

Empowering the Professional Judgement of Planners: A Study of Australian Discretion in International Comparison

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Abstract: Ongoing debate regarding the relevance of planning professionalism has implications for the effectiveness of the professions in the 21st century. This is not a comfortable state for urban planning if it has to stand in equal status with other professionals. Planning's claims to possess an exclusive body of knowledge and to deliver outcomes that benefit the public at large are often challenged. Alongside this picture of decline, contrasting evidence has also been developing, influenced by a renewed conceptual framework of professionalism that reasserts the value of planning professionalism to deal with complex development management issues relating to space and place. In this context, discussion about professional discretion has re-emerged. This paper reports research findings that examine the different types of discretion exercised by planning professionals in English and Victorian Planning systems. Semi-structured interviews were conducted with planners in England in order to establish an understanding of the different types of discretion and their roles in planners' professional decision making. This kind of understanding will then be used to explore professional discretion in the Victorian planning system. The paper argues that these findings provide a venue for further research to articulate more clearly the benefits of, and impediments to, the use of professional discretion in development management processes in Australia. The paper concludes with the argument that, to understand how discretion can be harnessed usefully as central element of professionalism, the 'judgment centric' of decision making needs to be understood.

Keywords: Development Control, Development Management, Planning Professionalism, Professional Discretion, Judgment

Introduction

In dictionary terms, discretion is defined as 'the freedom to decide what should be done in a particular situation'. This 'freedom to decide' implies a fundamental base in the allocation of at least some power to make judgments (Pratt and Sossin, 2009). In the context of urban planning, Booth (1996, pp. 109) regards discretion as the power to take decisions in the light of circumstances. He further reminds in dealing with the question of discretion, that the most significant issue is *how* this discretionary power is used and controlled. Focusing on discretion as power ('power-centricity'), it is not surprising that the place and role of professional discretion has become contested in the context of planning debates about flexibility versus certainty. This 'power centric' view often questions the values of professional discretion, particularly its relationship with related issues such as threats to certainty, legitimacy and accountability in planning decisions (Fingland, 2011; Tewdr-Jones, 1999; Booth, 1996). As counter-measures to imbalanced power relations between planners and other actors, planners' discretionary spaces are often subject to various legislative and management prescriptions, aimed at checking and controlling this form of action during various stages of planning decision making processes (Gunn and Vigar, 2012). This restriction appears to contradict many aspects of a developing body of literature, at least within the academic circles of planning, that promotes the significance of planners' creativity and synthetic thinking as enablers to transformative planning (Campbell, 2012; Albrechts, 2010; Healey, 2007). Another issue intertwined with this mismatch of expectations is emerging evidence that highlights the dilemmas faced by planning professionals as an array of legislative and management prescriptions shrink the professional discretionary space in which they work (Gunn and Vigar, 2012).

Alongside this picture of apparent decline is a developing body of literature attempting to redress negative perspectives of professionals generally. Freidson (2001, p. 208) analogises this negativity as 'shibboleths assaulting professionalism'. He highlights that the series of constraints imposed on professionals and the mistrust towards professionally specialised knowledge have 'strengthened the power and increased the legitimacy of the ideologies of consumerism and managerialism'. As a way forward, the "third logic" of the professional offers empowerment of 'freedom of judgement or discretion' as an intrinsic feature of professionalism. Vigar (2012, p. 361) associates this freedom of judgement with planning, grounded in the 'generation and melding of knowledge and knowledge claims and in the exercise of non-routinized judgement in issues pertaining to place and space. Hence, if discretion *is* an activity for which planning professionals are responsible, how then can it be used as an input to development management processes in statutory planning systems? Specifically, what are the different types of discretion planners exercise in their professional decision making and what might constitute 'better' or 'worse' form of professional discretion?

This paper aims to focus upon the first of these questions, examining the different types of professional discretion in English and Victoria planning systems. The outcome of this discussion is intended to open up opportunities for ongoing research and discussion towards the exploration of the second question, to inform the ways that 'better', 'worse' or other measures of professional discretion might be understood. It is important to establish a clear understanding of the different types of discretion's exercise by planning professionals before a conceptual framework can be developed to consider discretion how to deploy discretion in the most beneficial way, and the many variations and perspectives this might involve. To undertake this particular aim, first, the concept of discretion will be examined, seeking to move beyond 'power centric' views that tend to obscure our attention, to the closely related concept of *judgment* (Pratt and Sossin, 2009; Hawkins, 1992; Feldman, 1992). The conceptual framework contributed by (Manning, 1992 and Hawkins, 2003) is used to enable professional discretion to be approached from a 'judgement centric' perspective, focussing on understanding how this type of discretion is used.

The paper reports results derived from analysis of two case studies that provide examples of different types of professional discretion being exercised during development management processes. The use of the two cases allowed cross case comparison (Yin, 2009; Flyvbjerg, 2001). These two case studies, drawn from London and Melbourne, demonstrate the circumstances in which 'successful' executions of professional discretion can deliver better outcomes. 'Successful' execution of discretion in this sense refers to the circumstances where the use of professional discretion allows a productive balance between the need to align planning decisions with particular planning objectives, and the need to take into account considerations of related multiple interests (March, 2004; 2012). Further, good judgement is attributed to the diversity and quality of inputs into decisions which is made *deliberatively*, as opposed to individual intuition (Thiele, 2006; Forester, 1999). Additionally, this paper argues for the need to understand planners' professional discretion moving beyond 'power centric' to 'judgement centric' styles of discretion. It is intended through this 'judgment centric' approach that positive aspects of professional discretion can be revealed. It is envisaged that this understanding will be able to empower professional judgement as a core value of planners as important contributors to the society they serve.

The paper is divided into five sections. The section that follows provides the theoretical framework to our 'judgment centric' approach to professional discretion. Although this framework has its origins outside planning, the ideas and theories are shown to be useful in providing new perspectives of how professional discretion can be approached and understood, particularly in terms of moving beyond 'power centric' approaches. As context for the discussion of the two case studies, the second and third sections of the paper will discuss the character of the discretionary spaces in English and Victoria planning systems, respectively. The two case studies then presented in this paper illustrate that policy instances exist which open up opportunities for professional discretion to be exercised in a successful manner, understood in terms of the achievement of better planning outcomes. The paper's conclusion is presented in part five, which highlights the implications of these findings for meaningfully approaching the exercise of professional discretion.

A Judgment-Centric View of Professional Discretion

The previous section introduced the aim of this paper, seeking to approach the question of professional discretion from the perspective of a 'judgment-centric' view of discretion. This section sets out a theoretical framework to this approach, and discusses two key features of professional discretion being defined and interpreted.

How is Professional Discretion Defined?

As a topic of investigation, professional discretion is commonly presented as being related to 'freedom of judgement' (Evans, 2011; Friedson, 2001; Smith, 1989), contextualised as allowing professionals to 'lay claim to esoteric professional knowledge' (Adler and Asquith, 1981, p. 13). Lipsky (1980) in his theoretical framework of *street level bureaucracy* considers this 'freedom of judgement' as a 'coping and adapting strategy' to complex policy implementation conditions. He refers to street level bureaucrats as those 'public service workers who 'interact directly with citizens in the course of their jobs and who have substantial discretion in the execution of their work' (Hudson, 1993, p. 387; Lipsky, 1993). He observes that most policy objectives require interpretation before they can be adopted for implementation on the ground. Discretion is exercised by the professionals to add the human dimension to complex policy objectives by offering a degree of flexibility to individual cases under certain policy context.

However, one important note can be discerned from the ongoing debate regarding the relevance of Lipsky's street level bureaucracy theory (Evans, 2011). In operationalizing the concept of discretion as

freedom of judgement within professional decision making, these two concepts (between street level bureaucracy and freedom of judgement) are not a comfortable match. The professional is governed by particular institutional and professional operational parameters (Hawkins, 2003, Manning, 1992). Thus, in this discussion, we refer to professional discretion as a 'bounded freedom of judgement', which is constrained by the limits of the institutional and professional parameters that govern it. We build this conceptualisation by borrowing ideas from Dworkin's doughnut analogy of discretion. In this analogy, discretion is referred to as the 'residual of law and regulations', situated in the hole of the doughnut. The belt of the doughnut acts as a constraining factor to discretionary space offered to the professionals. In this context, Feldman (1992, p. 164) considers professional discretion as 'the legitimate right to make choices based on one's authoritative assessment of a situation'.

Judgement-Centric Professional Discretion: The Interpretative Tool

The synthesis of Hawkins (2003, pp. 187-193) and Manning (1992, pp. 259 – 263) offers a theoretical framework for our 'judgment centric' approach to establish understandings of the different types of discretion that planners exercise during professional decision. This can help make sense of how these discretionary decisions are actually made. Drawing from naturalist views of decision making, this framework conceptualises discretion beyond its individual conception, emphasising a holistic view of discretion in relation to the collective process of decision making. Accordingly, discretion is to be understood in relation to the setting of its decision environment, organisational context, decision field and the interpretative practices of how discretion is framed. These key features are discussed below:

'The Social Surround' is a wider umbrella term for those that follow, and describes the organizational context, decision field and decision framing. The surround provides the broad environmental setting within which a particular decision making activity takes place. The nature of this setting is not static; it is subject to political and economic forces. A change in the setting of the social surround, resulting from the shifting of political and economic forces, has an influence upon the organizational context, decision field and decision framing.

'Organizational Context' refers to the 'assumptions', 'values', 'ideologies' and 'social norms' that form the context governing decision processes by decision makers. In the context of our discussion, organizational context can be in the form of legislative provisions, policy frameworks, organizational value ideologies and professional norms.

'Decision field' refers to the social basis 'seen as relevant to the moment' during the assembling of facts and meanings from which a particular decision or situation of deciding is situated and comprehended. Decision field acts as the foreground and background to a decision making activity process where foreground matters are seen against dominant background assumptions.

'Framing' refers to the structure of 'knowledge', 'experience', 'values' and 'meanings' that decision makers construct within which a particular problem or decision case is to be understood, placed or accorded relevance. Framing speaks to the interpretative behaviour in the situation of deciding. In attending to a question of 'what is going on here', framing involves a variety of processes. A frame provides the rules and principles which structure how one construct meanings. As an interpretative means to meaning construction, framing is operationalized for 'interpretation' (make sense of what is presented), 'classification' (what kind of decision circumstance is this?) or organised task within diverse decision setting. Framing provides a means to connect decision criteria with outcome.

Case study 1: Operationalizing Professional Discretion in aligning decision with planning objective and other related multiple interests

Prior to discussion of case study 1, the following sub-section provides a brief description of the character of discretionary action space for planning professionals in English Planning System. This character acts as the organizational context defining the decision field and framing of the discretionary decision circumstance described in case study 1.

Discretionary Space in English Planning: Development Plan and Other Material of Considerations

“If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material consideration indicate otherwise”, The Planning and Compulsory Purchase Act 2004 s. 38(6)

The provision for ‘other material considerations’ under the clause above differentiates the character of discretionary space in English planning from others such as the Dutch and French planning systems (Moore and Purdue, 2012; Cullingworth and Nadin, 2006; Booth, 1996). The clause relating to ‘other material considerations’ brings life to the discretionary space in English planning by expanding the definition of what is considered as ‘material’ during the determination of development application. There have been planning reforms since 1990s to provide a statutory base to development plans as a ‘first and primary point of reference’, the same clause also provides ‘other material’ to be considered during the determination of development application. The clause of ‘other material consideration’ is an ever-expanding concept (Purdue, 1989) where it covers ‘material consideration’ ranging from building and site specific consideration such as ‘siting and appearance of the proposed buildings; the suitability of the site and its accessibility; relationship to traffic and infrastructure provision; landscaping and the impact of neighbouring land and property’ to other considerations such as ‘environmental impact; the historical and aesthetic nature of site; economic and social benefits of the development; considerations of energy and sustainable development, impact on small business; previous appeal decisions and in few cases of financial considerations that includes the personal circumstances of occupiers (Moore and Purdue, 2012; Nadin and Cullingworth, 2006, p. 161). The discretionary space for actors in English planning is governed by the fact that it is a matter of judgement of what is considered ‘material’ to any development decision and a judgement of whether that particular ‘material consideration’ outweighs the relevant development plan. ‘Other material of considerations’ is indeed a powerful clause in English Planning where it provides a degree of flexibility for development to be judged based on its merit where a considerable discretionary space is afforded to local planning authority to adapt central directed policy statement to the local context (Booth, 1996; 2003; Tewdr – Jones, 2002).

Section 101 of the Local Government Act 1972 defines the powers that can be delegated to actors during the determination of development applications (Moore and Purdue, 2012; Nadin and Cullingworth, 2006). Relevant to our current discussion are the powers delegated to planning professionals. Under this clause, delegated power is provided to planning officers to determine those applications which are not in conflict with respective development plans or other planning policy frameworks of the authority. In other circumstances where development proposals are not in accordance with respective development plans or other policy frameworks, the power to determine applications is delegated under the jurisdiction of a planning committee of the authority. Under this arrangement, the role of a planning professional is still considered very significant. She or he will have to ensure all considerations material to decisions are made available to assist the committee to make an informed decision. A recommendation for how an application should be dealt with is also another important matter for the respective planning officers to prepare for the committee. The ‘other material considerations’ clause opens opportunities for planning professionals to exercise their discretionary powers in selecting relevant evidence and determining of what is considered ‘material’ to respective development decisions (Moore and Purdue, 2012; Nadin and Cullingworth, 2006; Claydon, 1998). The development application process is shown in Figure B and the places that open up opportunity for planning professionals to exercise their discretionary space are marked by the shaded box.

The Royal Town Planning Institute (RTPI), the UK’s professional planning body, in recent years has made fundamental changes not only relating to the revision of core values and intention of planning (RTPI, 2001; Gunn and Vigar, 2012) but also other initiatives that include redefining membership requirements and education requirement for professional membership (Nadin and Cullingworth, 2006). Influenced by the new conceptual framework of professionalism, planners are called upon to be creative in mobilizing planning instruments to confront the complex urban conditions at stake. Under

the new planning visions which comprise four elements: spatial, sustainable, integrative and inclusive, the emphasis upon better professional decision making promotes planning as both 'value-driven – concerned with identifying, understanding and mediating conflicting sets of values' and 'action oriented – driven by the twin activities of mediating space and making of place' (RTPI, 2001, pp. 1). This renewed vision of planning acknowledges the role of planners operating effectively within their discretionary space to enable their proactive capabilities and ability to understand the impact of development holistically, strategically and critically. Consequently, this vision calls for collaborative and integrative forms of action, emphasising the significance of evidence-based argument. Discretionary space is defined as being within the context of professional abilities to identify and determine different sources of evidence encompassing social, economic and environmental consideration and link to other policy objectives.

What constitutes 'material' concerns to development: Historical value and Amenity vs. Personal Circumstances?

This case study is quoted by E_JP01 (case study subject identifier code) as an example of her recent successful exercise of discretion. The case is not particularly contentious, but rather represents a fairly standard development application under a typical development application processes (Figure B). Our main focus here is to establish an understanding of how E_JP01 used the discretionary space allowed her in determining what is the 'material' relevant to a development application under consideration? During the interview with E_JP01, she defined her discretion in this particular case study as 'the act of balancing different interests' and 'as an exercise of judgement' to assess relevant impacts in order to determine relevant evidence to be considered as 'material' to the development application under consideration. These definitions are clearly reflected in her development assessment report, particularly the way she synthesised her evidence and used it to determine the application based fairly on its merit. While on the one hand, she aligned her decision to existing planning policy framework, on the other hand she also weighed the relevant planning policy framework of the authority with other considerations. In this particular context, she executed her discretionary powers to enable respective development application to be judged based on its merit.

The proposal involved a rear extension to a two storey mid-terrace property within a conservation area in the south-east of London. According to the Design and Access statement submitted by the applicant, the need for the additional space is to accommodate a special needs child where the additional space will be used as a bedroom. Due to this decision circumstance, the application was considered unique in nature and, as the officer's assessment report states, additional considerations were taken to enable this particular application to be judged based on its merit.

The proposed development site is affected by the Article 4 directive whereby the permitted development rights on a site are removed due to heritage values. The building in question is listed by the local authority as having architectural and historical values. The existing planning policy framework sets constraints in terms of type and scope of proposed development. Any new development is not permitted to alter the architectural and historical character of the site. Development allowed is normally only that which contributes towards the preservation or enhancement of character and appearance of the conservation area in which it is located. The scope of development is limited to a scale and design that is appropriate to the existing building and locality. The protection of the amenity of adjoining buildings is also 'material' to development decisions. In considering an application involving a rear extension, consideration needs to be given to minimization of impacts with potential for reduction of daylight, sunlight, privacy or a possibly interference to a pleasant outlook of the adjoining occupiers. Other relevant policy also relates to the potential relaxation of planning policies for residential extensions enabling disabled people to continue living in their own home.

While space does not permit full explanation of the application process, the application was determined by the planning officer, E_JP01 under the relevant delegated power. The consultations and information gathering including site visits and references made to previous planning decision cases were coordinated by the planner. Our investigation demonstrated that E_JP01 used the discretionary space allowed to her to frame her decision, gathering relevant evidence which is considered material to her decision, and consequently enabled this application to be judged based on its merit.

In summary, four planning issues were considered during the determination of this application:

- ***Design, scale and aesthetic impact of the proposed works on the area***

The proposed extension did not fit well with the existing design within the conservation area. The scale of the rear extension was considered 'overly dominant in its scale and bulk' and had the potential to alter the character and aesthetic view of the site, particularly the architectural and historic setting of the conservation area.

- ***Existing patterns of development***

The proposed rear extension was considered inappropriate not only to the existing building, but to surrounding developments. Its 'overly dominant scale' was not seen to contribute towards a better quality of environment'

- ***Impact of the proposed works on the amenity of the immediate area***

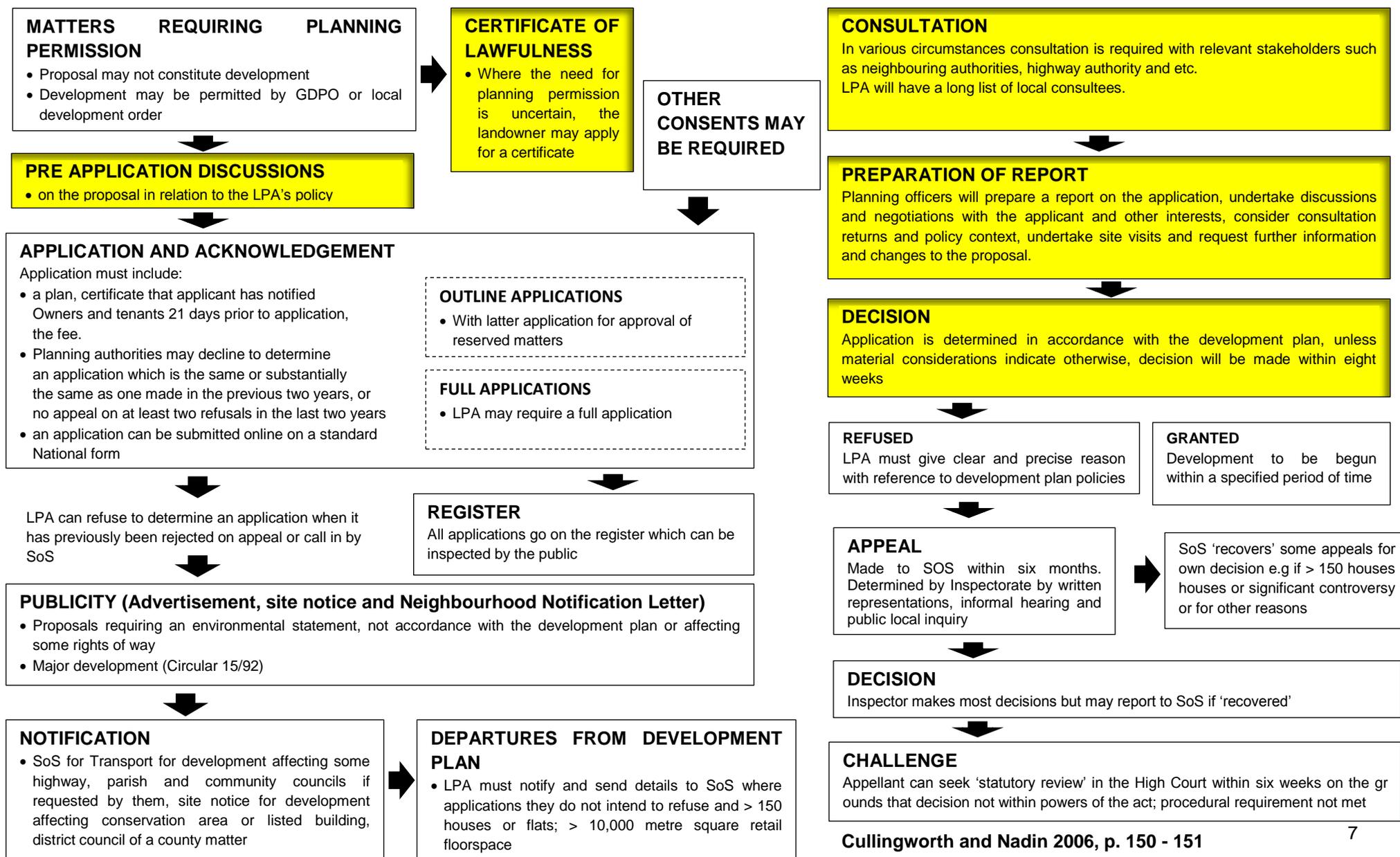
The proposed rear extension was seen to have a significant detrimental impact on the amenity of the neighbouring properties in terms of a reduction in the amount of daylight, sunlight and privacy.

- ***Impact of the works on the locally listed building and surrounding of the conservation area***

The scale was seen to contribute a detrimental impact not only it had the potential to alter the architectural character of the locally listed building but also it would contribute towards the alteration to the existing character of the conservation site.

It is important to consider how E_JP01 manoeuvres within the discretionary space allowed to her to balance different interests, while at the same time aligning her decision with the existing planning policy objectives of the authority. On the one hand, she aligned her decision with the existing policy objectives that aim to deliver good quality of environment in a conservation area. On the other hand, she took into consideration the personal circumstances of the applicant, which is to accommodate extra space for a disabled child. In doing so, E_JP01 widened her scope not only to consider the development plan as the primary point of reference during the determination of application, but she also took into consideration other factors such as previous decision cases and the personal circumstances to the applicant. It is the provision of 'other material consideration' that allows her not only to be able to preserve existing character of the conservation area but also able to deliver social justice by providing extra space for the disable child. She operationalized her discretionary space to hold an internal consultation with the applicant, advised the applicant to reduce the scope of the rear extension to the scale not only in compliance with the existing planning policy framework of the authority but also a scale that would not jeopardise the character of the host building and the amenity of the neighbouring occupants. To determine the appropriate scale for the proposed rear extension, she referred to relevant previous planning decision cases.

Figure B – The English Planning Application Process



Case study 2: Operationalizing Professional Discretion in mediating a compromise between parties in planning dispute

The following discussion examines the character of the discretionary action space allowed to planners in the Victorian Planning System. It acts as the organizational context that defines the decision field and the framing of discretionary decision circumstance in Case Study 2.

Discretionary space in Victoria planning

Australian urban planners, particularly those with statutory roles based in state-based planning legislation, have many opportunities to exercise discretion. The Planning Institute of Australia (PIA) requires that members comply with the Code of Professional Conduct, which requires that a member's "True Professional Opinion" always be provided, above any sectional interests he or she may have, and that the "highest professional standards" be adhered to at all times (PIA, 2002, p.2). However, little detail is provided about *how* discretion would be exercised in the range of settings planners might encounter, perhaps reflecting the nature of planners' roles being increasingly defined by the statutory settings in which they work. This section discusses a preliminary analysis of the space for exercise of discretion in Victoria, focussing particularly on certain relevant clause(s) of the Planning and Environment Act 1987 (the Act) that define the scope and nature of the discretionary space and other key provisions and documents. As an overarching provision, the Act sets out the main parameters for urban planning in Victoria, guided by broad objectives set out at Section 4. Importantly, the Act is binding on all parties, including government agencies and Ministers (s16), although many exception clauses do exist.

The main statutory planning instrument, planning schemes, apply to all land in Victoria, excepting Commonwealth Land, and must be based upon the Victoria Planning Provisions (VPP) (Part 1A and Part2) of the Act. The VPP provide a base of planning provisions from which all planning schemes in Victoria must be derived, standardising most aspects of decision making tools, but which are adapted to municipalities' local circumstances, as appropriate. Within the parameters of the Act a number of parties are allocated roles and responsibilities requiring the exercise of discretion in some way (noting that related legislation, regulation and other provisions may establish parameters for the conduct of these parties in association with the Planning and Environment Act):

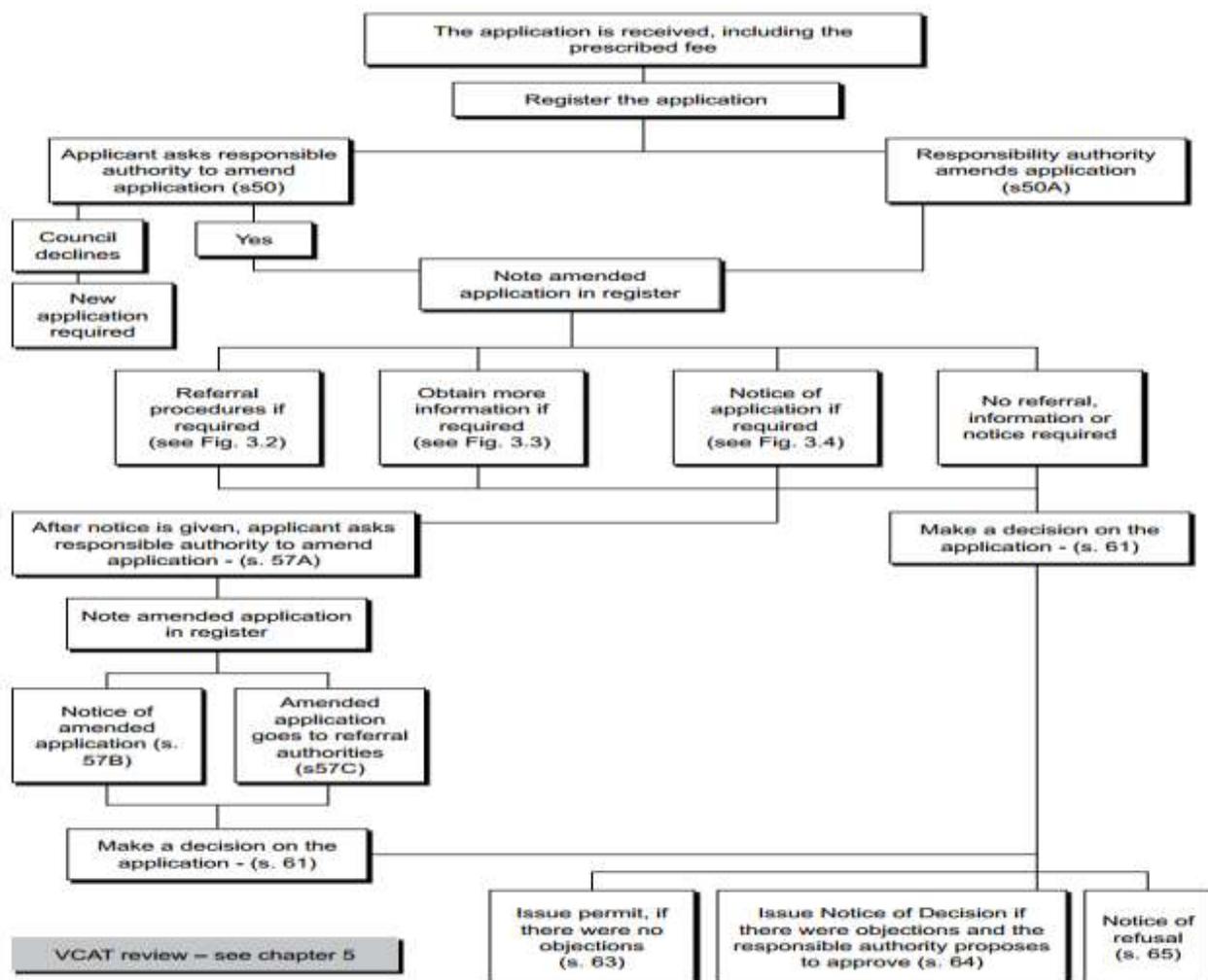
- The Minister;
- Growth Areas Authority;
- Planning Panels;
- Victorian Civil and Administrative Tribunal;
- Planning Authority;
- Referral Authorities;
- Responsible Authority;
- Proponents;
- Applicants; and
- Objectors.

Focussing on the development control processes of Victoria, the Permit Process provides an understanding of the ways that discretion can be exercised by Victorian planners. The permit process, what might be described as development control or development approvals in some systems, is set out at Part 4 of the Act. While exceptions exist, the bulk of permit applications are managed by local government in the statutorily ascribed role of Responsible Authority set out at section 13 of the Act. The Act provides for relatively detailed procedures in the processing of planning applications, ascribing roles and responsibilities that require the careful use the Victoria Planning Provisions to guide decision making. In the first instance, any proposed activity will fall into one of three categories:

- No permit required;
- Permit required; or
- Prohibited (VPPs: Clause 31).

Accordingly, the vast majority of discretion in the permit process is exercised in the "Permit Required" category, although it is noted that instances occur where discretion is required to appropriately categorise use and development according to the VPP planning scheme. The outcome of the permit process will ultimately be a Permit with Condition, or a Refusal. The main steps of the Permit Required process for deciding on permit applications are set out below in Figure C.

Figure C – The Victoria Planning Application Process



(Source: DPCD, Using Victoria’s Planning System Ch. 3, p.3)

In this process, urban planners exercise discretion in a number of areas, dependent on the nature of the particular application being considered, either in providing a recommendation to the Responsible Authority (usually the elected Councillors of the municipality), or in using their powers of delegated authority provided to them by the Councillors (The Act, s 61A). The overarching tests used to apply discretion in the Victorian case stem from a range of “measures” against which proposals can be compared. In summary, these include:

- The objectives of planning in Victoria (The Act: s4);
- state policy;
- local policy;
- zone decision criteria;
- overlay;
- particular provisions;
- General decision criteria (VPPs: Clause 65; and The Act Section 60)

One main mechanism then, by which discretion is exercised by planners is by identifying the decision criteria and weight apportioned to these that are relevant to a permit application process. This may be highly specific, or include criteria that allow for open interpretation according to circumstance. For example, in the Environmental Significance Heritage Overlay, the decision criteria these are listed at Clause 42.01-4:

“Before deciding on an application, in addition to the [overall] decision guidelines in Clause 65, the Responsible authority must consider, as appropriate:

- The State Planning Policy Framework and the Local Planning Policy Framework,

- Including the Municipal Strategic Statement and local planning policies.
- The statement of environmental significance and the environmental objective contained in a schedule to this overlay.
- The need to remove, destroy or lop vegetation to create defensible space to reduce the risk of bushfire to life and property.
- Any other matters specified in a schedule to this overlay”

View Sharing in Victoria Planning

Within this wider scope, it remains to be seen how the exercise of discretion could provide for better decisions and outcomes. One research approach is to first demonstrate an instance where the ability to exercise discretion does allow improved outcomes, such as the case of outward views from a property to visually attractive features (March, 2003). While typically there has been no “right” to a view, in some cases Victorian planning system allows *shared* rights to outward views in as a valid planning reason, requiring the exercise of discretion. For example, the Surf Coast Planning Scheme includes a provision at Clause 21.10-2 to:

“Seek to achieve a reasonable sharing of views of scenic landscape features from private land”

This provision requires that on a case by case basis, the particular circumstances of a proposal, in its surrounds need to be considered, with the intent that sharing would occur, *if* this is possible, to achieve an overall better outcome. A case study was undertaken of a case on land near to Port Phillip Bay in which provisions existed requiring view sharing to be considered. In this case, an existing single-storey house with views is located near to the water on ground sloping to the foreshore. The surrounding area, including attractive view to the waterfront, is visible from some of the existing dwelling’s windows and surrounds. The proposal in discussion was for a new two-storey dwelling on the land immediately to the west of the existing property, with large glazed areas and decks on its western side to take advantage of the view. The new structure proposed would block the existing property’s views to the water and surroundings. The decision maker was required to consider the reasonable sharing of views, given that the proposal complied with most other provisions of the planning scheme. Council planners, using their discretion, put forward a compromise position based on establishing conditions ameliorating the loss of views suffered by the existing property. Ultimately a compromise was reached to re-site the new dwelling 1 metre down-slope and 6 metres nearer the street frontage. Analysis of the plans indicated that the existing dwelling retains almost all of its views, while the new dwelling enjoys views of comparable quality to those of the existing dwelling.

It would seem that the ability to exercise discretion, in this case by offering and mediating a compromise between parties in a planning dispute, led to an outcome that significantly improved overall benefits, shared between existing and new residents. Further, the case illustrates that the complexity of the scenario and the need to mediate between the various parties precludes pre-establishment of mechanistic or numeric decision rules that will deliver useful outcomes without planners being able to exercise discretion. Rather, the use of higher order principles as decision criteria allowed planners to guide the process to a unique and locally particular desirable outcome that encompassed physical planning and participatory elements.

Conclusions

Lipsky (1980) argues that professionals exercise their discretion as 'coping' and 'adapting' strategies to deal productively with complex policy implementation conditions. He observes that most policy objectives require further interpretation before they can be further applied to the context of a particular decision at stake. Further, the existence of discretionary action space enables professionals to add the human dimension during the interpretation of complex policy objectives, by providing a degree of flexibility in dealing with individual cases under certain policy contexts. These discretionary circumstances are evidenced in both of the case studies discussed in the previous sections. Case study 1 demonstrates that the planning professional, E_JP01 used her discretionary action space to deal with a particular case, which at the surface seemed non-compliant with existing policy objectives in relation to preservation and other requirements for the locally listed building. It is significant to note how she synthesised various evidence sources in framing her judgement during the determination of the application, without jeopardising the requirements of existing conservation policy objectives of the listed building and its surroundings. Similar findings also evident in case study 2 where the successful exercise of discretion can be seen to have led to professional judgement being exercised to offer and mediating a productive compromise between parties. Rather than a planning dispute, it resulted in views for both the new and existing buildings. In this particular instance, the respective planning professionals took a mediated and negotiated design stance to resite the new building in order to deliver collective benefits to the new building and its surroundings.

The two case studies discussed in this paper illustrate that the successful exercise of professional discretion can deliver better planning outcomes. Hawkins (2003) and Manning (1992)'s framework, directing examination to a 'judgment centric' approach enables a better understanding of this type of discretion in the ways they are actually exercised in institutional and regulatory settings. This reveals examples of the positive aspects of professional discretion. While it is true that improper use of professional discretion may jeopardize the effectiveness and legitimacy of outcomes that planning aims to deliver, it should be taken to mean however that we disregard totally the value of professional discretion. As Hawkins (1992, p. 3) suggests '*the use of rules involves a considerable degree of discretion, while the exercise of discretion is to a substantial extent guided by rules, though not necessarily by legal rules*'. Thus, greater nuance is required, particularly to explore the benefits of, and impediments to, the use of professional discretion during development management processes. This can be undertaken by addressing two significant questions: what are the different types of professional discretion in diverse statutory planning contexts; and, building from this a framework of how to measure 'better' and 'worse' form of discretionary decision circumstances. This paper provides a new set of analyses to the first question and opens a discussion for the second question to be explored further. It is argued that, through a better understanding of different types of professional discretion in diverse planning contexts, an evaluative framework can be built to identify of what might constitute a 'better' and 'worse' use of discretionary decisions, including the circumstances where different types of discretion are exercised, and the ways that this can be encouraged, particularly in institutional settings towards.

REFERENCES

- Adler, M. and Asquith, S. (1981) Discretion and Power in Adler, M. and Asquith, S. (Eds) *Discretion and Welfare*, (London, Heineman Educational).
- Albrechts, L. (2010) Enhancing creativity and action oriented in Planning in Hillier, J. and Healey, P. (Eds) (2010) *The Ashgate Research Companion to Planning Theory: Conceptual Challenges for Spatial Planning*, (London, Ashgate).
- Booth, P. (1996), *Controlling development: Certainty and Discretion in Europe, the USA and Hongkong*, (London, UCL Press)
- Booth, P. (2003) *Planning by consent: the origins and nature of British development control*, (London, Routledge).
- Campbell, H. (2012) Planning to change the world between knowledge and action lies synthesis, *Journal of Planning Education and Research*, 13(2), pp. 135 – 146
- DPCD, Using Victoria Planning System, http://www.dpcd.vic.gov.au/___data/assets/pdf_file/0018/41274/Chapter_3_Planning_Permits.pdf
- Dworkin, R. (1978) *Taking Rights seriously*, (USA, Harvard University Press)
- Cullingworth, B. and Nadin, V. (2006) *Town and Country Planning in the UK*, (New York, Routledge)
- Eccles, D. and Bryant T, (2011) *Statutory Planning in Victoria*, (NSW, The Federation Press)
- Evans B. (1993) Why we no longer need a town planning profession?, *Planning Practice and Research*, 8(1), pp. 9-15
- Evans, T (2011) *Professional Discretion in Welfare Services: Beyond Street Level Bureaucracy*, (Burlington, Ashgate)
- Feldman, (1992) Social Limit to Discretion: An Organizational Perspective in Hawkins, K. (ed), (1992) *The uses of Discretion*, (Clarendon Press, Oxford)
- Fingland, D. (2011) *Better to be roughly right rather than exactly wrong: the concept of certainty in land use planning*, Paper presented in the 5th State of Australian Cities Conference, 2011, University of Melbourne, Australia
- Forester, J (1999) *The Deliberative Practitioner: Encouraging Participating Planning Processes*, (London, The Mit Press Cambridge)
- Flyvbjerg, B. (2001) *Making Social Science Matter: Why social inquiry fails and how it can succeed again*, (United Kingdom, Cambridge University Press,).
- Claydon, J. (1998) Discretion in development control: A study of how discretion is exercised in the conduct of development control in England and Wales, *Planning Practice and Research*, 13(1), pp. 53 - 62
- Freidson, E. (2001) *Professionalism: The Third Logic*, (Chicago, University of Chicago Press)
- Gunn, S. and Vigar, G. (2012) Reform processes and discretionary acting space in English Planning Practice, 1997 – 2010, *Town Planning Review*, 83(5), pp. 533-552
- Hawkins, K. (1992) The use of Legal Discretion: Perspectives from Law and Social Science in Hawkins, K. (Ed), 1992, *The uses of Discretion*, (Clarendon Press, Oxford)
- Hawkins, K. (2003) Order, rationality and silence: some reflections on criminal justice decision making in Gelsthorpe, L. and Padfield N. (Eds), (2003) *Exercising Discretion: Decision Making in the Criminal Justice System and Beyond*, (Devon, Willian Publishing)
- Healey, P. (2007) *Urban Complexity and Spatial Strategies: Towards a Relational Planning for our Times* (London, Routledge)
- Hudson, B. (1993) Collaboration in social worker: A framework for analysis in Hill, M. (1993) *The Policy Process: A reader*, (London, Harvester).
- Lipsky, M. (1980) *Street-Level Bureaucracy: Dilemma of the individual in Public Services*, (New York, Rusell Sage Foundation)
- Manning, P. (1992) 'Big Bang' Decision: Notes on a Naturalistic Approach in Hawkins, K. (Eds.), (1992) *The uses of Discretion*, (Oxford, Clarendon Press,)
- March, A. (2003), Outward Views: Rights and Utility in Victorian State Planning, *Urban Policy and Research*, 21(3), pp. 263 – 279.
- March, A. (2004) Planning as a democratic practice: antinomy and mediatisation, Thesis submitted in total fulfilment to a degree of PhD, (Australia, University of Melbourne,).
- March, A. (2007) Institutional Impediments to Planning Professionalism in Victoria, Australia, *International Planning Studies*, 12(4), pp. 367-389
- March, A. (2012) *The democratic plan: analysis and diagnosis*, (United Kingdom, Ashgate,)
- Moore, V. and Purdue, M. (2012) *A Practical Approach to Planning Law*, (Oxford, Oxford University Press)
- PIA (2002) Code of Professional Conduct, <http://www.planning.org.au/documents/item/1025>
- Pratt A and Sossin L. (2009) A Brief Introduction of the Puzzle of Discretion, *Canadian Journal of Law and Society*, 24(3), pp. 301 – 312.

- Purdue, M. (1989) Material Considerations: an ever expanding concept?, *Journal of Planning and Environment Law* 1989, pp. 156 – 161.
- RTPI (2001) RTPI Vision for Planning, <http://www.rtpi.org.uk/education-and-careers/learning-about-planning/what-planning-does/rtpi-vision-for-planning/>, accessed January 2013.
- State of Victoria (2010) *Planning and Environment Act 1987*, (Victoria, Anstat,)
- Smith, G. (1985) Discretionary Decision Making in Social Work in Adler, M. and Asquith, S (Eds), (1985) *Discretion and Welfare*, (London, Heineman Educational,).
- Tewdr-Jones (1999) Discretion, Flexibility and Certainty in British Planning, *Journal of Planning Education and Research*, 18(3), pp. 244 – 256.
- Tewdr-Jones (2002) *The Planning Polity: Planning, Government and the policy process*, (London, Routledge).
- Thiele L. (2006) Making Intuition Matter in Schram S. and Caterino B. (2006) *Making Political Science Matter*, (New York, New York University Press)
- Vigar, G. (2012) Planning and professionalism: Knowledge, judgement and expertise in English planning, *Planning Theory*, 11(4), pp. 361-378
- Yin, R (2009) *Case study: design and methods*, (London, Sage).