TOWN AND COUNTRY PLANNING AND ITS IMPACT ON THE INDIVIDUAL—AN INTRODUCTION FOR THE STUDENT

A. E. Hurley, LL.B.

Although town planning has been known in one form or another since the foundation of New Zealand as a colony it was not until the turn of the century that the more stringent controls on subdivision of land were initiated. The Town Planning Act 1926 made further provision for the future planning of towns but a considerable lack of enthusiasm followed by the depression and the Second World War hindered the studies in that field.

Since the Town and Country Planning Act 1953 there has been an increasing awareness throughout Local Government in New Zealand and throughout the Government Services that orderly development of land uses is vital if the retention for production of high fertility land is to be maintained and if urban development is to proceed in an orderly fashion.

Consequently, town and country planning touches the individual person throughout New Zealand, whether he be in a town or in the country and touches him in a very direct and personal way.

Since the passage of the Town and Country Planning Amendment Act 1957 s. 38A, it has been unlawful, except with the consent of the local borough or county council, for anyone to use land or buildings for a purpose that was not of the same character as that which immediately preceded it.

Since the Amendment Act of 1963 whenever land is bought or buildings acquired and a change in the kind of use to which they have been previously put is contemplated the buyer must apply to the council for its consent and the council must cause an advertisement to be published of the proposed change of use. Any person affected by the proposed change is entitled to object if the proposed use detracts or is likely to detract from the amenities of the neighbourhood.

There is a right of appeal to the Town and Country Planning Appeal Board by the applicant and by objectors.

Section 38A applies in every instance where there is not already in existence an operative district scheme. It is the first impact which the Town and Country Planning legislation makes on the individual.

If, of course, there is an operative district scheme in existence, that is one which has already passed through the stages of public notification, objection and appeal and has become the final form of the district scheme, at least for the period of five years, then only may a change of use take place without the consent of the council so long as the proposed new use is a predominant use under the Code of Ordinances for the particular zone whether residential, rural, commercial or industrial in which the land or buildings are situated.

It will be seen therefore that the zoning of land for classifications of use is basic to town planning.

The district scheme for a local district comprises a scheme statement which describes the purposes of the scheme, planning maps which show in varying colours, areas which are zoned for residential, rural,

commercial and industrial purposes. Finally there is the Code of Ordinances which are based on the form set out in the Town and Country Planning Regulations 1960 serial 109 and which specify for each zone those uses which the local authority has designed as being "predominant' or "conditional".

A predominant use is one to which any land or any building within the particular zone may be put without specific planning approval other than such control as the local authority may exercise through specific provisions referable to the predominant uses or through its by-laws.

In addition to the provisions of s. 38A, a local authority which has resolved to prepare a district scheme and has adopted by resolution any provision that would be contained in its district scheme may therefore control any work and any plan of subdivision and any change of use of land that might be regarded as in conflict with the development of the district scheme. This s. 38 is again a provision to enable local authorities to preserve the amenities of a district and to shape the character of the development of a district even before the district scheme of the local authority has become operative and binding. The person who feels himself to be aggrieved by the control exercised by the council under s. 38 has a right of an appeal to the Town and Country Planning Appeal Board.

The intention of the Town and Country Planning legislation is that both regional schemes and district schemes shall be prepared.

Regional schemes are those which lay down the broad lines of conservation and economic development of the region to which it relates by means of the classification of land comprised in it for the purposes for which that land is best suited by nature or for which it can best be adapted and the co-ordination of public improvements, utilities, services and amenities as are not limited by the boundaries of the districts of the individual local bodies in the region.

The private individual has little direct contact with regional planning schemes. They are prepared by the local authorities of the region and they lay down the guiding lines within which the several local authorities in the region must prepare their own district schemes.

District schemes are the work of an individual local authority, either county or borough.

In the first place the local authority prepares what its technical advisers consider to be the most suitable planning development of the district and it then must give notice of its scheme to the Minister of Works and to every local authority which is likely to be affected by its scheme. The Minister and the local authorities may then require the council to make provision for any public works which any of them have in mind. When these requirements have been notified the council proceeds to make such variations to its district scheme as may be necessary and then publishes the scheme with all the associated maps by notice in the New Zealand Gazette and also notifications with an interval of one week in a newspaper circulating throughout the area affected.

The purpose of the notice is to give every person who is the owner or occupier of any property affected by the proposed district scheme an opportunity to object.

After the closing of objections, the council must prepare a detailed analysis of those objections and appoint a time and a place at which

the objectors may be heard. It is also permitted that prior to the date of the hearing of objections persons who are affected by an objection may themselves support or oppose the objection.

The council must then appoint either the whole council or a committee of the council to hear objections.

In my experience, these have been conducted with great patience and care by the councillors appointed, who in many instances sit for days and even weeks listening to the complaints of objectors. I think that this is a very useful forum at which the people affected by the district scheme can come before those councillors who have promulgated it and those councillors must listen to their objections. It is an opportunity for the individual person to be heard on matters which have very considerable importance for him and for the land which he owns or occupies. He is dealing face to face with his own councillors. They hear his plea and may, if the occasion warrants it, visit his land and finally they make their recommendation to the council which may either support the objection or over-rule it, but if it is over-ruled the objector has a right of appeal to the Town and Country Planning Appeal Board.

Both before the committee of the council and before the Town and Country Planning Appeal Board the objector has the right of audience either in person or by his solicitor and he may call evidence to support his objection. Before the committee of the council he is not entitled to cross-examine witnesses, because it is only a hearing of objections but before the Town and Country Planning Appeal Board he has all the rights of a litigant in a Court proceeding where he may, by himself or through his counsel, lead evidence and cross-examine witnesses.

After the objections and appeals, if any, have been disposed of the district scheme can be made operative and from that time onwards it has the binding force of a regulation and can no longer be attacked on the ground of unreasonableness as can a by-law of a local body. Not only are individuals then bound by the district scheme but also the council that promoted it is bound by the operative district scheme and s. 33 provides that no permit or consent, waiver or sufferance from any requirement or provision of an operative district scheme, whether written or otherwise and whether or not under seal shall have effect insofar as that action is contrary to the provisions of the district scheme.

Even a member of the public may prosecute the local authority which has prepared an operative district scheme. (*Pahiatua Borough v. Sinclair and anor.* [1964] N.Z.L.R. 499) Once a district scheme is operative it remains operative until it is reviewed. An operative district scheme may be varied by the local authority for the district under the provisions of s. 29 but it becomes automatically due for review after the expiration of five years and where the district scheme of a local body is prepared in sections then all the sections become due for review on the expiration of five years after the first section became operative.
(Regulation 30 (1)). While a district scheme is due for review any person may object to any of its provisions with right of appeal against an adverse decision of the local body (s. 30 (3) and (5)).

Town planning is, of course, dealing with human needs and while reasonable certainty and conformity to principles is desirable, there

are bound to exist or to arise circumstances where some modification is desirable.

Furthermore, protection has been given to those properties on which what are usually called "non-conforming uses" have been established before town planning became effective. Under s. 36 existing uses at the date when the district scheme became operative are protected and an existing use under this section means a use of the land or building for any purpose that does not require substantial reconstruction or alteration or addition and that is of the same character as that for which it was last used before the date on which the district scheme became operative or of a similar character.

The term "character" in relation to the use of any land or buildings is to be construed with regard to the effect of that use upon the amenities of the neighbourhood.

Even when a district scheme is fully operative and the existing use provisions of s. 36 do not arise a change of use can be permitted under the special procedure provided in s. 35 which authorises an application to be made to the Town and Country Planning Appeal Board for consent to any specified departure from the provisions of an operative district scheme or of a proposed district scheme. The proposed district scheme is one which has received public notification but which has not, in fact, yet become operative.

This section has been availed of to a considerable extent for changes in use of particular sites or buildings and it affords a degree of flexibility from the rigidity of either a proposed or operative district scheme.

There is, however, a further power which is vested in a local authority which applies at all times both before and after an operative district scheme is in existence. It is s. 34A which deals with the duty to keep objectionable elements in connection with uses of land to a minimum.

The objectionable elements which are dealt with in the section are noise, smoke, smell, effluent, vibration, dust or other noxiousness or danger or detraction from amenities and whether in relation to the employees of the user of the land or building or to other persons or property. The power under s. 34A is vested in the council of the local district. The council may serve notice on any person who is making use of any land which has an objectionable element. The person so served may appeal to the Town and Country Planning Appeal Board. This is not, therefore, a right which is vested in individuals to exercise to protect themselves against objectionable elements. It is a right which is vested in the council and only a council can take action under that section but it can affect the individuals whose properties have objectionable elements associated with them.

Another power which is vested in councils under s. 47 of the Town and Country Planning Act 1953 is a power which applies only while a district scheme is operative to take compulsorily any land in its district if in accordance with the scheme it is necessary or expedient to do so for the proper development or use of the land or for the improvement of areas that are too closely subdivided or are occupied by or appurtenant to any decadent building or for the purpose of determination any use of any land or building that does not conform to the scheme or for the provision or preservation of amenities.

It will thus be seen that there is a wide power vested in a council which has an operative district scheme of implementing that scheme by compulsory acquisition of land which might be non-conforming to the uses provided for in the district scheme or which for some other reason blocked development under the district scheme. There is also power under that section when a refusal to permit a detrimental work under s. 38 has been upheld by the board or at any time when the owner or occupier of any land so requests in writing, for the Board to make an order that the local authority responsible for a public work or the Crown shall take the land compulsorily under the Public Works Act 1928. This order can only be obtained where there is a need for an early decision. If, for example, the owner of land proposes to erect a new building which would be a detrimental work because the land is sited where a new road is to be constructed then the owner can apply for such an order so that his land is not sterilized by the scheme or by the refusal to permit him to change the use which the council regards as detrimental to the plan.

Finally, I should say a word about compensation. Section 44 provides for full compensation to every person having an estate or interest in land which is taken for any of the purposes of the Act of which is injuriously affected by the operation of any scheme or any refusal or prohibition under s. 38.

Compensation is, however, not payable in respect of provisions under a district scheme which deal with the density of buildings on land or the height or floor space of buildings in relation to their areas or the design or external appearance of or space about buildings.

No compensation, of course, can be claimed where any act is done in contravention of a district scheme after that scheme has become operative nor can compensation be claimed merely because in the text of the scheme there is provision for a proposed new highway or street widening or closing of a highway or of a proposed public reserve or open space.

Compensation is, however, payable in respect of zoning and this could apply if land which has been zoned as commercial and industrial were to be re-zoned as residential (c.f. *Valuer General v. General Plastics (N.Z.) Limited* [1959] N.Z.L.R. 857).

There is also a right to claim compensation for a refusal or prohibition under s. 38.

Both cases, however, of zoning and of refusals under s. 38 are dependent on the claimant exercising his rights of objection and appeal conferred by the Act and making his claim for compensation within twelve months after the date on which the provision became operative or the refusal or prohibition was given.

Not only this but the owner must also be able to show that he has been deprived of the right to continue to use the land or building for the purpose for which it is already used and that that use does not detract from the amenities of the neighbourhood, or that the provision, refusal or prohibition deprives him of the right to change from the existing use to any other use which would not detract from the amenities or cause demand for extension of services which would be uneconomic or cause an extension that is not in the economic interests of the region of industrial or commercial development along existing roads or streets and furthermore he must be able to show that the proposed change of use is not unsuitable for the land.

I have not attempted to deal with many of the difficult questions of interpretation which arise under this legislation. I have tried to sketch the broad outlines of the scheme of the statute which are designed to preserve the amenities of neighbourhoods to promote the best utilization of land and to ensure a reasonably orderly development. There are no regional planning authorities in many parts of New Zealand and in these parts the district schemes must proceed, therefore, on the basis of the application to their own districts of the principles of town and country planning. These principles are becoming better known as experience of local bodies increases and there becomes more readily available the services of competent town planning consultants.

Hitherto most local bodies have tried to control town planning through the provisions of ss. 38 and 38A almost exclusively and have deliberately left their schemes as undisclosed schemes. This perhaps gives a greater flexibility in changing the scheme but it does mean infinitely more attendance to detail and decision on each application on its own merits independently of any recognised overall scheme. This is not truly town planning and the Act itself is designed, I think, to give the general public a great deal of protection through the hearing of objections and the rights of appeal that arise therefrom.

The regulations require that district schemes shall be prepared with a view to future development over a period of twenty years but at least in the preparation the individual has the right to be heard whereas while a scheme remains undisclosed permits can be granted for new development and unless there be a change of use neighbouring property owners who may easily be affected have no right to be heard on those matters which are dealt with by the local body under s. 38.