Planning for petroleum development

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Here an overview is given of the more important aspects of planning for petroleum development. An approach is suggested which enables the complexity of resource planning to be broken down into smaller parts, to be understood and consequently to be open to control. The topic is dealt with under the three heads, process, procedures and persuasion.

I. INTRODUCTION

Planning involves both politics and law. It is a social process in the widest sense. The unifying factor is consensus. It is hard to better a comment by Alistair Cooke on consensus:[1]

> When the people in power can neither keep the consent of the governed nor keep *down* the dissent of the governed, then there will be a blow up.

Between consent and dissent is the space for manoeuvre.

If the political decision does not reflect a consensus —it will not last. If the law does not permit a consensus decision — it will be changed.

The nature of this consensus is well described in a report by Link Consultants Ltd. entitled "An Assessment of Issues of Public Concern over the Operations of the Mining Act 1971" (March 1981) —[1a]

> The operative district scheme is the means by which Council regulates land use in the public interest for the above mentioned ends.
>
> The means by which the district scheme becomes operative is by public participation by all interested people and agencies (including Mines Division etc.).
>
> Once operative, the district scheme is therefore a *social contract with status in law* by virtue of the Town and Country Planning Act.
>
> It is approved by the Minister of Works and Development on behalf of all Government Departments.
>
> Thus, by virtue of legislation it has a legal authority and by virtue of the process by which it has been drawn up with public participation it has the standing of a moral or social contract (hence use of words like "integrity" of the district scheme by Planning Tribunal).

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1 *America,* B.B.C., London, 1973, p. 122, quoted in P. Devlin *The Judge* (Oxford, 1981) 2.

1a Page 44.

Consensus limits politics — politics determines the result — the law provides the process and gives the results validity. That is the reality of planning.

Planning involves the management of change — and nothing is sacred — not even the law. This paper addresses the legal processes of planning only. These processes are important. But they are not the only way of achieving a result. Never forget the politics of planning. Never forget consensus. Do so — and you may win the battle but lose the war.

Planning for petroleum development is enormously complex. The many statutes and governmental procedures offer a choice of procedures. Whenever dealing with the management of a resource (and many other things as well) it is helpful to approach by asking —

What are the processes by which decisions are made?

What are the procedures leading to decisions?

How may I persuade the decision-maker?

For that, in essence, is what planning involves.

Planning, all too often, is seen as a series of formal events that are isolated yet somehow linked and at which participants play out their appointed roles as very competent tacticians. Yet despite this very competent if phrenetic activity, people are still asking "Where are we going? Why are things just happening? How do we get control of events?" Controlling events is where the strategist comes in. And that focuses attention again on —

Understanding the decision-making process,
Knowing the procedures leading to a decision,
Appreciating there is a range of means by which a decision-maker may be persuaded.

II. THE PROCESS

The starting point is a check list.

Firstly — subject matter. What are we dealing with? In this case it is a resource— petroleum — its exploration, extraction, processing, distribution and use. The only thing that might be done without commitment to the sequence is to explore for petroleum — and I have my doubts about that for reasons mentioned later.

Secondly — what legal framework are we working within? The legal framework will define the constraints on the developer and should provide a policy framework for decisions. With petroleum there are a number of statutes; the main ones are the Petroleum Act 1937 and Regulations, the National Development Act 1979, the Town and Country Planning Act 1977, the Water Control legislation and the Local Government Act 1974. Some thought needs to be given to their inter-relation.

Thirdly — who are the decision-makers (who makes the decisions that stick)? There is the Minister (the Executive). There is Parliament. There is, sometimes, the Planning Tribunal, and also local government agencies, the petroleum industry, land owners and, usually forgotten, there is the public.

Fourthly — what is the nature of the decision? Is it political, personal, administrative or judicial. This is important when it comes to planning appropriate techniques of persuasion.

Finally, who wants to influence the decision? The list will be much the same as for that of decision-makers and we will see later how roles may change. This information is important because it enables allies to be identified. One person may not be able to persuade the Minister — but if he can persuade someone who can persuade someone who can persuade the Minister — has he not achieved his goal?

Look at the process in general terms. Look with an open mind. Look with an active imagination. This is the point where the best ideas come before the mind becomes bogged down in the minutiae of procedure.

Before going on to procedure two matters — the interaction of statutes, and the nature of the decision — will be discussed in a little more detail.

A. The Legal Framework

This section will be addressed under the following heads:

1. *Stewart's* case.
2. Town Planning.
   (a) Regional planning.
   (b) Reserves.
   (c) Matters of national importance.
3. Environmental Enhancement and Protection Procedures.

1. *Stewart's case*

There is a belief that prospecting and mining for petroleum does not come under town planning control. Doubtless this belief is founded on the Court of Appeal decision *Stewart v. Grey County*[2] which held the mining Act to be an exclusive code in respect of the use of land for mining and not to be subject to the land use control provisions of the Town and Country Planning Act 1977.

Consideration of *Stewart's* case requires that the distinction between land title and land use is emphasised. Title is concerned with who — who can enter land, who can work land, who can mine it, who can control it. Title is directed to a person. Use is concerned with what — what can be done with land, what can be done on land. Use is directed to an activity.

There is no reason at all why one Act should not deal with title and another with use — indeed that is normal. Problems do arise, however, when two statutes deal with the same one. It becomes even more complex when one of the statutes deals consequentially rather than explicitly with use and when the inter-relation between the Acts in question is not spelt out. In *Stewart's* case the question arose

2 [1978] 2 N.Z.L.R. 577.

as to whether there was a conflict between the Mining Act and the Town and Country Planning Act over the control of use. If there was, the Mining Act, as an Act dealing with a special subject, would apply to the exclusion of the more general Town and Country Planning Act.

In *Stewart* the Court of Appeal held there was a conflict and referred in particular to the following matters. Firstly, it noted that before there could be any conflict the land must be open for mining. Under the Petroleum Act 1937 all land is open, or potentially open, for prospecting and mining .Secondly, mining is not a matter of private bargain between the owner of the land and the miner. This too is the case under the Petroleum Act. Thirdly, the Mining Act 1971 imposes a condition that licensees will ". . . Without delay carry out such a programme of work as may be approved by the Minister and be specified in the licence"[3]. The Petroleum Act contains provision for approval of a programme of works by the Minister and then requires the licensee ". . . to carry out the works and undertake the production of petroleum and comply with all other terms of the approved work programme"[4]. Part II, which deals with pipelines, contains no provision requiring construction pursuant to an authority granted by the Minister.

Fourthly, the Mining Act provides for specific land use limitations on mining activities. Examples include conditions relating to prevention or reduction of injury to land, to protection of roads, streets and bridges, and to reporting to a number of agencies (but not to territorial authorities) on methods of mining that will disturb the surface of the land. The Petroleum Act contains similar provisions. Section 28 (2) imposes a duty on " . . . all persons exercising any powers conferred on licensees by this Act to do as little damage or injury as possible to the property and rights of other persons". Furthermore the Petroleum Regulations 1978 deal extensively with the manner in which drilling is to be conducted and given the intimate relationship between the land and the drill, these controls might be regarded as relating to land use. They could equally be regarded as imposing personal obligations only.

Fifthly, reference is made to the responsibility placed on the Minister in respect of mining operations. The same applies in the case of mining for petroleum.

Sixthly, the Mining Act provides the compensation; so does the Petroleum Act.

The conclusion reached by the court was that the Mining Act " . . . provides a clear and detailed statutory code determining and controlling, under the direction of the Minister, the use and development of land for mining purposes"[5].

The most compelling reason, indeed the only compelling reason, for excluding town planning controls is the third reason — the condition requiring work to be carried out without delay. It is a statutory requirement that could be defeated by

3 Section 84 (1) (a).
4 Section 14A (11).
5 Supra n. 2, 583.

controls imposed under another Act. It imposes a statutory obligation relating to activity on the land. By way of contrast the other provisions define relationships between persons:

— The Minister may interfere with a person's title;

— Land owners and miners may not bargain ;

— The miner will be in breach of certain obligations if he does not carry out his work in a certain manner;

— Land owners are to be compensated.

As mentioned, these are not very compelling reasons for excluding the operation of the town planning controls.

Stewart was litigated under the Town and Country Planning Act 1953 which did not bind the Crown. The 1977 Act does. It has been suggested this makes a difference. Without going into detail, in the context of the case, I do not think it does.

Turning to the Petroleum Act 1937, as noted there are certain close similarities to the Mining Act and it is quite understandable that it too should be regarded as an exclusive code. But is it?

Firstly as to prospecting and mining the Act provides that nothing in prospecting or mining licences ". . . shall exempt the licensee from the obligation to comply with the requirements of any other Act or Regulations that may affect or apply to any operations carried out . . . under the licence"[6]. What are " . . . operations carried out under the prospecting [or mining] licence"? The mining licence, which is the more important of the two in this context, gives a right to carry out mining operations, which term is defined as meaning mining for petroleum and including prospecting for petroleum as well a wide range of activities relating to extraction and development.

Despite the structural similarity between the Mining Act and the Petroleum Act it is apparent from the clear and unambiguous words of the legislation that prospecting and mining for petroleum does come within town planning controls. Sections 7 (3) and 14 (3) were inserted as part of the 1980 Amendment to the Petroleum Act; *Stewart's* case was in 1978. Does it make a difference? All that can really be said is that in the case of petroleum the legislature has defined the priorities between the statutes. It does not say there is no conflict between the Acts — just that where there is the town planning controls are to prevail.

Pipelines are a different matter. As noted there is not the same direction to proceed diligently with works that there is in the Mining Act and to a lesser extent in part I of the Petroleum Act. Nor, however, is there an obligation imposed on those to whom a pipeline authority is granted to comply with the provisions of other Acts. So we are back into the same type of argument as cropped up in *Stewart's* case. But in the case of pipelines there are two additional factors that weigh very heavily in favour of the pipeline provisions being an exclusive code.

6 Sections 7 (3) and 14 (3).

In the first place pipeline authorisations are specific as to the route of the pipeline. It would not be sensible to suggest that the route should be defined with all the consequences that follow from that (as to noting easements on titles and such like) if the actual use of that route for the construction of a pipeline was still subject to procedures under other Acts.

The other factor is that the Minister has power to appoint a commission of inquiry with the function of advising the Minister as to whether, in its opinion, he should grant the application. Thus there is a procedure for an independent inquiry into such matters as " . . . it (the Commission) thinks necessary or expedient". So there is some parallel between the public consideration of land use issues under the Town and Country Planning Act (the social contract element) and the opportunity for public consideration of issues under Part II of the Petroleum Act 1937.

For mining the matter was put beyond doubt by the 1981 amendment to the Mining Act which specically excluded the application of the Town and Country Planning Act. Had the same result been intended for petroleum a similar provision might have been made in the 1982 amendment to the Petroleum Act — but it was not, even for pipelines. This lack of consistency does not aid interpretation .

These inter-relationships between Acts are important and this type of issue may well arise between other statutes within the group. As far as the Petroleum and Town and Country Planning Acts are concerned mining and prospecting come within town planning control but pipelines do not. Possibly it could be argued otherwise in respect of pipelines but the argument is not a strong one. This opinion accords with current practice and reference might be had to the publication *Prospecting for Petroleum — Exploration in New Zealand* which was issued by the Ministry of Energy in June 1980. Under the heading *Environmental Considerations* in the section dealing with general provisions and government policy relating to prospecting and mining licences is found the following:

> Environmental factors are an important consideration in all prospecting and mining proposals. When an application for a licence is received, the effect of the proposed operations on the environment is taken into account and if a licence is subsequently issued it will include appropriate conditions to protect the environment. Apart from the Petroleum Act 1937, there are a number of other Acts which have relevance in this respect, viz:
>
> Water and Soil Conservation Act 1967
> Marine Pollution Act 1974
> Town and Country Planning Act 1977
> National Development Act 1979.

2. *Town Planning*

I will turn now to the three matters arising under the Town and Country Planning Act: Regional Planning, Reserves, and Matters of national importance.

(a) Regional Planning

The nature of the process is that the regional council is to prepare a regional

planning scheme. It is to notify its intention to prepare that scheme. Any interested party or person may make submissions[7].

Once a scheme has been prepared, any local authority may call for an inquiry by the Planning Tribunal into its provisions. It would seem, from section 157, that the only parties to that inquiry will be the united or regional council, the local authority and the Minister. The scheme is then referred to the Minister who, if he considers any matter to be of national importance and to have significance beyond the region, may refer the matter back to the council — and there is provision for a further inquiry by the Planning Tribunal and recommendation to the Minister[8]. A number of other procedures follow in the event of continuing disagreement but the end result is that the Minister has the last word at least on these national importance matters.

The matters to be taken into account in preparing the scheme are set out in the First Schedule and include:

— The development of the regional economy;

— The identification, preservation and development of the region's natural resources;

— The production and distribution of power and fuel.

Section 17 indicates the importance of the Regional Scheme. It provides:

> (1) The Crown and every local authority and public authority shall adhere to the provisions of an approved regional planning scheme.
> (2) In accordance with sections 37 (district schemes) and 112 (maritime planning) of this Act, every operative district scheme and every operative maritime planning scheme shall give effect to the provisions of the relevant regional planning scheme.
> (3) In the event of any conflict between the provisions of an approved regional planning scheme and an operative district scheme or maritime planning scheme, the provisions of the regional planning scheme shall, subject to section 20 of this Act, prevail.

Section 20 deals with changes to an approved regional planning scheme.

Regional planning is still in its infancy but it will be a major planning force in petroleum development.

(b) Reserves

Reserves may be a strange item to consider in terms of petroleum planning. But let us turn for a moment to the Local Government Act 1974. Sections 285 and 286 provide for the payment of a reserves contribution in respect of developments — the development levy. The Crown is bound by these provisions by section 272. Section 288 provides, in essence, that reserve contributions are to be used to provide reserves; section 284 directs the Council, in exercising its powers, to "comply with the council's reserves policy as set out in the proposed or operative district scheme for the locality . . . ". There is an alternative provision for residential subdivision.

7 Section 11.
8 Sections 13 and 14.

There have already been cases where reserve fund requirements imposed by councils have been set aside because they could not be justified in terms of the reserves policy expressed (or not expressed) in the district scheme[9]. The sums of money involved can be very large. It is therefore important for councils (both regional and territorial) to appreciate the importance of keeping a very close eye on its reserve policies.

A wise developer would also pay careful attention to reserve policies as the reserves contribution from new subdivisions to provide housing for a growing work force may well have a bearing on the amount that may properly be demanded by way of a development levy.

The Local Government Act 1974 tends to be overlooked. This reserves point is mentioned to illustrate that it too may have a significant bearing on planning matters.

(c) National Importance

The third point concerns matters of national importance. These are set out in section 3 of the Town and Country Planning Act 1977 and are to be provided for in the preparation, implementation and administration of regional, district and maritime schemes. They include "the wise use and management of New Zealand's resources". Attempts have been made under this head of wise use to raise the issue of the appropriate end use of petroleum. There have been four cases[10] dealing with this use in one way or another. Their effect may be summarised as follows:

1. The Town and Country Planning Act creates control over the use and development of land only.

2. The Town and Country Planning Act does not enable control over resources once they have been won from the land.

3. Planning schemes must be drawn and administrated in a way that will enable resources to be used wisely; there is no power to direct how a resource is used.

4. When the provisions of the National Development Act apply, the Order in Council will sufficiently indicate that the work in question is of national importance.

5. Sufficient information is required to indicate the degree of importance of the activity for the purpose of weighing it against other matters of national importance bearing on the particular land use application under consideration .

The last point suggests there may be a limited opportunity for end use to be considered and indeed this happened in this case of *Gilmore*[11].

9 *Wright Stephenson Properties Ltd.* v. *Invercargill City* 9 N.Z.T.P.A. 282; *Penfolds Wines (N.Z.) Ltd.* v. *Gisborne City,* Planning Tribunal Decision W68/83, p. E1316, 16 September 1983.

10 *Petralgas Chemicals N.Z. Ltd. (Methanol Plant)* 8 N.Z.T.P.A. 107; *Synthetic Fuels Corporation Ltd. (Methanol and Methanol to Petroleum Plant)* 8 N.Z.T.P.A. 139; *Smith* v. *Waimate West County (Ammonia-Urea)* 7 N.Z.T.P.A. 241; *Gilmore* v. *N.W.S.C.A. (Clyde Dam)* 8 N.Z.T.P.A. 298 (H.C.).

11 See supra n. 10.

Two other points were made in the *Petralgas* case[12]:

1. A decision to commit a particular raw material to a specific purpose is a decision that is not subject to planning control.

2. A district scheme may direct that a particular resource be left in situ if the extraction or winning of it would result in unacceptable environmental or social damage or detraction from amenities.

What emerges very clearly is that end use is a factor that is seen as having very limited significance when deciding on the location of processing facilities. Is it relevant at an earlier stage, when the question of mining or extraction arises? There is a problem .The Planning Tribunal will be looking for policy guidance on what is wise use .It will almost certainly look to the Petroleum Act for guidance.

The long title to that Act is "an act to make better provision for the encouragement and regulation of mining for petroleum . . . ". The general thrust of the Act is that licensees are to actively prospect and mine and it may be noted[13] that the Minister's power to postpone development is not unlimited. He may exercise such a power only where he is satisfied that the rate of production would be contrary to the national interest, and other provisions could also be mentioned.

Applications under the Water and Soil Conservation Act must by now have brought home to all the importance of the long title to an Act when it comes to determining policy guidelines. Certainly the long title to the Petroleum Act was inserted in 1937, but it has survived two recent and substantial amendments. Given this, I believe the Planning Tribunal would be hard pressed to say wise management required petroleum to be left in the ground. It certainly seems to place the onus on those seeking to show extraction is not in the national interest rather than on the developer to show it is.

Constraints of space prevent the traversing of other Acts and particularly the National Development Act 1979 and the legislation relating to water use.

3. *Environmental Protection and Enhancement Procedures (1981)*

This document has been amended to the point where it has so many internal inconsistencies that just about everything can be read into it. Simply, three points are to be noted.

Firstly the procedures may be applied to "the granting by the Crown of all licences authorisations, permits and privileges which may have environmental implications and which are issued pursuant to . . . the Petroleum Act 1937 . . .". In other words the procedures may be applied to prospecting and mining for petroleum.

Secondly, documented information on the environmental implications of a proposal may be required where consents are sought under the Town and Country Planning Act 1977, the Water and Soil Conservation Act 1967, the Soil Conservation and Rivers Control Act 1941, the Public Works Act 1981, and the Clean Air Act 1972.

12 Idem.

13 Section 14A.

Thirdly the Commissioner has had his wings clipped: "The Commissioner will not concern himself with the economic implications of the proposal including those relating to alternative resource use." This consequence is believed to follow from the *Baigent* case[14]. However this direction so conflicts with other provisions that one wonders what it is really worth, especially as environmental impact assessment is called ". . . a process whereby a conscious and systematic effort is made to assess the environmental consequences of choosing between various options which may be open to the decision maker".

It has been a matter of comment that the term "environmental impact report" is not defined. This is of importance when it is recalled that the provision of an environmental impact report by the applicant starts the National Development Act clock.

The matter was addressed by the Court of Appeal in *EDS v. South Pacific Aluminium Limited (No. 4)*[15]. In that decision it was said to be[16]

> . . . the plain intention of the [National Development Act] that members of the public will have an early and sufficient opportunity of informing themselves about proposed works and their implications to the environment .A report that was wholly deficient would not even begin to do that . . .

And further[17]

> All this suggests strongly that the statutory intention concerning such a report is that the document will include adequate and reliable reference to every matter that is significant and relevant and so provide a coherent and sufficient basis for consideration by the public and by those local authorities and individuals who may be affected and by the Commissioner himself as a starting point for the important audit he must make.

Other passages point to the importance of having a fully adequate report in the early stages. A report that is grossly inadequate may well be held not to be an environmental impact report at all[18].

So, to recapitulate on the legislative and legal framework: get to know it well and examine carefully how each Act relates to each other Act. The coverage in this part gives some idea of the degree of complexity that may be involved.

B. The Nature of the Decisions

The other point I wanted to cover within the decision-making process was the type of decision. Is it personal — such as a land owner might make on questions

14 When talking environment, economics must be ignored, but when talking economics a price must be put on a view!

15 [1981] 1 N.Z.L.R. 530 (C.A.).

16 Ibid. 533.

17 Ibid. 534.

18 By way of digression note the notion that where an environmental impact report was found to be deficient some penalty either of delay or of money should be imposed on the proponent: [1979] N.Z.L.J. 512. It is a thought for the future.

of compensation? Is it political, is it administrative, is it judicial? Much has been written on what is an administrative decision — what is a judicial decision. It will suffice for present purposes to clear up a few misunderstandings about the judicial decision.

It is said in *Environmental Audits and Appraisals (1976-1981): a Review*[19] —

> There is a fairly widespread concern that the judicial system is not well-equipped to evaluate competently technical and scientific issues relating to the environment. Nor does it take adequate account of scientific/technical issues and natural processes which may be specific to each project and its environmental setting. A corollary is that the system, as it operates at present, over-values legal procedures and interests, and precedents.

If I may riposte with a similarly sweepiing generalisation, I detect a wide-spread belief that if the judicial system could but evaluate competently technical and scientific issues relating to the environment then it could, under the guidance of our scientific and technical witnesses, take over the running of the country. This is a perhaps not unreasonable expectation given the extent to which the Planning Tribunal in particular is increasingly being forced in its decision-making to fill a policy vacuum.

The judicial process has two major functions — to make decisions within the context of a system of laws, and to provide a means of ensuring that the administration acts within the proper limits of its power.

The first involves making findings of fact on the information before it, determining the relevant legal principles and making a decision accordingly. It is a decision on facts within a framework of principles. The second involves reviewing the action of administrators. Are they acting within their powers, have they properly exercised their discretion, have they taken into account matters they were required to? This was what *CREEDNZ Inc. v. Governor-General*[20] was about.

In the second case the judge will not be making a decision for the administrator. If need be he will set the decision aside. But it can almost always be made again — by the administrator — properly.

The judicial system operates within a framework. The art of the advocate lies partly in assisting the court to find that framework. The framework is not inflexible and there is usually room for judgement — for choice. But in some aspects of planning the discretionary element has been made so large that there is virtually no framework at all.

Let us return for a moment to wise use. The wise use of resources is what planning is about. But the Tribunal is entitled to expect policy guidance on what is wise use in any particular case. Its particular skill, as a judicial body, lies in resolving any

19 Published by the Commission for the Environment, Wellington, p. 42.
20 [1981] 1 N.Z.L.R. 172.

conflict between different wise uses on the basis of the evidence. What is wise use is a political decision: how one use should be balanced against others may be decided judicially or decided politically depending on which of the various statutory procedures are followed.

Thus, to revert to the question of end use, there will be occasions — indeed there have been occasions —when it is proper for a judicial body to consider the end use of a resource. But that opportunity may be curtailed by the exercise by the executive of certain of its powers and in particular the power to apply the provisions of the National Development Act.

The disappointment of those who consequently see themselves as losing a formal forum for debate is understandable and made even more acute when one looks at publications such as *"Integrating Conservation and Development: a proposal for a New Zealand conservation strategy"*, a publication of the Nature Conservation Council in 1981. It has a foreword by the Minister of Lands who "acknowledges that the task of studying this document and considering the implementation of its recommendation is now yours and mine".

> The attraction of the proposed Maui gas to synthetic petrol programme is that it can be implemented quickly because it does not require changes to existing petrol engines. Other alternative fuels produced by Maui gas such as CNG, LPG and methanol blends require engine modifications or additional equipment. However, the synthetic fuels programme and the expanded refinery will shut out the development of many alternative fuels. The two plants combined will produce so much petrol that there will be both little immediate need for the use of petrol substitutes and little chance of developing them without undermining the economic viability of one or other of the two petrol producers. As long as supplies of crude oil to the refinery are continued, dependence on a non-renewable fuel will be maintained, the incentive for transition postponed and a false confidence about New Zealand's long term position created.[21]

That publication highlights sustainability: present development is based on the more limited goal of import-substitution.

It is a very real problem that there is no procedure for developing an overall energy strategy with full opportunity for public participation. That is the context for an end use debate. Glossy publications notwithstanding, I do not see a social contract for petroleum development. If that opportunity for participatiion is not provided — and *"Integrating Conservation and Development"* suggests there are matters worthy of debate — we are likely to continue to see endless activity before the courts, the Planning Tribunal and commissions of inquiry, for they are seen as the main formal means by which the public can gain effective access to the decision-making procedure[22]. That said, I hope the remainder of this paper will suggest other possible avenues for achieving results.

21 Page 33.

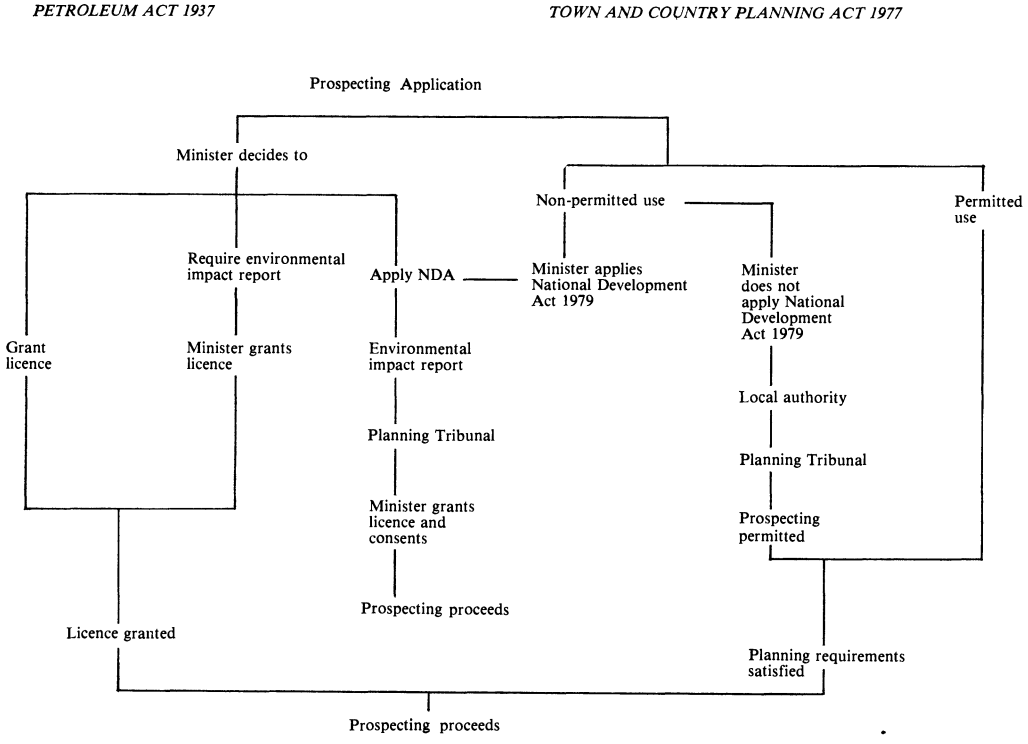
22 The Commission for the Environment is perhaps another — but as a persuasive witness rather than as a decision-maker.

Deficiencies lie not so much with the judicial system as with the unsatisfactory policy framework within which it is required to function in a judicial manner. Combined with this is an expectation that it is a doorway into the decision-making process. When the door is found not to lead to the right room it receives the kick that might be better directed to the person with the map.

To recapitulate, this section has been concerned with the decision-making process. It has taken an overview of the general area being dealt with. This involves looking at the subject matter, at the legal framework within which decisions will be made (or outside which decisions will be made), at the decision-makers, at the nature of the decision, and at those who want to influence the decision. The next point is to go into more detail and look at the various procedures by which decisions will be made.

III. PROCEDURES

The following is a very simplified flow chart illustrating the possible routes that may be taken to obtain a decision on a prospecting licence.



Knowledge of the decision-making process will enable parties to assess which pathway is likely to prove most favourable. Will they have more success with a judicial pathway or with a political one? The roles different parties will play may also be seen. Thus on one course the local authority is a decision-maker; on another it is a party .It is important to know this sort of thing when it comes to assessing the avenues through which decision-makers may be influenced.

As mentioned when dealing with the decision-making process, the choice of procedure may have a considerable bearing on the definition of the matters that may be discussed at "the formal doorways for public participation" — the Planning Tribunal and any other body charged with making a recommendation after an enquiry.

One other most important point hinted at, but not developed, in the chart is that there may be a number of different procedures all being followed at the same time. The chart deals with licensing and planning for prospecting only. At the same time there may well be a review of a regional scheme, or a water allocation plan under development, or a district scheme change — all progressing at the same time. And in addition it is probable that consents under other Acts[23] will also be required. By carefully charting the procedures an overview may be maintained throughout and may often suggest different ways of achieving the desired end.

The final point about charting procedures is that it will enable the political as well as the judicial points of decision-making to be identified — and at the risk of becoming tedious it should not be forgotten that planning involves as much if not more politics than it does law.

IV. PERSUASION

We have a grasp of the decision-making process. We understand the detail of the procedures. We have identified the decision-makers. Now we want to make them see things our way. The most important thing here is attitude. The key word is persuasion. If you are a lawyer — no longer think of getting a planning consent — think of persuading a Council or Tribunal to grant that consent. If you are a witness think no longer of giving evidence — think of persuading a Tribunal that the facts you are giving are correct and your opinions sound. Never again just write a submission — persuade whoever it is addressed to that the arguments being advanced warrant consideration.

The next matter to consider is who to persuade. Here it may prove helpful to identify the main decision-makers and to chart the formal means by which they may be approached. It is to be emphasised that these are by no means the only avenues.

23 The Water and Soil Conservation Act 1967, especially.

The essential point is to be sure that the person or body being addressed can make the decision sought. The earlier discussion on end use illustrated the problems that can arise here.

The Minister is in a key position and it is interesting to note that there is provision, albeit discretionary in some cases, for formal public participation in discussions made by him through inquiry or similar procedures. But as noted the two decisions that do not have provision for formal public participation are resource development policy and the decision to apply the provisions of the National Development Act 1979.

It is important to keep in mind all the formal processes leading to a decision. An environmental impact assessment or report that is of great assistance to the Minister may not cover matters that will help the Planning Tribunal — and therefore will not advance the use addressed as well as it might. Thus although a particular approach to environmental impact assessment and reporting may be eminently suitable where a mining licence is involved, a different approach may be seen as preferable where the National Development Act is invoked because of the interposition of the Planning Tribunal. At the very least the person responsible for conducting matters before the Planning Tribunal should be involved in the assessment and reporting procedures.

Where there are several formal processes leading to a decision there exists an opportunity to multiply the effect of an argument by persuading one of the bodies in the chain to support a particular position. The same result may also be achieved by persuading a more influential party to adopt a particular point of view.

Finally reference might profitably be made to the full text of the decision in *Liquigas v. Manakau City*[24]. It is a good example of the manner in which the Planning Tribunal evaluates the evidence of expert witnesses. It makes one suspect that the "widespread concern" as to the competence of the judicial system might be founded in part on witnesses who do not sufficiently recognise the need to communicate to a decision-maker the information he needs in terms he can understand[25].

This paper has touched lightly on the formal avenues of persuasion only. There are other means of properly influencing a decision. This is not the place to go into what is proper. Suffice to say that administrative decisions are to be made within the proper ambit of the administrator's powers and that to encourage him to act beyond those proper limits lays his decision open to the risk of being set aside.

V. EPILOGUE

Resource management is complex but it may be brought down to manageable proportions by procedures such as outlined here. First identify in broad terms the

24 Decision A22/83, reported in part at 7 N.Z.T.P.A. 193.

25 This aspect is covered more fully in the January 1984 issue (No. 20) of *Landscape* — the journal of the N.Z. Landscape Architects Association, pp. 16-18.

processes by which decisions will be made, then detail the various procedures leading to those decisions. Finally, identify the decision-makers and there is a fourth step — define the goal and make sure that any procedure followed is relevant to attaining that goal.