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Book Review: The Reform of Planning Law, by Neal Allison Roberts

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THE REFORM OF PLANNING LAW, NEAL ALLISON ROBERTS, London: The MacMillan Press Ltd., 1976. Pp. 279. (Cloth: $28.95; Paperback: $10.95).

Planners and lawyers may not enjoy reading Professor Roberts' new book, *The Reform of Planning Law*, but they should read it anyway. The author tells them that their plans and preoccupations with judicializing the process are not worth very much, and I think he is right. By exploding the myth that professionals have a monopoly on good plans and the best processes,

Professor Roberts has made a substantial contribution to the jurisprudence of planning law.[1]

Although the focus of the book is planning law, it is not particularly legalistic. For those who are intimidated by a lawyer's capacity to cite cases, seemingly *ad infinitum*, they need not worry. Very few are mentioned. The emphasis is on explaining and analysing the bureaucratic process, not a tight analysis of the rather considerable case law in the area.

The Reform of Planning Law presents a readable, well argued thesis that is as simple as it is important. Briefly, it is a directive to planning reformers: forget the plans and begin focussing on the planning process! To this may be added a number of subthemes that run throughout the book, but they all, in one way or another, highlight the importance of the "procedures for drafting plans and granting the permission."[2] They include, for example, the importance of recognizing the inherent limitations of planning and setting our planning horizons accordingly;[3] of recognizing the various component parts of the planning task and designing decision-making mechanisms with this in mind;[4] of rejecting the concept of an objectively "good" or "right" plan; accepting that plans are only as good as the process that develops and implements them, and the process, in turn, is only effective if it offers society as a whole, with a little help from the planners, a mechanism for fairly setting priorities and defining a "desired future".

As these themes are developed throughout the book, a number of important points become apparent. First, planners do not necessarily know what is best for society. They do, of course, know what is best for them. Thus, their "findings" about what is best are usually nothing more or less than a statement of their own particular values. To use Professor Roberts' phraseology, the technical jargon and the "facts" which "seem to lead so determinably to the planners' decisions [are] actually based on their view of the end product."[5] Secondly, reformers' preoccupation with efficiency is not necessarily misplaced because the cost to society of delayed approvals is considerable. Most efficiency measures, however, are counter-productive and almost all are done at the expense of another equally laudable goal, public

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[1] While the book clearly recognizes the all-encompassing nature of planning, it focusses on land use planning.

[2] N. Roberts, *The Reform of Planning Law* (London: The MacMillan Co. Ltd., 1976) 10.

[3] Like A. Toffler in *Future Shock*, Roberts notes the futility of trying to produce plans in a rapidly changing society. The problem is not new. Roberts uses a delightful quote from Tolstoy's description of Napoleon at the Battle of Borodino in *War and Peace* to show that the information on which we make decisions is usually outdated and irrelevant as soon as we get it: *id.* at 231.

[4] To the extent that Roberts emphasizes the importance of the process and its relationship to the task at hand, he seems to be applying, very successfully, a Fuller-Weiler jurisprudential analysis to English planning law. The jurisprudential basis for such a comment may be found in L. Fuller, *The Morality of Law* (2nd ed., New Haven: Yale University Press, 1969) and P. Weiler, *Two Models of Judicial Decision-Making* (1968), 46 Can. B. Rev. 406.

[5] *Supra*, note 2 at 79.

participation. Finally, given the complex, multifaceted nature of planning, no one process will necessarily produce the best results. Adjudication, especially as it has developed in the context of the public inquiry, may be an excellent way to air both viewpoints when dealing with planning permission; it clearly is not the best way to formulate general plans. What may be needed is a process, like the newly developed public examination, that digs out all (or as many as possible) points of view and then facilitates compromise among the participants. In any event, to be effective, the process must be tailored to the task at hand.[6]

Planning is clearly an elusive art. Most, including Professor Roberts, agree that society should engage in it, but few are particularly happy with the result it is producing. Since 1947,[7] the United Kingdom has experimented with a variety of planning "concepts" ranging from public inquiries to public examinations, from survey plans to structure plans, and from case-by-case approvals to some automatic approvals. None has proven particularly effective. While the rationale for planning may lie in the socially unacceptable uses that were prohibited by the process, there is little doubt that chronic housing shortages, unemployed construction workers, astronomical land prices, and a general lack of co-ordinated decision-making attest to the overall failure of planning.

Most attempts to reform land use planning have been directed at expediting the approval or disapproval process and making it more efficient. But according to Professor Roberts, the "reformed" system is neither efficient nor is it particularly fair to those who are directly or indirectly affected by the output of the system.

Professor Roberts uses his rather considerable understanding of political, administrative and legal processes not only to mount an effective attack on planning as it is presently practised in the United Kingdom, but also to suggest the parameters of a reformed planning process and more effective planning law. He divides the book into three parts. The first comprises two chapters, one describing government reorganization and the second providing a brief introduction into the relationship between government finance, particularly the property tax, and land use planning. Both provide useful background material to the more important Part Two; however, neither really alerts the reader to the excellent analysis of land use planning that follows. In fact, the author suggests that those already acquainted with the literature in these two areas should proceed directly to Part Two, and this is good advice. Part Three provides both an excellent conclusion to the second part, and offers some thoughts on fundamental ways of reforming land use planning.

Before discussing Part Two, one point must be emphasized because it is too often overlooked by students of land use planning. Chapter Three, which deals with financial reform, alludes briefly, perhaps too briefly, to the role of the rating system or property tax in local land use planning. As Roberts points out: it is a system that imposes no tax burden on under-utilized property, pro-

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[6] Again, see, Fuller, *The Morality of Law*, *supra*, note 4.

[7] *Town & Country Planning Act, 1947* (10 & 11 Geo. 6, c. 51).

vides no incentive for the owner to use the land more productively, and provides no likelihood of the planning authority predicting when this land will come into more productive use. Thus, by not integrating property taxes and planning goals, the two may work at cross purposes or at least not compliment one another.[8] Recent reforms, according to Roberts, enacted under the *Local Government Acts*[9] provide taxing flexibility to overcome these problems, but the author provides little information as to whether rating policies have changed substantially and if so, whether this has enhanced the land use planning process. Nevertheless, the reader is introduced at the outset to the important relationship between governmental organization, local government finance and land use planning.

Part One is primarily descriptive; those looking for a probing, thoughtful analysis of the planning process must wait until Part Two.

As Professor Roberts points out in the preface, he is as much a political scientist and administrative theorist as he is a lawyer,[10] and this is certainly reflected in Part Two. Hardly a paragraph goes by without the reader gleaning some insight into *why* land use planning does not work very well in England and Wales and, for that matter, North America. His analysis suggests many defects in our planning systems as well.

Taking a page from the administrative theorists, Professor Roberts begins by identifying the goals of the planning exercise.[11] They are not, he suggests, to produce plans for their own sake, but rather to generate a process that best reflects society's conception today of its best interests tomorrow. The task, of course, is too complex for any single, rational administrative system.[12] All we can do in the circumstances is design a process that ensures that this "desired future" reflects as many interests as possible without being so cumbersome as to make change impossible. But if this is the goal, how is it best accomplished?

Throughout the past twenty-five years, planning in England and Wales has undergone a number of important changes, all of which are described and analyzed by Professor Roberts.

"Unreformed" planning in England, that is planning based primarily on the 1947 legislation, was plagued with a number of serious problems. By and

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[8] Undertaxing vacant land and taxing building improvements may also lead to "leapfrog" development and the demolition of historical buildings, both often contrary to the land use plans of the jurisdiction.

[9] *Local Government Act*, 1972 (1972, c. 70); *Local Government Act*, 1974 (1974, c. 7).

[10] *Supra*, note 2 at xi.

[11] Or, to use the terminology of the administrative organizational theorists, "goal identification". See, for example, James March & Herbert Simon, *Organizations* (New York: Wiley, 1958).

[12] The book's emphasis on the futility of prescribing the impossible reminds the reviewer of the Nova Scotia Planning experience. Under *The Planning Act*, S.N.S. 1969, c. 16, municipalities were required to make "development plans" within two years. Since then the deadline for such plans has been extended every two years. In the spring of 1976, only a handful of municipalities had complied with the original statutory directive.

large, they are all an inherent feature of the basic premise of the English land use planning system, namely, that development is best regulated by case-by-case permission (or lack of permission) that is only vaguely related to local "development plans". In retrospect, the problems seem obvious. By leaving planning to the local units, there is no real co-ordination among units, and no co-ordination between local, regional and national planning authorities. Furthermore, by divorcing plan-making from plan-applying (regulation), the regulators or caseworkers are given wide discretion to determine who will be regulated and on what bases. When one adds to this a lack of qualified personnel and the absence of a mechanism to ensure that all affected parties are given a voice in the planning and approval process,[13] the plan-making function becomes largely superfluous and the plan-approving function becomes open to serious abuse. Frustration and alienation, not good plans, become the most important output of the planning process. To use Professor Roberts' words, "It somehow lacked legitimacy."[14] Planning lacked legitimacy because it did not meet any of the expectations of society.

Reforms instituted in 1968 and 1973[15] have not really alleviated the earlier planning problems. One of the most important features of the changes is the move away from survey and development plans toward structure plans. The structure plan was designed to provide more direction for the caseworkers who deal with planning problems on a case-by-case basis and thus ensure a proper link between plan-making and plan-applying. Roberts' review of the planning experiences in both Greater London and the Midlands[16] leads him to conclude that few plans (new or old) contain the specificity needed to be anything more than empty platitudes, and fewer still really represent the aspirations of the community for which they were designed. In light of these conclusions, the better approach is to limit plan-making to a fact-finding, fact-evaluating, general policy-making exercise, and to stop trying to produce a single document that is supposed to be all things for all people.

Another equally important "reform" is the move away from the public inquiry toward the public examination of plans and major approvals. The public inquiry was envisaged originally as a procedure for investigating certain facets of the approval process as well as the making of development plans. From this inauspicious beginning, it evolved, with the assistance of the Franks Committee recommendations, into a "major adjudicatory mechanism" and a "forum for decision-making in its own right."[17] For some issues, such as reviewing the Greater London District Plan, the public inquiry clearly provided a useful, although time-consuming, mechanism for testing the factual validity of information and re-evaluating the basic premises upon which the

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[13] In this regard the courts seriously curtailed the rights of many "affected parties" to participate in the planning process. See, for example, *Buxton* v. *Minister of Housing and Local Government*, [1960] 3 All E.R. 408.

[14] *Supra*, note 2 at 78.

[15] *Town & Country Planning Act*, 1968 (1968, c. 72); *Town & Country Planning Act*, 1972 (1972, c. 42).

[16] *Supra*, note 2 at 119 ff. & 130 ff.

[17] *Id.* at 74.

recommendations contained within the plan were made. For most, the inquiry offered unhappy developers an even more useful device for bogging down the refusal process. Perhaps characteristically, the lawyers who were so adept at representing their property clients before inquiries, "did not seem . . . particularly inventive in applying those procedures to the benefit of other affected members of the community . . . ."[18] The delays and the combatant features of the public inquiry led reformers to experiment with something called a public examination. Because of the public examinations' more open-ended, flexible approach to evaluating plans, it has proven to be a marked improvement over the public inquiry with two important exceptions: unlike the public inquiry, the public examination has no built-in device that will probe and test the validity of facts and recommendations, and, again, unlike the inquiry, there is virtually no room for one 'little man' to have much impact through such an open ended, wide ranging debate. These tasks may be performed by the chairman, providing he is an experienced prober; however, the general experience is that very little probing is done by anyone. On the basis of these conclusions, Roberts argues that the inquiry may serve a very useful function in resolving rather narrow, two-party disputes, provided all relevant persons are parties to the inquiry; while the examination may be the most useful way of focussing on the more general concerns of society and, in particular, how those concerns might best be expressed in a plan. In both cases, it is important to recognize that certain procedures can best deal with certain kinds of tasks, and that, regardless of the procedure, it is crucial that affected persons have equal rights to participate in the plan-making and plan-approving processes.

Almost all attempts to reform the process have focussed on making it more efficient, but these, according to Professor Roberts, often increase the problems rather than minimize them. To speed up approvals, caseworkers were given more discretion on how they disposed of the case, and, more recently, the power to categorize applications as either substantial or insubstantial, with only the former normally requiring detailed approval. More discretion, however, merely makes the approval process more uncertain and hence more difficult for caseworkers. Categorization may make sense, but only if there is some fair and rational way to categorize applications. To leave this function to the caseworkers' unfettered discretion, merely accentuates the problems associated with heaping more discretion on decision-makers without imposing appropriate checks and controls. The "efficiency problem" may be alleviated somewhat, according to Professor Roberts, by looking to the American general rule-making experience. Rather than a continuing commitment to case-by-case approvals with enormous discretionary powers vested in a case worker, the English may be better advised to look to some combination of zoning powers and specific site approvals.

The final part of the book provides both a detailed conclusion to Part Two and some useful comparative material from Sweden about how legislators might fundamentally reform land use planning, rather than merely tampering with the existing system.[19] Thus, Part Three provides, in a sense, the best of

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[18] *Id.* at 75.

[19] The discussion is put in the context of a recent Labour Government White Paper entitled Land White Paper, *Land*, comnd. 5730 (H.M.S.O., 1974).

both worlds. First, by way of concluding Part Two, it suggests a number of innovations that might truly "reform" the process and then, by way of speculating about a more enlightened government and a more liberal political philosophy, it suggests a new basis for dealing with land use problems, namely, limited public ownership and development. For some North American readers, this may be too politically unpalatable for them to digest. Furthermore, Roberts' earlier suggestion that incremental change in the planning process may, in the long run, accomplish more than grandiose reform packages would seem to point to a contradiction. For these reasons, it may detract from both Parts Two and Three. It should not, however. Suggested fundamental reform does not lessen the need to make piecemeal improvement in the existing system. In fact, in the context of this book and its focus on procedure, it may simply be saying that once we have a proper procedure in place for making decisions about our desired future, one future that society should consider is limited public ownership of land for recreational and residential development purposes.

Before anyone embraces Professor Roberts' idea of increased public ownership, however limited the proposal may be, the book contains a mostly unstated caveat.[20] Public ownership may be fine, but the same bureaucracy that produced so many problems with the existing system will presumably be called upon to assemble, manage, develop and dispose of this newly acquired land. Until there is some evidence that the bureaucracy and the decision-making process can be reformed, there is no reason to entrust this scheme to them, whatever the apparent benefits.

By way of concluding, it is interesting to note that after reading the book, one is left still wondering whether planning is ever anything more than an exercise in futility. Professor Roberts certainly paints a bleak picture about its past futility in England. There are enough excellent suggestions in the book, however, to help ensure that the reform of planning law is not only feasible, but something we should start doing immediately. The book's focus on process and its suggestion that planners may function best as brokers, and lawyers as advocates in a limited number of situations is something that Canadians should keep in mind before we end up with thirty years of planning mistakes behind us.

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[20] While Professor Roberts suggests that this may be a problem, see, *supra*, note 2 at 10 ff.; he doesn't warn the reader of the dangers of giving an already ineffective bureaucracy more responsibilities in the land development sphere.

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