GUIDELINES FOR

THE PREPARATION OF ENVIRONMENTAL

IMPACT REVIEWS UNDER SECTION 653

OF THE CITY OF WINNIPEG ACT

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May, 1974

At its meeting held on February 14th, 1974, the Executive Policy Committee passed the motion:

> "That the Board of Commissioners be instructed to prepare guidelines for the timing, content, methodology and resources relative to the preparation of future Environmental Impact Reviews required under Section 653 of the City of Winnipeg Act."

Section 653 requires that an Environmental Impact Review be prepared to assess the potential effects of certain public works proposed by the City. This legislative requirement reflects the growing concern of our society to anticipate, and prevent or minimize, deleterious changes in the environment. Any guidelines adopted for the fulfillment of this requirement should be directed towards ensuring that the decision of Council with respect to a public work is based on the most complete assessment of potential effects that the administration can reasonably provide.

In addition to a concern for a comprehensive assessment of potential effects, the need for anticipation of change establishes as a major concern the institution of the Environmental Impact Review at the earliest possible stage of project development. An attempt to ensure that the chosen alternative will be the least expensive in terms of the human environment may, indeed, ensure that it is the least expensive in several contexts, since:

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> "Experience in existing programs has clearly demonstrated that it is more economic to incorporate environmental objectives at the conceptual stage of a project than to provide abatement equipment and restorative efforts as an afterthought."
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> - Green Paper on Environmental Assessment, Ontario Ministry of the Environment, September, 1973.

and, since it is likely that a clear demonstration of the consideration of such environmental objectives would prevent the City from becoming involved in litigation with respect to certain works.

An extensive review of literature on the subjects of the philosophy and methodology of such Environmental Impact Reviews has provided practical criteria by which to incorporate an effective and efficient Review Process into the existing administrative and political structure of theCity of Winnipeg.

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INTRODUCTION

Section 653(1) of the City of Winnipeg Act states:

> "In addition to the duties and powers delegated to the Executive Policy Committee by this Act or by council, the Committee shall review every proposal for the undertaking by the city of a public work which may significantly affect the quality of the human environment and shall report to the council before such work is recommended to council on,
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> a) the environmental impact of the proposed work;
> b) any adverse environmental effects which cannot be avoided should the work be undertaken; and
> c) alternatives to the proposed action."

The implementation of this section must be based on certain key phrases:

"proposal for the undertaking by the city of a public work"

It would seem logical that a concept only becomes a formal proposal when it is included in the Estimates, and that undertaking includes the committment of monies to any phase of implementation of a public work, such as design or land acquisition.

"a public work which may significantly affect the quality of the human environment"

The decision on potential significance rests solely with the Executive Policy Committee since only this Committee can commission an Environmental Impact Review. Thus, every proposal for a public work must be reviewed by the Committee to decide the issuance of significance.

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"and shall report to the council before such work is recommended"

Since the completed Environmental Impact Review is required by the Executive Policy Committee before the Estimates can proceed to Council, it would seem necessary that the decision on significance be made at the earliest opportunity in order to guarantee that adequate Reviews are prepared.

"the environmental impact of the proposed work"

The scope of an Environmental Impact Review must include, in addition to obvious physical impact, impacts on the cultural, social, or economic components of the environment. Positive and negative, direct and indirect, short-term and long-term, qualitative and quantitative effects must be considered. In order that all Reviews be adequately comprehensive it is necessary that GUIDELINES be adopted by the Executive Policy Committee establishing a standard requirement for content.

Based on these parameters, the following report will discuss:

1) the timing of stages in a recommended Review Process,

2) the allocation of resources necessary to prepare consistently adequate Reviews,

3) recommended Guidelines for the methodology and content of all Environmental Impact Reviews.

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GUIDELINES: REVIEW PROCESS

The timing of the stages in any Review Process must necessarily depend on the reference in Section 653(1) to "proposal for the undertaking ... of a public work", with the implications that:

a) a FORMAL proposal must have been made, and

b) the commitment of monies to any phase of implementation of a proposal MAY require an Environmental Impact Review.

Although, in practice, the assessment of potential effects of a project may begin well before it is formally proposed, in cases with obvious significant effects, the Review Process will be considered to encompass only those proposals which have been submitted for some degree of funding, i.e. as a part of either the Current or Capital Estimates.

Further, since the issue of significance may be decided only by the Executive Policy Committee,it would be necessary to include all such proposals in the Review Process.

Thus, the FIRST STAGE of the Process constitutes the identification of all proposals for the undertaking of a public work, for submission to the Executive Policy Committee. It is suggested that a recommendation would accompany the submission, indicating which proposals might be deemed to be significant and the reasons for such recommendation, to facilitate the necessary review by the Committee.

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Extracting the GENERAL definition of "works" from the City of Winnipeg Act, we have:

> "... fabrics made, built, constructed, erected, extended, enlarged, repaired, improved, formed or excavated by means of, or with the aid of, human skill and human, animal, or mechanical labour."

Thus, virtually every physical undertaking of the City, whether development, redevelopment, or rehabilitation, must be submitted to the Executive Policy Committee for a ruling on significance before consideration is given to its funding.

The administration of such a correlation of proposals from so many departments of the City would logically fall under the aegis of the Board of Commissioners. However, because of the necessary scope of this procedure, it is suggested that the Board delegate the task of identification and recommendation to an inter-departmental committee, and further that this Review Committee be constituted of:

a member of the Law Department,

> in order that proposals which might in the absence of a Review, involve the City in litigation, be recommended to be deemed significant and have Environmental Impact Reviews prepared;

the Director of Operations, Department of Works and Operations,

> since it may be expected that the great majority of public works proposed would be generated by this Division of the administration;

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the Chief Planner, Environmental Planning Division,

since it may be expected that a substantial portion of any potential significant effects would occur in areas currently the responsibility of this Division;

the Assistant Director of Public Welfare, Welfare Department

since it may be expected that major public works might have significant effects on the social component of the environment.

With the founding of the Review Committee, the various civic departments could be directed to submit all formal proposals for sufficient review before such proposals proceed to the Standing Committees of Council as part of the Current or Capital Estimates. The proposals could then be presented to the Executive Policy Committee with recommendations on significance, concurrently with the presentation of the Estimates in the other Committees of Council.

It is suggested that the CRITERIA be adopted for the use of the Review Committee in making its recommendations on significance to the Board of Commissioners and Executive Policy Committee:

1) A proposal should be recommended as significant if it is likely to produce any major deleterious change in the existing human environment.

2) A proposal should be recommended as significant if it is likely to produce both major positive and major negative changes in the existing environment, but the balance of such changes appears to be positive, or is not readily evident.

3) A proposal should be recommended as significant if it is likely to be controversial.

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4) A proposal, or group of proposals, should be recommended as significant if the overall or cumulative effects of the proposal or proposals, in conjunction with existing works, or with each other, is likely to produce any major deleterious change in the existing human environment.

Each department should review the typical class of proposals that it makes and with the Review Committee should develop methods to identify proposals which are likely to be recommended as significant.

Although the City of Winnipeg Act does not exclude proposals with significant positive effects from the Review Process, it is suggested that the expense of preparing extensive Environmental Impact Reviews for such proposals cannot be justified. However, if a proposal appears to include negative effects, whether or not these effects are outweighed by positive effects, it should be recommended as significant, in order to prevent a delay at a later stage of the Process.

If it appears to be obvious that a proposal will be recommended as significant, but the proposal is not sufficiently developed to be submitted formally, the generating Department should submit an evaluation to the Review Committee if it appears that the preparation of an Environmental Impact Review were best begun at an informal stage of the Process.

The SECOND STAGE of the Review Process constitutes the decision of the Executive Policy Committee on which proposals are significant, and its subsequent directive that an Environmental Impact Review be prepared for each such proposal.

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The decisions made by the Committee must necessarily be public, in order that citizens may make representation to the Committee to forward additional proposals to the Environmental Impact Review stage, if these appear to be significant only to the public. By this means, the City may ensure that proposals of marginal significance are included in the Review Process, rather than face litigation at a later stage. It must be noted that proposals as contained in the Estimates will be tabled in the Standing Committees of Council concurrently with their review by the Executive Policy Committee. Certain proposals may become controversial for no other reason than that public reaction was not taken into consideration at this stage of the Review Process.

The THIRD STAGE of the Review Process constitutes the actual preparation of the necessary Environmental Impact Reviews.

The resources necessary to this end, and the content and methodology of the Reviews themselves, are treated in subsequent sections of this report.

The FOURTH STAGE of the Review Process constitutes the submission of the completed Environmental Impact Review to the Review Committee in order that its adequacy under the Act may be determined. It is hoped that the communication between the Review Committee and the Task Force preparing the actual Review would obviate the need to redraft a report but cases may arise in which legislative requirements have not been fulfilled. The Review Committee would ensure, at this stage, that completed reports submitted to the Board of Commissioners and the Executive Policy Committee were, indeed, sufficient to permit a proposal to proceed if this be the decision of the Executive Policy Committee.

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The FIFTH STAGE of the Review Process constitutes the tabling of the Environmental Impact Review in the Executive Policy Committee, and that Committee's discussion of both the report and a recommendation in terms of the Current or Capital Estimates of which the significant proposal forms a part.

Again, such discussion must necessarily be public in order that citizens may later make representation to the Committee or Council with respect to the report or recommendation. In fact, the publication in draft form of the Environmental Impact Review would be necessary to allow meaningful public reaction. Failure to consider public reaction to the proposal, or to the Environmental Impact Review, may result in considerable delay in budget approval, if this public reaction were considered at the Municipal Board level, or in the Courts.

The SIXTH STAGE of the Review Process constitutes the report to the Council by the Executive Policy Committee on the Environmental Impact of the proposed work and Council approval or disapproval of the proposal.

If it is approved, the FINAL STAGE of the Review Process is ongoing Review through the final stages of design in order to provide for all possible mitigation of adverse effects. The Process ends with the completion of the project.

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GUIDELINES: RESOURCES

The Task Force to prepare the Environmental Impact Review itself, should satisfy the following requirements:

1) It must be so constituted that it does not jeopardize confidentiality in those cases where this is essential to the expeditious evolution of the proposal.

2) It must both be, and appear to be, unbiased and objective.

3) It should comprise, or have at its disposal, the necessary expertise in all appropriate fields.

4) It should be able to develop consistency with respect to methodologies employed and impacts evaluated.

5) It should be so constituted that it facilitates the establishment of environmental objectives as an integral part of the conceptual stage of development of a public work.

It is suggested that the Task Force be established within the administration in order to meet the requirement of confidentiality (1), drawing upon the various civic departments in accordance with the kinds of expertise judged to be relevant to the issue under review (3). When the expertise required is not available within the administration, provision should be made to engage appropriate consultants.

Thus, the composition of the Task Force will vary with each particular proposal under review. However, it is necessary to ensure consistency in approach and methodology (4), and to consolidate the experience gained in the preparation of a series of Environmental Impact Reviews, since both consistency and experience will determine the future efficiency of the process.

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It is, therefore, suggested that a permanent Core Committee be established around which each Task Force can be built.

In order to maintain consistency and efficiency, the Core Committee would assemble the appropriate Task Force in response to a directive to prepare a Review. It would co-ordinate the inputs from the various Task Force members and initiate further research which may be required as a response to these inputs. It would seem logical that the Core Committee also compile the actual Environmental Impact Review.

These responsibilities of the Core Committee would necessitate that it remain small in the interests of efficiency, and that its members be drawn from areas of the administration which maintain a general overview of City development in order to facilitate both the placement in a general context of a specific proposal and the co-ordination of inter-disciplinary effort. It is suggested that in order for this Core Committee not to be obviously biased, it should include members of the agency which initiates the proposal or members of the Review Committee which screens all public works proposals (2).

Since the required general overview is presently available within the Department of Environmental Planning already engaged in functions which require the co-ordination of inputs from other civic departments; and since the various departments of Works and Operations will each, from time to time,be the proponent of a public work; it would seem appropriate that the Core Committee be drawn from the staff of the Department of Environmental Planning.

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Specifically, it is suggested that the members of this Committee be the four incumbents in the positions of Head of Research, General Development Plan Co-ordinator, District Plan Co-ordinator, and Urban Development and Special Projects Officer. These positions afford both the required general overview and the interdepartmental contacts, at the operational level, necessary to the expeditious establishment of a Task Force possessed of the requisite expertise.

It is further suggested that, in order to consolidate experience and ensure consistency of approach and methodology, the Head of Research be directed to maintain and update a library of materials relevant to the North American, and particularly Winnipeg, experience with Environmental Impact Reviews.

It is to be expected that the interdepartmental communications established through the Core Committee within the Task Force structure, will further the aim of making environmental objectives an integral part of the conceptual, as well as subsequent, stages of development of the public work.

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GUIDELINES: METHODOLOGY AND CONTENT

Guidelines for the preparation of Environmental Impact Reviews should be sufficiently comprehensive to ensure adequate consideration of the various components of the human environment yet, at the same time, sufficiently general and flexible to apply to ANY proposal for a public work. Thus, rather than developing a specific set of guidelines to be directed towards each particular class of public works, the following Guidelines are intended to apply to ALL Reviews concerning any type of public work.

The Guidelines are intended to give direction to the Task Force preparing the Environmental Impact Review, the Review Committee, the Board of Commissioners and the Executive Policy Committee, in order that the Council be provided with a sound and comprehensive basis for a decision regarding the proposed public work.

In addition, the Guidelines are intended to ensure that each Environmental Impact Review fulfills the legal requirements of the City of Winnipeg Act. Although the question of Environmental Impact Reviews is without exact Canadian judicial precedent (see Appendix "B") it is noteworthy that Section 653 is derived from the American National Environmental Policy Act of 1970. Therefore in formulating Guidelines to ensure the preparation of an ADEQUATE Review reference has been made to the American experience in administering this Act, including over 250 court cases.

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While the Winnipeg legislation is somewhat less comprehensive than its American counterpart, the question IS judicially untested in Canada and the American experience dictates that caution be exercised in the formulation of Guidelines, to ensure that Reviews are not subsequently deemed to be inadequate by the Courts. Thus, it would be preferable for the Reviews to be overly, rather than insufficiently, comprehensive in order to meet anticipated requirements of a judicial interpretation of Section 653.

The Guidelines recommended for adoption by way of resolution are:

1. INTELLIGIBILITY

THE ENVIRONMENTAL IMPACT REVIEW SHALL BE PREPARED IN SUCH A WAY THAT IT MAY BE FULLY UNDERSTOOD BY THE LAYMAN.

Highly technical terminology and analyses should be recast in layman's terms in the body of the draft Review, but could be attached verbatim as appendices. This provision should apply to maps and diagrams as well as text.

2. ASSUMPTIONS

THE ENVIRONMENTAL IMPACT REVIEW SHALL EXPLICITLY STATE ANY MAJOR QUALITATIVE OR QUANTATIVE ASSUMPTIONS CENTRAL TO THE JUSTIFICATION AND ASSESSMENT OF THE PROPOSED PUBLIC WORK.

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At the outset, assumptions utilized to delimit the scope and extent of the 'project environment' (see Guidelines 4 and 5) should be clearly stated. In addition, the Review should identify and evaluate any major, ancillary assumptions, such as trends in public policy, population growth or change, land use patterns, technology, finance and economics, or consumer attitudes.

3. PRECISION

THE ENVIRONMENTAL IMPACT REVIEW SHALL, WHEREVER APPROPRIATE, SUBSTANTIATE CONCLUSORY STATEMENTS BY REFERENCE TO ANY UNDERLYING REPORTS, STUDIES, OR OTHER INFORMATION USED IN THEIR PREPARATION.

The Review should avoid vague terminology, such as 'slightly', 'somewhat', 'marginal', or 'greatly', utilizing, wherever possible precise, quantitative descriptions. Conclusory statements should be substantiated by references, not only to underlying data but also to methodologies utilized in their derivation and analysis. The American experience suggests that failure to substantiate conclusions could result in a judicial determination that the Review were inadequate.

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4. PROJECT DESCRIPTION

THE ENVIRONMENTAL IMPACT REVIEW SHALL CONTAIN A COMPLETE DESCRIPTION OF THE PROPOSED ACTION, INCLUDING ITS PURPOSES, LOCATION, EXTENT, SCOPE, STAGING AND THE METHODS AND MATERIALS TO BE USED IN ITS CONSTRUCTION OR ALTERATION.

The exact amount of detail provided in such descriptions should be commensurate with the scope and projected impact of the proposed public work, and with the amount of information required or available at the time of Review. It is to be expected that as the proposal progresses through phases such as feasibility, planning and design, additional information would become available to the on-going Review Process.

5. ENVIRONMENTAL INVENTORY

THE ENVIRONMENTAL IMPACT REVIEW SHALL CONTAIN A COMPREHENSIVE DESCRIPTION OF THE PROJECT ENVIRONMENT AS IT CURRENTLY EXISTS, INCLUDING PHYSICAL (BUILT AND NON-BUILT), SOCIAL AND DEMOGRAPHIC, ECONOMIC, AND CULTURAL COMPONENTS.

Again, the extent of the 'project environment', and the exact amount of detail provided in its description should be commensurate with the scope and projected impact of the proposed public work, and with the amount of information required or available at the time of Review. It is to be expected that as the proposal develops, the project environment may be redefined, and additional research undertaken as necessary.

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6. EXISTING PUBLIC POLICY

THE ENVIRONMENTAL IMPACT REVIEW SHALL MAKE EXPLICIT THE RELATIONSHIP OF THE PROPOSED PUBLIC WORK TO EXISTING PUBLIC POLICIES AND PROGRAMS AFFECTING THE PROJECT ENVIRONMENT.

The Review should describe the extent to which the proposal can be altered, if this is necessary, to accommodate itself to existing or intended policies and programs. If it cannot be altered sufficiently to achieve a full reconciliation with such policies and programs, the proponents of the public work must provide reasons for their decision to proceed nonetheless.

7. ALTERNATIVES

THE ENVIRONMENTAL IMPACT REVIEW SHALL INCLUDE AN EVALUATION OF ALTERNATIVES TO THE PROPOSED ACTION, INCLUDING BOTH CONCEPTUAL AND DESIGN ALTERNATIVES.

Section 653 requires that the report to Council include "alternatives to the proposed action". This particular use of the word 'action' implies that no consideration of alternatives can be regarded as adequate unless it includes alternatives at the conceptual level, as well as design alterations. The Review should include an evaluation of the effects of:

a) the postponement, or rejection, of the proposed action,
b) employing fundamentally different means of accomplishing the end to be served by the proposed public work, and
c) design variations of the same means.

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These various kinds of alternatives should be examined in sufficient detail to allow comparative evaluation of the environmental costs and benefits of each alternative.

8. IMPACTS

THE ENVIRONMENTAL IMPACT REVIEW SHALL INCLUDE A DISCUSSION OF THE POTENTIAL EFFECTS OF THE PROPOSED PUBLIC WORK ON THE QUALITY OF THE HUMAN ENVIRONMENT INCLUDING BENEFICIAL AND DELETERIOUS, DIRECT AND INDIRECT, INDIVIDUAL AND CUMULATIVE, QUALITATIVE AND QUANTITATIVE, TEMPORARY AND PERMANENT, AVOIDABLE AND UNAVOIDABLE EFFECTS.

It must be emphasized that the indirect effects of a proposed public work, such as alterations in patterns of land use and social or economic activity, may prove to be far more significant to the quality of the human environment than direct effects, such as changes in topography or hydrology.

Section 653 requires that the report to Council include "any adverse environmental effects which cannot be avoided should the work be undertaken". This particular use of the word 'any' implies that if an impact study is deemed both adverse and unavoidable it must receive consideration whether or not this impact is deemed major. In making a distinction between avoidable and unavoidable adverse effects, the Review should demonstrate why the latter are deemed to be unavoidable, and also how adverse effects which are avoidable will be mitigated.

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9. LIMITATIONS OF FUTURE OPTIONS

THE ENVIRONMENTAL IMPACT REVIEW SHALL MAKE EXPLICIT ANY IRREVERSIBLE OR IRRETRIEVABLE COMMITMENT OF RESOURCES, OR IRREVOCABLE PUBLIC POLICY COMMITMENT, ENTAILED IN THE IMPLEMENTATION OF THE PROPOSED PUBLIC WORK.

The Review should include consideration of the extent to which the proposed public work involves trade-offs between short-term gains at the expense of long-term losses, or vice-versa.

The Review should make explicit the extent to which the proposed work is likely to foreclose on future alternatives, such as subsequent use of the same site for other purposes, or, the eventual necessary extension or reduction of a public works system because of the establishment of one particular component.

It is not necessary that each of the foregoing Guidelines be dealt with under a separate heading, provided that the requirements of all Guidelines are met within the report.

It should be noted that American judicial experience has shown that Reviews deemed "adequate" by the courts have ranged from six to three hundred pages, depending on the scope and projected impact of the proposed public work.

The previous Guidelines will determine the content of the DRAFT form of the Environmental Impact Review. This draft would be made public as an integral part of the Review Process, for comment from concerned parties. The final Guideline then becomes:

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10. RESPONSIVENESS

THE FINAL ENVIRONMENTAL IMPACT REVIEW SHALL CONTAIN SOME CONCRETE INDICATION THAT SUBSTANTIVE SUBMISSIONS IN RESPONSE TO THE DRAFT FORM HAVE BEEN CONSIDERED.

The provisions to the Council of both the draft Environmental Impact Review and responses to it, developed according to these Guidelines, would ensure that the decisions of Council were based on the most complete assessment of potential effects that the administration can reasonably provide.

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David Anderson
Commissioner of Environment
May 30/74.

APPENDIX "A"

EXISTING BUDGET PROCESS

PROBLEM DEFINED

alternative solutions considered

SOLUTION SELECTED

alternative designs considered

embodied in Estimates

Board of Commissioners

Committee on Environment | Committee on Works & Ops. | Committee on Finance

EXECUTIVE POLICY COMMITTEE

1 receives recommendations on Estimates from three Standing Committees

2 receives Environmental Impact Review

3 reports to Council on Environmental Impact

4 recommendation to Council on proposed public work

COUNCIL

RECOMMENDED REVIEW PROCESS

All formal proposals to undertake public works are compiled into a list.

Review Committee forwards list with recommendations on significance.

Board of Commissioners

Executive Policy Committee makes decision on significance.

significant proposals | not significant

Environmental Impact Review prepared.

Review Committee determines adequacy of report.

Board of Commissioners

APPENDIX "B"
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GENERAL REFLECTIONS

ON THE

LEGAL REQUIREMENTS OF

SECTION 653 OF

THE CITY OF WINNIPEG ACT

Submitted May 15, 1974
By Mr. Brian M. Corrin
Solicitor
Law Department
City of Winnipeg.

does he not own property?

Section 653 of The City of Winnipeg Act requires that the Executive Policy Committee review all proposals for the undertaking by the City of public works which may significantly affect the quality of the human environment.

> "653 (1) In addition to the duties and powers delegated to the executive policy committee by this Act or by council, the committee shall review every proposal for the undertaking by the city of a public work which may significantly affect the quality of the human environment and shall report to the council before such work is recommended to council on,
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> (a) the environmental impact of the proposed work;
>
> (b) any adverse environmental effects which cannot be avoided should the work be undertaken; and
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> (c) alternatives to the proposed action.
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> 653 (2) Prior to a time in 1973 fixed by council and thereafter annually, the executive policy committee shall present a written report to the council concerning the work of the committee under subsection (1) to the end of the preceding December."

The above section closely resembles Section 102 (2) (c) of The National Environmental Policy Act (subsequently referred to as NEPA) of 1969. A copy of this Act is attached as Appendix "1" hereto. The aforementioned subsection requires that all agencies of the Federal Government shall...include in every recommendation a report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

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"(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

The American legislation is obviously more comprehensive than Section 653 of The City of Winnipeg Act but this does not altogether preclude the possibility of the former's judicial experience being generally re-enacted in the Manitoba courts. This possibility will be explored herein in order that the reader be provided with some insight into the judicial requirements of the provision. It is further noted that this short discussion will attempt to provide the reader with a critical perspective as to the implicit requirements of the subject section. This will often be of only illustrative value and is provided solely to edify the reader as to the antecedents of this particular type of legislative requirement.

We might logically begin with an examination of when the courts may actually review the actions of the public authority. It is well established in law

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that few City acts or decisions are subject to review by the judiciary. Subject to certain reservations, it may be said that the courts only may award relief where the City has acted without authority, has stepped outside the limits of its authority or has failed to perform its duties. These duties often entail adherence to the basic rules of fair procedure which of course demand freedom from interest or bias and the right to a fair hearing for those immediately affected by the authority's decisions.

In the present instance the City is given great latitude in the exercise of its duty. The City's Executive Policy Committee is given a statutory discretion and is not bound or otherwise inhibited in the exercise thereof. Rather, it would appear that the mere exercise of this committee's discretion in deciding whether a matter may or may not significantly affect the quality of the human environment suffices to place a matter beyond the scope of judicial review. Therefore, it is unlikely that the courts may scrutinize and determine the legal validity of the City's subsequent acts or decisions. A discretionary power must generally be exercised only by the authority to which it has been committed. Therefore, in the subject instance Executive Policy Committee must not delegate that responsibility to any other person or body. However, it would appear that committee does completely discharge its duty by

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merely ejudicating as to whether the matter is or is not significant. There is no requirement as to fair hearing and therefore such a decision need not be preceded by a judicial-type inquiry.

In the United States an agency need only prepare an impact statement for "major" actions which "significantly" affect environmental quality. Congress failed to define the lower limits of major actions and the courts have therefore had to rely upon the bare words of Section 102 (2) (c). Section 653 of The City of Winnipeg Act requires such a statement if an undertaking "may significantly" affect environmental quality. Therefore, there is good reason to believe that the threshold may be somewhat lower in the case of The City of Winnipeg Act than it is under the United States' legislation. This becomes exceedingly relevant if it is determined that there is scope for judicial review on this point. The American courts have under their broad terms of reference played a major independent role in formulating these guidelines. In Natural Reserve Defense Council vs Grant[1], the court interpreted major action as any action which "requires substantial planning, time, resources and expenditure". The relative magnitudes were not further clarified until the court in Hanly vs Kleindienst[2] adopted a more formulary approach. The court conceded that "significantly" was an "amorphous term" and held:

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> "In the absence of any Congressional or administrative interpretation of the term, we are persuaded that in deciding whether a major federal action will "significantly" affect the quality of the human environment, the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors:
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> (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and
>
> (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area."

Perhaps the best way to understand how low the threshold of major federal action has been set is to examine the facts of a survey of cases. The courts have confirmed that NEPA applies to the following matters:

(1) A project to clear 3,000 acres of oxygen consuming vegetation from 55 miles of the Gila River.[3]

(2) The construction of an incinerator at the Walter Reed Medical Center.[4]

(3) A downtown Washington, D.C., urban renewal project covering five blocks.[5]

(4) An FHA loan for the construction of a golf course and park in Texas.[6]

(5) The review by the National Capital Planning Commission of plans for construction of a private commercial mall and housing complex in a Washington, D.C., neighbourhood.[7]

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The courts have also held that NEPA does not apply to these following matters:

(1) HUD insurance assistance for a proposed 66 unit apartment building in Los Angeles.[8]

(2) An Environmental Protection Agency grant for construction of a regional sewage treatment plan.[9]

If guidelines were drawn by the City respecting significant affects then the dicta of the U.S. Seventh Circuit Court of Appeals in upholding a District Court decision in the case of Scherr vs Volpe[10] might well be taken into consideration. The court used a Federal Highway Administration "significant affects guideline" to rule that expansion of a 12 mile, 2 lane state highway to 4 lanes was a major federal action. The court said that this was manifestly so as the FHA guideline so defined the disputed project by its very own terms.

Also of topical interest, if the City were to adopt guidelines requiring public notice and participation, is the decision of the court in Hanly vs Kleindienst[11]. The court held that before a preliminary determination of significance could be made the responsible authority must give notice to the public of the proposed action and therefore give an opportunity to the public to submit relevant factual data which might bear upon the agency's decision. This would not be required under the enabling Manitoban legislation but same could be so required by an officially

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adopted internal procedural guideline. The court did not suggest that a full-blown formal hearing must be provided on every occasion but did submit that the necessity for same would best depend on the circumstances. It was also suggested that precise procedural steps to be adopted would best be left to the relevant agency as it would be best suited to determine whether the solution of the problems faced could better be achieved through a hearing or by informal agency acceptance of relevant data.

Generally, the authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. It must act in good faith and must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act. It also must not act arbitrarily or capriciously. The latter constitutes an abuse of discretionary power. These discretionary powers are broadly categorized by the courts as being either executive or administrative in nature. The former are generally considered immune from judicial review. That is not to say that the courts decline all jurisdiction over executive or "political questions". There appear rather to be categories of questions which they have decided to treat as non-justicable. Where the authority is empowered to take a prescribed course if satisfied that is necessary and in the public interest then the burden cast upon a person seeking to impugn

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such a decision is likely to be a heavy one to discharge, particularly if the competent authority is constituted of elected representatives. However, the language of Section 653 (1) is not wholly subjective and therefore one might see the court apply objective criteria in determining the adequacy of the authority's review. Since the question is judicially untested and without exact Anglo-Canadian precedent it is suggested that the matter should be treated with caution and every possible effort should be made to avoid future default on this point.

Having decided that our courts probably cannot review a bona fide decision as to whether a matter is significant or non-significant the question next arises as to the possibility of their reviewing the qualitative adequacy of an environmental impact report prepared pursuant to Section 653 (1) as submitted to Council. Most certainly the courts could exercise their powers of review if a report to Council with respect to sub-sections (a), (b) and (c) of Section 653 (1) was not made. However, the situation vis-a-vis review of qualitative aspects is not quite so clear.

The American courts have been vigorous in reviewing agency compliance with NEPA. In instances where Congress failed to specify how the Act should be implemented, they have imposed judge-made require-ments. Most important to our discussion it must be appreciated that NEPA requires compliance "to the

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fullest extent possible" and this has made a significant difference in the willingness of the courts to review agency decisions under NEPA. The key language is contained in the opening words of Section 102:

> "...The Congress authorizes and directs that, to the fullest extent possible: the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act..." (underlining mine).

The leading U.S. cases on compliance are not therefore germaine to our discussion as the language of NEPA is much more comprehensive than that of Section 653 of The City of Winnipeg Act. The language of Section 653 being therefore not so demanding as that of NEPA one concludes that the Manitoba courts would not likely be so inclined to probe the contents of such reports as would their American counterparts. It would therefore appear that the American decisions would just be significant with regard to the general content and adequacy of the committee's report.

In the United States the necessity for reporting on alternatives as provided in Section 102 (2) (c) has not been viewed lightly by the courts. In fact, failure to include and discuss alternatives has been frequently held to render a statement inadequate and to merit injunctive relief. For example, in Monroe County Council, Inc. vs Volpe, a case concerning the construction of an

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expressway through a public park, the United States Court of Appeals stated:

> "The requirement for a thorough study and a detailed description of alternatives...is the linchpin of the entire environmental impact statement. Without the detailed statement the conclusions and decisions of the agency appear to be detached from and unrelated to environmental concerns."[12]

The alternatives which must be discussed in the statement are those which can be "reasonably available".[13] The range of alternatives to be discussed has been held to be fairly wide. In a highway construction case, for example, it has been stated:

> "The Defendant's statement should consider all possible alternatives to the proposed freeway, including changes in design, changes in the route, (and) different systems of transportation."[14]

A further alternative which the courts have considered is the "Do-nothing approach" which would involve an examination of the merits and demerits of simply leaving things as they are, without the implementation of the proposed project. The failure to examine this alternative has not only been viewed with disfavour by some courts,[15] but has also been termed a "most glaring deficiency" by one court.[16] It has been held that the fact that an alternative does not offer a complete solution to a problem does not preclude it from discussion in the environmental impact statement.[17]

The courts have also held that the environmental implications of the various alternatives must also be examined. In Environmental Defense Fund, Inc. vs

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Froehlke[18] the court noted that:

> "...the impact statement should not just list the alternatives to the proposed project but it should also include the results of the corps' own investigation and evaluation so that reasons for the choice of a course of action are clear."

Section 653 (1) (b) also makes it mandatory that the report note any adverse environmental effects which cannot be avoided should the work be undertaken. It was held in Friends of Mammoth vs Board of Supervisors of Mono County,[19] that the adjective "any" as employed in NEPA Section 102 (2) (c) (ii) and Section 653 (1) (b) of The City of Winnipeg Act removes any requirement that the adverse effects be considered significant before they are required to be listed. It is therefore submitted that the courts could judicially review such a report if committee failed to do so an exhaustive report with respect to this matter.

Section 653 (1) (a) requires that the environmental impact of the proposed work be noted. The section is not nearly so demanding as the American requirement as it is not imperative that the statement be "detailed". This requirement of NEPA, as previously discussed, has considerably enhanced the position of the U.S. courts with respect to their scope of review in this regard. However, even if our courts' scope were somewhat

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reduced by this obvious deficiency the American cases still provide some guidance with respect to the content of an adequate impact statement. The broad general background which has promoted the enactment of such legislation as NEPA and Section 653 is best expressed in a passage from the decision in Environmental Defense Fund, Inc. vs Corps of Engineers.[20] This passage is illustrative of the American courts' sensitive identification and response to a new kind of public demand:

> "This movement is concerned with the integrity of man's life support system - the human environment. The stage for this movement is shifting from what once had been the exclusive province of a few conservation organizations to the campus, to the urban ghettos, and to the suburbs...".

It is submitted that Section 653 is a response by the provincial legislature to the concerns of many civic-minded citizens. It attempts to safeguard that civic decision making will be made more responsive to the needs of the citizenry by assuring some analytic evaluation of environmental costs and factors in that process.

In Monroe County Council, Inc. vs Volpe,[21] where a 2½ page statement was filed in relation to a highway construction project it was stated by the court that "mere token efforts" at compliance with NEPA do not suffice. An environmental impact statement which is too vague and too general does not meet the requirements of NEPA because such a statement cannot form a basis for responsible evaluation of various projects within the decision making process.

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When U.S. courts have reviewed the contents of challenged statements they have translated the policy of full disclosure into more specific requirements. In determining whether statements are reasonably detailed, the courts have indicated that:

(1) statements should be understandable and non-conclusory;

(2) they should refer to the full range of knowledge; and

(3) they must discuss certain impacts which are typical of some types of action.

The rationale for these guidelines are stated to be that the statements are to be used by both lay reviewers as well as their scientific advisors and therefore same must be comprehensible and informative for both. It is therefore generally accepted that the impact statement must be written in language that is understandable to non-technical minds and yet must contain enough scientific reasoning to alert specialists to particular problems within the field of their expertise. It has been suggested that this may be accomplished by providing the more technical aspects of the discussion in appendices to the statement. In Natural Resources Defense Council vs Grant, the court stated that:

> "Where there is no reference to scientific or objective data to support conclusory statements, NEPA's full disclosure requirements have not been honoured."[22]

In conclusion it is noted that the simple rationale behind the requirement of an environmental

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impact statement is that it should provide for a heightened awareness of environmental consequences within the decision-making process. In so doing it is hoped that at minimum it will contain such information as will necessarily alert the public as well as Council representatives to all possible environmental consequences of the proposed action.

Respectfully submitted,

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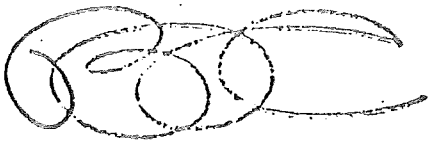

THE NATIONAL ENVIRONMENTAL POLICY ACT

PURPOSE

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of out national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented.

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

representatives of science, industry, agriculture, labor, conservation organizations, State and local governments, and other groups, as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec.206. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates (5 U.S.C. 5313). The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates (5 U.S.C. 5315).

Sec. 207. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal year 1971, and $1,000,000 for each fiscal year thereafter.

A P P E N D I X "2"

FOOTNOTES

1. 341 F. Supp. 356 (1972)
2. 2 ELR 20720
3. Sierra Club vs Laird, 1 ELR 20085 (1970)
4. Montgomery County vs Richardson, 2 ELR 20140 (1972)
5. Businessmen Affected Severely by the Yearly Action Plans, Inc. vs District of Columbia City Council, 339 F. Supp. 793
6. Texas Committee on Natural Resources vs United States, 430 F. 2d 1315 (1970)
7. McLean Gardens Residents Association vs National Capital Planning Commission, 2 ELR 20662 (1972)
8. Echo Park Residents Committee vs Romney 2 ELR 20337 (1971)
9. Howard vs Environmental Protection Agency 2 ELR 20745 (1972)
10. 466 F.2d, 1032
11. Hanly vs Kleindienst, 2 ELR 20720 at page 20723
12. 472 F. 2d 693 at page 697 (1972)
13. Natural Resources Defense Council, Inc. vs Morton, 458 F. 2d 827 at page 835 (1972)
14. Keith vs Volpe, 352 F. Supp. 1324 at page 1336 (1972)
15. Natural Resources Defense Council, Inc. vs Grant, 355 F. Supp. 280 at page 289 (1973)
16. Environmental Defense Fund, Inc. vs Corps of Engineers, 325 F. Supp. 749 at page 761 (1971)
17. Natural Resources Defense Council, Inc. vs Morton, supra, footnote 13 at page 836.
18. 473 F. 2d 346 at page 350 (1972)
19. 502 P. 2d 1049 at page 1059 (1972)
20. 325 F. Supp. 759
21. 472 F. 2d 693 at page 697 (1972)
22. Natural Resources Defense Council, Inc. vs Grant, supra, footnote 15 at page 287.