Councils, planning and bias: Attorney-General ex relatione Benfield v. Wellington City Council

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The conflict between the necessities of local body government and the theoretical requirements of the principles of natural justice creates practical problems for both local bodies and the courts. One particular problem is that created by the need to observe the rule of natural justice that no man should be a judge in his own cause. Three recent New Zealand judgments have been concerned with this conflict between theory and practice; this article examines the current situation in New Zealand in the light of those cases.

> Prithee, be content;
> This practice hath most shrewdly pass'd upon thee.
> But when we know the grounds and authors of it,
> Thou shalt be both the plaintiff and the judge
> Of thine own cause.
>
> *Twelfth Night* V.i. 350-354.

I. INTRODUCTION

This discussion of the role that the rules of natural justice ought to play in the modern planning application procedures of local bodies is merely a specific example of the older and wider controversy over the extent to which the protection of the freedom of the individual is necessary in the face of the powers vested in statutory authorities.

The arguments put forward by partisans on both sides have been built upon a common theme. This has been the balancing, on the one hand, of the merits of requiring all statutory authorities to adopt procedures designed to safeguard as far as possible the rights and interests of concerned persons and on the other, the need to promote efficiency in government and to develop rapid decision making processes.

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In this controversy, the possibility of resort to judicial review has been an important factor. But its availability as a safeguard in the area of local government administration has been limited by the old practice of classifying a particular function according to its nature and the legal consequences that flow from that classification. If the nature of the function was such that it was thought necessary to require certain procedural standards to be met in the process of fulfilling the function, then the proper classification was 'judicial' and some or all of the rules of natural justice would be imposed. Conversely, if the court determined that it was improper to enforce observance of any special standards, the label 'administrative' was applied. Of the numerous criteria on which the courts made the classification, such as the nature of the interest at stake, the availability of sanctions and the language of the empowering statute, the most relevant to this article is that of the context in which the power is being exercised. A local body's nature is administrative because its function is that of management. Under the classification system, the problem has been to impose the standards pertaining to a judicial function on one of a local body's management functions —that of decision making. Only by the classification of this function as judicial could a decision of a local body be reviewed by a court on the basis of an alleged breach of the natural justice rules. The difficulties that accompany the use of this terminology are well-known. The dichotomy itself has been blamed for the slow and confused progress in this area of administrative law.[1]

Initially, classification does not appear difficult within the limited confines of the planning application procedure. The administrative functions of a local body include, of course, the development of a planning scheme for its area, pursuant to the Town and Country Planning Act 1977. By producing this scheme, the local body constructs a plan for the future orderly development of the region. Proposed developments must fall within the limitations set out by the scheme; otherwise an application for permission to deviate from the scheme must be made. When such an application is made, it is the local body which must consider it, along with any objections to the granting of consent that have arisen from the compulsory notification of the application. This, it has been traditionally assumed, is where the judicial function of the local body arises. However, natural justice requires that a judge be disinterested. There is a risk that a local body's ability to perform its judicial role will be jeopardised if, in the pursuit of its administrative aims, it becomes in some way interested in the success of the planning application. To overcome this problem, local bodies have repeatedly attempted to argue that in the particular planning application at issue, the nature of their function was, for some reason, not judicial. Generally, these attempts have failed, but in *Attorney-General ex relatione Benfield* v. *Wellington City Council*,[2] the argument was successful. This judgment will be examined later, but at this point the result serves to emphasise the magnitude of the present difficulties and the consequential need for reform. The question remains whether the decision-making function should be taken away from local bodies in certain cases where it appears that it has some

1 Mullan "Human Rights and Administrative Fairness" in MacDonald and Humphrey (Ed), *The Practice of Freedom* (Butterworths, Toronto, 1979) 111, 125.
2 [1979] 2 N.Z.L.R. 385.

extraordinary interest in the planned development, or whether there should be enacted a special legislative sanction that validates the decisions of local bodies, even where it appears that there has, or may have been, predetermination of the issue.

II. THE DOCTRINE OF BIAS AND THE NEW ZEALAND CASES

The principle that no man may be a judge in his own cause is fundamental to the Common Law.[3] Like all such principles however, it is subject to the freedom of Parliament to modify or abolish it. It has become necessary for the courts to limit the effect of the rule in cases in which a statute explicitly states that a body or individual is to have jurisdiction to decide matters in which it necessarily has a bias, arising from the duties conferred on the body or individual by statute.[4] But the "competent authority must act fairly and with a mind open to persuasion."[5] It is able to be a judge in its own cause, but it must in fact adjudicate. More is required of it than that it merely 'rubberstamps' its own proposal.[6]

Two recent decisions of New Zealand courts demonstrate an apparent willingness in this country to invalidate a decision of a local body for failure to comply with this minimal requirement of the rule against bias. In *Lower Hutt City Council* v. *Bank*[7] a contract between the city council and the developer made it clear that the contract's survival was dependent on the ability of the council to close off a certain street. The council was under a statutory obligation to inquire into and dispose of objections to that street closure.[8] The Court of Appeal rejected the former distinction between judicial and administrative functions as the test of the applicability of the rules of natural justice as being now too blurred to provide a definite answer.[9] However, it was noted that the statutory obligation on the council to inquire into, and dispose of, objections imported "substantial elements of the

3 The classic early reference is *Dr. Bonham's Case* (1610) 8 Co. Rep. 113b, 118; 77 E.R. 646, 652-4.

4 See *Jeffs* v. *N.Z. Dairy Production and Marketing Board* [1967] N.Z.L.R. 1057, [1967] 1 A.C. 551 where the Privy Council held that an Act of the New Zealand Parliament (the Dairy Production and Marketing Board Act 1961) led to an "'inescapable conclusion" that the Legislature's intention was to make an exception to the general rule that a person shall not be a judge in his own cause [1967] N.Z.L.R. 1057, 1066 [1967] 1 A.C. 551, 565. And in *Lower Hutt City Council* v. *Bank* [1974] 1 N.Z.L.R. 545, the Court of Appeal said at 549:

> the extent to which this fundamental principle [that no man shall be a judge in his own cause] applies must be governed by the relevant circumstances, including, especially the statutory provisions relating to the function.

5 S. A. De Smith, *Judicial Review of Administrative Action* (3rd ed., Stevens, London, 1973) 220-221.

6 See *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87, 103.

7 [1974] 1 N.Z.L.R. 545.

8 For a discussion of the statutory scheme, see infra pp. 467-471.

9 [1974] 1 N.Z.L.R. 545, 548.

judicial function".[10] The court examined the circumstances in which adherence to the principles of natural justice should be demanded:[11]

> In our opinion whether the principles of natural justice should be applied to the function of a council in considering objections in terms of the sixth schedule does not turn on any fine classification of that function as judicial or administrative, but that instead whether they apply is to be decided upon a realistic examination of the legislation, the circumstances of the case and the subject matter under consideration.

By looking at a range of such factors, the court determined that the natural justice principles were applicable. But, as the legislature had left the task of dealing with the objections to the council's own proposal to the council itself, it was a necessary inference that the standards of impartiality that would be demanded of a court of justice could not be applied to the council:[12]

> We think that the state of impartiality which is required is the capacity in a council to preserve a freedom, notwithstanding earlier investigations and decisions, to approach their duty of inquiring into and disposing of the objections without a closed mind, so that if considerations advanced by objectors bring them to a different frame of mind they can, and will go back on their proposals.

The Court of Appeal considered that[13]

> In entering into this contract . . . the council placed themselves in a situation where there are valid grounds for believing that they are unable to discharge fairly the duty which the statute has placed upon them.

In the second case, *Anderton* v. *Auckland City Council & James Wallace Pty Ltd*,[14] there had been a long history of collaboration between the city council and the developer over the development of an area of the council's land, including council assistance to gain the proper planning permission. Objections to the development were disallowed by a council sub-committee. The objectors alleged predetermination by the council. Because the legislature had given to local bodies the task of hearing objections to their own proposals, Mahon J. held that it was necessary for the objector to prove actual predetermination on the part of the council — 'presumptive bias' was not here sufficient.[15] Even so, Mahon J. upheld

10 Idem.
11 Ibid. 549.
12 Ibid. 550.
13 Idem.
14 [1978] 1 N.Z.L.R. 657. An appeal has been lodged against the decision of Mahon J.
15 Ibid. 696. In *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon* [1969] 1 Q.B. 577, 599 it was affirmed that a "reasonable suspicion" of bias was all that was required to invalidate the decision of a judicial body. There has been considerable discussion amongst the judges as to whether the proper test is one of a "real likelihood" of bias or of a "reasonable suspicion" of bias. The first test is supported by many authorities, among which are *R.* v. *Rand* (1866) L.R. 1 Q.B. 230, 233; *Reg* v. *Cambourne Justices, ex parte Pearce* [1955] 1 Q.B. 41, 47. In *re Watson, ex parte Armstrong* (1976) 50 A.L.J.R. 778, the "reasonable suspicion" test was adopted by the High Court of Australia. In the present case, Mahon J. reviewed the authorities and recognised that the trend in Australia and New Zealand was to favour the "reasonable suspicion" test. However, because of the nature of the power vested in the council, Mahon J. considered at p. 696 that a decision of the council could not be invalidated for bias unless "actual bias was proved." Mahon J.'s analysis of the authorities and the conclusions he reaches on the basis of that analysis have been doubted — see the note in [1978] N.Z.L.J. 347.

the objectors complaint:[16]

> The Council, and its delegated committee, convened this hearing [to hear objections] with a closed mind, impervious to whatever evidence the objectors might submit, and determined to uphold the validity of this commercial development which it had laboured so long to create. It must follow that, in my opinion, the decision in favour of the scheme change, and therefore in favour of the Company, is invalid.

Thus, in two cases, New Zealand courts have insisted that local bodies observe certain minimal procedural standards when they exercise certain decision making functions. The need for planning decisions of local bodies to have a degree of legitimacy has been asserted in the face of arguments such as that advanced in *Lower Hutt City Council* v. *Bank*[17] that only councils are able to judge what is best for their community and ought to be left to carry out decisions made honestly and in the interests of the citizens.

On the other hand the Chief Justice, in his decision in *Attorney-General ex relatione Benfield* v. *Wellington City Council*,[18] while purporting to accept the general statements of principle in these two cases, has taken a markedly different policy approach to produce a result which, it is submitted, is inconsistent with the previous authority.

Attorney-General ex relatione Benfield v. *Wellington City Council*

A. The Relevant Facts

The Bank of New Zealand exchanged certain lots of land for neighbouring land owned by the Wellington City Council. To effect the transfer, an agreement was signed under which the bank was to submit plans for a multi-storey office building for town planning approval. The agreement imposed certain obligations on the council which, it was alleged by the plaintiffs, amounted to an agreement to the construction of the building and to assist the bank to get the necessary planning approvals.[19] Negotiations took place between the bank's architects and the city council regarding planning matters, and council records revealed the favourable attitude of the council to the bank's proposals. Certain features of the proposed building violated the newly operative Wellington District Scheme, and as a result the council agreed to waive certain requirements of the Scheme by means of a power of dispensation it believed was available to it under the Scheme. It became apparent, however, that in respect of certain aspects of the proposal, it would be necessary to apply for a conditional use of the site and that this application would have to be advertised. Accordingly, the application for consent to conditional use of the site was advertised in the *Evening Post*, a local daily newspaper, as required by the Town and Country Planning Act 1953. No objections were received, and the city council approved the application. Before and after the issuance of a building permit a few months later, certain other necessary applications for planning consent were made and advertised by

16 [1978] 1 N.Z.L.R. 657, 698.
17 [1974] 1 N.Z.L.R. 545, 551.
18 [1979] 2 N.Z.L.R. 385.
19 The relevant clauses from the agreement are quoted infra p. 465.

the bank, and, again in the absence of objections, the applications were approved by the council.

The plaintiffs, after obtaining the Attorney-General's fiat to commence a relator action, began proceedings against the bank and the council some three years after the final approval for the development was granted by the council, and alleged, inter alia, that proper planning consent had not been given to the bank, on the ground that the wrong type of applications had been made, and that the decisions of the council did not constitute lawful planning permission because, inter alia, the city council had been motivated by bias in making its decision.

B. The Decision

Davison C.J., in the course of giving judgment for the defendants, dismissed the plaintiffs' argument that no proper planning consent had been given either because he did not consider the allegations to be well founded, or, even if some of the consents and dispensations granted to the bank were improper, the degree of impropriety was too minor to warrant the remedies the plaintiffs sought; and also because of the "inordinate delay" on the part of the plaintiffs in bringing the matter before the court.

C. The Bias Issue

The Chief Justice decided that the issue of bias did not arise, because the council was not under a duty to observe the rules of natural justice in arriving at its decision. It was his opinion that whether or not there was a *lis inter partes* before the council when it had to decide whether to grant permission was a relevant consideration in determining the nature of the council's duty.[20] Here, there was no *lis* before the council, as there had been no objections made to the planning application. Therefore,[21]

> It had no duty to act judicially in the circumstances although there can be little doubt that had objections been raised to the Bank's proposals and those objections had been pursued to hearing, the City Council would then have had a duty to the objectors to observe the principles of natural justice.

In support of this, he cited *R.* v. *Manchester Legal Aid Committee ex parte R. A. Brand & Co. Ltd.*[22] and referred to certain passages in that judgment which appear to indicate that the court there thought that an administrative body would only be under a duty to act judicially if there was something in the nature of a *lis*. The Chief Justice specifically adopted as applicable to the question with which he was confronted, the following passage:[23]

> If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of lis and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially.

20 [1979] 2 N.Z.L.R. 385, 425.
21 Ibid. 426.
22 [1952] 2 Q.B. 413.
23 Ibid. 431.

His choice of authority for this general proposition is unfortunate. The passages he quotes from the *Manchester Legal Aid Committee* case are clearly obiter. There, the court had to decide whether or not a writ of certiorari would lie against the committee's decision to grant a certificate to a trustee in bankruptcy declaring his eligibility for legal aid. The committee had to decide the question on the basis of written evidence supplied by the applicant — there was no statutory right for any other party to object to the applicant's claim. A person aggrieved by the committee's decision alleged that the decision, by its very nature, was a judicial one, and therefore a writ of certiorari would lie against it. It is clear that, because the committee had to decide the question only on the basis of the evidence put forward by the applicant, there was nothing in the nature of a *lis*. Yet the court decided that the writ of certiorari would lie, and that the committee, in deciding to grant the certificate, was making a judicial decision. The basis of the court's reasoning was that the committee was not making a decision based on policy considerations. Therefore,[24]

> They [had] to decide the matter solely on the facts of the particular case, solely on the evidence before them and apart from any extraneous considerations. In other words they must act judicially, not judiciously.

So, although the existence of a *lis inter partes* might by itself require a tribunal to act judicially, the absence of one does not mean that there is not a duty to act judicially. The court relies on the notion that the type of decision and the manner in which it is reached is equally important. If the question has to be considered "from the point of view of policy and experience"[25] then there was no obligation to decide it judicially.[26] The principle that the Chief Justice presents as determinative of the issue is in fact not supported by the claimed authority at all — indeed, his conclusion represents a severe misinterpretation of the *Manchester Legal Aid Committee* case.

The English decision was also considered in *New Zealand Dairy Board* v. *Okitu Coop Dairy Co.*,[27] a decision of the Court of Appeal. The New Zealand court considered it to be authority for a proposition quite different to that extracted from the Chief Justice. Finlay J. said:[28]

> [Whether there is a duty to act judicially] can more readily be deduced if something in the nature of a *lis* exists, but it can also, in my opinion, be deduced from the inherent character of the function delegated. This latter proposition is established, I think, by *R.* v. *Manchester Legal Aid Committee* . . . where [the] Court . . . expressly rejected the existence of a *lis*, or any duty to hear two sides, as a test of whether or not an authority was exercising a quasi-judicial function.

24 Idem.

25 Idem.

26 This principle is suspect. A leading early case, *Rex* v. *Electricity Commissioner ex parte London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 K.B. 171 decided that the decision of an administrative tribunal was judicial in nature even in the absence of a *lis*, yet it arose from a question of "policy and expediency." See Wade, *Administrative Law* (4th ed., Clarendon/Oxford, 1977) 535, and De Smith, *Judicial Review of trative Action* (1st ed., Stevens, London, 1968) 402.

27 [1953] N.Z.L.R. 366.

28 Ibid. 403.

And Cooke J. said of the statement of Parker J. that if there was a *lis* then there arose a duty to act judicially, that it was[29]

> merely an example of a case in which, as a matter of construction, a duty to act judicially clearly exists. It involves no departure from the principle that first, and last, the question is one of construction and of the surrounding conditions and circumstances.

It seems, therefore, that Davison C.J. has extracted some passages that are clearly *obiter,* and in fact contrary to the decision in the case, and applied them without detailed examination or comment. Because he finds it to be established that the city council was under no duty to act judicially he says[30] "it becomes unnecessary to discuss the question of bias in detail, but on the evidence I find it not to have been established."

The plaintiff's allegations of bias on the part of the council have been dismissed in an almost summary manner. Yet the issue arising from the attack by the plaintiffs on the city council's decision is one of great and fundamental public importance. That a huge quasi-governmental concern could "ride roughshod" over the by-laws with which the plaintiffs themselves had to comply was to them outrageous and undemocratic.[31] The plaintiff's allegations that not only had the council prejudged the matter, but that it had also collaborated with the bank in an attempt to prevent would-be objectors from learning of the proposed development before the application for conditional use was approved, are serious, and it is submitted that the Chief Justice's disposal of these allegations was inadequate.

May it nevertheless be said that the result is the correct one? Was his finding that the city council was under no duty to observe the principles of natural justice correct in the circumstances? And was his conclusion that, on the evidence presented to him, there was no bias demonstrated, the proper conclusion? It is to these questions that I now wish to turn.

1. Was the council under a duty to act in accordance with the principles of natural justice?

Davison C.J. observed that[32]

> Had objections been raised to the Bank's proposals, and those objections been pursued to hearing, the City Council would then have had a duty to the objectors to observe the principles of natural justice.

There can be no doubt that this statement is generally correct. It is well established that the existence of a *lis inter partes* of the hearing and determination of objections may, by itself, impose a duty on a tribunal to conduct its hearing and to make its decision in accordance with the principles of natural justice.[33] But in one respect, the statement is in error. That is the implicit suggestion that, had the objections not been pursued to a hearing, then the council would not have had to observe

29 Ibid. 419.
30 [1979] 2 N.Z.L.R. 385, 426.
31 From an interview with one of the plaintiffs.
32 [1979] 2 N.Z.L.R. 385, 426.
33 *New Zealand Dairy Board* v. *Okitu Coop. Dairy Co.* supra n. 27, is a clear authority.

those principles. Section 28C(3) of the Town and Country Planning Act 1953 (in force during the time of the events in this case) obliged a council to consider all objections received by it in respect of an application. The word "consider" in section 28C(3) placed a far greater obligation on a council than merely, for example, to read the objection. It had to read it with an open mind, one not already closed by a prejudgement of the issue.[34] Holding a hearing to consider the objection would mean that a further rule of natural justice had to be observed in the process of the consideration, namely the duty of the council to give a fair hearing, but it did not create an obligation to observe them. Section 28C(3) already required the council to observe the nemo judex rule. The provisions in section 28C(3A), that a council must in refusing or allowing the application have regard to certain factors, recognise and confirm the requirement that a council must have an open mind to the application and objections even if there is no hearing. So to that extent at least natural justice is relevant to the matter.

The question of whether or not, in the absence of any objections to the application for conditional use, the rules of natural justice applied to the decision making of the Wellington City Council is rather more complex.

It was pursuant to section 4(1) of the Judicature Amendment Act 1972[35] that the plaintiffs in the present case brought the proceedings against the city council, seeking, inter alia, a declaration that the resolution of the council by which the conditional use was granted was unlawful. If a decision is made by a tribunal in breach of the rules of natural justice, then it is ultra vires, and can be reviewed by the superior courts. Essentially, Davison C.J. responded that the council's decision was not made under circumstances where the council had a judicial function to perform, so therefore it could not be challenged as having been in breach of natural justice. It was not, therefore, a decision that was ultra vires in the sense that it was made in "excess of the jurisdiction" of the council.

It is correct that originally the prerogative writs lay only to control the judicial functions of inferior courts. This led the courts to characterise as "judicial" any function where the person wielding the power was required by law to keep within his jurisdiction and to observe the elements of fair procedure, such as natural justice, simply in order to be able to control the actions of bodies which might

34 Cf. The obligation on a council to inquire into and dispose of objections to a proposal to stop a street under the Sixth Schedule to the Municipal Corporations Act 1954. For the interpretation of the Court of Appeal in *Lower Hutt City Council* v. *Bank* of the obligation placed on a council, see infra pp. 468-471.

35 Under s.4(1), the applicant makes an "application for review" of the decision, and the High Court may grant, at its discretion,

> any relief that the applicant would be entitled to, in one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction.

There has been strong pressure for such change in England, as well. See Wade, op. cit. 530, and De Smith, op. cit. (3rd ed.) 347-348.

more properly be characterised as administrative.[36] An early attempt to clarify the situation was made in *R.* v. *Electricity Commissioners ex parte London Electricity Joint Committee (1920) Ltd.*[37] Atkin L.J., in a famous and much misunderstood passage said:[38]

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

This was applied to a decision of an essentially administrative nature which had been made by the Electricity Commissioners, and the writ of certiorari was issued.[39] However, the statement required explaining to show why the qualification "and having the duty to act judicially" was included in the description of the type of power held by the Commissioners. The answer that was ultimately given by the House of Lords in *Ridge* v. *Baldwin*[40] was that the phrase was there as the consequence of the existence of a "legal authority to determine the questions affecting the rights of subjects." If a legal authority of that nature existed, then there was a duty to act judicially. The judicial character of the duty is inferred from the nature of the duty itself.[41]

Thus, the prerogative remedies became available to control administrative decisions "affecting rights." The qualification that the decision in question had to be one 'affecting the rights of subjects' was not seen as a great restriction. The mere exercise of a legal power necessarily affects the legal rights of somebody. The term is interpreted widely.[42]

Subsequently, in *Durayappah* v. *Fernando,*[43] the Privy Council initiated a movement away from the classification approach by stressing that, in determining whether the rules of natural justice applied, a court must look at the entire context, both statutory and factual. It must consider the nature of the interests involved, the sanction available, and the statutory procedures. This 'functional' approach has been paralleled by a trend for courts to rely on the concept of 'fairness' as the basis of their decisions on the role of natural justice in each challenged proceeding. Not only, the courts said, must the decision-maker act

36 Supra, p. 454. See also Keith, "The Courts and the Administration: A Change in Judicial Method." (1977) 7 N.Z.U.L.R. 325.

37 [1924] 1 K.B. 171.

38 Ibid. 205.

39 See the further reference to this case: supra n.26.

40 [1964] A.C. 40.

41 Ibid. 74-76.

42 Thus it has been held that the writ of prohibition will be granted to prevent a local body from licensing indecent films: *R.* v. *Greater London Council ex parte Blackburn.* [1976] 1 W.L.R. 550. Wade, op. cit. 542, states:

> The requirement of a decision "affecting rights" is not therefore a limiting factor; it is rather an automatic consequence of the fact that power is being exercised.

And see *R.* v. *Gaming Board of Great Britain ex parte Benaim* [1970] 2 Q.B. 417, 434 where Lord Denning M.R. said that, even though the plaintiff was only seeking to have a privilege conferred, and not to have a right upheld, nevertheless "The Board must at all costs be fair. If they are not, these Courts will not hesitate to interfere."

43 [1967] 2 A.C. 337, 349.

in good faith, but the procedural standards demanded of him would be regulated by a consideration of what would be fair to all parties in the circumstances.[44] This approach has been widely adopted by New Zealand courts, as the judgment of the Court of Appeal in *Lower Hutt City Council* v. *Bank* illustrates.[45]

Much distance lies between this present position and the old notion that there had to be some judicial feature about the function being performed. That was a product of the period before *Ridge* v. *Baldwin*, when the proper meaning of Atkin L.J.'s statement was not understood.[46] *R.* v. *Manchester Legal Aid Committee*, so heavily relied upon by Davison C.J., belongs to that period, and must be taken now to have been superseded. As a general principle, it may now be stated that the courts are prepared to find that if a body has the legal authority to make a decision, then that power must be exercised fairly in the circumstances, and in accordance with the applicable rules of natural justice.[47]

How strongly does this principle apply to the decision of a local body to allow an application for planning permission? The cases of *Lower Hutt City Council* v. *Bank* and *Anderton* v. *Auckland City Council* illustrate the willingness of the courts to demand that local bodies comply with the natural justice rules. Davison C.J., however, after quoting from these two cases, as well as from *Laytons Wines Ltd.* v. *Wellington South Licensing Trust (No. 2)*[48] was prepared to distinguish them. He said[49]

> Whilst I accept for present purposes the statements of principle to which I have just referred, there is one substantial feature which distinguishes the present case from all those referred to. They were all cases where there was a contest in some form or other between the interests of objectors or developers and the decision making body concerned.

44 The trend began with *In re H.K.* [1967] 2 Q.B. 617, 630. And see Mullan, "Fairness: the New Natural Justice" (1975) 25 U.T.L.J. 281.

45 The most important New Zealand authority must, of course, be the judgment of the Privy Council in *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660, 679, [1973] 2 N.Z.L.R. 105, 718 In a very recent decision, the New Zealand Court of Appeal held that even decisions of a Minister of the Crown were reviewable by a court to determine whether they had been made unfairly: *Movick* v. *Attorney-General* [1978] 2 N.Z.L.R. 545. (Note that the Court rejected the view taken by Davison C.J. at first instance that a Minister's discretionary powers were unfettered and not reviewable by the courts).

46 This was implicitly recognised by the Court of Appeal in *Lower Hutt City Council* v. *Bank* [1974] 1 N.Z.L.R. 545, 548-549, where a prerogative writ was issued in circumstances where the situation was not classified by the Court as either administrative or judicial — it was simply a function the exercise of which affected citizens' rights.

47 This principle has received Parliament's stamp of approval with the enactment of the Judicature Amendment Act 1977, which, by s.11(1) amends s.4 of the Judicature Amendment Act 1972 by adding a new subsection, after s.4(2), which provides that the prerogative writs or the grant of relief on an application for review will be available even if "The person who has exercised, or is proposing to exercise, a statutory power was not under a duty to act judicially . . . ." Therefore, the mere fact that a power is being exercised renders the empowered body amenable to the writs.

48 [1977] 1 N.Z.L.R. 570.

49 [1979] 2 N.Z.L.R. 385, 425.

Having regard to all that I have said before, and to the particular facts of the *Lower Hutt City Council* v. *Bank* case, the distinction[50] relied on by the Chief Justice appears quite irrelevant to the real issue — if the Wellington City Council had fettered its power of decision making, or had prejudged the matter before the time came to determine it to the extent that it would not or could not have changed its mind, if objections were raised, then would the rules of natural justice apply to prevent the council from making a decision? Or, if the decision was made, would these rules apply to quash that decision as having been made ultra vires by the council?

Clearly, the answer is "Yes." In *Lower Hutt City Council* v. *Bank* the respondent plaintiff brought an action seeking a writ of prohibition to prevent the council from even hearing any objection that might be raised — he alleged the council had prejudged the matter, and had fettered its own discretion. So at the time the action was brought, there was no *lis inter partes*. Yet both Wild C.J. at first instance[51] and the Court of Appeal granted the writ to restrain the council from proceeding to consider the objections because the rules of natural justice required it.

Similarly, in the present case, if the relators had brought an action seeking an order of prohibition to prevent the council from determining the application for conditional use, then, if the facts disclosed that the council had fettered its ability to make the decision, the writ would, in accordance with *Lower Hutt City Council* v. *Bank*, have been granted, despite the absence of a *lis inter partes*.[52] The question to be asked was not "was there a *lis inter partes*, so that, if the council had fettered its discretion, there would have been a breach of natural justice?" Rather, the question should have been, "has the council fettered its discretion, so that by making a decision, it has acted in breach of natural justice?"

In accord with the modern trend, especially the recent New Zealand decisions, the overriding concern of the court should not have been to give to the action of the council a degree of retrospective legitimacy. That mistakes may have been "made in good faith in encouraging what the city council believed to be a desirable development for the city"[53] is really not particularly relevant. That the council may have been biased before it made its decision is not excused simply because no one objected to the jurisdiction of the council at the time of the decision.

It is submitted the court should have held that the council was under a duty to observe the principles of natural justice, and on that basis, conducted a thorough examination of the facts on which the plaintiffs' claim of actual bias was founded.

50 De Smith, op. cit. (3rd ed.) 72 also dismisses the distinction as unimportant; and describes the notion that a body or tribunal could not be required to observe the rules of natural justice unless it was expressly obliged to hold a hearing of a dispute between contending parties as a "heresy."

51 [1974] 1 N.Z.L.R. 385.

52 That the functions of the respective councils arose under different statutes does not, it is submitted, affect the application of the principle that fairness must be exercised by the council.

53 [1979] 2 N.Z.L.R. 385, 423.

2. Was the council biased?

Whether or not the plaintiffs' claim was well founded is a question that could be satisfactorily answered only by a thorough investigation of the history of the communications between the Bank of New Zealand and the city council.

Nevertheless, it should be observed that some of the facts of the present case are remarkably similar to facts in the two previous cases.

For example, the agreement between the bank and the council provided that[54]

> Each party agrees to cooperate with the other to the fullest extent necessary to enable the satisfactory completion of the arrangements recorded in this agreement and the proposed redevelopment of all the above recited properties in accordance with the intentions of the parties as expressed in this agreement.

and also that[55]

> The Corporation will, within its authority with all due expedition grant all such consents, permits, approvals and dispensations as may be necessary for the purpose of enabling such redevelopment of the Bank's Building Site to proceed to completion in accordance with the Bank's building programme and in conformity with the spirit and intent of this agreement and will in cases outside the Corporation's authority support the Bank in any application it may make to some other appropriate body to obtain such consents, permits, approvals and dispensations.

It is not a strained interpretation of these words which produces the impression that the council has promised or contracted to provide all the necessary town planning permission that the development may require. The impression is surely strengthened by the initial decision of the Town Planning Committee not to require "public notification of the proposal as this would, it was considered, be contrary to the spirit of the Agreement regarding development of the Site." — a decision that was only ultimately reversed by the very strong protest of the Town Clerk.[56] The following passage from the judgment of the Court of Appeal in *Lower Hutt City Council* v. *Bank* seems applicable:[57]

> In entering into this contract, in our view, the council placed themselves in a situation where there are valid grounds for believing that they are unable to discharge fairly the duty which the statute has placed upon them. In these circumstances the courts should act to prevent them performing the duty.

The long history of the negotiations between the Bank and the city council is reminiscent of the similar history between the developers and the city council in *Anderton* v. *Auckland City Council.* It is difficult to see the logic of the passage in which the Chief Justice refers to the history of negotiations:[58]

> It is suggested that the City Council had prejudged the issue. I do not agree. The agreement which was entered into was the result of discussions and negotiations between the Bank and the City Council over a period of time.

54 Clause 13 of the Agreement, quoted by Davison C.J. in his judgment at p. 390.

55 Clause 3 of the Agreement, quoted by Davison C.J. at p. 389.

56 Davison C.J. refers to this episode at p. 394.

57 [1974] 1 N.Z.L.R. 545, 550.

58 [1979] 2 N.Z.L.R. 385, 422.

That, surely, was the whole point! The agreement was evidence of a decision by the council — perhaps not one that was strictly binding, but nevertheless it was a bargain, and as such something that the council was morally obliged to follow. That negotiations had been taking place over a period of time does not negate the possibility of prejudgment — rather it turns the possibility into a probability of prejudgment. Well knowing the obligation they were accepting, the council nevertheless entered into the agreement.

In *Anderton* v. *Auckland City Council*, Mahon J. was prepared to find that actual bias was proved against the council, and in that case there was no written agreement between the council and the developer, nor any written indication that the council had determined to "cooperate . . . to the fullest extent necessary." Mahon J. reached his decision on the combined effect of evidence less damning than this.

It is not my intention to undertake any deeper inquiry into the facts. Whether or not there was "actual bias" on the part of the Wellington City Council, as required by both *Anderton* v. *Auckland City Council*, and *Lower Hutt City Council* v. *Bank*, is outside the scope of this paper. But the attempts by Davison C.J. to justify and excuse any bias that may have existed are so inadequate as to require additional comment.

I have just referred to his reason for refusing to allow the Agreement as evidence of prejudgment. A further instance is his refusal to consider the dispensations granted by the council as evidence of an attempt by the city council to disguise the extent of the planning permission that was being granted. This refusal was made because "These allowances were made at the time in good faith and not simply to 'procure the appearance of compliance,' as the plaintiff suggests"[59] Is "good faith" *all* that is required of a council when it grants dispensation? Will there be no legal remedy when a council violates its own district scheme, if the council has acted in "good faith?" Decided cases suggest otherwise.[60]

The question of the effect of a dispensation made under a dispensing provision that was held to be ultra vires was at issue in *Attorney-General* v. *Mt. Roskill Borough*.[61] That the dispensation was given in good faith was not even considered by McMullin J. Even the argument advanced that a power of dispensation was so widely used throughout the country that it should not be declared ultra vires because great inconvenience would result to town planners, was to no avail. In the event, McMullin J. used the discretion available to him in such matters to refuse the remedy by the plaintiff because he had suffered negligible loss. Davison C.J., however, chose to refuse the remedy because, inter alia, there was no evidence of wrong intent on the part of the council. Nor however had there been evidence of that kind in the *Mt. Roskill Borough* case.

59 Idem.

60 Mahon J. in *Anderton* v. *Auckland City Council & James Wallace Pty Ltd* [1978] 1 N.Z.L.R. 657, 698 made an express finding that the City Council had acted in good faith, yet did not allow that fact to deter him from holding that "actual bias" was proved, and that therefore its decision to grant planning permission was invalidated. See further, infra p. 468.

61 [1971] N.Z.L.R. 1030.

Similar considerations apply to the finding that good faith on the part of the council validated any mistakes that may have been made in the public notification of the application for approval for conditional use.[62]

Such, then, was how the Chief Justice disposed of the substantial and important issue of bias. Whether or not the plaintiffs' allegations of improper planning consent were well founded, or whether or not the plaintiffs were guilty of such a substantial delay as the Chief Justice found to be the case, his decision does not highlight a concern to give a decision in accordance with the modern trend of the law. Rather, it might be seen to be a product of his view of the desirability of the development:[63]

> This is a unique and novel redevelopment for Wellington, and probably for New Zealand. It involves retail shopping areas under streets, the establishment of a reserve adjacent to the site and the application of a Code of Ordinances, some portions of which were not clearly designed to meet a situation which arises in the new Bank development. The City Council met the situation as it best saw proper.

That may be so, but it does not, it is submitted, excuse any breach of the natural justice rule forbidding bias.

III. THE STATUTES

It will have become apparent that much of the conflict in this particular area of the law arises from the current state of the relevant legislation. It is the legislation which defines the powers and duties of local bodies when making decisions on applications for planning permission, and it is the inconsistency and lack of clarity in that law that has given rise to the litigation.[64] Thus the Court of Appeal in *Lower Hutt City Council* v. *Bank*,[65] in order to determine whether the Council was bound to apply the rules of natural justice to its decision making process, had to proceed "upon a realistic examination of the legislation" because the question did "not turn on any fine classification of [the] function as judicial or administrative." Mahon J. considered that the dispute that ultimately arose in *Anderton* v. *Auckland*

62 [1979] 2 N.Z.L.R. 385, 423.

63 Idem.

64 It is not only in planning matters that the inadequacy of particular legislation has given rise to this type of problem. Licensing tribunals have also been successfully attacked for decisions granting or refusing licences for the sale of liquor that have been motivated by some sort of bias: *Layton Wines Ltd.* v. *Wellington South Licensing Trust (No. 2)* [1977] 1 N.Z.L.R. 570. In that case, the type of bias for which the decision of the Licensing Trust was invalidated was pecuniary bias — i.e., the Trust had some financial motive for reaching its decision. Pecuniary bias always disqualifies a judge or tribunal: *Dimes* v. *Grand Junction Canal* (1852) H.L. Cas 759. It is possible to argue that the first two of the cases with which this paper is principally concerned were decided as they were because the judges saw some evidence of an indirect pecuniary gain resulting to the city councils from their decision to grant permission for the developments, and that the councils were therefore motivated by pecuniary bias. See the discussion of the practice of "bargaining for a gain": infra p. 474.

65 [1974] 1 N.Z.L.R. 545, 549.

City Council and James Wallace Pty. Ltd. was inevitable, because although the council acted in good faith[66]

> they were then obliged, when these hundreds of objections were lodged, to become the statutory tribunal charged with the duty of judging the merits of that same proposal. It would have been preferable, no doubt, to have the objections heard by the Town and Country Planning Appeal Board, but the statute did not permit that procedure to be followed.

That fact, it is submitted is the major deficiency of the legislation under which these cases arose. The following examination of the legislation will demonstrate that there is an urgent need to reform the current statutory procedures in planning legislation.

The interpretation of the Sixth Schedule of the Municipal Corporations Act 1954 was the basis of the decision in *Lower Hutt City Council* v. *Bank*. That Schedule lays down the "Conditions as to Stopping Streets." It must first be noted that any plan to stop a street must be one that is supported by a council, as only a council can commence the street stopping procedure, whether for its own purposes or to enable development by a private individual or company. The example of an application for street closure therefore is one that is particularly well suited to this paper. The conditions in the Sixth Schedule required that a council prepare a plan with the information relevant to the stopping of the street, and the construction of any replacement street, and that this plan be made available for public inspection; that notice be given of the proposal and of the availability of the plan for public viewing, with a request that persons objecting to the proposals lodge their objections in writing within a specified period of not less than 40 days after the first publication of the notice. The owners and occupiers of land neighbouring the streets in question are required to be informed. If objections are received, the council "shall forthwith . . . inquire into and dispose of the objections." If it reaffirms its decision to stop the street, it is required to send the plans and the details of its decision to either the Town and Country Planning Appeal Board[67] (where the proposed street stopping is to give effect to an operative district planning scheme under the Town and Country Planning Act 1953) or to the Magistrate's Court. The board or court must then "consider" the plans and objections thereto and confirm or reverse the earlier decision of the council, which confirmation or reversal shall be final. Thus, there is a two-tier system in the case of street stopping. The proposal needs the approval both of the council and of the particular tribunal to which the proposal is automatically referred.

The Court of Appeal in *Lower Hutt City Council* v. *Bank* thought that the provision for an automatic referral of a council's decision to an independent body did not mean that the council's role lost any of its judicial character. The Lower Hutt City Council did not simply have an 'administrative' function to perform. "We cannot accept that a council's task is merely to act as an assembler and

66 [1978] 1 N.Z.L.R. 657, 698. Note that the Town and Country Planning Act 1977 has not altered the situation described by Mahon J. as existing under the 1953 Act; infra p. 469.

67 Now, under the Town and Country Planning Act 1977, the Board is called the Planning Tribunal.

passer-on of facts and considerations."[68] The council was therefore not any less bound to apply the rules of natural justice to its decision making. It still had to act fairly. The fact that a council has to make a decision, whatever the nature or effect of the decision, means that it is under a duty not to fetter its ability to decide. The words of the statute allow for no other interpretation of the nature of the council's duty. In addition to the requirement to "inquire into and dispose of" the objections in clause five of the sixth schedule, clause six talks in terms of a council "reaffirming its decision."

It appears, however, that the original intention of the legislature was that the duty of a council under this Act should be very different from the duty of a council when hearing objections to a planning application under the Town and Country Planning Act 1953. That it should be different is because of the obviously different natures of the two types of function. By one statute, a council is required to consider objections to its own proposal. By the other, it is required to consider objections to all applications for planning consent that came before it. Therefore the inherently biased nature of councils hearing objections under the Municipal Corporations Act 1954 gave rise to a very different set of statutory provisions from those that appear in the Town and Country Planning Act 1953. And the differences are even more remarkable when it is remembered that the Municipal Corporations Act 1954 was enacted just one year after the Town and Country Planning Act 1953 . The provisions relating to the hearing of planning applications by councils differ little between the Town and Country Planning Acts of 1953 and 1977. It is therefore proposed to compare the Municipal Corporations Act 1954 with the Town and Country Planning Act 1977.

The most noticeable of the differences is the provision in clause 6 of the Sixth Schedule that if a council reaffirms its decision to stop the street, it must send all plans of the proposal and its decision on the proposal to an independent tribunal, which considers the proposal and objections to it and confirms or reverses the council's decision. Section 69 of the Town and Country Planning Act 1977 provides that the objectors may appeal to the Planning Tribunal within one month of the council's decision. The appeal by the objectors is therefore a matter of their own volition.

A further difference is found in the words describing the manner in which a council must receive, hear and consider the objections. By clause five of the Sixth Schedule, the council is required to "inquire into and dispose of" the objections, which must, by clause two, be in writing. There is no provision for the council to conduct a hearing at which objectors may appear.

Section 66(2) of the Town and Country Planning Act 1977 requires that objections to the notified application be in writing, but section 66(3) states that

> The applicant and every body or person who has objected to a notified application shall have the right to be heard by the Council, either personally or by its or his counsel or duly authorised representatives, and to call evidence in support of its or his contentions, before the Council makes a decision on the application.

68 [1974] 1 N.Z.L.R. 545, 548.

Section 67(1) states that a council may, "after . . . any application for the consent of the Council and any objections to it have been considered . . . grant or refuse its consent . . . ." Section 67(2) requires that a council give reasons for any decision made.

The cumulative effect of these provisions is to place a greater emphasis on the role of a council as an important decision making body when it is hearing applications for planning consent and objections to them, than when it is hearing objections to a proposal to stop a road. In the first case, it is required by section 66 to hold a hearing before which the parties may appear to argue their case and to call evidence in support. The council must "consider" the submissions made to it, and, by section 67(2) give reasons for its decision. These are all the trappings of a judicial inquiry, such as is consonant with a situation where the council is, in most cases, the independent arbitrator between two opposing groups. In the latter case, it need receive only written objections, then "inquire into and dispose of" them, without giving reasons. There is very little that is "judicial" about this process, other than the council's duty to make a decision after examining the objections.[69] This process is appropriate to a body that is hearing objections to its own proposals, and the decisions of which are subject to automatic review if they are in its own favour. The process can be seen as nothing more than an opportunity for a council to gauge the depth of feeling about the proposal in the community, and to ascertain the nature of the objections to that proposal, thus giving it an opportunity to either retract its proposal of its own accord, or to strengthen its case in support of it before the independent tribunal by answering the specific complaints in the objections received. The process of a council's inquiry can be seen in this light as an opportunity for fact finding presented to it by the legislature to facilitate its borough work. The really 'judicial' inquiry in the case of street stopping does not occur until the matter reaches the independent tribunal. Councils were never really intended to play a determinative role in the process.

The interpretation of the Court of Appeal in *Lower Hutt City Council* v. *Bank* however, is that the Sixth Schedule[70]

> clearly contemplates two distinct independent and fair hearings, one by the council and a later one, if necessary, by the appeal board or a Magistrate's Court.

By the court's interpretation of the provisions of the schedule, a council was somehow supposed to be able to give an "independent and fair hearing" even though it had previously decided that it supported the principle of the road stoppage. To overcome this inherent bias, and to accommodate the interpretation of the nature of the council's task forced on the court by the statutory language, the court said that 'fair' when applied to the Lower Hutt City Council did not mean 'fair' in its ordinary sense. Instead, the council had only to show that it had not made an irrevocable decision. Thus, if the council entered into a fresh agreement to sell the land without the defect contained in the first agreement, and then proceeded to consider whatever new objections to the road closure

69 Supra pp. 460-461.
70 [1974] 1 N.Z.L.R. 545, 551.

might be lodged, its competency to undertake that consideration could not be challenged.[71] Such a procedure would do little to strengthen an impression of the council's impartiality. The court's attempt to reconcile the principles of natural justice with its interpretation of the conditions of the sixth schedule has led to the nemo judex rule being severely undermined to the extent that it is virtually worthless to objectors in all but the most extreme cases.

The view that it was the legislature's intention that a council's duty in the process of considering objections under the Sixth Schedule should not be one of a 'judicial' nature, is strengthened by the enactment of section 3(1) of the Local Government Amendment Act 1978, which amended the Municipal Corporations Act 1954 procedures for street stopping:[72]

> 5. If objections are received as aforesaid, the Council shall, after the expiration of the period within which an objection must be lodged, unless it decides to allow the objections, send the objections together with the plans aforesaid and a full description of the proposed alternatives to the Planning Tribunal.

There is thus no duty to inquire into the objections, nor even an obligation to look at them. A council can, if it wishes, simply receive the objections and send them off, with the plans, to the Planning Tribunal. But if it wished to strengthen its case or to gauge the public feeling about the proposals, it may examine the objections without obligation to "consider" them or to make any decision about them at all.

What is the current state of affairs under the Town and Country Planning Act 1977? The old Town and Country Planning Act 1953 ignored the possibility of local bodies being required to hear either their own applications for planning consent, or applications favoured by the local body. There was no provision for a council to decline to hear an application or objections to it on the ground of a prior interest amounting to a prejudgment of the issue.

The new Act does, however, indicate an awareness that the problem could arise.[73] Section 58 provides:

> (1) Every Council which owns or occupies land shall have the power to negotiate with any proposed purchaser or purchasers or lessee or lessees of the land or any

71 This interpretation receives support elsewhere: (1975) 24 Town Planning & Local Government Guide 203, para. 889.

72 The correct term is now "road stopping" after the enactment of the Local Government Act 1974. The new procedures are set out in the Tenth Schedule.

73 A committee was established to report to the Minister of Works and Development on the reforms that ought be made to the 1953 Act. It recommended that the new Act should "provide a permissive provision enabling local authorities within a defined area to appoint a "commissioner" to decide on applications for planning consent, but with rights of appeal retained". (New Zealand Town and Country Planning Act Review Committee: Report to Government. (1973), 10).

This recommendation is made "in order to relieve local authorities and the public of some of the burden and formality of planning hearings." It was not, therefore, motivated by a concern that local bodies might find themselves in the position of having to decide their own planning application and is not indicative of any particular concern that the rules of natural justice should be enforced in the area of planning. Whether the Committee intended that their proposed "commissioner" should be used in circumstances

part of it with a view to reaching agreement in principle upon a mutually acceptable planning scheme for all of the land.

(2) The fact that any such negotiations have taken place before the Council proceeds to change its district scheme to give effect to any such agreement shall not of itself be a ground for challenging in any Court the validity of the Council's action in that regard.

The extent to which this section validates any action by a council in negotiations with a proposed developer before it is required to hear objections to an application has not yet been judicially determined.[74] It was designed to give statutory blessing to the normal practice of a council and a proposed purchaser negotiating on the development of council property prior to a formal planning application being made. The term "negotiations" in section 58 could conceivably include a definite contract or "gentleman's agreement" between the council and the prospective developer of the council's land. The purpose of negotiations is to reach an agreement. The developer wishes to know, before he enters into an agreement with the council for the lease or purchase of the land, that he will receive the necessary planning permission, and it may be that he will only be satisfied with a definite contractual undertaking that planning permission will be given. Under the old Act, the test of the Court of Appeal in *Bank* or of Mahon J. in *Anderton* would certainly mean that the contract had rendered the council incompetent to hear the objections to the application. But would the council be stopped from hearing the objections now, under section 58? If not, the position would have been reached in New Zealand planning law that, in all cases except street stopping, not only would local bodies have been made judges in their own cause, but also the practice of extensive negotiations and collaborations with prospective developers to such an extent as to amount to a virtual alliance of

where the local body had an interest in a planning application that might be evidence of predetermination to objectors is doubtful.

The Committee's recommendation is incorporated in the new Town and Country Planning Act 1977, but in an altered form which diminishes its value in this type of situation. By the terms of s. 87(3) the Commissioner, who need not be a member of any council, may make "a recommendation to the Council in respect of the application." Because the Commissioner may only make a recommendation, the council is still the final decision maker, and therefore this part of the section does not alter the present position in any way.

Section 87(1) provides that a council may delegate such of its "powers, duties, and discretions, . . . as the Council considers necessary for the proper operation and administration of" the council's district scheme to a committee constituted under s. 63 of the Municipal Corporations Act 1954 or s. 71 of the Counties Act 1956 — now s. 104 of the Local Government Amendment Act (No. 3) 1977. Such committees may be composed of persons who are not members of the council, and, it appears, make binding decisions on behalf of the council. But such a committee is still not an adequate solution to the problem. By s. 104(7) "Every such committee shall be subject in all things to control of the council, and shall carry out all directions, general or special, of the council given in relation to the committee or its affairs".

It is clear that the committees cannot be truly independent bodies. The value of s. 87 must, therefore, be seen to be confined solely to the contribution it makes to the streamlining of council procedures. It cannot be said to be of any use to facilitate the task of a council to comply with the rules of natural justice.

74 Section 58 was relied on to some extent by counsel in *A.-G. ex rel. Benfield* v. *Wellington City Council*. Davison C.J. however did not refer to it in his judgment.

interests would have received the blessing of the legislature. Local bodies will have been statutorily excused from the requirement of compliance with the rules of natural justice when considering applications for planning consent.

It is submitted that the proper scope of section 58 is that it only prevents the use by objectors of any argument based on such negotiations that there was constructive or presumptive bias on the part of the council, and that "actual predetermination" would still be a ground for the invalidation of the council's decision.[75]

Whatever the width of section 58, there can be no doubt that it does aim to make local bodies freer in their procedural actions, and less encumbered by the fear of the interference of the rules of natural justice. The spirit behind the section would therefore seem to be in direct conflict with the spirit behind the recent amendment to the Sixth Schedule of the Municipal Corporations Act contained in the Local Government Amendment Act 1978. Why does this conflict exist? The two statutes were, like the statutes that they respectively amended or replaced, passed within a year of each other. The Local Government Amendment Act 1978 reinforces the position taken in the Municipal Corporations Act 1954, by virtually abolishing the decision making function of councils in cases of street stopping proposals. The Town and Country Planning Act 1977, on the other hand, specifically allows a practice that, while not prohibited by the 1953 Act, was forbidden by the Common Law, in that a local body may hear a planning application for a development about which it has already entered into negotiations with the developer. If the original difference between the two approaches lay in the fact that a council that was making a decision under the terms of the Sixth Schedule of the Municipal Corporations Act 1954 was bound to be a judge in its own cause, the significance of that difference is very much reduced by the effect of section 58. The rationale for applying two different principles to the different situations is, practically, invalidated, and it is consequently urged that action must be taken to remove the anomalies between the two procedures.

IV. PROPOSALS

There are two obvious ways of dealing with the anomalies. One view is that it is best to follow the lead given by section 58 of the Town and Country Planning Act 1977, by affirming that a council may hear objections to its own application for consent and that predetermination will not disqualify it from giving a 'decision.' The objections would serve to inform the council of the nature and depth of the opposition to the application, and thereby better prepare the council for the support of its application if objectors should take the matter to the Planning Tribunal. The recent amendment to the Municipal Corporations Act 1954 must logically be repealed, for there can be no reason to differentiate between street-stopping proposals which must have council support, and those

75 If this submission is correct, then s. 58 does not have any effect on the law existing after the decision in *Anderton* v. *Auckland City Council & James Wallace Pty. Ltd.*, where Mahon J. stated that actual bias need be approved before a decision of a council could be quashed: supra n. 15.

applications under the Town and Country Planning Act 1977 which happen to have the support or sponsorship of the council.

Alternatively it may be considered that it is necessary to preserve the integrity of the natural justice rules and that, therefore, in all cases where a local body has an inherent bias, it should be prevented from hearing the application. It would be necessary to require that a council surrender its duty to hear the application, and objections thereto, to an independent tribunal, so that the council would then be no more than an equal party to the application with the objectors. The proper legislative reform would be to amend the Town and Country Planning Act 1977 to make it conform with the Sixth Schedule of the Municipal Corporations Act 1954 to provide for the automatic referral of such applications to the Planning Tribunal. Which course ought be followed?

There now exists in the United Kingdom a widespread practice amongst local bodies of "bargaining for a gain" with developers, that is, granting the necessary permission for the development only in return for some positive benefit to the local body such as an improved or new right of way over land, extra land for community use, the provision of a public amenity, or the like. Jowell[76] notes that this

> "planning through agreement" appears to evade the criteria and permit what the courts forbid. Agreements of this kind appear to release the naked power that procedural justice attempts to restrain. Undue influences, collusion and the abuse of discretion all seem on the surface to be encouraged by a practice which seems close to a barter, or a sale, of planning permission.

The role of the law under a procedure whereby a local body both bargains with a developer and makes a decision on its application is very much diminished. The local body becomes one of the parties in a bargaining situation, as well as maintaining its intended role of arbitrator in a dispute between the developer and the objector. However, the system has the advantages of providing adaptability and of allowing a local body to work for what it sees to be the collective good with the minimum of interference from such an abstract notion as the rule of law. The preoccupation of the law with the need to control discretion or the necessity of preserving the individuals rights can be regarded as obsolete, and inappropriate, in a modern bureaucratic system in which complex tasks have to be performed. Nevertheless, it has been acknowledged from early times that it is important that justice should not only be done but that it should be seen to be done. Such is one of the great principles of the Common Law. Allowing local bodies to be judges in their own cause is a serious violation of this principle, and it must be asked whether the danger that such a violation may bring the law into disrepute is not of itself a sufficient justification to require that the statute law be changed. Jowell suggests that what is required is[77]

> a balance that will inhibit planners in their desire to become the unrestrained arbiters of the public interest . . . and that will restrain the law from blindly following a policy

76 Jowell, "The Limits of Law in Urban Planning" (1977) 30 Current Legal Problems 63, 70. This type of bargaining was very obviously present in *A.-G. ex rel. Benfield* v. *Wellington City Council.*

77 Ibid. 82.

of expansion that has already subverted much of its own authority and put at risk too many of its finer values.

Achieving that balance is, as the New Zealand experience demonstrates, a difficult matter. The modern English approach, which seems to be inclining towards conferring a greater discretion and freedom on local bodies, is not in the writer's opinion, the approach that New Zealand ought to adopt in the future.[78] The Court of Appeal decisively rejected it in *Lower Hutt City Council* v. *Bank:* "Expedience cannot be promoted to the stage of denying citizens fundamental rights."[79]

Although it is submitted that the second of the two proposals outlined above should be adopted, it is more strongly submitted that whatever approach is taken to the role of natural justice in local body hearings, the present inconsistencies in the legislation and doubts held by local bodies, objectors and the courts have created an urgent necessity that something be done. As the law at present stands, local bodies may force themselves to be unnecessarily cautious in their negotiations with prospective developers, with the result that they fail to adequately bind the developer before the costly procedure of hearing the applications is commenced. Equally, they may be too lax in their observance of the rules of natural justice, with the result that their decisions on planning applications are challenged in the courts.

To avoid the possibility of future litigation in the nature of that in the cases discussed here, it is imperative that there be a legislative rationalisation of the relevant statutory procedures.

78 The approach taken in England is indicated by the movement from the planning legislation that is based on a 'rule' model, exemplified by the Town and Country Planning Act 1947 (U.K.), to the Town and Country Planning Act 1968 (U.K.), which empowers local bodies to adopt flexible "structure" plans, which are open to more diverse pressures for change than simply those pressures that are occasioned by land use. Now, economic and social forces can have an effect. The resulting structure plans are, in Jowell's opinion, "flexible to the point of vagueness" —: Jowell, op. cit., 68. Also, the Community Land Act 1975 institutionalises bargaining between local authorities and developers to a much greater extent than is envisaged by s. 58 of the New Zealand Town and Country Planning Act 1977.

79 [1974] 1 N.Z.L.R. 545, 551. The argument, that requiring a local body, or any administrative tribunal for that matter, to follow the rules of natural justice, will necessarily result in inefficiency is, it has been suggested, unfounded:

> I personally can never accept the idea that fair procedures and high-quality judicial review inevitably result in inefficiency. Perhaps there is some delay; but this seems to be a cheap price to pay for fairness in administration.
>
> Whitmore, "The Role of the Lawyer in Administrative Justice" (1970) 33 Mod. L.R. 481.

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