interest.

This indictment of the 'public interest' approach is also relevant to the situation in South Africa. It is supported by Pavlich,[42] Boulle[43] and Schoombee[44] who criticise the general attitude of officialdom in this country and the role played by the administration:

> The tendency has been [illegible] on a sectional and centralised basis, to prefer efficie[illegible] fairness in the exercise, and to allow control intermittently and contingently. These tendencies have been conducive to administrative injustice.[45]

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41 Law in a changing society Stevens 2ed 1972 117.

42 Pavlich DJ "Zoning law and administration in the United States of America and the Republic of South Africa" 1978 SALJ 102; 228; 404.

43 Boulle L "Administrative justice and public participation in American and South African law" 1986 TSAR 136.

44 "Group areas legislation - the political control of ownership and occupation of land" 1985 Acta Juridica 77. See 107 where Schoombee clearly indicates that particularly in respect of group areas legislation has 'the security traditionally associated with the 'absolute' ownership of land and the rights flowing from ownership' been undermined. In terms of this legislation, ownership can be terminated by the exercise of executive discretion which is 'uncertain and practically non-justiciable'. Furthermore procedural safeguards are 'virtually non-existent'.

45 Boulle op cit 151-152.

The judiciary is also criticised since it does not

> participate meaningfully in planning matters by curbing excess administrative zeal, even where this gives rise to patently undesirable town-planning consequences.[46]

Its role is therefore limited

> not because of an inherent antipathy towards issues involving town-planning, but because of a general inertia in the sphere of administrative law.[47]

This particular criticism is well-illustrated by the decision of Ogilvie Thompson JA in Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council [48] that

> in bringing the Administrator's decision ... under review, it would ... not avail the City Council to establish that, judged by the criterion of sound town-planning principles, the Administrator probably made a wrong decision. Nor would it suffice for the City Council merely to show that, in the light of such criteria, the Administator's decision was unreasonable .... Having regard to the nature of the Administrator's function under the Ordinance, the court cannot usurp that function and

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46 Pavlich op cit 414.

47 Pavlich op cit 413.

48 1971 1 SA 56 (A).

substitute its view for that of the Administrator.[49]

A means of remedying this situation is that planning should be made

more democratic, more pluralistic and more egalitarian.[50]

This end can be achieved by the participation of the public in the planning process.[51]

4.3 THE IDEOLOGY OF PUBLIC PARTICIPATION

Public participation evolved from the broadening of democracy and justice.[52] In turn, public participation may be seen as democratising the legislative and bureaucratic decision-making process.[53] This occurs because participants, appreciating the responsibility they

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49 79 H - 80 A.

50 Reich op cit (1966) 1267.

51 Reich op cit (1966) 1243-1245; 1251.

52 McAuslan op cit 5.

53 Emond DP "Participation and the environment: a strategy for democratising Canada's environmental protection laws" 1976 Osgoode Hall Law Journal 783 785.

bear, become more sensitive to, and accepting of, the average opinion.[54]

Furthermore, public participation forces individuals to take into account the interests of others and to develop the notion of a community interest.[55] Essentially public participation implies community representation,[56] since residents of a community act not only as individuals but most significantly as part of a group. Dixon states that public participation implies a profound involvement in determining which resources are available to the 'covenantal community'- which, distinguished from the technical community of the modern corporation and the volitional community of a constitutional polity, is a

> *community of comfort, affection and beauty.*[57]

Kahn has examined the interrelationship between the planning process and participation. He divides participants into the following groups in order to determine the type of participation and representation, namely

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54 Ibid.

55 Emond op cit 786.

56 Dixon J "How can public participation become real?" 1975 Public Administration Review 69.

57 Op cit 70.

- direct interest groups, being most affected and motivated by their own interests rather than community interests, and including property owners, occupiers of premises, commercial interests and operational interests;
- special interest groups related to non-financial interests such as arts associations, historical societies, sports bodies and cultural societies;
- indirect interest groups, specifically residents' associations where the proposals affect the group as a whole rather than individuals;
- professional interest groups representing the views of particular professions having an interest in planning matters;
- general interest groups such as the Wildlife Society and other ecologically concerned groups, having no actual interest in but rather a concern for or awareness of their environment.[58]

Public involvement is therefore the voice of special interest and of special commitment. It is the voice of a variety of unique groups, usually small, who believe that what they hold dear is threatened in some way or other.[59]

Usually the participants are property owners. Where, however, they are not property owners, they may, in terms of the above groupings,

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58 Kahn M Planning, process and participation Inaugural lecture University of Natal 1982 12-13.

59 Emond op cit 784.

be either lessees, occupiers or merely interested persons. Public participation ideology does not therefore give the individual property owner a special place in participation. Rather, he is one of a number considered in the democratic process.[60] Each participant however, does have a substantial, material stake in the specific community or society which is threatened. The determining factor remains one of whether or not the potential participant has some interest in the property that will be affected by the decision.[61]

Returning to the seventeenth century concept of ownership as an absolute right, it is clear that the concept was far wider than it has been since. The fact that it had so much wider a meaning opens up the possibility of ownership's being seen as something akin to that right, and no longer the privilege granted 'in the public interest'. Philbrick states that it can and should once again become that right to life and liberty described by Locke.[62]

Apart from this there is also the urgent need to move away from the character of a restricted ownership because of the negative connotations associated with it. Lastly, it has been seen that a democratic need exists whereby ownership entails the right to participate in

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60 McAuslan op cit 5.

61 Emond op cit 784.

62 Op cit 713.

> a system of power relations which will enable the individual to live a fully human life.[63]

4.4 THE BIRTH OF PUBLIC PARTICIPATION

The year 1974 saw a landmark decision in McCarthy v Mustheights (Pty) Ltd[64] with Van Zijl J's statement that

> the Ordinance recognises the public interest in the planning of urban and village development. The public is entitled to notice of such proposed development and must be given the opportunity, if any member so wishes, to object and any objection must be considered. The public cannot be robbed of this right.[65]

This judgment indicates the turning point, away from negative connotations of the public interest trend in planning, towards the more positive, democratic principles of public participation.[66]

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63 Macpherson CB "Capitalism and the changing concept of property" in Kamenka E and Neale RS Feudalism, capitalism and beyond Arnold 1975 104 123.

64 1974 4 SA 328 (C).

65 347 C.

66 McAuslan op cit 5.

Thirteen years were to elapse before the milestone decision in Johannesburg City Council v Tugendhaft[67] was to provide the clearest indication of the extension of one's

> proprietary rights and interests.[68]

These two decisions and the shelving of the Norweto scheme[69] are concrete affirmation of the recognition, acceptance and importance of public participation in the planning process in South Africa. What is more important but somehow less obvious, however, is that possibilities for participation by the public have been in existence for some time already.

Certain circumstances exist where owners, specifically, are provided rights of participation. They may officiate on guide plan committees;[70] may lodge objections, make representations and be heard in evidence both in respect of guide plans[71] and town-planning schemes;[72] have the right to object and appeal on issues regarding,

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67 1987 1 SA 16 (A).

68 See also supra 1.3.

69 By the Minister of Constitutional Development and Planning on 24 February 1987. For a detailed discussion of the history of Norweto see 1.2 supra.

70 In terms of section 6A(1)(a) of the Physical Planning Act 88 of 1967.

71 Sections 6A(4)-(7) of the Physical Planning Act 88 of 1967.

72 See the detailed discussion supra 3.3.2.12.2.

for example, timber plantations;[73] and those who are landowners in the area may become members of conservation committees.[74]

Where the rights of persons other than the owner are concerned, possibilities exist for those persons having an interest to become members of advisory committees in respect of, for example, mountain catchment areas;[75] they may take part in a consultative process,[76] or may acquire membership of for example the National Parks Board of Trustees[77] or the regional development associations.[78]

The general public may participate by submitting environment impact assessments.[79] With the broadening of the locus standi requirement as suggested in the decision of Bamford v Minister of Community Development and State Auxiliary Services,[80] the hope of some participation in the adjudicative process is increased.

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73 Section 7 of the Forest Act 122 of 1984. See also supra 3.3.2.9.

74 Section 16(2)(a) of the Conservation of Agricultural Resources Act 43 of 1983.

75 Section 6(2) of Act 3 of 1970.

76 In terms of section 2(2) of the Regional Services Councils Act 109 of 1985.

77 Section 5 of the National Parks Act 57 of 1976.

78 See supra 3.3.3.2 for a discussion.

79 See supra 3.3.3.7.

80 1981 3 SA 1054 (C).

4.5 CONCLUSION

That we are at present witnessing the acceptance of public participation in planning law is obvious. Also clear is the fact that the effect of public participation in land-use planning on the concept of ownership is a positive one[81]. The rights of ownership, once lost to the 'public interest' cause, have been regained.

As Macpherson so aptly states

> (Ownership) can and should become a right to a fuller and freer life for more people than was attainable (though it was dreamed of) in the seventeenth century. And the right to live fully cannot be less than the right to share in the determination of the power relations that prevail in society.[82]
>
> If we achieve this concept ... we shall have reached again, but now on a more effective level, and for more people, that broader idea ... that prevailed in the period just before the individual was at once released and submerged by the capitalist market - the idea that a man has a property,

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81 Only for the members of the so-called 'in-group' (see Schoombee op cit 107). For members of the 'out-group' in society, the discussion of the effect of public participation on their concept of ownership is largely irrelevant. One cannot deny that there has been a movement towards a more comprehensive right of ownership with the recent introduction of the Black Communities Development Act 4 of 1984. See, however the comments on the provisions of the Group Areas Act 36 of 1966 supra 3.3.2.2.

82 Macpherson op cit 123.

not just in the material means of life, but in life itself, in the realisation of all his active potentialities.[83]

83 Macpherson op cit 122.

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