

**Justiciability and the Issues Involved in a  
Specified Departure\***

by

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INTRODUCTION

Sound town and country planning is dependent upon both reasonable certainty and reasonable flexibility. An element of rigidity in planning allows those affected by planning controls to use their land for a permitted use secure in the knowledge that it is reasonably certain that such a use will continue to be permitted for a period ahead. However, over a period of time uses which were once incompatible may become compatible, and needs which were non-existent at the commencement of a planning period may subsequently be created.

An element of flexibility in planning is required, therefore, to avoid any hardship for which the planning scheme did not provide alleviation. This flexibility is provided by specified departures from the provisions of the planning scheme.

In order that the element of certainty, which is so essential to a planning scheme, may be maintained it is necessary that specified departures be regulated. It is in this manner that it may be possible to balance the elements of rigidity and flexibility.

(i) *Specified Departures*: In New Zealand the machinery which regulates specified departures is contained in the Town and Country Planning Act 1953, s. 35.

Prior to 1 January 1967, s. 35 of the Act gave power to the Town and Country Planning Appeal Board to consent to specified departure from the provisions of an operative district scheme, except for certain minor cases delegated to Councils by the Town and Country Planning Regulations 1960 (S.R. 1960/109), Regulation 33. The Board was the sole authority having jurisdiction to approve departures. Then, on 1 January 1967, the then existing s. 35 of the Act

was replaced by a new s. 35 introduced by the Town and Country Planning Amendment Act 1966. The effect of the new s. 35 is that all applications for specified departures are dealt with by the Council concerned, and there is also a right of appeal to the Board from any decision. Under the new section both the Council and the Board are fettered in their respective jurisdictions by the requirement of s. 35(2) of the Act.

The effect of s. 35(2) is that the Board may permit a specified departure only where the effect of the departure will have little significance beyond the immediate vicinity of the property in respect of which the departure is sought and where the District Scheme can properly remain without change or variation.<sup>1</sup> The Board may also permit a departure in respect of a matter for which the Council has resolved to bring down a change or variation to the scheme, but which is of such urgency as to warrant its immediate authorisation.<sup>2</sup> In determining an appeal the Board must observe those principles specified in s. 35(2) of the Act, unless some dispensation from them is considered warranted in the public interest.<sup>3</sup>

(ii) *Public Interest*: The paramount consideration in granting or refusing a specified departure is public interest.<sup>4</sup> However, "Public interest" is an extremely wide term, and s. 3 of the Act provides only a broad definition. The decisions of the Appeal Board, however, reveal a number of factors which the Board has considered either to be contrary to or to promote the public interest. It is these factors which will be discussed in the course of this paper in order to determine the extent to which issues involved in the granting or refusal of a specified departure, as evidenced by the decisions of the Board, are justiciable. No consideration will be given to issues considered by the Board which do not involve the public interest, such as *locus standi* and the effect of a specified departure. No consideration will be given to Supreme Court decisions since the Supreme Court has not adjudicated upon public interest in specified departures.

(iii) *Justiciability*: Before considering the issues which the Board has considered to be contrary to or to promote public interest and the extent to which such issues are justiciable, it is necessary to discuss justiciability.

An issue may be said to be justiciable where the principle of the relevant legislation may be effectuated without resorting to policy. Justiciability is dependent essentially upon the nature of the issue

<sup>1</sup> Town and Country Planning Act 1953, s. 35(2)(a).

<sup>2</sup> *Ibid.*, s. 35(2)(b).

<sup>3</sup> *Ibid.*, s. 35(7).

<sup>4</sup> *Ibid.*, s. 35(4).

which is to be considered; an issue is justiciable if it is possible to apply general rules to particular facts, and to confine considerations to such rules.<sup>5</sup>

It is said that:

Only if the matters are so blatantly political that to attempt to solve them by adversary procedures, which characterise a court, would be meaningless, can it be said that "something is non-justiciable".<sup>6</sup>

However, it is considered the above statement is too limited a definition of non-justiciability. For the effect of the above statement is to say that all issues are justiciable except those which are "blatantly political" to the extent that the adversary procedure is quite inadequate to solve them. It is considered that whilst the above statement is correct in that the adversary procedure is unsuited for the solution of non-justiciable issues the above statement is incorrect in that non-justiciable issues need not be "blatantly political". It is considered that the writer of the above-quoted statement has erred by making reference to "political" matters; for, a matter which involves mere "policy", as opposed to "politics", may be non-justiciable.

Whilst the writer acknowledges that there is scope for opinion as to the meaning of justiciable, for the purposes of this paper it is proposed to consider as justiciable those issues which are reasonably predictable by applying general rules to particular facts without resorting to policy.

#### FACTORS CONTRIBUTING TO PUBLIC INTEREST

Public interest as contained in The Town and Country Planning Act 1953, s. 35, is indeed a wide term. Luxford S.M. in discussing public interest in *G.U.S. Properties Limited v. Christchurch City*<sup>7</sup> stated as follows:

The expression "public interest" includes "all matters which can in any circumstances be of "public interest". It would be difficult if not impossible, to compile a list of all the matters which may be of public interest within the meaning of the definition, nor would such a list be of any assistance. The degree to which any such matter is contrary to the public interest, or whether any particular matter affects the public interest at all depends or may depend on the surrounding circumstances.<sup>8</sup>

Whilst it is not proposed to compile a list of all matters of public interest within s. 35, or to compile a list of all matters which the

<sup>5</sup> See 551 H.C. Deb. (5th) col., 404, 12/3/56.

<sup>6</sup> Robert Stevens, [1964] *Public Law Journal* 221, 238.

<sup>7</sup> 3 N.Z.T.C.P.A. 202.

<sup>8</sup> *Ibid.*

Board has considered relevant to public interest, it is possible to extract from the decisions of the Board ten factors which the Board has considered relevant to public interest within s. 35 of the Act.

### I. A SPECIFIED DEPARTURE IS NOT A TEMPORARY REMEDIAL MEASURE

It is evident from certain decisions of the Board that the Board may take into consideration whether the granting of a specified departure would amount to a mere temporary measure to serve public interest. Should the board decide that the proposed specified departure is in the nature of a stop-gap measure it will decline to grant the specified departure.

In *re Ferguson's Application*<sup>9</sup> the Board stated:

The right to apply for a specified departure from the provisions of an operative scheme is not to be regarded as a planning tool to remedy deficiencies in zoning, except possibly to the limited extent envisaged by s. 35(2)(b).<sup>10 11</sup>

The decision of the Board in *District Public Trustee v. Wanganui City*<sup>12</sup> involved an appeal against the decision of the Council to grant a specified departure to permit the establishment of factory premises in a residential area. The Board<sup>13</sup> stated that the proposed intrusion of this substantial industrial enterprise in a residential area had nothing to commend it from a planning point of view; the policy of the Council to preserve and increase employment was prevailing over planning principles in the decision of the Council, and the Board opposed such a policy for that policy overlooks the fact that pure planning principles, intelligently applied, serve the public interest in a way which stop-gap measures cannot.

In *Shanks v. Matamata County*<sup>14</sup> the Board considered an appeal against the refusal of a specified departure concerning the minimum standard area of frontage requirements of allotments in the subdivision of rural land in the county. The ordinances provided that subdivisions should be in 20-acre blocks, and the applicant was applying for consent for a subdivision of eight 10-acre blocks. The question was whether the public interest would be better served by allowing the appeal. The Board, in refusing the appeal, stated:

<sup>9</sup> 3 N.Z.T.C.P.A. 72.

<sup>10</sup> *Ibid.*, p. 72.

<sup>11</sup> For a decision on s. 35(2)(b) see *Re The Auckland Hospital Board's Application 2* N.Z.T.C.P.A. 291.

<sup>12</sup> 3 N.Z.T.C.P.A. 79.

<sup>13</sup> *Ibid.*, p. 80.

<sup>14</sup> 3 N.Z.T.C.P.A. 215.

Unfortunately, but inevitably there is a persistent demand and pressure for urban development of rural land in close proximity to urban areas, which can best be controlled by establishing a minimum standard area sufficiently large to prevent allotments in a sub-division being used ostensibly for predominant uses, but principally for residential uses.<sup>15</sup>

The Board considered in *Watney Sibun & Sons Limited v. Manukau City*<sup>16</sup> an appeal against the decision of the Council to disallow an application for a specified departure permitting a funeral chapel in a residential zone. The operative scheme made no provision for funeral chapels. The Board dismissed the appeal stating that it was a novel matter to be taken up by the City of Manukau when that body prepared the planning scheme for the whole city.

In determining whether a proposed specified departure would constitute a temporary remedial measure and thus would be contrary to planning principles the Board has taken note of the imminence of the review of the district scheme.

The Board declined to grant a specified departure for the sub-division of a coastal strip of land, 4 chains in width and 20 acres in area, in *Re the Tauranga County Council's Application*<sup>17</sup> on the grounds that *inter alia* the rezoning of a greater area was anticipated. Again, in *Re Rodney Motors Limited's Application*<sup>18</sup> the Board refused an application for a specified departure to permit the use of rural land for a garage and service station for retail sale of petrol for the reason *inter alia* that a review of the district scheme was imminent.

Again, in *May et ors v. Newmarket Borough*,<sup>19</sup> the Board allowed an appeal against the decision of the Council to permit twelve single flat units in a Residential zone on the grounds that it was probable that "the whole question of the redevelopment of the area must fall to be considered at a comparatively early date".<sup>20</sup>

It would appear that in the converse situation a plan having been in operation for only a short period, it may be said that it is not in the public interest to grant a specified departure. For, in *Watney Sibun and Sons Limited v. Manukau City*<sup>21</sup> the fact that the plan had been in operation only one year was among the factors upon which the Board based the dismissal of the appeal.

Again, in *Re Millar's Application*,<sup>22</sup> the applicant sought a specified departure to permit the use of a retail shop in a Residential zone in

<sup>15</sup> *Ibid.*, p. 215.

<sup>16</sup> 3 N.Z.T.C.P.A. 17.

<sup>17</sup> 2 N.Z.T.C.P.A. 1.

<sup>18</sup> 2 N.Z.T.C.P.A. 288.

<sup>19</sup> 2 N.Z.T.C.P.A. 230.

<sup>20</sup> *Ibid.*, p. 232 *per* Carson S.M.

<sup>21</sup> *Supra*, n. 16.

<sup>22</sup> 3 N.Z.T.C.P.A. 39.

the operative district scheme, a scheme which was under revision during the currency of the application. In refusing the application Watts S.M. stated:

The five-yearly reviews contemplated by the Act gives a reasonable degree of flexibility to what might otherwise be a rigid system of zoning. This review scheme provides proper opportunities for the zoning of land to be investigated under conditions which are designed to protect public interest.<sup>23</sup>

*Non-justiciable:* Whilst it is apparent from the above decisions that the use of a specified departure from a district scheme is considered by the Board to be a factor contrary to the public interest it is not an issue which may be reasonably predictable. It is correct that the Board may consider the proximity in time between the application for the specified departure and the review of the district scheme. However, there appears to be no reasonable certainty in calculating whether a review is insufficiently proximate to an application so as not to amount to a temporary remedial measure. In *Watney Sibun and Sons v. Manukau City*<sup>24</sup> a year had passed since the district plan became operative; it is uncertain if a departure would be considered as a stop-gap measure if application were made eighteen months or even two years after the commencement of the operation of a plan or before the due date for a review.

Thus, it is considered that the issue of whether a departure may amount to a temporary remedial measure may not be reasonably predicted and that accordingly the issue is non-justiciable.

However, it is considered that the lack of predictability is related to the number of reported cases on a particular point and to the extent to which the tribunal has developed its reasoning on that point. Thus, it may be that an issue, such as that of the temporary remedial measure, may well become justiciable as a result of principles developed by an emerging body of case law.

## II. THE ESTABLISHED NON-CONFORMING USE

In the case of an application for a specified departure involving an established non-conforming use the Board has considered the fact that the use is one presently existing to be of relevance.

(a) *Length of Time of Existence of Non-conforming Use.* It is apparent that the length of time for which the non-conforming use has existed is relevant to the public interest.

Kealy S.M. made the following *obiter* statement in *Tomin v. Hamilton City Council*.<sup>25</sup>

<sup>23</sup> *Ibid.*, p. 40.

<sup>24</sup> *Supra*, n. 16.

<sup>25</sup> 3 N.Z.T.C.P.A. 111.

There is . . . a distinct difference between permitting an extension of a long established activity already possessing existing rights on the one hand and on the other permitting the establishment of a fresh non-conforming use.<sup>26</sup>

The following cases illustrate this distinction.

In *Christchurch Regional Planning Authority v. Paparua County*<sup>27</sup> the applicant had carried on the business of a sawmill for a period of four years using the property as a timber mill and timber yard. This use had originally been conditional, but due to a Council resolution the applicant was required to apply for a specified departure. After referring to the above-stated *dictum* of Kealy S.M., in *Tomin v. Hamilton City Council*,<sup>28</sup> Luxford S.M. stated:

These circumstances do not however justify, *per se*, the grant of a consent to a specified departure, but are relevant to the question of public interest which remains always the paramount consideration. Nevertheless, such considerations may be of sufficient importance to turn the scale in favour of a finding that the public interest will be better served by granting the application than by refusing it.<sup>29</sup>

And in *Christchurch Regional Planning Authority v. Paparua County*<sup>30</sup> the Board dismissed the appeal against the Council's consent to the specified departure but made the departure subject to a variation in form of consent.

Again, in *Stitchbury et ors v. Wellington City*<sup>31</sup> the matter of the period for which the non-conforming use had been in existence was considered. The applicant had applied for a specified departure to permit the use of a service station in a Residential C zone. For thirty years the applicant had carried on business on a corner diagonally opposite to that which the application was concerned with until the former site had been taken by compulsory acquisition by the Ministry of Works. Luxford S.M. referred to the previously cited *dictum* of Kealy S.M. in *Tomin v. Hamilton City*<sup>32</sup> and continued by stating:

This *dictum* . . . is directed at the land on which the long standing activity is carried on under existing use rights but there is no reason why it should be so limited where it is in the public interest that a long standing activity be permitted to extend.<sup>33</sup>

Luxford S.M. continued by stating in the present case the site upon which the standing activity was conducted had ceased to exist as effectively as if destroyed by earthquake. The Chairman then stated:

<sup>26</sup> *Ibid.*, p. 112.

<sup>27</sup> 3 N.Z.T.C.P.A. 169.

<sup>28</sup> 3 N.Z.T.C.P.A. 111, 112.

<sup>29</sup> 3 N.Z.T.C.P.A. 170.

<sup>30</sup> 3 N.Z.T.C.P.A. 169.

<sup>31</sup> 3 N.Z.T.C.P.A. 171.

<sup>32</sup> 3 N.Z.T.C.P.A. 111, 112.

<sup>33</sup> 3 N.Z.T.C.P.A. 171, 172.

. . . the application for consent to a specified departure to enable the service station to be re-established in the immediate vicinity of the old site differs materially from an application to enable the proposed site to be used for a newly established non-conforming use. The difference, however, does not *per se* justify the granting of the consent but should be regarded as a factor relevant to "public interest".<sup>34</sup>

The above-mentioned decisions discussing long-standing existing rights clearly demonstrate that where there is an application for a specified departure involving a long-established use, this established use, whilst not being conclusive of an application being in the public interest, is a factor contributing to public interest.<sup>35</sup>

(b) *Perpetuation of the Non-conforming Use*. It has been held by the Board in several instances that the perpetuation of existing non-conforming uses is contrary to the principles of planning and thus is contrary to the public interest.

It was held by the Board in *Kirwan v. Ashburton County*<sup>36</sup> that to permit the erection of additions in permanent materials to an existing non-conforming use in a Residential zone would tend to perpetuate the existing non-conforming use and would infringe the principles of sound town planning and would be against the public interest. Accordingly, a specified departure in respect of such works was declined.

In *Parratt et ors v. Waiheke Road Board*<sup>37</sup> the appellant sought a specified departure to rebuild a grocery business in a Residential zone. The grocery business had been carried out for forty years on the proposed site until the store had been destroyed by fire. Whilst the appeal was allowed because of certain unusual circumstances in that case the Board did state that it was not normal for it to approve the reinstatement of a non-conforming building that had been destroyed by fire.

The Board in *Crittall Metal Windows Limited v. Mt Eden Borough*<sup>38</sup> refused an application for a specified departure to erect buildings to be additional to existing buildings for the manufacture of metal windows. The non-conforming industry was in a Residential B zone and had been carried on for a number of years. The grounds for the refusal were that large scale extension might result in a

<sup>34</sup> *Ibid.*

<sup>35</sup> Whilst it is not within the scope of this paper to discuss the matter in detail, it is questionable whether the Board is justified in its finding that it is in the public interest to grant a specified departure which would result in the extension of the area of an existing use. This is particularly questionable, in view of the stringent provisions limiting existing uses imposed by s. 37 of the Act.

<sup>36</sup> 2 N.Z.T.C.P.A. 102.

<sup>37</sup> 2 N.Z.T.C.P.A. 115.

<sup>38</sup> 2 N.Z.T.C.P.A. 115.



prolonging of a non-conforming use and the granting of the application was, therefore, not in the public interest.

In *re Garricks Application*<sup>39</sup> permission was sought to add to a grocer's shop by including in the said shop a part of the building which was laid out as living accommodation. The proposed use was zoned Commercial A and the area in question was zoned Residential. The Board had no objection to the continued operation of the non-conforming use but such continued operation was to be only as an existing use. The Board was not prepared to grant rights which would extend beyond the existing life of the building.<sup>40</sup>

However, it is possible that the attitude of the Board to the perpetuation of the non-conforming use may have altered since the decision of the Court of Appeal of *Clifford v. Ashburton Borough*<sup>41</sup> where a rather more liberal attitude to existing use rights appears to have been taken.

(c) *Justiciable*. The Board's attitude towards departures involving established non-conforming uses remains far from certain. If it were not for the decisions of *Stitchbury et ors v. Wellington City*<sup>42</sup> and *Parratt et ors v. Waiheke Road Board*<sup>43</sup> it would appear that from the previously cited decisions that it is conducive to public interest that a departure be granted to permit the continuance of an existing non-conforming use where the proposal involves no extension of the physical size of the non-conforming use; further, it would appear contrary to public interest to permit an extension in area of an existing non-conforming use. If this were the position then the issue of the existing non-conforming use would be reasonably predictable and accordingly the same could be said to be justiciable.

However, the two above-mentioned decisions may be distinguishable for in the former it was the *site* which was effectively destroyed by the requisition, while in the latter it was the *building* which was destroyed.

If this distinction is valid it follows that the issue of the established non-conforming use is justiciable.

### III. STABILITY OF ZONING

It is a general principle of sound town and country planning that the stability of zoning should not be undermined.<sup>44</sup> This principle is

<sup>39</sup> 2 N.Z.T.C.P.A. 198.

<sup>40</sup> See also *Beacons Motors Limited v. Hawkes Bay County* 2 N.Z.T.C.P.A. 141; *Balog et anor v. Newmarket Borough* 2 N.Z.T.C.P.A. 228.

<sup>41</sup> [1969] N.Z.L.R. 927.

<sup>42</sup> 3 N.Z.T.C.P.A. 171.

<sup>43</sup> 2 N.Z.T.C.P.A. 115.

<sup>44</sup> *Re Port Carriers Limited's Application*, 3 N.Z.T.C.P.A. 31.

manifest in three matters which involve public interest; first, spot or pocket development is not in the public interest; second, ribbon development is not in the public interest; third, a buffer between different planning zones is in the public interest. Each of the above contributes to the stability of zoning.

(a) *Spot or Pocket Zoning*. There is a body of Board decisions from which it is apparent that spot or pocket zoning is not in the public interest.

In *Keast et ors v. Taranaki County*<sup>45</sup> the appellant was appealing against the Council's refusal of consent for a specified departure to permit the appellant to use an area of 13 acres in a Rural zone for industrial purposes, the land being part of a 20-acre block. In refusing the appeal, Luxford S.M. stated:

It is an accepted principle of town and country planning that it is contrary to good planning practice to zone an isolated area of land solely to enable any person or body corporate to use the land for a particular purpose which does not conform with the purposes authorised by the zoning of the surrounding lands in the same vicinity.<sup>46</sup>

The applicant sought a specified departure to permit the use of a commercial garage and petrol reselling in a Residential zone in *Monsdon Limited and Mobil Oil (N.Z.) Limited's Application*.<sup>47</sup> And it was stated by Watts S.M. that the application was an endeavour to create the equivalent to a spot Commercial zone, by way of a specified departure, between statutory reviews, and as such the application was not in the public interest.

Again, in *Cosy Homes Limited v. Howick Borough*,<sup>48</sup> there was an application for a specified departure to permit a petrol station in a Residential zone. It was stated by Kealy S.M.:

"Spot" zones of an area as small as half an acre are (save perhaps in the case of commercial "A" zones to provide for small neighbourhood shopping centres) most undesirable from a planning point of view, and yet there are many instances where the most convenient and desirable location for a petrol station is in a residential zone.<sup>49</sup>

The Board, in that case, did not consider there was a necessity for a petrol station, and accordingly the appeal was dismissed.

In *Re Walton's Application*<sup>50</sup> there was an application for a specified departure to permit the erection and operation of buildings to carry on the business of an engineering shop for servicing agricultural machinery and to permit the operation of a petrol station. The pro-

<sup>45</sup> 3 N.Z.T.C.P.A. 211.

<sup>46</sup> *Ibid.*, p. 212.

<sup>47</sup> 3 N.Z.T.C.P.A. 44.

<sup>48</sup> 3 N.Z.T.C.P.A. 121.

<sup>49</sup> *Ibid.*

<sup>50</sup> 2 N.Z.T.C.P.A. 75.

posed site was zoned Rural in the operative district scheme and the Council proposed to rezone the land Residential. The Board refused to grant a specified departure on the grounds that if it did so and if the said land together with an area in the vicinity were zoned Residential there would be a non-conforming commercial use established in a residentially zoned area.

Again, in *Akeroyd v. Rotorua City*,<sup>51</sup> there was an application for a specified departure to permit the use of a commercial garage and store for the sale of petrol in a Residential zone; the proposed use was zoned Commercial B in Council's operative district scheme. This appeal was also dismissed on the grounds that *inter alia* the departure would create a spot zone.

In *re Port Carriers Limited's Application*<sup>52</sup> the applicant sought a specified departure to permit the parking and storage of trucks on his land which was zoned Residential. Among the grounds resulting in the dismissal of the appeal was the fact that the Board was satisfied that the storage of trucks would lead to "a serious intrusion of an industrial use into a residential area".<sup>53</sup>

The Board considered in *Re Modern Freighters Limited's Application*<sup>54</sup> the granting of a specified departure for a road transport depot involving the erection of garages, workshops and other buildings in a Rural zone. The use was zoned Industrial in the County's district scheme. Among the reasons for the Board's not consenting to the departure was the fact that consent might result in sporadic industrial and commercial development in a Rural zone.

Whereas the above decisions demonstrate that the Board is generally opposed to the establishment of industrial or commercial uses in Residential or Rural zones the decision of *National Trading Company Limited v. Mt. Roskill Borough*<sup>55</sup> demonstrates the Board may regard the removal of a spot zone to be in the public interest. *National Trading Company Limited v. Mt. Roskill Borough*<sup>56</sup> concerned an application seeking permission to erect shops including a supermarket on a property zoned Residential. The proposed use was zoned Commercial and the proposed site was completely surrounded by properties zoned either Commercial or Industrial. And a factor which contributed to the Board's granting of the specified departure was that under the present zoning there was in effect a small spot zone of residential land. Permitting the proposed use would remove

<sup>51</sup> 3 N.Z.T.C.P.A. 59.

<sup>52</sup> 3 N.Z.T.C.P.A. 31.

<sup>53</sup> *Ibid.*, per Watts S.M.

<sup>54</sup> 2 N.Z.T.C.P.A. 162.

<sup>55</sup> 2 N.Z.T.C.P.A. 155.

<sup>56</sup> *Ibid.*

this pocket which did not conform with the purposes authorised by the zoning of the surrounding lands in the same vicinity.<sup>57</sup>

It should be noted, however, that while spot zoning is generally not in the public interest it does not follow that an application for of the same will create a spot zone. It may be that some other factor a specified departure will be necessarily refused because the granting contributes to public interest to a greater degree in a particular instance than the degree to which a spot zone is contrary to public interest.

Such an instance is to be found in *Re Jarvis's Application*<sup>58</sup> which involved an application for a specified departure to establish a milk bar and dairy in a Residential zone. Such a use was zoned Commercial. There was no other commercial undertaking in the applicant's area. A substantial number of residents in the locality supported the application and the Board consented to the specified departure. It is considered that in that case the Board concluded that the granting of the specified departure was in the public interest for in that case the need<sup>59</sup> for the services outweighed any instability of zoning.

Another instance is *Amalgamated Brick and Pipe Company (Wellington) Limited v. Hutt County*.<sup>60</sup> The appellant company was the owner of a block of 90 acres of land. Of the 90 acres a 7½-acre block was zoned Industrial while the remainder of the land was zoned either Residential or Rural. The appellant used most of the Industrial zone for a factory and had for a number of years used a small section of the Residential zone for industrial purposes. The appellant Company sought to use a greater area of the land zoned Residential for storage purposes and to erect a new factory to be operated in conjunction with the existing works. The proposed use would undoubtedly amount to a spot industrial use in a Residential zone. However, taking into consideration *inter alia* the importance of the existing plant and the proposed factory operating as a unit in the interests of efficiency, and the urgent need of the additional storage space the Board held that it was more in the public interest to grant the application than to refuse it. This decision is another instance of the Board's considering surrounding circumstances and balancing stability of zoning against other factors which are in the public interest.

<sup>57</sup> *Keast et ors v. Taranaki County* 3 N.Z.T.C.P.A. 211, 212, per Luxford S.M.

<sup>58</sup> 2 N.Z.T.C.P.A. 9.

<sup>59</sup> "Need", as an issue is discussed *infra*.

<sup>60</sup> 3 N.Z.T.C.P.A. 122.

(b) *Ribbon Development*. Decisions of the Board concerning ribbon development and the adverse effect of that practice on stability of zoning are not as numerous as those concerning spot zoning. The reason for this may be that spot zoning and ribbon development are inter-related, ribbon development being one of the possible results of spot zoning; since the Board is generally opposed to spot zoning that use of land seldom arises, and thus the resulting ribbon development is considered infrequently by the Board.

However, in the previously cited decision of *In re the Tauranga County Council's Application*<sup>61</sup> the Board refused to grant permission for the development as a residential use of a coastal strip 20 acres in area and 2.4 chains in width. Reid S.M. stated that such a use was "clearly ribbon development and as such should be avoided".<sup>62</sup>

Again, in *Re Miller's Application*<sup>63</sup> the Board refused to grant consent to permit the erection of a retail shop in a Residential zone on the grounds, that, *inter alia*, it would result in an extension of ribbon development out from an important intersection.

(c) *The Existence of a Buffer*. The Board has taken into consideration the existence of a buffer or line of demarcation between two zones in the granting of a specified departure. The Board may more readily grant a specified departure where a buffer will prevent any further extension of a non-conforming use adjacent to the land for which the application has been made. The existence of such a buffer may contribute to stability of zoning and, thus, may be in the public interest.

In *Keast et ors v. Taranaki County*<sup>64</sup> a railway formed a line of demarcation between a predominantly industrial area and an area which was partly rural and partly commercial. As has been previously stated the applicant sought the departure to enable it to use a *rural* area for an industrial purpose. After making the previously cited statement concerning spot zoning<sup>65</sup> Luxford S.M. continued:

An exception is generally made where the proposed zoning is an extension of an existing zone, which would have been the case with respect to the relevant land had the definite line of demarcation between the industrial zone and the rural zone to which reference has already been made not existed.<sup>66</sup>

Again, in *Gowing v. Waitemata County*<sup>67</sup> the applicants requested a specified departure to enable them to subdivide a part of a lot held

<sup>61</sup> 2 N.Z.T.C.P.A. 1.

<sup>62</sup> *Ibid.*

<sup>63</sup> 3 N.Z.T.C.P.A. 39.

<sup>64</sup> 3 N.Z.T.C.P.A. 211.

<sup>65</sup> *Ibid.*, p. 212.

<sup>66</sup> *Ibid.*, p. 212.

<sup>67</sup> 3 N.Z.T.C.P.A. 78.

by them. A factor entering into the Board's decision to grant the specified departure was that the location of an adjacent regional reserve effectively prevented any tendency to further residential expansion adjacent to the land which was subject to the appeal.<sup>68</sup>

(d) *Justiciable*: It is apparent that stability of zoning is a matter which promotes public interest. It is equally apparent that the prevention of spot zoning, and of ribbon development, and the existence of a buffer between planning zones are factors which promote stability of zoning.

The existence of each of the three factors may be readily ascertained in a given proposal. A spot zone is an isolated non-conforming use; a ribbon development is an extension of a non-conforming use; a buffer is a line of demarcation between planning zones, such line comprising some physical barrier such as a railway line, a reserve, a motorway, or a river.

Where the issue of stability of zoning is raised in a given case it will be reasonably predictable whether the proposal involves a spot zone, a ribbon development, or a buffer, and it follows that it will be reasonably predictable whether the departure would affect the stability of the zoning. Accordingly, it is considered that stability of zoning is a justiciable issue.

#### IV. TRAFFIC

In determining applications for specified departures a further matter which the Board has taken into consideration is the effect the proposed use would have on traffic flow. Where the departure is likely to have an adverse effect on traffic flow such a factor is contrary to public interest. On the other hand where the departure is likely to improve the existing traffic condition then such a factor will promote public interest.

(a) *Traffic Congestion*. The Board has on a number of occasions stated that any use of land which is likely to result in the interference to traffic is contrary to public interest. In the previously considered decision of *Monsdon Limited and Mobil Oil (N.Z.) Limited's Application*<sup>69</sup> Mr Watts (Chairman) stated:

. . . the Board is of the opinion that the siting of a petrol station on a road such as this, for the purposes of catching the trading of the passing motorist, provides an impediment to the free flow of traffic that should not normally be permitted.<sup>70</sup>

<sup>68</sup> See also *Stevens Drug Holdings Limited v. Christchurch City* 2 N.Z.T.C.P.A. 28.

<sup>69</sup> 3 N.Z.T.C.P.A. 44.

<sup>70</sup> *Ibid.*, p. 44.

And the likelihood of an impediment to the free flow of traffic was a factor in the Board's declining the application in that case.

In *Re Dillon's Application*<sup>71</sup> the Board considered an application for a specified departure to permit the erection and establishment of a commercial garage including the retail sale of petrol in a proposed Residential zone. The proposed site was at a "T" intersection and it was possible that a collector road would join the road on which the proposal was to be sited opposite the applicant's property. If the collector were to join opposite, the proposed site would be situated at an intersection of considerable importance. In any event it seemed certain that once the collector road was established a volume of traffic could be expected to use the road upon which the petrol station was proposed, and the application was accordingly refused.

In another previously cited decision, *Re Port Carriers Limited's Application*,<sup>72</sup> a factor influencing the Board's refusal of the specified departure was that there would be an interference to traffic flow. Such interference would be caused by the turning of trucks across the traffic flow to enter the proposed driveway, and by the slowing of large trucks, resulting in the disruption of traffic flow.

An application for a specified departure to erect and operate a service station was considered in *Re Hunter's Services Limited's Application*.<sup>73</sup> Among the factors which the Board considered as affecting public interest were the siting of the proposal and its relation to traffic, the volume of that traffic and the creation of possible traffic hazards. The Board did conclude that minimal traffic inconvenience would result from the proposal because of the proposed site, and this was a factor which contributed to the granting of the application.<sup>74</sup>

(b) *Improvement of Traffic Flow*. In some instances a proposal may offer improved traffic flow and improved parking facilities and such would be factors promoting public interest.

Such an instance is the case of *Pearson v. Waimairi County*<sup>75</sup> which involved an application to establish a funeral director's business in a Residential zone. The Board considered that any possible traffic danger in the immediate vicinity generated by the proposed use would be offset by the proposal's relieving of funeral traffic in more densely populated parts of the city. The proposal was con-

<sup>71</sup> 3 N.Z.T.C.P.A. 59.

<sup>72</sup> 3 N.Z.T.C.P.A. 31.

<sup>73</sup> 2 N.Z.T.C.P.A. 274.

<sup>74</sup> See also *Re an Application by Burns Philp & Co. Limited* 2 N.Z.T.C.P.A. 213; *Re Walton's Application* 2 N.Z.T.C.P.A. 287; *Shell Oil (N.Z.) Limited v. Waimairi County* 3 N.Z.T.C.P.A. 77.

<sup>75</sup> 3 N.Z.T.C.P.A. 93.

sidered to be good also from the traffic control aspect since it provided means of entrance and egress from various streets. Whilst the above factors were outweighed by several factors which were contrary to the public interest, resulting in the refusal of the application the Board stated that the applicant had established a strong case.

*Re an Application of the National Trading Company of New Zealand*<sup>76</sup> concerned an application for a specified departure to permit the demolition of a shop and the erection of a supermarket upon part of the land included in a Residential zone. In granting the application the Board took into consideration the fact that on the balance the traffic situation would improve for two reasons: first, the demolition of the existing corner store would result in increased visibility at one difficult corner; second, there was provision for off-street parking.

In *Andrew and Andrew Limited v. Otahuhu Borough Council*<sup>77</sup> the appellant company, which was a cartage contractor, applied for a specified departure to use a lot which fronted on to one street as a means of ingress and egress. The lot was zoned Residential. The applicant had a 10-foot egress strip on to a major arterial road. The Board granted the application on the grounds that it would help relieve traffic congestion on the major arterial road.

The Board in *Re Weir's Application*<sup>78</sup> considered an application for a specified departure to erect a petrol station on a block zoned Commercial. Under the existing zoning the block was zoned for nine shop sites. The block was situated within a few feet of a busy traffic intersection which was to be the entry and exit point of a motorway. In granting the application the Board considered relevant the fact that the traffic flow would be interfered with far less under the applicant's proposal than if there was a block of nine shops.

In *Templeton v. Christchurch City*<sup>79</sup> the Board was required to determine an appeal from the decision of the respondent Council granting a specified departure in respect of a petrol station which was already in existence on another site. The Board took account of the fact that the granting of the application would result in a service to the public interest from a traffic aspect, for the proposed site was a marked improvement from the original site which had been situated at a busy intersection.

Again, *Re an Application by Regional Centres (Mount Albert) Limited*<sup>80</sup> concerned an application for a specified departure to

<sup>76</sup> 2 N.Z.T.C.P.A. 180.

<sup>77</sup> 2 N.Z.T.C.P.A. 131.

<sup>78</sup> 2 N.Z.T.C.P.A. 172.

<sup>79</sup> 3 N.Z.T.C.P.A. 154.

<sup>80</sup> 2 N.Z.T.C.P.A. 181.



establish an integrated shopping and commercial centre on land included in a Residential zone. Amongst the factors which the Board considered as relevant in granting the application was that off-street parking meant there would be no crossing of roads by pedestrians, and thus congestion would be reduced.

(c) *Summary*. It is considered that the above-mentioned decisions concerning the effect of the granting of a specified departure on traffic clearly establish two points: first, where the proposal will result in a congestion of traffic, such congestion is a factor which is contrary to public interest; second, where the proposal will ameliorate a traffic problem, such amelioration is a factor which is in the public interest.

It must be stressed, however, that the congestion or amelioration of traffic flow is only one factor which may be contrary to or promote public interest. Every application for a specified departure will involve considering all factors relevant to public interest and determining on the balance whether the proposal is in the public interest or contrary to it.

(d) *Non-justiciable*. Whether the issue of the effect of a proposal upon traffic flow is reasonably predictable or not will generally depend upon the evidence presented in the particular case.

It may be ascertained with reasonable certainty whether certain matters either detract from or improve the existing traffic situation. For instance, the effect a proposal will have on the visibility of traffic, must be reasonably apparent. So too, the adequacy of the parking provisions of a proposal may be ascertained by comparing the number of car spaces required for off-street parking in the code of ordinances for the district with the number of car spaces provided for in the proposal.

However, other matters such as the degree of interference with traffic flow, relief of traffic flow on major arterial routes and in central areas, and the volume of traffic generated from the proposal are less readily ascertainable. In some instances, because of the evidence tendered, the effect of these matters on the traffic situation is clearly not reasonably predictable. An example of such an instance would be if a traffic engineer were to state, that it was not his opinion that it was a matter of "undue concern", and "the considered opinion is that . . . this can be adequately absorbed. . . ."<sup>81</sup>

It is possible, however, for traffic engineers to produce figures on traffic flow and traffic generation. Such figures are produced by means of surveys, but, there may be a conflict of evidence where different traffic engineers have adopted different types of surveys.

<sup>81</sup> See *Denton et ors v. Auckland City et ors* [1969] N.Z.L.R. 257.

Such a conflict of evidence is particularly common where there are estimations as to traffic generation, for such estimations are based upon traffic generations from uses already in existence which are similar to that proposed and engineers may differ as to which uses are similar to that proposed. Further, it is often necessary for experts to consider what the future traffic volume will be, and what the future traffic generation from a proposal will be; again, experts may differ in their opinions as to the correct method to predict these figures. It is, thus, apparent that even where experts do produce statistical information the effect of the proposal on traffic conditions is not necessarily reasonably predictable.

However, while it is recognised that experts may differ in their opinions as to the precise effects of some matters upon the traffic situation should a departure be granted, such differences will be in general mere differences of degree. Thus, it is possible for the Board to predict with reasonable certainty whether the traffic situation resulting from a proposed use will be contrary to or will promote public interest. Accordingly it is considered that the issue of traffic is justiciable.

#### V. THE AMENITIES OF THE NEIGHBOURHOOD

The effect of a proposal on the amenities of the neighbourhood is a matter which the Board frequently considers in determining applications for specified departures.

(a) *Detractions from the Amenities.* Where a proposal will result in a detraction from the amenities of the neighbourhood, such detraction is a factor which is contrary to public interest.

In *Strawbridge et ors v. One Tree Hill Borough Council*<sup>82</sup> the Board considered three applications seeking a specified departure for the removal of minimum location requirements. Under the relative district scheme an industry that could be operated as of right in an Industrial B zone could be operated in an Industrial B2 zone subject to the factory buildings being sited at least eighty feet from any neighbouring residence. The Board interpreted the reason for this location requirement as the giving of some measure of protection to the owners and occupiers of residential properties in an area from excessively close intrusion by industry. It was stated by Reid S.M.:

If the applications were granted the effect would be that each of the applicants could sell his property for use by any industry classified as a predominant use in an industrial B zone and clearly some of these would detract from the amenities of the neighbouring properties used for residential purposes only.<sup>83</sup>

<sup>82</sup> 2 N.Z.T.C.P.A. 9.

<sup>83</sup> *Ibid.*, p. 10.

The application was refused by the Board.

Again, in the previously cited decision of *Re Port Carriers Limited's Application*<sup>84</sup> the Board considered the question of a detraction from the amenities. In that case the applicant had purchased a house in a street zoned Residential. The rear of the site formed the near boundary of property owned by the applicant which was zoned Industrial. The applicant desired to provide a rear access from the street zoned Residential for purposes of parking and storing trucks and other transportation equipment, thus the applicant sought consent for a specified departure. The proposed driveway would have been five feet from the lounge window of an adjoining land owner. Vehicles travelling along the driveway would have caused vibration and cracks in the interior of the objector's house. The appeal was disallowed.

However, not all instances of detractions from the amenities are as obvious as that of *Re Port Carriers*.<sup>85</sup> Indeed, the detraction is always a matter of degree and in many cases the detraction is so minimal as not to be seriously contrary to public interest. The detraction from the amenities of the neighbourhood may be so slight as to be outweighed by other factors in the public interest.

In *Re the Maori Trustee's Application*<sup>86</sup> the Board considered the proposal for the establishment of a residential hostel for the accommodation of six Maori probationers. The proposal was strongly opposed by a number of nearby residents. The Board granted the application holding that it was in the public interest that there be such hostels in Residential areas. It was stated that within a two mile radius of the site there were over one hundred persons already located who were either on probation, had served prison sentences, or had been convicted of criminal offences. Six minor offenders under the supervision of a warden could not seriously detract from the amenities.

The Board considered in *Re C. Little and Sons Limited's Application*<sup>87</sup> a proposal for a funeral director's office, mortuary, and chapel for the conducting of funerals. The proposal was opposed by a number of residents in one of the streets in which the proposal was sited, but it was not opposed by the owners of the immediately adjoining properties, a block of shops and a Church. In granting the application the Board stated that any detraction from the neighbour-

<sup>84</sup> 3 N.Z.T.C.P.A. 31.

<sup>85</sup> *Ibid.*, p. 31.

<sup>86</sup> 2 N.Z.T.C.P.A. 206.

<sup>87</sup> 2 N.Z.T.C.P.A. 176.

hood amenities would be small since the site was screened by a Church Building.<sup>88</sup>

(b) *An Amenity in Itself*. The Board has granted specified departures on occasions on the grounds that the proposal is a scheme which will amount to an amenity in itself.

*Gowing v. Waitemata County*<sup>89</sup> concerned an application for a specified departure to enable the subdivision of part of a lot held by the appellant. The Board allowed the appeal on the ground *inter alia* that the proposed enterprise was of a semi-public nature and special allowance should be made to foster it. In that case the land was zoned Rural and held by the appellants who were trustees under a deed of trust, the purposes of which being a conference centre for Anglicans of all ages, a retreat for Anglican clergy and laity and a youth weekend and holiday camp. The trustees proposed to sell one third of the land to provide funds and maintain facilities required to implement the trust. The only asset of the trust was the land.

Again in *Simpson et ors v. Waimairi County*<sup>90</sup> the Board considered an application for a motor camp. Local residents had appealed against the decision of the Council to grant a specified departure. The Board in disallowing the appeal held that the proposal would provide a genuine amenity for holiday makers and travellers.

An application for a departure to permit a supermarket in a Residential zone was granted by the Board in *Re an Application of the National Trading Company of New Zealand Limited*<sup>91</sup> on the ground that *inter alia* the convenient, up-to-date facilities would add to the attractiveness of the street and thus contribute to the general welfare of the inhabitants.<sup>92</sup>

(c) *Conditions Imposed by the Board*. The likelihood of a proposal for a specified departure resulting in a detraction from the amenities being declined on the grounds that it is contrary to public interest is not particularly great. This is not because detractions from the amenities occur rarely but rather because the Board may control such detractions to a certain degree by imposing conditions on granting the application.

<sup>88</sup> See also: *Re an Application of the National Trading Company of New Zealand supra*; *Amalgamated Brick & Pipe Company (Wellington) Limited v. Hutt County supra*; *Templeton v. Christchurch City supra*; *Re Hayton Properties Limited's Application 2 N.Z.T.C.P.A. 302.*

<sup>89</sup> 3 N.Z.T.C.P.A. 78.

<sup>90</sup> 3 N.Z.T.C.P.A. 76.

<sup>91</sup> 2 N.Z.T.C.P.A. 180.

<sup>92</sup> See also: *Re Hayton Properties Limited's Application 2 N.Z.T.C.P.A. 302*; *Wiley v. Upper Hutt Borough 2 N.Z.T.C.P.A. 114.*

For the purposes of ensuring that there is no detracting from the amenities, conditions may be imposed for off-street parking,<sup>93</sup> preventing advertising,<sup>94</sup> nuisances arising from noise, smoke, smell and dust.<sup>95</sup> The imposed conditions may also be for the purpose of beautifying the site by the planting of trees, shrubs and lawns.<sup>96</sup>

(d) *Non-justiciable*. While it is quite apparent the Board may consider the effect of the proposal on the amenities of the neighbourhood, it is not apparent what is meant by "amenities".

It appears that on no occasion has the Board attempted to define the term "amenities". Since s. 35 of the Act does not specifically refer to "amenities", it is of little relevance referring to s. 2 of the Act. However, section 2 defines amenities as being "those qualities and conditions in a neighbourhood which contribute to the pleasantness, harmony, and coherence of the environment and to its better enjoyment for any permitted use." However, with reference to the decisions of the Board it is uncertain what "qualities and conditions" may be said to affect the neighbourhood. In *Re the Maori Trustee's Application*<sup>97</sup> the Board held that the presence of six Maori probationers would detract from the amenities *albeit* to a slight degree; however, it is considered that it is arguable that a possible unruly element might be attracted to the camping ground in *Simpson et ors v. Waimairi County*<sup>98</sup> and the presence of such persons would detract from the amenities to a greater degree than would six Maori probationers. It may also be arguable that the supermarket in *Re an Application of the National Trading Company of New Zealand Limited*<sup>99</sup> far from adding to the attractiveness of the street and contributing to the general welfare of the inhabitants, may result in the inhabitants being "deprived of the amenity of living in a zone undisturbed by any commercial activity being carried on therein".<sup>1</sup>

Accordingly, it is considered that the issue of whether a proposal will either detract from or contribute to the amenities of the neighbourhood may not be reasonably predicted and that the issue is, thus, non-justiciable.

<sup>93</sup> See *Re Lane's Application* 2 N.Z.T.C.P.A. 174; *Re C. Little and Sons Limited's Application* *supra*, n. 83; *Amalgamated Brick & Pipe Company (Wellington) Ltd. v. Hutt County*, *supra*, n. 56.

<sup>94</sup> *Re C. Little & Sons' Application* *supra*; *Self Help Ltd. v. Upper Hutt City* 3 N.Z.T.C.P.A. 106.

<sup>95</sup> *Amalgamated Brick & Pipe Company* *supra*, n. 56.

<sup>96</sup> *Self Help Ltd. v. Upper Hutt City* *supra*; *Amalgamated Brick & Pipe Co. supra*; *In re the Papakura Borough Application*, 2 N.Z.T.C.P.A. 4.

<sup>97</sup> 2 N.Z.T.C.P.A. 206.

<sup>98</sup> 3 N.Z.T.C.P.A. 76.

<sup>99</sup> 2 N.Z.T.C.P.A. 180.

<sup>1</sup> *National Trading Company of New Zealand Limited v. Rotorua City* 3 N.Z.T.C.P.A. 203, 204, *per* Luxford S.M.

## IV. ECONOMIC USE OF LAND

In determining an application for a specified departure the Board has considered to be relevant the fact that there will be a resulting economic use of the land.

The Board considered in *Re the Mt. Albert Borough Council Application*<sup>2</sup> the granting of a specified departure to permit certain land zoned as being reserved for Government Railway purposes to be used for uses zoned Industrial. Reid S.M. stated:

The real question is whether this land should continue to lie idle and vacant or whether it should be put to some revenue-producing use.<sup>3</sup>

And the Board considered that the public interest would be best served by putting the land to some useful purpose. The application was accordingly granted.

Again, in *Re an Application by T. R. Taylor Limited*<sup>4</sup> an applicant sought consent to permit the re-opening of a commercial garage and petrol reselling station in premises already erected on the land which had been previously used for this purpose. The land was zoned Residential. The Board granted the application, for it considered that it was in the public interest for the "premises to be occupied and that a service station would be of 'economic value' to the community".

The applicant in *Stevens Drug Holdings Limited v. Christchurch City*<sup>5</sup> sought permission to erect factory premises on a site which was zoned Industrial in one part and Residential in another. The proposed premises encroached on to that part of the site which was zoned Residential. In granting the application the Board stated that there would be a more economic use of the land.

It may be considered from the above decisions that it is possible to predict whether a proposal will result in an economic use of the land in question. It is noted that in both *Re the Mt. Albert Borough Council's Application*<sup>6</sup> and *Re an Application by T. R. Taylor*<sup>7</sup> the land in question was lying idle and the proposal was to put this land to some use.

However, in many cases the issue will not be as clear. For example, it may be questioned whether it is an economic use of land to permit a supermarket or a petrol station or a factory to operate on a site which may be used for unit flats, or town houses. In that

<sup>2</sup> 2 N.Z.T.C.P.A. 2.

<sup>4</sup> *Ibid.*, p. 2.

<sup>5</sup> 2 N.Z.T.C.P.A. 205.

<sup>6</sup> 2 N.Z.T.C.P.A. 103.

<sup>7</sup> *Supra*, n. 97.

<sup>7</sup> *Supra*, n. 99.

case both the commercial and industrial use and the residential use may be said to be of "economic value" to the community. The question then would be which of the two uses is of more "economic value" to the community. The matter may not be reasonably predicted for a number of variables may enter into the consideration, such as the proximity of the industrial use to the market which it will serve.

In short it is considered that the issue of whether the proposal would result in an economic use of the land is not reasonably predictable and that it is accordingly non-justiciable.

### VIII. FINANCIAL COST

On occasions the Board has considered the financial cost of a proposal in determining whether to grant a departure.

It may appear that questions of financial cost are irrelevant to town and country planning principles. However, the relevance of such a matter was explained in *Altus Products Limited v. Waimairi County Council*.<sup>8</sup> In that case an industrial concern had carried on business for thirty years in a Residential zone. The neighbourhood had developed as a residential one and the question was whether to permit the extension of the industrial use in the Residential zone.<sup>9</sup> In explaining the relevance of financial costs in that case, Kealy S.M. stated:

If by refusing to allow a business reasonable facilities for expansion very considerable outlay of funds (whether public or private) will have to be applied to the non-productive purpose of moving a factory from one site to another, then, bearing in mind the fact that industrial costs are, in the long run, passed on and paid by the public, the question arises, whether or not there will be a substantial (even if not necessarily a corresponding) public benefit achieved by the removal of a specific non-conforming activity on to a more substantial site.<sup>10</sup>

Discussions of financial costs of proposed specified departures appear to be confined largely to the outlay of public funds, especially the funds of the Councils which would be called upon to service the proposal should the application be granted.

An application for a specified departure to permit a subdivision of approximately eight acres of land zoned Rural was considered by the Board in *In re Whitaker's Application*.<sup>11</sup> Among the reasons for the Board's refusal of the application was the fact that full services

<sup>8</sup> 2 N.Z.T.C.P.A. 77.

<sup>9</sup> Whilst the decision concerned an appeal under the Town and Country Planning Act 1953, s. 26, it is relevant to present purposes in that it involved a discussion of the Town and Country Planning Act, s. 35.

<sup>10</sup> 2 N.Z.T.C.P.A. 77, 78.

<sup>11</sup> 2 N.Z.T.C.P.A. 39.

could not be economically provided for the area in the vicinity of the proposed subdivision in the near future.

In the previously discussed case of *Re Modern Freighters Limited's Application*<sup>12</sup> the Board refused an application for the establishment of a transport depot in a Rural zone on the grounds that *inter alia* consent might result in sporadic industrial and commercial development in a Rural zone which would cause the Council to be called upon to provide uneconomic services.

In *Napier v. Ashburton Borough Council*<sup>13</sup> the Board considered an application for a specified departure permitting the construction of a further residence on an area of land where the proposed building would have resulted in slight shortages as to bulk and location requirements. The Board held that an additional residence on the site would be in the public interest by providing another residence without present or future Council expenditure on services such as street, sewerage, water and electricity reticulation.

*Non-justiciable.* It is considered that it cannot be predicted with any certainty whether a proposal will result in a sufficiently minor degree of public expenditure for it to be in the public interest.

Where a proposal will involve no public expenditure in the way of servicing it is certain that such a factor is in the public interest. However, where a proposal does require partial or full services the issue is whether such services may be economically provided. The question would seem to be whether the public will benefit by the proposal to the extent of public monies expended on servicing the site. This question must involve balancing costs against social benefit; if the costs are greater than the public benefit the servicing is uneconomic; if the public benefit is greater than the costs the servicing is economic. This balancing of costs against social benefit is clearly a socio-economic issue, and as such is non-justiciable.

#### VIII. ALTERNATIVE SITING

Whilst it is not its normal practice, the Board has considered on several occasions whether there might not be more suitable sites than that proposed in the particular application for a specified departure.

In the previously cited decision of *Pearson v. Waimairi County*<sup>14</sup> which concerned the application for the establishment of a funeral director's business in a Residential zone it was held by the Board in dismissing the appeal that it was not impossible that a more in-offensive site than that proposed might be found.

<sup>12</sup> 2 N.Z.T.C.P.A. 162.

<sup>13</sup> 2 N.Z.T.C.P.A. 36.

<sup>14</sup> 3 N.Z.T.C.P.A. 93.



Again, in *Re Modern Freighters Limited's Application*<sup>15</sup> another decision which has been previously discussed, the Board considered an application for the establishment of a road transport depot in a Rural zone. The Board found in refusing the application that there was already sufficient land in the Borough zoned Industrial.

In *Watney Sibun's and Sons Limited v. Manukau City*<sup>16</sup> which also concerned an application for a funeral chapel in a Residential zone, in dismissing the appeal the Board held that it was not clear that land more suitably zoned was not available.

By contrast, reference should be made to *Re the Waimea County Application*.<sup>17</sup> The case concerned an application to establish an abattoir. A slaughterhouse had been in operation on the proposed site for a number of years, but the abattoir was not permitted in this Rural zone. In allowing the application the Board disposed of the suggestion of two alternative sites by stating that it appeared that the cost of disposal of effluents was lower at the proposed site.

*Non-justiciable.* It is apparent from the above decisions that the Board is prepared to consider whether there is an alternative site upon which the proposal might be better established.

However, it is considered that it is not reasonably predictable whether the proposed siting will be more conducive to public interest than an alternative site because of the number of variables which may enter into such a consideration. In *Re Waimea County Application*<sup>18</sup> the Board considered the economic viability of alternative sites; it may be that consideration is given, for example, to the traffic position, the effect on the amenities, and the effect on the stability of zoning of an alternative site.

It is, thus, not reasonably predictable whether a proposed site is more in the public interest than alternative sites and accordingly it is considered that the issue is non-justiciable.

## IX. ECONOMIC VIABILITY

The economic viability of a proposed undertaking is a matter which the Board has taken into account when considering applications for specified departures. The reason for such consideration is no doubt that it is in the public interest that those commercial activities which the Board permits to be established should be a financial success.

<sup>15</sup> 2 N.Z.T.C.P.A. 162.

<sup>16</sup> 3 N.Z.T.C.P.A. 17.

<sup>17</sup> 2 N.Z.T.C.P.A. 157.

<sup>18</sup> *Ibid.*

The situation is the converse of that in *Re an Application by T. R. Taylor Limited*<sup>19</sup> which was discussed in relation to the economic use of the land. In that case it was held to be in the public interest to permit the reopening of the commercial premises, for, the premises would be occupied and the service station would be of "economic value" to the community. By contrast if a commercial enterprise was established which did not prove to be economically viable the result may be that the premises become unoccupied and that the enterprise be of no "economic value" to the community. Hence, there exists the need to establish that the commercial enterprise will be economically viable to ensure that to permit the establishment of that enterprise will not be contrary to the public interest.

Further, it is in the public interest that profitable commercial enterprises be established providing facilities which are of use to a large sector of the general public.

The question of economic viability was discussed by Luxford S.M. in *G.U.S. Properties Limited v. Christchurch City*.<sup>20</sup> The case concerned an appeal against the refusal of the respondent Council to grant a specified departure to permit the erection of buildings to be used as shops and a supermarket on land owned by the appellant, part of which land was zoned Residential. After accepting the submission of the appellant that it would be uneconomic to establish the proposed supermarket in a Commercial zone, because of the high capital expenditure, Luxford S.M. stated:

The Board agrees that the establishment of a profitable business which provides a useful service to a large section of the general public is in the public interest, but the weight to be given to that factor for the purposes of considering public interest depends upon all the surrounding circumstances.<sup>21</sup>

However, in that case whilst the Board was satisfied that the supermarket would be a financial success consequent upon the giving of consent for a specified departure, the appeal was not allowed on the grounds that the proposed increase of the Commercial zone could have been better dealt with by the appellant lodging an objection to the proposed zoning of the land at the time of the review of the District Scheme.

Economic viability is a unique factor in contributing to public benefit. In determining whether to grant a specified departure the Board has proceeded by considering the various factors discussed above in relation to public interest. Then by weighing these factors

<sup>19</sup> 2 N.Z.T.C.P.A. 205.

<sup>20</sup> 3 N.Z.T.C.P.A. 202.

<sup>21</sup> *Ibid.*, 203.

with reference to the particular facts of the case the Board has decided whether on the balance a specified departure would be in the public interest. Where the question of economic viability is considered, however, the Board has held that that factor must always be subservient to the establishment of the need for the proposed facilities in assessing whether or not the proposal is in the public interest.

*National Trading Company of New Zealand Limited v. Rotorua City*<sup>22</sup> also concerned an appeal against the decision of a respondent Council refusing to consent to a specified departure permitting the establishing and the conducting of the business of a supermarket in a Residential zone. In determining whether the public interest would be better served by allowing or disallowing the proposal Luxford S.M. stated:

The evidence adduced by the appellant merely establishes that the proposed supermarket will be an economic success because the parking facilities available on the site will assure the patronage of an adequate percentage of the large volume of passing traffic. That, however, does not, in the opinion of the Board, establish a public need of the kind necessary to justify the consent the appellant seeks.<sup>23</sup>

The Board dismissed the appeal on the grounds that there was an absence of public need for the proposal.<sup>24</sup>

*Non-justiciable.* It is considered that the likely financial success of a commercial venture may not be ascertained with reasonable certainty.

Considerations of economic viability in practice will be confined largely to applications for departures to permit the establishment of petrol service stations, shopping centres, and supermarkets. All three undertakings depend upon two sources of custom for their economic success: first, the patronage of the local residents contained in a catchment area surrounding the proposal; second, the patronage of a sufficient percentage of the volume of passing traffic. The first source is more applicable to the supermarket and shopping centre proposals than to the petrol station proposal; the second source is more applicable to the petrol station proposal than to the other two.

While it is possible to estimate the maximum number of customers contained in a given catchment area, it is not possible to estimate accurately the number of those possible customers who will patronise the proposed enterprise. Some of these possible customers may not find the proposed enterprise offers the facilities they require; some

<sup>22</sup> 3 N.Z.T.C.P.A. 203.

<sup>23</sup> *Ibid.*

<sup>24</sup> See also *Thompson Bros. Service Station Limited v. Christchurch City* 3 N.Z.T.C.P.A. 185.

may prefer to continue to patronise an existing enterprise which provides the same facilities. In short, owing to the number of variables which may enter into calculations of the number of prospective customers in a given catchment area such calculations may not be made with reasonable certainty.

It may be possible to calculate the volume of traffic passing the proposed site but to estimate the percentage of that traffic which will patronise the proposed undertaking is a more difficult task. Some of these prospective customers may find the proposed premises unattractive; some may find they are unable to patronise the proposed undertaking, because of the siting of the premises they have been offered inadequate opportunity to pull over from the stream of traffic and stop. Again, the number of variables which may enter into calculations of the percentage of passing traffic which is likely to patronise the proposed undertaking prevents any element of reasonable certainty in such calculations.

It is considered, therefore, that the economic viability of a proposal may not be reasonably predictable and that, thus, the issue is non-justiciable.

#### X. A PUBLIC NEED

In deciding whether the public interest would be better served by the granting of or the refusal of an application for a specified departure the Board has taken into consideration whether or not there is presently provided adequate facilities of the type proposed. Where there are inadequacies it is in the public interest that this need be met by the granting of the specified departure; on the other hand where there are adequate facilities of the type proposed it is contrary to public interest that the application be granted.

It must, however, be emphasised that it is a public need which is necessary for the proposal to be in the public interest. It is not the need of the applicant which the Board considers. The distinction between public need and the appellant's need is illustrated in *Thompson Bros. Service Station Limited v. Christchurch City*.<sup>25</sup> The applicant operated a petrol station which was declining in trade. The declining trade was likely to lead to cessation of business unless a specified departure was granted to permit the business to be relocated in a Residential zone. The Board considered the site to be suitable and that the business would be economically viable. However, in dismissing the appeal Luxford S.M. stated:

<sup>25</sup> 3 N.Z.T.C.P.A. 185.

The only need proved is the need for the appellant to find a site to which it may remove its business, but if such a site has to be in a residential zone it must be one where the need in public interest can be proved; not the need of the appellant alone.<sup>26</sup>

(a) *Future Need*. It would seem that the Board has interpreted on occasions public need as being a need which may arise in the future.

In *Re Hunter's Services Limited's Application*,<sup>27</sup> (a decision which has been previously discussed), the applicant sought permission to establish a service station in a Residential zone. It was stated by Mr Taylor (Chairman) that the evidence showed that having regard to the present and future development in the area a petrol station and garage was not only justified at present but within a few years would become a necessity and that it was sound principle to anticipate future needs.

And in *Penrose and Buist's Application*<sup>28</sup> the Board considered an application for a specified departure to permit the erection of a service station and garage in a Residential zone. In granting the application Kealy S.M. stated that having regard to the likely demands of an increasing population it was desirable in the public interest that the site should be used for the proposed purpose.

Again in *Poverty Bay Electric Power Board v. Gisborne City*<sup>29</sup> the question of future needs was considered. In that case the applicant sought a specified departure from the operative district scheme which required the erection of a veranda over the footpath where in this instance, a new building was to be constructed. In refusing the departure Kealy S.M. stated that the Council ordinance in respect of requirements for verandas in this particular street was not unreasonable having regard to the likely future growth of Gisborne.

It is submitted that the three above decisions involve misdirection as to law. In each instance the Board has considered the *future public needs*, and yet it is a clear principle established by decisions of the Board that a specified departure is not a temporary remedy. A departure is not a planning tool to remedy deficiencies in zoning. Whilst it is a sound town planning principle to anticipate this future growth by the granting of a specified departure under the Town and Country Planning Act, s. 35, future needs may be met by the five-yearly review of schemes provided by the Town and Country Planning Act.<sup>30</sup> It is present needs which are in the public interest which the Board should consider in the granting of a specified departure.

<sup>26</sup> *Ibid.*

<sup>27</sup> 2 N.Z.T.C.P.A. 274.

<sup>28</sup> 3 N.Z.T.C.P.A. 38.

<sup>29</sup> 2 N.Z.T.C.P.A. 17.

<sup>30</sup> See *Re Millar's Application* 3 N.Z.T.C.P.A. 39, 40 per Watts S.M.

(b) *The Public Affected*. The test for determining whether there is sufficient need would appear to be whether it is more contrary to the public interest to refuse the application than it is to grant it. In the previously discussed decision of the Board of *National Trading Company of New Zealand Limited v. Rotorua City*<sup>31</sup> Luxford S.M. stated as follows, in discussing public need:

Such a need may exist if refusal of consent would *adversely affect the residents in a residential zone*<sup>32</sup> to a greater degree than their being deprived of the amenity of living in a zone undisturbed by any commercial activity being carried on therein. Such a need may also exist if it is of *such importance to the general public*<sup>33</sup> or a large section of the general public that the adverse effect of a refusal of the departure outweighs all other considerations.<sup>34</sup>

These two instances of an existence of a public need may be broadly termed as being local public need and general public need.

(i) *Local public need*: Instances where the refusal of consent would have affected the residents in a Residential zone more than their being deprived of the amenity of living in a zone undisturbed by commercial activity are to be found in *In re Jarvis's Application*<sup>35</sup> and in *Parratt et ors v. Waiheke Road Board*.<sup>36</sup> The former concerned an application to permit a dairy and milk bar business in a Residential zone, and the latter an application to permit a grocery business in a Residential zone; in both cases the application was supported by a large number of local residents and in both cases the Board granted the application.

(ii) *General public need*: The question of public need in the second sense referred to by Luxford S.M. in *National Trading Company of New Zealand Limited v. Rotorua City*<sup>37</sup> that of a general public need, has been considered by the Board on a number of occasions.

In *Mobil Oil (N.Z.) Limited v. Christchurch City*<sup>38</sup> where the applicant sought to establish a petrol station in a Residential zone the departure was not granted for there was no evidence of other petrol stations in the locality not being able to supply the reasonable needs of the motoring public.

In *Blogg v. Christchurch City*<sup>39</sup> the applicant sought to establish a petrol service station and garage in a residential area. Luxford S.M. stated:

<sup>31</sup> 3 N.Z.T.C.P.A. 203.

<sup>32</sup> Writer's emphasis.

<sup>33</sup> *Ibid.*

<sup>34</sup> 3 N.Z.T.C.P.A. 203, 204.

<sup>35</sup> 2 N.Z.T.C.P.A. 9.

<sup>36</sup> 2 N.Z.T.C.P.A. 115.

<sup>37</sup> 3 N.Z.T.C.P.A. 203, 204.

<sup>38</sup> 3 N.Z.T.C.P.A. 90.

<sup>39</sup> 3 N.Z.T.C.P.A. 169.

The real difficulty the appellant has to face is proving that such a service station and garage are required in the public interest, and that it is also in the public interest that the proposed site be used for the purpose.<sup>40</sup>

And the Board in declining the application held that the applicant had failed to prove that there was any present need at all for a new petrol station in the area.

In the previously discussed case of *National Trading Company of New Zealand Limited v. Rotorua City*<sup>41</sup> the Board refused the departure of a supermarket in a Residential zone on the ground that *inter alia* the evidence relating to the number of supermarkets already operating in Commercial zones within the City of Rotorua or in the course of construction negated public need of a nature that justified the appeal being allowed.<sup>42</sup>

In *Mark v. Hutt Valley*<sup>43</sup> the appellant was appealing against the decision of the Council to refuse an application for a specified departure to permit the erection of a two storey block of shops and offices in a Residential zone. The only existing non-conforming use in the Residential zone was a large commercial building on the land adjoining the block where the appellant sought to erect the building. The appeal was disallowed on the grounds that it was contrary to public interest to allow any further commercial developing in the Residential zone except in circumstances constituting a public need of sufficient importance to outweigh any effects adverse to the public interest caused by the departure.

Instances where a general public need has in fact been established are indeed rare. The writer's research revealed only two reported cases where this general public need had been established to the satisfaction of the Board.

The first is *Amalgamated Brick and Pipe Co. (Wellington) Limited v. Hutt County*,<sup>44</sup> the facts of which have been previously discussed. The appeal was allowed by the Board on the ground that *inter alia* the appellant company manufactured a product which was essential to public health.

The second is *Stitchbury et ors v. Wellington City*<sup>45</sup> the facts of which also have been previously discussed. Among the factors taken

<sup>40</sup> *Ibid.*

<sup>41</sup> 3 N.Z.T.C.P.A. 203.

<sup>42</sup> For further examples of a failure to establish a general public need see the following: *Shirley et anor v. Hawke's Bay County* 2 N.Z.T.C.P.A. 133; *Re Rodney Motors Limited's Application* 2 N.Z.T.C.P.A. 288; *Tomin v. Hamilton City* 3 N.Z.T.C.P.A. 111; *Caltex Oil (N.U.) Limited v. Hutt County* 3 N.Z.T.C.P.A. 156; *Watts v. New Plymouth City* 3 N.Z.T.C.P.A. 190.

<sup>43</sup> 3 N.Z.T.C.P.A. 226.

<sup>44</sup> 3 N.Z.T.C.P.A. 122.

<sup>45</sup> 3 N.Z.T.C.P.A. 171.

into consideration in granting the departure to permit the erection of a service station in a Residential zone was that there was no petrol service station in the area or within a reasonable distance of the proposed site; at least 66.5 percent of the applicant's cash and credit customers lived in that area.<sup>46</sup>

It is quite apparent from the above decisions that where a specified departure to establish a commercial enterprise in a Residential zone is sought, where the circumstances warrant the showing of a general public need for the proposed enterprise the applicant will have a stern task in satisfying the Board of the existence of such a need.

It is noted, however, that in certain instances involving the proposed establishment of a commercial enterprise in a Residential zone the Board has not considered the factor of a general public need, notwithstanding that judging by decisions in similar cases the circumstances clearly warrant a consideration of general public need.

In *National Trading Company Limited v. Mt. Roskill Borough*,<sup>47</sup> the Board considered an application for a specified departure to erect shops including a supermarket on land zoned Residential. The application was granted without the Board's considering a general public need.<sup>48</sup>

Again, in *Re an Application by Regional Centres (Mt. Albert) Limited*<sup>49</sup> the Board granted an application for a specified departure permitting an integrated shopping and commercial centre in a Residential zone without considering the existence of a general public need. It is true that the Board took into account the support of a large body of residents:

The Board feels that this is not a factor which should influence it unduly, but the views and wishes of residents of the district undoubtedly have a degree of relevance when the question of public interest has to be considered.<sup>50</sup>

However, local support does not necessarily indicate a general public need. It is only to be expected that residents of the district would want greater facilities, but such a demand does not in itself represent a need. It may be that the needs of the district are adequately satisfied without the proposal.

<sup>46</sup> A further instance of general public need being satisfied may arise in *Re W. F. Turner Family Partnership's Application* 3 N.Z.T.C.P.A. 162. It is not, however, clear whether the proposed centre was to provide facilities only for those shopkeepers who had been displaced or whether facilities were also to be provided for additional shops.

<sup>47</sup> 2 N.Z.T.C.P.A. 155.

<sup>48</sup> See also *Re an Application of the National Trading Company of New Zealand Limited* 2 N.Z.T.C.P.A. 180.

<sup>49</sup> 2 N.Z.T.C.P.A. 181.

<sup>50</sup> *Ibid.*, 182 per Kealy S.M.



There can be no doubt that it is a convenience for a householder to be able to purchase all his household requirements in one shop instead of having to go to a number of shops such as the grocer, the baker, the butcher, the seed and plant shop, the hardware shop and the like. The same may be said of any commercial form of activity which like the modern supermarket provides a useful and efficient service to a large range of people or a large section of the general public, but that does not *per se*, justify a local authority<sup>51</sup> consenting to a specified departure.<sup>52 53</sup>

*Non-justiciable:* It is apparent from the above decisions that in determining an application to permit the establishment of a commercial enterprise the Board has on occasions taken into consideration whether there is a general public need for such an enterprise.

It may be demonstrated that a proposal fulfils a need by establishing the existence of an unsatisfied public demand which the proposal will satisfy. In practice, it will be necessary to calculate the number of prospective customers in the area of the proposed facilities, and to demonstrate that the existing facilities in the area of the type proposed inadequately serve this number of prospective customers.

Uncertainty arises in that it is not possible to calculate with any certainty the number of customers the existing facilities of the same type in the area are capable of adequately serving.

First, catchment areas for different sites must, to a certain degree, cover different areas, and it would be difficult to calculate with reasonable certainty the degree to which the catchment area of an existing enterprise overlaps that of the proposed enterprise; it follows that it is not reasonably certain the percentage to which the prospective customers of the proposed enterprise are presently adequately served by an existing enterprise.

Second, the capacity of existing facilities cannot be calculated with reasonable certainty; whilst planning experts may offer opinions upon the customer capacity of facilities, such opinions are only approximations and such experts may differ in their opinions.

<sup>51</sup> This statement would apply equally to the Board where the departure sought will have little significance beyond the immediate vicinity. (In this particular case the Board held that the departure would have little significance beyond the immediate vicinity.)

<sup>52</sup> *National Trading Company of New Zealand Limited v. Rotorua City* 3 N.Z.T.C.P.A. 203, 204 *per* Luxford S.M.

<sup>53</sup> It is questionable whether the Board can justify the requirement that a general public need need be shown before granting a specified departure which will affect the general public interest. It may be argued that by this requirement the Board is basing its decision on a matter which exceeds the promotion and safeguarding of economic welfare of the inhabitants of the area referred to in s. 18 of the Act, and that the Board is exceeding its jurisdiction by considering a factor which amounts to economic control. It is for the Legislature and not the Town and Country Planning Appeal Board to determine the necessity of economic licensing.

Third, where the enterprise is a supermarket or shopping complex a degree of uncertainty arises as to what are facilities of the same type. It is a recognised feature of town planning that shopping centres of differing sizes serve differing needs. It is not possible, however, to distinguish arbitrarily between one type of centre and another. Hence, there is a further element of imprecision in determining the type of need a particular centre purports to serve.

It is clear, therefore, that a great number of variables enter into determining whether a proposed enterprise will serve a general public need. Hence, it cannot be predicted with reasonable certainty whether there is a general public need for a proposed enterprise and accordingly it is considered that the issue of the existence of public need is non-justiciable.

#### CONCLUSION

From the above survey of the ten factors which the Board has considered in relation to public interest in specified departures it is apparent that these issues which concern public interest are to a large extent non-justiciable.

Whilst the issues of the established non-conforming use, and of stability of zoning with its three heads of spot zoning, ribbon development, and lines of demarcation are justiciable, the other seven factors contained in the survey are non-justiciable. Of these non-justiciable issues those concerning whether the proposal is a temporary remedy, and whether there is a general public need for the proposal are frequently considered by the Board. For this reason it is considered that the decisions of the Board upon specified departures are based on non-justiciable issues to a very high degree.

However, it must be emphasised that in considering a specified departure the Board will take account of all the surrounding circumstances. The Board in general makes its determination by isolating the various issues which affect public interest, deciding the degree to which each issue is adverse to or promotes public interest, and then, by weighing these various factors, determines whether on the balance the proposal will promote public interest or will be contrary to it.

By adopting the inquisitorial or semi-inquisitorial procedure of a tribunal as opposed to the adversary procedure of a court the Board is able to approach matters with a degree of flexibility, and is free from excessive legalism. The freedom offered by this inquisitorial approach enables the Board to fully investigate the non-justiciable, social and socio-economic issues which are factors affecting public

interest. This investigation could not be successfully undertaken by the more rigid adversary procedure.

For a determination to be successful and for there to be a complete consideration of issues it is necessary that the procedure adopted by the determining body be suited to the type of investigations of social and socio-economic issues. And it is considered that the Board, by adopting an inquisitorial or semi-inquisitorial procedure, is suited to investigating the issues involved in determining whether or not a departure will promote the public interest.

It is further considered that the Board has proved to be successful in determining public interest in relation to proposed departures. However, in two instances which have been previously discussed the decisions of the Board are not completely satisfactory. First, the Board has not been consistent in considering the issue of whether a commercial proposal is in the general public need for, on several occasions the Board has failed to consider this issue whilst in similar cases the outcome of the case has been to a large degree dependent upon this issue. Second, on several occasions the Board has wrongly considered future need to be relevant to public interest, for specified departures are concerned only with present needs, and scheme reviews cater for future needs. The effect of considering future needs in a departure is that it results in too much flexibility in zoning and too little certainty.

Overall, however, the Board by adopting an inquisitorial approach to consider the mainly non-justiciable issues which are relevant to public interest has achieved that which the legislature intended it to achieve in the granting of specified departures. In determining that which is contrary to public interest and that which promotes public interest in the manner which it does the Board ensures that departures from a district scheme introduce a certain flexibility into that District Scheme without sacrificing the stability which is so essential to town and country planning.