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Commentary

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Administrative Discretion in Social Housing Policy

ADMINISTRATIVE DISCRETION IN SOCIAL HOUSING POLICY

By SUSAN A. FISH*

Administrative discretion — how much, under what circumstances, exercised by whom — is one of those perennial, sometimes boring but still fundamental issues of organization. The social policy field — sensitive and frequently controversial — is an area where administrative discretion has emerged as a highly contentious problem. It is a problem for legislators seeking to frame programs through legislation that will implement government policy. It is a problem for administrators seeking to carry out legislative intent within the framework of responsible government. It is a particularly important problem for the consumers of the government social policy, the client group on the receiving end of the administrative discretion.

How much administrative detail should be included in statutes? There must be sufficient detail to make the policy intent both clear and meaningful in implementation terms; enough detail so that there is at least a good chance the programs will accomplish what the legislators intended. But there must not be too much detail or the programs will choke on their own requirements.

Decisions regarding the appropriate level of detail are heavily influenced by the socio-political environment. For example, Canadian statutes tend to have far less detail than their American counterparts. U.S. legislation is frequently characterized by page after seemingly endless page of administrative detail. The Canadian model, closely patterned on the English, relies instead on a plethora of bureaucrats to flesh out program definition. The differences in approach are particularly sharp in the area of social policy legislation, especially in housing and housing related fields. Compare Canada's National Housing Act — replete with urban renewal and neighbourhood improvement sections — with the U.S. Model Cities legislation.

Differences in national political culture help to explain broad differences in approach to legislative detail, but tradition is an inadequate guide to reach specific decisions on particular legislation. On the assumption that the legislation is framed in the hope of launching workable programs that meet stated objectives, a finer analysis of the socio-political environment may be necessary to assess the desirability of additional statutory detail. To what extent is the policy thrust perceived — by the legislators, by the administrators — as a simple extension of past action? Earlier programs may have tried and true ways of doing things that are easily transferred to the new program. To what

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extent is there concensus that the goals are indeed desirable? The social policy field is a highly charged political arena. Despite the ever present myth of public service neutrality, public administrators operate from a political base. The fleshing out of program detail and taking of day to day administrative decisions is done through the perceptual screen of that which the administrator holds is desirable and acceptable. The individual administrator's conviction is reinforced by the attitudes of fellow workers whose collective opinion is molded by the organization's traditional understanding of what is to be encouraged and what is not. Basic socio-political values exhibited by the implementing agency will deeply affect — probably in a hindering way — the agency's ability to develop administrative regulations compatible with attaining the goals of a sharply divergent policy thrust. A greatly increased legislative control over administration may be necessary to achieve the desired results.

Problems that arise from the exercise of administrative discretion, however, do not always lend themselves to legislative correction. Policy goals may not be clearly spelled out. Without identifiable goals, even the best intentioned administrator may have difficulty in setting out procedures and regulations that facilitate reaching the goals. Social housing policy and a variety of social housing programs, for example, may have "housing families of low income" as their stated goal. But housing policy may also have "economic stabilization" as an unwritten goal and housing programs (social and market) may be used as instruments to implement the stabilization policy. Funding levels may skyrocket then plummet; attention to housing unit starts to stimulate the building industry may result in a considerable de-emphasis on the "low income" or "family" aspects of the housing. The two sets of goals are incompatible within a single program or set of programs; increased legislative control will not overcome the problems of conflicting cues sent to administrators.

Implicit in the discussion thus far is that there are two levels of administrative discretion: that which sets standards and guidelines to implement the legislative program, and that which operates on a daily decision basis and takes the form of interpreting or applying the guidelines. In the housing field, the former would be the General Instructions developed by Central Mortgage and Housing Corporation (CMHC). The General Instructions are the administrative regulations for program operation; they are developed with the standard case in mind and would lend themselves to inclusion in legislation should more statutory detail be desired. This is administrative discretion in the broad sense, the major identifiable effort to shape a program.

A far less visible — and less easily controlled — form of discretion occurs at the micro level of daily decisions. These decisions shape a program only in the aggregate and over time; their influence on the government's *de facto* policy is rarely seen through the analysis of a single instance. To use an example from Mr. Wilson's article *"Discretion" in the Analysis of Administrative Process:*[1] the law states the speed limit and punishment for conviction

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[1] T. Wilson, *"Discretion" in the Analysis of Administrative Process* (1972), 10 Osgoode Hall Law Journal.

on the offense, administrative regulations detail the procedures to be followed by the policeman stopping a speeding car. The legislative and administrative regulations assumption is that all drivers exceeding the speed limit will be charged. This is not the case because the police officer uses administrative discretion in applying the law; offenders may be waved on with only a warning. A look at an individual warning will not reveal a major shift in legislative intent. But suppose the policeman tickets only those who are evidently manual labourers? Examining the decision pattern then reveals that the apparent legislative intent to restrict all drivers has been revised to restrict a selected group on a class basis. Yet as important as this decision level is in policy making, it is extremely difficult to correct through legislative control of administration. The following discussion of administrative discretion in one social housing program illustrates many of the problems outlined above.

Public housing and full recovery rental housing are Canada's two traditional programs for housing the low income. Full recovery housing operates on a loan basis with the lending agent recovering the full cost of the loan from the borrower. Full recovery low rental housing programs are governed by section 15 of the National Housing Act,[2] and it is full recovery entrepreneurial housing that will be examined in this article.

Section 15 provides very wide latitude for administrative discretion in filling in the program outlines. The legislative requirements for making a loan are that the loan:

> . . . bear interest at a rate prescribed by the Governor in Council; . . . not exceed ninety-five per cent of the lending value of the project; . . . be for a term not exceeding the useful life of the project to be fixed by the Corporation and in any case not exceeding fifty years from the date of completion of the project; . . . be secured by a first mortgage . . .

In addition, the borrower agrees to maintain "fair and reasonable rents" and not to sell without the consent of the Corporation.

A low rental housing project is defined as:

> . . . a housing project undertaken to provide decent safe and sanitary housing accommodation complying with standards approved by the Corporation, to be leased to families of low income or to such other persons as the Corporation . . . designates . . .[3]

A family of low income is defined as:

> . . . a family that receives a total family income that, in the opinion of the Corporation, is insufficient to permit to rent housing accommodation adequate for its needs at the current rental market in the area in which the family lives . . .[4]

The legislation has left CMHC to determine the program clientele.

Section 15 specifies eligible borrowers as "any person", leaving the administering agency to decide which developers or non-profit groups should be financed and the emphasis given to each. Also left to administrative dis-

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[2] *National Housing Act*, R.S.C. 1970, c. N-10.

[3] *Id.*, s. 2.

[4] *Id.*

cretion are the terms of the agreement; the length of time rents will be controlled; the nature of the tenant selection process; and leases, tenant security and issues of fair management practices.

The way in which the section has been administered has had a profound effect on the program. Output under the program had been at a relatively low level until the late 1950's. Non-profit sponsors were not in abundance and private developers were not interested in a program that limited investment returns. When other forms of financing dried up and the government significantly increased the funding level of the program (as part of an overall stabilization policy) applications from enterpreneurs flooded in. But the applications were to finance what would otherwise have been the builders' stock market projects. In many cases, this meant bachelor and one-bedroom units in projects quite unsuited to families with children.

In 1960, following an unfavourable review of program results that highlighted inappropriate project design and poor maintenance, loan requirements were substantially tightened. Project size was limited to 100 units, average bedroom count was to be 2.5, and the equity requirement was increased in an effort to stimulate an interest in ongoing management of the project. Under the tight policy, no loans were made; when the requirements were loosened a few months later, applications poured in.

In 1961, a further review of the program concluded:[5]

> It would seem that the profit motive cannot be in harmony with housing of the lower income group. Some intend to produce a well-built project with a minimum equity and to keep interim financing in anticipation that private refinancing can be arranged. Others produce a project with a minimum equity, minimum financing costs, minimum specifications, and minimum operating expenses to realize a quick profit and then hope that the Corporation will take over the property.

By 1963, a substantial number of projects were in default and taken back by the Corporation. Shortly thereafter the more stringent loan requirements were re-imposed.

Once again, entrepreneurial activity under the program dropped to a very low level and Corporation attention began to turn to non-profit sponsors. CMHC lobbied for several years to seek the legislative changes necessary to attract and support non-profit sponsors (e.g., to increase the loan up to 100 per cent of lending value instead of requiring equity — a requirement frequently difficult for non-profit sponsors to meet). There was little legislative response.

By 1967, pressure was again building to increase the rate of unit starts. Sympathy for non-profit sponsors and an unsatisfactory experience with entrepreneurs in the social housing field notwithstanding, the Corporation again concerned itself with revising its loan requirements to attract private developers.

> We should be prepared to accept any project under section 15, at any moment of time, which we would be prepared to accept on an insured basis under Part I; i.e.

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[5] *CMHC Memorandum*, August 28, 1961, as quoted in M. Dennis and S. Fish, *Programs in Search of a Policy: Low Income Housing in Canada* (Toronto: A. M. Habbert, 1972) at 227.

> if the market would support the project at economic rentals, we can assume it can support that which is below economic rates. The effect is that there will be no arbitrary limits on bedroom count, project size, etc., nor will physical limitations on the quality of the project be required.[6]

As a result of the loosening of administrative regulations — backed by legislative change also more favourable to developers — entrepreneurial participation in section 15 boomed once again.

Problems in the quality of the product continued to emerge. The 1969 Appraisal Instructions of the Corporate note:[7]

> For a variety of reasons, among them land costs, sites are frequently found to be on the periphery of a town or city, or in a neighbourhood where objectional features tend to preclude use of the property for normal residential development. The latter locations are often characterized by proximity to heavy or obnoxious industrial areas, railway tracks, run-down residential districts or other undesirable attributes. Peripheral sites, on the other hand, may suffer from none of these drawbacks, but may nevertheless be equally undesirable for the intended purpose. As a general rule, the greater the distance from the urban core, the more importance is attached to the problem of transportation. In many cases, public transit systems do not operate, or only occasionally operate to such locations and often at higher or multi-zone fares. Dependence on the private automobile becomes paramount. Ironically, therefore, the same circumstance of distance which makes cheaper land available may, through the inadequacy of transportation facilities render the site impractical. There is no economic advantage in achieving cheaper rents and then having this advantage nullified by adding to the financial burden of the low-income tenant through excessive transportation costs.

No attempt has been made to combat the problem of marginal sites through additional administrative regulations. To do so would presumably result in a decreased program output.

Still, the basic legislative requirement that the projects be for families of low income remained. Yet the absence of any requirements regarding bedroom counts-coupled with the pressure of increased land costs — resulted in projects that tended to have very small bedroom counts and be in apartment form rather than row housing (a preferable housing form for families with children). Even projects that had larger bedroom counts, however, frequently excluded larger families by underutilizing the space in terms of people per room. While the legislation calls for "families" to be served, it does not specify "families with children". Neither do the administrative regulations. Developers — concerned with holding down building and maintenance costs — will exclude large families with small bedroom counts and discourage small families (in favour of childless couples) through underutilization.

What about the legislative requirement of low income? Tenant incomes are to be checked regularly to ensure that tenants in the project have incomes that fall within the stated income limit range for the project (bearing in mind that the range is established by the Corporation based on its assessment of low income for the area). The operating agreement requires the developer to

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[6] *CMHC Memorandum,* November 3, 1967, as quoted in Dennis and Fish, *Id.,* at 229.

[7] *Appraisal Instructions,* Central Mortgage and Housing Corporation, at M-2 and M-3.

obtain income statements from all tenants and make these available to CMHC. There is no requirement that the statement be physically transmitted to the branch office. Branch personnel may then decide whether they must see the statements themselves or will accept, for example, telephone assurances from the developer that all the tenants are within the income range.

The administrative regulations permit a temporary or permanent waiving of income ceilings where the developer is unable to rent within the income limits. But there are no CMHC regulations regarding tenant selection. Vacancies may thus be developer induced — the developer may refuse to rent to welfare recipients or larger families with children. There is also no requirement as to the period of time the developer should bear the cost of any vacancies that may occur. In a market operation (and the administrative regulations for the program suggest that CMHC wishes to treat section 15 projects as private market projects that happen to have a lower rent) the developer does not expect to have every unit filled immediately; there is usually an initial period during which units will be vacant. Since the regulations do not recognize any such initial period, the developer may apply for and receive an income limit increase virtually on completion of the building.

The Corporation is required (by its administrative regulations) to make an annual check on the maintenance of the project. But maintenance is not management and the regulations display no interest in the management issues (such as the rules and regulations that the developer imposes for continued tenancy). There is no control over harsh or discriminatory management practices. In the other major social housing program (public housing) management practices are a major concern and CMHC has led the way toward improved conditions. What provincial landlord-tenant legislation does not cover, CMHC has made no effort to address.

Even where the situation may be covered in provincial law, the protection to the tenant is frequently made insufficient through the lack of a long term lease. Although the operating agreements require that tenants be offered leases, a monthly lease is considered satisfactory. Under these circumstances, the tenant seeking relief under provincial legislation may simply find the owner giving one month's notice to quit and terminating the tenancy agreement — hardly a practice conducive to housing the low income.

This brief discussion of the development of the entrepreneurial full recovery housing program illustrates the critical role administrative discretion plays in policy and program implementation. A number of areas were indicated where increased legislative control might well be desirable. But increased control assumes that there is agreement on the basic policy objectives and that elected representatives are prepared to take on responsible political leadership. This discussion also highlighted some of the very real problems in goal attainment when administrators receive conflicting cues as to what the program goals are and are thus left to determine what the real goals are and the best means of attaining those goals. Any discussion of administrative discretion must take into account the political environment in which the discretion is exercised. The line should be clearly drawn before administrators are asked to toe it.