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THE SCOPE OF DISCRETIONARY POWERS

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DISCRETIONARY POWERS IN DISTRICT SCHEMES

The Town and Country Planning Act 1977 introduces two new provisions authorising the inclusion of discretionary controls in district schemes. These powers are contained in sections 36, subsections (4) and (5). To a certain extent they may overlap and in neither case is a bare open ended discretion conferred. The powers must be related to the general purposes of the scheme or to more particular policies and objectives concerning landscape and design, so the planning justification for including the discretionary controls will depend largely upon an adequate statement of objectives, purposes and policies, and identification of the discretionary controls as a means to achieve these ends.

The discretionary powers are in addition to the existing powers conferred upon councils to grant dispensations and waivers from bulk and location provisions. The powers are obviously intended to allow a council, or planning officer acting under delegated authority, a much more comprehensive and finer degree of regulation as to the form of the district scheme and its subsequent implementation. The types of discretions which may be introduced through section 36(4) and (5) are numerous, and must depend upon the needs of the district and what is "appropriate" provision in the circumstances (s 36(1) and clauses 2, 5, 6, 7, 8, 2nd schedule). However, one can attempt to give some examples as to the types of discretions which may be valid now under the 1977 provisions.

A. Use definition - s 36(4)

Formerly a district scheme could define only two kinds of use in any zone, i.e. predominant and conditional uses. Subsection 4 authorises these two "classes of development, uses, and buildings" but also adds a third type (c):

"Those which are permitted subject to such powers and discretions specified in the scheme as are necessary or desirable to achieve the general purposes of the scheme and to give effect to the policies and objectives contained in the scheme relating to -

- (i) Landscaping;
- (ii) The design and external appearance of buildings;  
and
- (iii) Such other matters as may be specified in that behalf by any regulations in force under this Act".

The scope of this subsection is not entirely clear and raises matters of statutory interpretation. Can the discretion relate to general policies alone, such as compatibility of use, performance standards, or are the general purposes intended to be those concerning landscaping, design, and other matters defined in regulations? If the former view is correct, the need to define other matters in regulations would seem superfluous, and that may indicate the more restrictive approach is intended.

Accepting the latter conjunctive interpretation, a zone could include a category of uses permitted subject to approval of landscaping provision, and design and appearance of buildings in accordance with stated policies: e.g.

- (a) Residential A zone - predominant uses - 1 or 2 dwelling units; "controlled uses" - subject to approval as to design and landscaping - 3 or 4 units; conditional uses - 5 units or more.
- (b) Alternatively in the Residential zone - a desirable use such as a church, playcentre, or pensioner flats could be a "controlled use" to ensure compatibility of appearance and reasonable design standards.
- (c) In a special amenity area, or area of landscape requiring visual protection, all uses could be defined as "controlled uses", with no predominant uses. This situation would solve the problem raised in Fifth City Estates Ltd v Christchurch City [1976] 1 NZLR 354 of obtaining a discretion to approve design and external appearance in harmony with the character of an area.
- (d) In the absence of any special circumstances, in the "average" type of planning area it would not be "appropriate" to exclude predominant uses and define all the uses as controlled uses. The Act contemplates a reasonable balance of categories depending upon planning needs and policies. General design control may still be retained however by introducing a power under subsection 5.

B. General discretionary controls - s 36(5)

This subsection states:

"Any district scheme may confer on the Council such specified powers and discretions as are necessary or desirable to achieve the general purposes of the scheme and to give effect to the policies and objectives contained in the scheme relating to -

- (a) The preservation or conservation of trees, bush, plants, landscape, and areas of special amenity value;
- (b) The design and external appearance of buildings; and
- (c) Such other matters as may be specified in that behalf by any regulations in force under this Act".

This provision raises the same problems of interpretation as subsection 4, but the cautious view will be taken that the discretions are limited to matters stated in subclauses (a) and (b), and anything which may be specified by regulation under (c) (e.g. satisfactory noise and emission standards).

Subsection (5) fills an important lacuna under the 1953 Act which did not allow for preservation of existing amenities, trees and landscape other than by specific identification and listing within the scheme. The register system for preservation is available under the 1977 Act, but subsection (5)(a) enables general powers to be included for "preservation and conservation". Thus, the type of ordinance discussed in Attorney-General ex rel McHardy v Waitemata City Council [1977] 1 NZLR 680 would now be authorised. That ordinance generally prohibited any destruction of trees (as defined) and landscape, without council consent. In addition, an ordinance may relate to the preservation or conservation of "areas of special amenity value". These areas would require definition in the scheme and the discretion would have to be related to stated policies and objectives. In effect the English system of conservation areas can be adopted, subject to possible compensation aspects.

Under subclause (b), a general power to approve and impose conditions as to design and external appearance is authorised, and such power could apply to the whole district and all uses. The actual degree of regulation permissible under the power would need to be related to justifiable scheme purposes and policies in particular areas, or related to types

of activity. Whether the design control power is defined as an overall power, or defined in conjunction with each category of use as far as needed would be a matter of choice for the council depending on the circumstances.

Another aspect of sub-clause (b) is the wording "the design and external appearance of buildings" compared with the wording of the former provision in clause 8(b) of the second schedule to the 1953 Act which contemplated regulation of buildings with respect to "character, and harmony in design and external appearance". In making the comparison of words it is also of significance that clause 7 to the second schedule of the 1977 Act commences by referring to "the design and arrangement of land uses and buildings," including "the design and external appearance of buildings." The question of character would appear to be dealt with under clause 5 concerning the preservation or conservation of buildings and objects. <sup>in the Fifth City Estates case</sup> Casey J/~~considered that the former~~ provision did not authorise any general design control or control over internal layout and appearance. This limitation would no longer apply under the 1977 Act as the word design is specifically used and is not limited to external design or harmony in design. However the reference to "external appearance of buildings" <sup>indicates</sup> that the term "design" should be interpreted to relate to matters other than external appearance. It is suggested that design covers all the objective aspects of layout and structure either internally or external to a building whereas external appearance covers the actual appearance of cladding or sheathing or paint colour schemes upon the exterior of a building. By specifically limiting the control of appearance to the external part of a building it would appear part of the legislative intent (as divined by Casey J) to prevent any regulation of internal colour schemes of buildings or internal control over materials, other than as necessary to satisfy building bylaws or to comply with the general structural design requirements. Thus a discretion as to design related to specific design policies for a particular area or generally could be used to considerably refine the more basic control achieved through bulk location and height controls. Questions of pitch of roofs, nature of external cladding, and

colour schemes could all be controlled by the discretionary power. Controls of this nature accord with planning controls in extensive use in the United Kingdom.

C. Relationship of discretionary controls to other scheme provisions.

In considering the type of discretionary controls which may best suit a district scheme, the form of control may be determined by the other provisions contained in the district scheme which contribute towards the preservation of landscape and amenities and the control of design and appearance. These other aspects are listed in brief and of course are self evident.

1. Zoning or use definition. Under clause 2 of the Act, the scheme should provide for the establishment of land uses or activities as are appropriate to the circumstances and presumably this regulation will continue to be achieved by the present zoning system on planning maps. Thus incompatible uses which may lead to incompatible structures can be eliminated initially.

2. Bulk and location provisions. The second schedule clause 7 contemplates the continuation of the present bulk and location controls with an increased emphasis under clause 8 towards the adoption of performance standards as to noise and other noxious elements. Section 36(3) states that the district scheme shall provide not only controls and prohibitions but also incentives relating to development, and this provision clearly authorises the continued use of bonus ordinances which allow for increased development where amenities are provided in the public interest.

3. Building lines. Although not specifically authorised, clause 5 of the second schedule relating to preservation of objects of visual appeal and amenities and clause 7(g) concerning access to day-light and sun-light clearly contemplate the use of building lines for these purposes. In particular section 80 gives the building line provisions in a district scheme paramount affect over building lines proposed under other Acts.

4. Verandahs. The existing power to require provision or to prohibit and control the erection of verandahs in commercial streets is broadened

to refer to any area so it would be open to require verandahs in industrial areas or for any shop which fronts a public street or is located set back from a public street. The power to make provision of course enables a council to impose a condition on design that a verandah be incorporated.

5. Advertising. Clause 7(d) also applies to the provision, prohibition, and control of signs and advertising displays. This contemplates the control of a sign as a use in itself or the control of advertising displays where placed on existing structures which might be predominant uses. The former reference to outdoor advertising is deleted so advertising within the internal dimensions of a shopping mall is also contemplated.

6. Floating zones. The validity of floating zones has not been pronounced upon yet under the 1953 Act and the 1977 Act does not specifically refer to this technique of zoning. However as a matter of principle the adoption of a floating zone by way of a formal scheme change should not be viewed as ultra vires and is wholly compatible with the dynamic nature of the planning process. A number of decisions in the United States have approved such techniques. To the extent that the 1977 Act is cast in wider language and does not suffer from any limitation of model ordinances, the adoption of floating zones is likely to increase.

7. Structure plans. Certain district schemes require as a condition of sub-division or development of lots for specific or large scale developments that a structure plan be submitted as part of the plans for approval. The power to accept or reject a structure plan introduces a discretionary control unless the objectives of requiring a structure plan are set out and the decision then of the council is one of certification of compliance with development principles. Where the structure plan is adopted for a large area and the structure plan itself determines the predominant or conditional uses and bulk and location provisions, it would appear ultra vires the Act to incorporate such a finite decision by way of a simple council resolution rather than enabling objection rights to be exercised through the formal scheme change procedure. For example the West Harbour structure plan of the Waitemata City raises questions of validity on this point.

8. Preservation of objects and places of value. Clause 5 of the second schedule contemplates a system to preserve and conserve buildings and objects of value, trees, bush and plants and amenities and clearly the relationship between the existing systems under which specific objects or places are included in a list on the scheme and the discretionary powers of control must be weighed up. The validity of the present model ordinances is in some doubt; see the authors, Planning Law in New Zealand, 1977 (page 73), as such listing should be achieved by way of formal change and the listing should be deleted again following a scheme change rather than a simple council resolution. Cf. Trustees of Christchurch Club case (1977) 6 NZTPA 235 (designation required). From the land owners point of view, the listing of a building or place achieves the benefits of certainty and possibly entitles the owner to compensation where the restrictions result in a limitation of use or involve any expenditure which would not otherwise be required, and obviously the listing of clearly defined objects of value should be encouraged. On the other hand a council may wish to maintain a discretionary control depending on needs and circumstances and money available to preserve the objects or places without any commitment on paper, and on this basis the use of the discretionary powers will be a valuable supplement.

9. Power to impose design conditions on planning consents. A condition of a consent can obviously require approval of design or colour scheme to the satisfaction of a named person; see Turner v Allison [1971] NZLR 833, however the attitude of the appeal boards on a number of cases, including McDonald v Dunedin City Council (1972) 4 NZTPA 305, is that design restrictions should not be imposed at will where the scheme itself does not require particular design standards. This attitude is likely to harden in the future if district schemes fail to detail adequately policies and objectives for design and control.

10. Dispensations from design and landscaping requirements. Section 36(6) of the Act contemplates that a scheme may have specific design and appearance requirements and provisions concerning verandahs and landscaping and in this event, the scheme may provide under the dispensation or waiver clause that these requirements can be dispensed with. The dispensation is granted in accordance with the criteria



of section 76, that the dispensation will encourage better development etc and will not result in a detracton from amenities. Where the dispensation is refused by a council officer there is a right of review under section 88 by the council and after review a right to appeal to the tribunal under section 69. One would consider that in areas of special amenity, the district scheme could lay down precise design requirements in advance rather than leaving the matter to be resolved under the discretionary powers.

11. Land sub-division powers. Following the 1974 amendments to the Municipal Corporations and Counties Act, councils have the power to require upon a sub-division that landscape and buildings be preserved and trees and shrubs be planted. A broader power is contemplated under the Local Government Amendment (No 4) Bill 1977 which states in clause 279 (2) (n) that in the case of a comprehensive sub-division the design, type and location of buildings shall be such as approved as a condition of the approval of the scheme plan. This appears to confer an additional discretionary power to regulate design and location of buildings. The comprehensive sub-division is in effect a sub-division which the council deems to be of that nature.

D. Form of general control. As stated initially the ability to use a general power of control under section 36(5) will depend upon the scheme setting out in the general purposes and policies and objectives reasonably specific matters to be achieved by use of the discretionary power. If such purposes are too vague and there are no policies or objectives, it is likely that a court would uphold a challenge to use the powers for objectives decided in the whim of the planning officer or council. Assuming that such policies can be drawn up the question arises as to who will make the decisions.

1. Delegation powers. Under section 88 the council may delegate to an officer or officers the powers of the council concerning applications to be made without notice and one would assume that the scheme would provide for applications which require approval under the discretionary amenity and design powers to involve applications without notice where a predominant use or control use is involved. In this event the owner or occupier has a right of review before the council.

In the alternative the council may delegate the approval function to a

committee as set out in section 87 of the Act and the committee may be given a power of final decision on behalf of the council. Otherwise the council may delegate the function to a commissioner who must recommend back to the full council or to a planning committee the matter for final decision.

The nature of a committee which may be constituted is defined in section 104 of the Local Government Act 1974 (as amended by No 3 amendment 1977) and under that provision the committee should consist of a minimum of two councillors but may otherwise include outside persons who in the opinion of the council have knowledge which would assist the work of the committee. Accordingly the Council Committee considering design applications or applications for review from the decision of an officer could be constituted by the council to comprise, for example, two councillors and two other persons not employed by the council or being members, perhaps being practising town planners, architects or landscape architects. This system of an architectural board of review has been accepted in the United States and was proposed in the Fifth City Estates case in Christchurch. As decisions on matters of design and external appearance may involve considerable differences of opinion, the adoption by a council of a semi-independent review committee could be a wise move. In any event a further appeal right from the decision of this committee or the council itself is conferred under section 69. The tribunal may accordingly in the end influence considerably the nature of controls in this area, bearing in mind that the tribunal may under section 152 in any proceedings require amendments to be made to a district scheme to remedy any mistake, defect or uncertainty in the scheme or for giving full effect to it.

2. Proposed model ordinance (in simplified form).

Preservation of amenities and design control.

1. The council shall be entitled to refuse to approve any development (as defined hereunder) and may impose conditions in respect of any such development, as is necessary or desirable to achieve the general purposes of the scheme and to give effect to the policies and objectives

contained in this scheme relating to -

- (a) the preservation or conservation of trees, bush, plants, landscape, and areas of special amenity value;
- (b) the design and external appearance of buildings; and
- (c) such other matters as may be specified in that behalf by any regulations in force under the Town and Country Planning Act 1977.

2. For <sup>the</sup> purposes of this ordinance and subject to sections 90 and 91 of the Act (relating to existing use rights), development means -

- (a) any new building or structure which may be proceeded with as of right or after approval by way of a notified or non-notified application,
- (b) any appreciable alteration, addition, repair, reinstatement, destruction of, or change of character to any existing building or structure (including material changes in external colour schemes),
- (c) any change of use of any land or building which would be contrary to or conflict with the provisions of a proposed change, variation or review of the scheme,
- (d) any appreciable work on or excavation of land affecting land form or native bush or any tree of a height of not less than 4 metres or trunk girth of more than half a metre.

3. Where any development is subject to control of the council under this ordinance, consent of council shall be obtained and the council may require such plans and information as necessary to come to an informed decision and may delegate its power of decision in the first instance to any officer of the council. Where a decision is made by an officer and if the applicant is dissatisfied he may within one month apply in writing to the council for a review of the decision.

4. The council may in its discretion refer any application for review to a committee for final decision or for recommendation. The review committee shall comprise two councillors and two other persons, being practising town planners, architects or landscape architects as

appointed by the council. The applicant shall be entitled to make written submissions and to appear before the committee along with council officers for a hearing on the matters raised. The committee shall give written notice of its decision to the applicant.

5. Nothing in this ordinance shall limit the power of the council to grant a dispensation or waiver from requirements of the scheme as to design and appearance of the buildings and signs and the provision, design, and appearance of verandahs, and as to landscaping (as provided for in ordinance XX).

6. Where an application under this ordinance concerns work or a change of use that would be contrary to provisions of a proposed change, variation or review of the operative scheme, the matter may continue to be dealt with by way of non-notified application under this ordinance unless the council otherwise determines (see section 75(6)).

#### Conclusion

E. It is hoped that the foregoing discussion of the discretionary powers will indicate the wide potential for control now conferred upon councils in the delicate area of design and amenity preservation, and will indicate the options open in changing schemes to take on the additional functions. Clearly the need for discretionary powers of this type will vary depending on local conditions, and the benefits obtainable from the use of the powers will depend substantially upon the expertise, expectations and dedication of the planning staff and council concerned, bearing in mind that questions of compensation for undue restrictions imposed are inevitably likely to arise. A reasonable balance must be maintained within any community to ensure that the objects of furthering the general welfare of the people are achieved as required by section 4 of the Act.

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