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**DEFINING THE IDEOLOGY OF PUBLIC PARTICIPATION: ‘DEMOCRACY’,  
‘DEVOLUTION’, ‘DELIBERATION’, ‘DISPUTE RESOLUTION’ AND A NEW SYSTEM FOR  
IDENTIFYING PUBLIC PARTICIPATION IN PLANNING LAW**

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*The need to include processes for public participation and involvement has long been accepted as a crucial element in the design of laws dealing with environmental and planning decision-making. Yet, across the world, processes for including public participation in environmental and planning laws have been criticised for failing to exhibit the hallmarks of genuine participation, with claims that opportunities for public participation are included in form, but not in substance. Recent planning law reforms in the UK and in Australia have continued the rhetorical endorsement of public participation as a crucial element of an effective statutory planning system. This article will critically analyse the meaning and purpose of public participation in the context of UK and Australian planning law. Public participation in planning law will be presented as an ‘ideology’ which can be separated into the following elements: democracy, devolution, deliberation and dispute resolution. The article will then apply these elements as the basis of a systematic framework to explore the extent to which the ideology of public participation is genuinely evident in recent reforms to planning law and policy in the UK and Australia.*

I INTRODUCTION

Writing in 1979, British planning lawyer Patrick McAuslan noted the existence and increasing potency of what he termed an ‘ideology of public participation’ within environmental land use planning law, which, together with the ideology of private property and the ideology of public interest, formed the basis of modern planning law and policy. According to McAuslan, the ideology of Private Property asserts that the law exists and should be used to protect private property; while the ideology of Public Interest contends that the law exists and should be used to advance the Public Interest; and the ideology of Public Participation seeks to assert the rights of the wider public in decision-making on planning and environmental issues, and is founded on notions of openness, fairness and impartiality in planning administration in order to promote and balance ‘social, community and ecological factors’ in decision-making against the interests of ‘economic and technological factors’.<sup>1</sup> While the ideologies of private

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property and the public interest have been dominant features of planning law,<sup>2</sup> the ideology of public participation has, over the last forty years or so, become entrenched as a fundamental and sacred tenet of planning law and policy.<sup>3</sup>

However, while governments insist that they recognise and support the importance of public participation in planning law and policy, many commentators and communities consider such platitudes meaningless, perhaps tinged with venality, insincerity, and even mockery.<sup>4</sup> To many, the ideology of public participation has become a sacred cow. That is, an ideology that government ostensibly accepts as part of orthodoxy in effective planning law and policy, but which is not fully understood or genuinely endorsed. The ideology of public participation has become a matter of form, not substance.<sup>5</sup> The problem is, that without meaningful recognition of the importance of public participation, public confidence in planning processes and decisions is eroded.<sup>6</sup>

This article seeks to address this crisis in public confidence by proposing a new method to identify the ideology of public participation in planning law and policy by deconstructing (as in ‘taking apart’) the ideology into four constituent elements — ‘democracy’, ‘devolution’, ‘deliberation’ and ‘dispute resolution’. An examination of the way in which each of these elements is expressed in a particular planning law or policy can thus be used as an effective tool for identifying whether the ideology of public participation is genuinely reflected in that law or policy. This will provide a systemic framework to analyse the expression of the ideology of public participation across a wide range of jurisdictions.

The article will then test the framework across two jurisdictions — England, UK; and NSW, Australia — that are currently in the process of developing comprehensive

<sup>1</sup> Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press, 1980) 6.

<sup>2</sup> The following passage from British planning lawyer and academic, Malcolm Grant, demonstrates the centrality of the ideology of private property and of public interest in the development of planning law:

‘Planning law prescribes the procedures — it sets the battlelines — for the resolution of conflict over land use between the interests of private property and the prevailing ‘public’ interest or ‘community’ interests. It is neither static nor a neutral system of rules, and the balance which it sets between private and public and between different institutions representing the public interest is constantly changing’, cited in John Haydon, ‘The Judicial system and Public Interest in Queensland Town Planning’ (1989) 6 *Environmental and Planning Law Journal* 18, 18.

<sup>3</sup> For example, Principle 10 of the *Rio Declaration on Environment and Development* UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) explicitly emphasises the importance of public participation in governmental decisions that affect the environment.

<sup>4</sup> See, eg, Patrick D Smith and Maureen H McDonough, ‘Beyond Public Participation: Fairness in Natural Resource Decision Making’ (2001) 14(3) *Society & Natural Resources* 239, 240; Norman Beckman, ‘The Planner as a Bureaucrat’ in Andreas Faludi (ed), *A Reader in Planning Theory* (Pergamon Press, 1973); Christopher Swain and Malcom Tait, ‘The Crisis of Trust and Planning’ (2007) 8(2) *Planning Theory & Practice* 229.

<sup>5</sup> McAuslan, above n 1, 268. As McAuslan put it, ‘the ideology of public participation, though strong vocally, (plays) only a subsidiary role in practice’.

<sup>6</sup> See, eg, Tracey Bedford, Judy Clark and Carolyn Harrison, ‘Limits to New Public Participation Practices in Local Land Use Planning’ (2002) 73(3) *Town Planning Review* 322; Graham Marshall, ‘Economics of Incorporating Public Participation in Efforts to Redress Degradation of Agricultural Land’ (Paper presented at the 43<sup>rd</sup> Annual Conference of the Australian Agricultural and Resource Economics Society (AARES) and the 6<sup>th</sup> Annual Conference of the New Zealand Agricultural and Resource Economics Society (NZARES), Christchurch, 20–22 January 1999) 3.

planning laws, and which both emphasise the importance of public participation in the new planning regime. By exposing the reality behind the veneer, the new framework for identifying the operative ideology of public participation will provide communities and policy makers with a new tool for assessing the authenticity of participatory mechanisms in planning law and policy.

## II A NEW SYSTEM FOR IDENTIFYING THE IDEOLOGY OF PUBLIC PARTICIPATION IN PLANNING LAW AND POLICY

The ideology of public participation has assumed an important role in planning law and policy because of its role in managing conflict between the various actors involved in making decisions regarding land use. Community and environmental groups see public participation as a way to influence better planning decisions,<sup>7</sup> which are improved by being based on ‘fuller’ information that the community can provide.<sup>8</sup> If a community feels that a process of public participation has led to a better planning decision, then this will reduce the likelihood or intensity of any conflict that might have resulted if a poor planning outcome had been imposed.<sup>9</sup> Planning authorities and decision-makers see the value of public participation as a means of providing legitimacy to planning decisions.<sup>10</sup> The transparency and accountability encouraged through public participation can increase the public’s sense of confidence that government decisions are consistent and just.<sup>11</sup> A decision resulting from a process considered to be open, fair and transparent is less likely to generate feelings of disenfranchisement than an arbitrary or autocratic decision imposed on a community, which might just exacerbate conflicts over land use planning decisions. A ‘project carries more legitimacy, and less hostility, if potentially affected parties can influence the decision-making process’.<sup>12</sup> The experience of a participatory process may also generate a ‘reservoir of good will’ that can carry over to future decisions and engender a ‘spirit of cooperation and trust between the agency and the public’.<sup>13</sup> Participation has an important role in managing conflicts for ‘the atmosphere it engenders’.<sup>14</sup> By involving everyone who wants to participate, direct citizen

<sup>7</sup> See, eg, Hans Spiegel, *Citizen Participation in Urban Development* (NTL Institute for Applied Behavioural Science, 1968); John Lucas, *Democracy and participation* (Penguin Books, 1976),

<sup>8</sup> Lucas, above n 7, 139; This view is also supported by section 3 of the United Nations Conference on Environment and Development, Agenda 21, Chapter 23, which provides that participation allows authorities to ‘acquire the information needed for formulating the best strategies.’

<sup>9</sup> Lucas, above n 7, 141. As Lucas noted, ‘even when a decision is not wholly agreeable, we may be more willing to accept it for having had some part in the discussions which preceded it’.

<sup>10</sup> James Cook, *Citizen Participation: A Concepts Battery* (University of Missouri, 1975); Trevor Roberts, ‘The Seven Lamps of Planning’ (2002) 73(1) *Town Planning Review* 4.

<sup>11</sup> Robert M Steeg, ‘Federal Agency Compensation of Interveners’ (1976) 5(4) *Environmental Affairs* 697; John Warburton and Geoff Baker, ‘Integrity Systems and Local Government’ (2005) 64(2) *Australian Journal of Public Administration* 62.

<sup>12</sup> Anne Shepherd and Christi Bowler, ‘Beyond the Requirements: Improving Public Participation in EIA’ (1997) 40(6) *Journal of Environmental Planning and Management* 725.

<sup>13</sup> Arnold Cogan, Sumner Sharpe and Joseph Hertzberg, ‘Citizen Participation’ in Irving So and Bruce McDowell (eds), *The Practice of State and Regional Planning* (American Planning Association, 1986) 284.

<sup>14</sup> Lucas, above n 7, 155.

participation has the potential to be a 'solvent of social conflicts'.<sup>15</sup> Similarly, involving the public might cushion 'the shock of disagreement, adjustment and change'.<sup>16</sup> In this way, conflict is managed by increasing confidence in the process by which policies are made, and, consequentially, the legislative instruments in which they are expressed.<sup>17</sup>

However, as identified in the introduction, while there is broad agreement on the importance of the ideology of public participation in planning law, there is less clarity on what public participation actually means, and how it can be identified as being at work in policy and legislation. The lack of specificity in definitions of public participation is indicated by the wide variety of words used to describe the same ideas. 'Citizen', 'community' and 'civic' are used interchangeably with 'public', while 'engagement', 'involvement' and 'input' are used as synonyms for 'participation'.<sup>18</sup>

While it is clear that public participation is a process rather than an outcome,<sup>19</sup> there is widespread debate about how extensive the process of participation should be.<sup>20</sup> Some commentators suggest that participatory processes might be limited to social survey, while others suggest that nothing short of direct citizen control over decision-making constitutes genuine participation.<sup>21</sup> Such debates led Bishop and Davis to note that public participation should be understood more as 'a political label rather than a settled process'.<sup>22</sup> The processes that define public participation are also political in nature, so that those who choose to take part in the participatory process may have, as a result, significantly greater political power.<sup>23</sup>

While a defining characteristic of public participation in planning law and policy is that it upholds the rights of 'the public' to participate in decisions on environmental and planning matters, the identification of exactly who constitutes 'the public' is a matter of ongoing debate. Under the common law rules of standing, actions for negligence and private nuisance can only be brought by persons whose direct personal or property interests are adversely affected. Even actions for public nuisance can only be brought where the nuisance is so widespread it would not be reasonable to expect

<sup>15</sup> Robert H Salisbury, 'Research on Political Participation' (1975) 19(2) *American Journal of Political Science* 323.

<sup>16</sup> Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press, 1970) 7.

<sup>17</sup> Steeg, above n 11, 697-719.

<sup>18</sup> Jana Carp, 'Wit, Style, and Substance: How Planners Shape Public Participation' (2004) 23 *Journal of Planning Education and Research* 243. For example, Carp refers to 'civic engagement' in the same context as 'public participation'; Sarah Elwood, 'Perspectives on Participation, Urban Research, And the Transformation of "local" Urban Geographies' (2005) 26(3) *Urban Geography* 262. Elwood adds the synonyms 'citizen participation' and 'stakeholder involvement'.

<sup>19</sup> Lucas, above n 7, 146. As Lucas points out 'participation is a means'; Thomas Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions* (RFF Press, 2002), 42-54.

<sup>20</sup> For a discussion of various models to assess the extent and quality of public participation in planning law, see Mike Smith and Mike Beazley, 'Progressive Regimes, Partnerships and the Involvement of Local Communities: A Framework for Evaluation' (2000) 78(4) *Public Administration* 855.

<sup>21</sup> Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) *Journal of the American Institute of Planners* 216.

<sup>22</sup> Patrick Bishop and Glyn Davis, 'Mapping Public Participation in Policy Choices' (2002) 61(1) *Australian Journal of Public Administration* 16.

<sup>23</sup> James Simmie, *Citizens in Conflict: The Sociology of Town Planning* (Hutchinson, 1974) 136.

one person to take proceedings to stop it on his or her own.<sup>24</sup> Yet, the ideology of public participation has a much broader conception of who can participate under planning law and policy. According to McAuslan, the ‘public’ refers to all those who have ‘an interest or concern’ in a proposed development of land or change in the environment, including those directly affected (such as landowners or tenants) and any other person or group, regardless of whether they are personally affected.<sup>25</sup> Priscoli & Homenuck provided a categorisation of such ‘groups’ of the public, including: the organised public, the general public, politicians, public interest groups and local experts.<sup>26</sup> The scope of the ‘public’ is potentially very wide and its composition will change from situation to situation. A person or group that is part of the ‘public’ in reference to one planning decision may not comprise part of the ‘public’ in relation to another. This means that the public can be more specifically defined as ‘affected’ and/or ‘interested’ persons or groups. Therefore, the common law test of standing based on a ‘special interest’ becomes a useful tool for determining the parameters of the interested public in a particular case.<sup>27</sup> However, unlike the common law test, the extent of the ‘public’ cannot be readily identified by reference to matters such as land ownership or environmental activism. People may also be included as part of a particular ‘public’ on the basis of membership in sporting or community groups, or even intangible interests such as emotive sentimental attachment to a childhood domicile.<sup>28</sup> On the other hand, it is also important to note that the public that actually involves itself in planning does not necessarily form a representative cross-section of society.<sup>29</sup> People whose interests may be directly and tangibly impacted by a development proposal or planning instrument may choose not to become involved. In these situations, a vocal minority may be the only ‘public’ that chooses to participate.

The fact that public participation in planning law and policy is so hard to define is one reason why citizens and commentators, across a wide range of international jurisdictions, have expressed concerns about the efficacy of public participation in practice.<sup>30</sup> Such uncertainty has also undermined public confidence in the motives of policy-makers who support public participation in word, but appear to undermine it in deed.<sup>31</sup> The following discussion will therefore detail a systemic method of identifying the ideology of public participation at work in planning law and policy. This will be presented as an ideology focused on promoting a democratic process,

<sup>24</sup> See *Baulkham Hills Shire Council v Domachuk* (1988) 66 LGRA 110.

<sup>25</sup> McAuslan, above n1, 5.

<sup>26</sup> Jerry Priscoli and Peter Homenuck, ‘Consulting the Publics’ in Reg Land (ed), *Integrated Approaches to Resource Planning and Management* (Banff Centre School of Management, 1986) 68.

<sup>27</sup> See *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

<sup>28</sup> Such ‘intellectual or emotional’ concerns would not be enough to establish a ‘special interest’ according to the test developed in *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, per Gibbs J at [530].

<sup>29</sup> Simmie, above n 23, 137.

<sup>30</sup> For example, Falleth and Saglie analyse the tension between efficiency and democracy in Norwegian planning law: Eva Falleth and Inger-Lise Saglie, ‘Democracy or Efficiency: Contradictory National Guidelines in Urban Planning in Norway’ (2011) 4(1) *Urban Research & Practice* 58.

<sup>31</sup> For a discussion of issues of public trust in planning administrators and decision-makers, see Lucie Laurian, ‘Trust in Planning: Theoretical and Practical Considerations for Participatory and Deliberative Planning’ (2009) 10(3) *Planning Theory & Practice* 369.

through which the public might be involved in deliberations surrounding decisions that directly affect them and their local communities. By virtue of such a process, the public might have recourse to independent methods of dispute resolution when they are either unhappy with a decision itself, or the manner in which it has been made. In summary, the ideology of public participation consists of four central elements — that planning law and policy should be democratic, deliberative, devolutionary, and provide access to independent dispute resolution. Each of these four central ideas is examined below.

#### A *Public Participation and the Idea of Democracy*

The ideology of public participation is a direct outworking of democratic theory, with participation considered a ‘cornerstone of democracy’.<sup>32</sup> According to McAuslan, democracy was one of the ‘more abstract principles’, along with justice, which formed the basis for the ideology of public participation.<sup>33</sup> It is therefore important to analyse the interplay between this ‘abstract principle’ of democracy and the ideology of public participation to determine why democracy forms such a central component of public participation. This relationship is of specific relevance in the context of environmental land use planning, which involves a mix of public and private rights and property. Participation in decisions affecting land use ‘can be viewed as the application of democratic governance to environmental matters’.<sup>34</sup>

The debate over democratic theory occupies the ground between the two broad schools of democratic thought — one that limits participation to the indirect democratic process of electing decision-makers, and the other that asserts the need for direct popular decision-making by the people themselves. The ‘terrain for participation’ lies somewhere between these extremes of ‘policy making by administrative fiat and direct democracy’.<sup>35</sup> The nature and extent of opportunities for public participation in between these extremes is conceived as a ‘measure of democratic health’.<sup>36</sup>

The terrain for participation is a difficult topography to traverse. On the one hand, ‘a vote is a stylised voice’,<sup>37</sup> so that calls for participation should be sated by involvement in elections.<sup>38</sup> To concede the legitimacy of participation is to recognise the supremacy of the people over parliament in those situations where participation leaves decision-making with the people. This is consistent with John Locke’s pronouncement that ‘there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them [sic].’<sup>39</sup>

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<sup>32</sup> Nancy Roberts, ‘Public Deliberation in an Age of Direct Citizen Participation’ (2004) 34(4) *American Review of Public Administration* 315.

<sup>33</sup> McAuslan, above n 1, 2.

<sup>34</sup> Donald Anton, ‘Increasing Public Participation in Victoria’s Environmental Laws: Part 1’ (2000) 50 *Property and Environmental Law Bulletin* 10.

<sup>35</sup> Bishop and Davis, above n 22, 14.

<sup>36</sup> Patrick Bishop, ‘Representative Democracy and the Place of Participation’ (1999) 94 *Canberra Bulletin of Public Administration* 12.

<sup>37</sup> Lucas, above n 7, 39.

<sup>38</sup> Robert A Dahl, *Democracy and Its Critics* (Yale University, 1989).

<sup>39</sup> John Locke, *The Second Treatise of Civil Government* (1690) Chapter XIII, Section 149.

On the other hand, public participation is an important expression of democracy, since to give a person the right to participate is ‘to make him a person who counts’.<sup>40</sup> In this way, Habermas conceived of participation in the public sphere as a ‘democratic dam against the colonizing encroachment of system imperatives on areas of the lifeworld.’<sup>41</sup> Public participation in government decision-making is thus justified in democratic societies as being both morally and functionally integral to fundamental democratic values, such as political equality, legitimacy, accountability of government, and social responsibility among the citizenry.<sup>42</sup> Participation makes government institutions more accountable, with individuals and communities able to influence the decisions that affect them. According to democratic theory, participatory mechanisms provide a sense of ongoing stability to the entire democratic system.<sup>43</sup> Participation makes democracy a more dynamic, ‘vital’ and representative system of governance.<sup>44</sup> As Lucas observed ‘participation not only helps people to construe the phenomenon of government as a form of action rather than merely a kind of event, but leads them to criticise from the standpoint of agents rather than spectators.’<sup>45</sup>

This also points to the educative benefits of participation. Theorists such as John Stuart Mill, and latterly Carole Pateman, point to the role of civic engagement in educating the public in democratic principles and processes.<sup>46</sup> Practice in democratic skills ‘sustains our capacity for self-government’,<sup>47</sup> as well as enhancing personal confidence and development.<sup>48</sup>

Politics is the exercise of practicing democratic skills, so it follows that the ideology of public participation in planning law emphasises the role of politics in planning decisions. While plans are drafted and implemented by planners, decisions largely rest with politicians. Planning is therefore a political activity, subject to political forces and political manipulation.<sup>49</sup> The democratic nature of public participation leaves planning open to capture by special interest groups.<sup>50</sup> However, the same criticism could be leveled at any aspect of democracy, which emphasises freedom to participate over coercion, even where apathy or failure to get involved means that the interests of active citizens prevail.<sup>51</sup> As Pløger argued, a democratic approach is all about enabling people to determine how to improve their lives on their own terms.<sup>52</sup>

<sup>40</sup> Lucas, above n 7, 170.

<sup>41</sup> Jürgen Habermas, ‘Further Reflections on the Public Sphere’ in Craig Calhoun (ed), *Habermas and the Public Sphere* (Massachusetts Institute of Technology, 1992) 421.

<sup>42</sup> Ortwin Renn, Thomas Webler and Peter Wiedemann (eds), *Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse* (Springer, 1995).

<sup>43</sup> Frank Laird, ‘Participatory Analysis, Democracy and Technological Decision Making’ (1993) 18(3) *Science, Technology and Human Values* 341.

<sup>44</sup> Roberts, above n 32, 315.

<sup>45</sup> Lucas, above n 7, 142.

<sup>46</sup> See Pateman, above n 16.

<sup>47</sup> Carp, above n 18, 243.

<sup>48</sup> Sherry Arnstein, ‘A Ladder of Citizen Participation’ (1969) 35(4) *Journal of the American Planning Association* 216.

<sup>49</sup> Alan Evans, ‘Shouting Very Loudly: Economics, Planning and Politics’ (2003) 74(2) *Town Planning Review* 199.

<sup>50</sup> *Ibid* 200–201.

<sup>51</sup> Lucas, above n 7, 230. As Lucas argues, ‘better that some should be able to participate than that none should’.

<sup>52</sup> John Pløger, ‘Strife: Urban Planning and Agonism’ (2004) 3(1) *Planning Theory* 71.

To this extent, meaningful public participation requires the facilitation of personal feelings of *powerfulness* (the ability to influence processes, projects and political institutions) and *masterfulness* (capacities to exploit opportunities for political influence). Unless these conditions are met, ‘no policy maker can say that they are putting the citizen at the core of their policy making and planning’. Pløger advocated a kind of non-solution as the solution. That is, a form of anarchic ‘strife’ is needed to allow public participation room to breathe. To this extent, he advocates public participation processes that ‘stress openness, temporality (temporary solutions), respect for difference ... and the need to live with inconsistencies and contingency’. Hillier agreed, labeling democratic planning decision-making as ‘inevitably messy, time-consuming, turbulent, frustrating and exasperating’. Quoting Briand, she concludes that we should expect ‘chaos’.<sup>53</sup>

### B *Public Participation and the Idea of Deliberation*

The idea of deliberation is an important element in debates about democracy,<sup>54</sup> and is equally important to the ideology of public participation. Deliberative democracy posits that decision-making is legitimatised through ‘the ability of all individuals subject to a collective decision to engage in authentic deliberation about that decision’.<sup>55</sup> Deliberation, in this sense, was defined by Gastil as ‘discussion’ involving ‘judicious argument, critical listening, and earnest decision making’.<sup>56</sup> The ‘critical’, ‘earnest’ and ‘careful’<sup>57</sup> nature of such discussion means that deliberation involves more than mere public consultation. Instead, as Gastil noted, ‘full deliberation includes a careful examination of a problem or issue, the identification of possible solutions, the establishment or reaffirmation of evaluative criteria, and the use of these criteria in identifying an optimal solution’.<sup>58</sup> According to Carson and Hartz-Carp, a process of deliberation should include the following principles: ‘open dialogue, access to information, space to understand and reframe issues, respect, movement toward consensus’.<sup>59</sup> This emulates the processes of deliberation identified by Habermas, such as public reasoning, reflection and argument, and reaching consensus.<sup>60</sup>

This indicates a requirement for certain preconditions to be satisfied for meaningful public deliberation to occur. First, planning authorities must disclose all relevant information about the proposal to the interested public.<sup>61</sup> The Internet has provided an

<sup>53</sup> Jean Hillier, ‘Agonizing Over Consensus: Why Habermasian Ideals Cannot be “Real”’ (2003) 2(1) *Planning Theory* 39.

<sup>54</sup> John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000) v.

<sup>55</sup> Ibid.

<sup>56</sup> John Gastil, *By Popular Demand: Revitalizing Representative Democracy Through Deliberative Elections* (University of California Press, 2000) 22.

<sup>57</sup> David Blair and John Bernard (eds), *Macquarie Pocket Dictionary* (Jacaranda Press, 3<sup>rd</sup> ed 1998) 275.

<sup>58</sup> Gastil, above n 56.

<sup>59</sup> Lyn Carson and Janette Hartz-Karp, ‘Adapting and Combining Deliberative Designs: Juries, Polls, and Forums’ in John Gastil and Peter Levine (eds), *The Deliberative Democracy Handbook: Strategies for Effective Civic Management in the 21<sup>st</sup> Century* (John Wiley & Sons, 2005) 120.

<sup>60</sup> Habermas, above n 41, 445–448.

<sup>61</sup> As Smith and McDonough concluded, ‘participation is impossible if the decision is hidden’: Smith and McDonough, above n 4, 244;



effective avenue for planning authorities to distribute information regarding plans and development proposals.<sup>62</sup> However, a major challenge to the objective of ensuring that all relevant information is available to the public is making complex details about planning proposals easy for the community to understand. As O'Mara observed, the 'increasing sophistication of science makes it difficult for people to engage in informed debate about the likely impacts of development.'<sup>63</sup>

There is also a need to have opportunities for genuine 'discourse', both among citizens and with planning authorities. Agenda 21 recommends that this should involve local authorities with citizens, local organisations and private enterprises.<sup>64</sup> Habermas defined discourse as the process of discovering topics of public relevance, interpreting values, contributing to the resolution of problems through generating 'good reasons, and debunk[ing] bad ones.'<sup>65</sup> In the context of land use planning, this takes the form of a dialogue between multiple publics in order to plan ways of living together. Dialogue can take many forms,<sup>66</sup> with a strong focus on communication through the spoken word.<sup>67</sup> The basic approach of dialogue in planning is to bring antagonistic parties together to discuss their concerns, with the aim of achieving consensus as to the solution. The importance of such approaches is emphasised where different parties have different cultural understandings of place and space.<sup>68</sup> The unevenness of the relative power of different actors in planning decisions is the focus of communicative planning theory, which posits that such power imbalances must be recognised and addressed in order to create a speech situation in which genuine deliberation might occur.<sup>69</sup>

In summary, the idea of deliberation expands the scope of public participation, so that it involves 'unrestrained communication'<sup>70</sup> which is 'broad, overt and accessible' in

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Bruce Williams and Albert Matheny, *Democracy, Dialogue and Environmental Disputes: The Contested Languages of Social Regulation* (Yale University Press, 1995) 152; In Simmie, there is discussion of the Skeffington Report (which McAuslan credits as the dawn of public participation in UK planning law): Simmie, above n 23, 228.

<sup>62</sup> This includes the use of Geographic Information Systems (GIS) technology – see 28(6) *Environment and Planning*, the theme issue being 'Public participation using web-based GIS'. In particular, note Zhong-Ren Peng, 'Internet GIS for public participation' (2001) 28(6) *Environment and Planning B* 889 - 905.

<sup>63</sup> Alexandra O'Mara, 'Environmental Impact Assessment and Objector Appeals Under Part 4 of the Environmental Planning and Assessment Act 1979 (NSW)' (2004) 9 *Local Government Law Journal* 150.

<sup>64</sup> United Nations Conference on Environment and Development, Agenda 21, Chapter 23, s 3.

<sup>65</sup> Habermas, above n 41, 452.

<sup>66</sup> There is substantial literature on methods of facilitating dialogue that goes beyond the scope of this thesis. However, to illustrate the diversity of approaches, see, eg, Leonie Sandercock, 'Out of the Closet: The Importance of Stories and Storytelling in Planning Practice' (2003) 4(1) *Planning Theory & Practice* 11.

<sup>67</sup> Habermas emphasised the need for an 'ideal speech situation'. Research undertaken by Smith and McDonough noted that people focus on the role of the 'voice' in public participation: Smith and McDonough, above n 4, 243–245.

<sup>68</sup> Leonie Sandercock, 'When Strangers Become Neighbours: Managing Cities of Difference' (2000) 1(1) *Planning Theory and Practice* 13; John Forester, 'Multicultural Planning in Deed: Lessons From the Mediation Practice of Shirley Solomon and Larry Sherman' in Michael Burayidi (ed), *Urban Planning in a Multicultural Society* (Greenwood Publishing, 2000) 147.

<sup>69</sup> For an overview of the development of communicative planning theory see Tore Sager, 'The Logic of Critical Communicative Planning: Transaction Cost Alteration' (2006) 5(3) *Planning Theory* 223.

<sup>70</sup> Jürgen Habermas quoted in Mitchell Stevens, 'Jürgen Habermas: The Theologian of Talk',

its scope, having the capacity to encompass all affected persons to ensure that their interests are addressed in the final decision.<sup>71</sup> If these elements are missing, deliberation is ‘incomplete’ or ‘less deliberative’, thus minimising the effectiveness of public participation.<sup>72</sup>

### C *Public Participation and the Idea of Devolution*

Dahl observed that modern democratic jurisdictions are too large and too complex to permit effective direct participation.<sup>73</sup> As Lucas summarised, ‘all forms of participation are subject to the fundamental constraint that the more people there are who have a say in a decision, the more formal and therefore the less real the decision will be.’<sup>74</sup> Proponents of public participation have countered this problem by focusing on the devolutionary nature of participation, whereby participatory processes are maximised at a local level. As Draper pointed out, ‘participation implies many things, but the common assumption is that it is the meaningful involvement of people in decisions that affect their lives.’<sup>75</sup> This assumption stems from the political theories of John Locke, who emphasised the importance of decentralising decision-making wherever possible, and vesting this power into the hands of those immediately affected.<sup>76</sup> Devolution was also a vital aspect of the educative importance of participation in a representative democracy. According to John Stuart Mill, ‘it is by participating at the local level that the individual “learns democracy”.’<sup>77</sup>

Lucas notes that ‘[p]articipation is not all of one piece, but takes many different forms.’<sup>78</sup> The practical outworking of participatory ideology is that one might accept a low level of participation, such as notification, for decisions affecting a diverse range of stakeholders, while demanding a much greater level of participation, such as direct input into decision-making, for small scale decisions affecting a discrete area and small range of interests. In the context of environmental land use planning, this might involve decisions at a ‘central’ level, such as a decision on the route of a new motorway, or it could relate to decisions at a ‘local’ level, such as a neighbourhood housing proposal.<sup>79</sup> According to the ideology of public participation, such decisions should be made with the ‘public’ that is most ‘interested’ in the subject matter of the decision, so that there is a sharing of power between the governed and the government.<sup>80</sup> Considering that the overwhelming majority of planning decisions have impacts at a ‘local’ level, this power-sharing often takes the form of the

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*Los Angeles Times Magazine* (Los Angeles), 23 October 1994, 26.

<sup>71</sup> Kevin Hanna, ‘The Paradox of Participation and the Hidden Role of Information’ (2000) 66(4) *American Planning Association Journal*, 398; James S Fishkin, *The Voice of the People: Public Opinion and Democracy* (Yale University Press, 1995) 41.

<sup>73</sup> Dahl, above n 38.

<sup>74</sup> Lucas, above n 7, 138.

<sup>75</sup> Dianne Draper, ‘Environmental Interest Groups and Institutional Arrangements in British Columbia Water Management Issues’ (1975) quoted in Kevin Hanna, ‘The Paradox of Participation and the Hidden Role of Information’ (2000) 66(4) *American Planning Association Journal*, 398

<sup>76</sup> See Lucas, above n 7, 29.

<sup>77</sup> Pateman, above n 16, 31.

<sup>78</sup> Lucas, above n 7, 138.

<sup>79</sup> McAuslan, above n 1, 11.

<sup>80</sup> Bishop and Davis, above n 22, 14.

devolution of power from central governments to local governments. This is demonstrated through the ‘expansion of responsibilities for local-level actors and institutions’, which is evident through the ‘persuasive requirements’ for public participation in urban planning and decision-making at a local level.<sup>81</sup>

The idea of devolution does not mean that participation is not important at a regional or metropolitan level.<sup>82</sup> However, it is much easier to facilitate public participation in smaller-scale, local decisions, where the interested public might be united by homogeneity of class, race and ethnicity, or simply by local familiarity. This unity of interest, which is ‘the rationale for participatory neighbourhood planning’,<sup>83</sup> has long been recognised as an important element of participatory practice. Since its proposal by Perry in 1923, the neighbourhood unit has become an important element in planning orthodoxy, being based on the principle of strong local connections around a primary school and local shops.<sup>84</sup> Proponents of neighbourhood planning proposed that neighbourhood units would foster the development of ‘organic’ community life,<sup>85</sup> and would assist the development of a ‘sense of identity with the community and the place.’<sup>86</sup>

The idea of devolution also emphasises the importance of local knowledge on the basis that local residents are best placed to be well-informed about local environmental, technical, economic and social conditions.<sup>87</sup> The need for local input has long been accepted as an important principle in plan-making. While the concept of comprehensive planning promoted by Patrick Geddes did not envisage a far-reaching role for public participation in plan-making, it did recognise that the development of comprehensive land use plans needed to be based upon an audit of a locality that embodied ‘the full utilization of local and regional conditions’ and that was ‘the expression of local and of regional personality’.<sup>88</sup>

#### D *Public Participation and the Idea of Dispute Resolution*

Lucas opines that ‘[l]ike all forms of government, democracy can be unfair’.<sup>89</sup> Therefore, a fundamental ingredient in the ideology of public participation is access to independent judicial bodies in which disputes regarding government decisions can be aired and resolved. This is acknowledged even by the most conservative and limited conceptions of participation, which still uphold the ability of the public to challenge government decisions. Pateman described this as the ‘protective role of participation, which aims to defend the individual from arbitrary decisions by elected leaders’.<sup>90</sup>

<sup>81</sup> Elwood, above n 18.

<sup>82</sup> Ibid 263.

<sup>83</sup> Susan Fainstein, ‘New Directions in Planning Theory’ (2000) 35(4) *Urban Affairs Review* 451.

<sup>84</sup> Gilbert Herbert, ‘The Neighbourhood Unit Principle and Organic Theory’ (1963) 11(2) *Sociological Review*, 165.

<sup>85</sup> Alison Ravetz, *Remaking Cities: Contradictions of the Recent Urban Environment* (Croom Helm, 1980).

<sup>86</sup> Peter Hall, *Urban and Regional Planning* (David & Charles, Newton Abbot, 1975).

<sup>87</sup> Marshall, above n 6.

<sup>88</sup> Patrick Geddes, *Cities in Evolution: An Introduction to the Town Planning Movement and to the Study of Civics* (Harper Torchbooks, 1968).

<sup>89</sup> Lucas, above n 7, 249.

<sup>90</sup> Pateman, above n 16, 14.

However, since the 1970s, courts and tribunals have moved from having a merely 'protective' role, towards being considered an important arena for public discourse about environmental and land use planning decisions.<sup>91</sup> The potential for public participation through the courts and other dispute resolution bodies has increased dramatically since the ideology of public participation began to develop. Thus, McAuslan concluded that 'the openness that has characterized the planning system since the mid [19]50s has both been a cause of and stimulated by judicial involvement.'<sup>92</sup> Public access to such an 'outside agency'<sup>93</sup> remains a central element of the ideology of public participation.

The idea of dispute resolution as an element of the ideology of public participation also extends to resolution techniques outside of traditional adversarial approaches. The popularity of extra-curial approaches has increased along with the widespread disenchantment with the use of litigation or political action as a means of public participation to resolve environmental disputes.<sup>94</sup> For example, the concept of Environmental Dispute Resolution, as conceived by Bingham, comprises 'a variety of approaches that allow the parties to meet face to face to reach a mutually acceptable resolution of the issues in a dispute or potentially controversial situation.'<sup>95</sup> This might involve negotiation, mediation or facilitation, but excludes litigation or arbitration on the basis that these involve an imposed determination, rather than being based on the achievement of a consensus between the parties. However, at the same time as EDR was proposed, Wald warned that such private, non-binding settlements avoid a proper public consideration of the public interest in environmental planning issues that might form the basis for future decision-making.<sup>96</sup> The courts, therefore, also provide an important vehicle for the enforcement of planning policies and decisions made through the democratic process, with public access to the courts constituting a vital element in safeguarding public environmental interests.<sup>97</sup>

### III CASE STUDIES IN IDENTIFYING EXPRESSIONS OF THE IDEOLOGY OF PUBLIC PARTICIPATION IN PLANNING LAW AND POLICY

The foregoing discussion deconstructed the ideology of public participation in planning law and policy into four constituent 'ideas' and presented the ideology as one concerned with the expression of democracy and justice through the core elements of democracy, devolution, deliberation and access to dispute resolution. The following discussion will apply this definition to two contemporary examples of significant planning law reforms in comparable international jurisdictions, to demonstrate how the four 'ideas' comprising the ideology of public participation in

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<sup>91</sup> The potential for an increased curial role in environmental and planning policy was identified and discussed in Joseph Sax, *Defending the Environment: A Strategy for Citizen Action* (Vintage Books, 1970).

<sup>92</sup> Patrick McAuslan, 'The Role of Courts and Other Judicial Type Bodies in Environmental Management' (1991) 3(2) *Journal of Environmental Law* 195, 200.

<sup>93</sup> Ibid.

<sup>94</sup> Hal Wooten, 'Environmental Dispute Resolution' (1993) 15(1) *Adelaide Law Review* 35.

<sup>95</sup> Gail Bingham, *Resolving Environmental Disputes: A Decade of Experience* (Conservation Foundation, 1986).

<sup>96</sup> Patricia Wald, 'Negotiation of Environmental Disputes: A New Role for the Courts' (1985) 10 *Columbia Journal of Environmental Law* 1.

<sup>97</sup> Donald Anton, 'Increasing Public Participation in Victoria's Environmental Laws: Part 2' (2000) 51 *Property and Environmental Law Bulletin* 8.

planning law and policy can help to identify whether rhetorical commitments by governments and planning administrators to the cause of public participation are reflected in reality. The two places selected for analysis — England, UK; and NSW, Australia — were chosen on the basis that: both jurisdictions have recently elected conservative governments that have commenced significant planning reforms in the past year; both jurisdictions have a shared legal and political system; both jurisdictions have a common heritage in the development of their respective planning systems within the context of a national framework — the UK Government in the case of England, and the Australian Government in the context of NSW; and, finally, both of these governments have explicitly championed the importance of the ideology of public participation as a guiding principle of their planning law reforms.

#### A *The Ideology of Public Participation in the English Planning Law Reforms*

English planning law is based on the *Town and Country Planning Act 1947* (UK), which established a system of plan-making and development control through a land use planning approach which introduced a requirement for planning permission in order to undertake land development. A hierarchy of land use plans developed over time, so that by the time of the election of the new Coalition Government in 2010, the planning system comprised the following instruments:

- Planning Policy Statements — along with their predecessor, Planning Policy Guidance, these are non-legislative policy directives from the UK Government, dealing with a range of policy issues in land use planning that must be considered in the preparation of spatial plans;<sup>98</sup>
- Regional Spatial Strategies — regional policy documents outlining the directions for growth and development within each of nine distinct regions into which England was divided by the *Regional Development Agencies Act 1998* (UK); and
- Local Development Frameworks — the consolidated policies regulating the development and use of land within the jurisdiction of a local planning authority (generally the relevant District Council).<sup>99</sup>

The Coalition Government, elected in 2010, promised significant changes to the structure of the planning system to facilitate greater construction and development, while devolving power over planning decisions to local communities.<sup>100</sup> Planning Policy Statements and Guidance have been replaced by a single National Planning Policy Framework (‘NPPF’) document in order to ‘radically reduce the volume of national policy’.<sup>101</sup> Regional Spatial Strategies have been abolished on the basis that they were a ‘bureaucratic and undemocratic tier of regional planning’.<sup>102</sup>

<sup>98</sup> While non-legislative, Planning Policy Statements and Guidance must be considered in the creation of Regional Spatial Strategies: see *Planning & Compulsory Purchase Act 2004* (UK) s 5(3)(a); and plans controlling local development: see *Planning & Compulsory Purchase Act 2004* (UK) ss 19(2)(a) and 62(5)(a).

<sup>99</sup> The contents of a Local Development Framework are prescribed in the *Planning & Compulsory Purchase Act 2004* (UK) s 15.

<sup>100</sup> UK Conservative Party, ‘Open Source Planning Green Paper’ (Policy Green Paper No 14, 2010) 4.

<sup>101</sup> John S Brearley, ‘What’s Wrong With Planning — And is it About to be fixed? A Crie de Coeur’ (2012) 5 *Journal of Planning & Environmental Law* 535.

<sup>102</sup> UK Conservative Party, above n 100, 5.

As the creation of the NPPF and the abolition of the Regional Spatial Strategies have significantly reduced the role of the central government in planning, the statutory reforms introduced by the *Localism Act 2011* (UK) have elevated the planning powers of local government and local communities. Councils have been given a ‘general power of competence, so that local government assumes the same legal capacity as a person to do anything that is not specifically prohibited.’<sup>103</sup> Councils are also empowered to choose how they will operate their own affairs, and are given more autonomy in drafting local planning documents and penalising unauthorised development. Local communities, represented by a parish council or neighbourhood forum, are empowered to draft a ‘neighbourhood development plan’ to prescribe local land use for the purpose of development control.<sup>104</sup> Local community organisations are also given the ‘right to build’ local development via a truncated approval process, provided local community support can be demonstrated through a local referendum.<sup>105</sup> Local communities also receive powers to devise a list of community assets on land (such as a local historic house, a church or a pub), for which the community will receive a right to ‘bid’ to purchase any of these assets should they be offered for sale.

The political rhetoric surrounding the reforms to English planning law is an emphatic endorsement of the ideology of public participation. As the Secretary of State for Communities and Local Government asserted in his introduction to the original Bill in the UK Parliament:

The Bill will reverse the centralist creep of decades and replace it with local control. It is a triumph for democracy over bureaucracy. It will fundamentally shake up the balance of power in this country, revitalising local democracy and putting power back where it belongs, in the hands of the people.<sup>106</sup>

The idea of democracy as an element of the ideology of public participation is certainly evident in the new powers for local residents to create their own local development plans; to propose and build local development under a streamlined process of development assessment; and to identify land of special importance to the local community, along with special rights to purchase this land should it be offered for sale. All of these rights will involve the application of citizen-initiated referenda — a well-established expression of direct democracy.<sup>107</sup> However, these rights must be considered in the light of the NPPF, which provides that ‘[a]ll plans should be based upon and reflect the presumption in favour of sustainable development, with

<sup>103</sup> *Localism Act 2011* (UK) s 1(1).

<sup>104</sup> See *Localism Act 2011* (UK) s 116, and sch 9, which makes consequent amendments to the *Town and Country Planning Act 1990* (UK), outlining how ‘neighbourhood forums’ are constituted and how ‘neighbourhood development plans’ are created.

<sup>105</sup> The relevant local council must conduct a referendum, where a petition calling for a referendum in relation to a defined area is signed by at least 5% of electors in that area and, provided that the issue subject of the referendum is local, not vexatious and not contrary to law.

<sup>106</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 17 January 2011, col 558 (Eric Pickles).

<sup>107</sup> For an overview of the development and application of the concept of the citizens’ initiative, see Matt Qvortrup, *Supply Side Politics, How Citizens’ Initiatives Could Revitalize British Politics* (London, Centre for Policy Studies, 2007).

clear policies that will guide how the presumption should be applied locally'.<sup>108</sup> New participatory rights to local councils also need to be read in light of s 110 of the *Localism Act 2011* (UK), which imposes a 'duty to co-operate in relation to planning of sustainable development'. This section requires every local authority to 'engage constructively, actively and on an ongoing basis' in plan-making that can impact beyond local boundaries and have an impact on development or strategic infrastructure across other planning areas. The Secretary of State is empowered to provide guidance on how the duty to co-operate is to be undertaken.<sup>109</sup> So, while local government and local citizens are given increased rights to participate, the overall narrative in which such participation might occur is strongly directed by the central government.

The idea of deliberation can be seen at work in the provisions of the *Localism Act 2011* (UK) that amend planning law to provide strengthened rights of notice and comment to local residents in the vicinity of proposed development.<sup>110</sup> The existing duty of developers to 'publish' a statement outlining how the local community will be consulted about the proposed development has also been strengthened by specifying that such publication must 'make the statement available for inspection by the public in a way that is reasonably convenient for people living in the vicinity of the land'.<sup>111</sup> The idea of devolution is strongly expressed in the move away from national intervention in planning law; the abolition of Regional Spatial Strategies (which were prepared by regional bodies not subject to direct election); and by the strengthening of powers given to local planning authorities. However, Le-Las has argued that providing more autonomy to local councils to determine how to run their own affairs could actually reduce participation and transparency, as councils are not simply liberated from accountability to the central government, but also from the interests of local residents.<sup>112</sup> The fact that the *Localism Act 2011* (UK) binds local planning authorities to the presumption in favour of sustainable development and to a duty to cooperate with central authorities under the 'guidance' of the Secretary of State, means that 'its provisions retain considerable national hegemony over local decision making'.<sup>113</sup>

The idea of dispute resolution (providing recourse to an independent and impartial appellate body in planning disputes) has never been strongly expressed in English planning law, which has traditionally promoted the notion that a landowner should be presumed to have the right to develop his or her land.<sup>114</sup> Appeals by an applicant,

<sup>108</sup> UK Department for Communities and Local Government, *National Planning Policy Framework* (March 2012), 4 [15].

<sup>109</sup> See *Planning and Compulsory Purchase Act 2004* (UK) s 33A(7), inserted by *Localism Act 2011* (UK) s 110.

<sup>110</sup> See *Localism Act 2011* (UK) s 122, which inserts (inter alia) new sections 61W and 61X into the *Town and Country Planning Act 1990* (UK) to require a developer to advertise the proposed development 'in such manner as the person reasonably considers is likely to bring the proposed application to the attention of a majority of the persons who live at, or otherwise occupy, premises in the vicinity of the land', and then to 'have regard to' any submissions received.

<sup>111</sup> See *Localism Act 2011* (UK) s 134.

<sup>112</sup> Wendy Le-Las and Emily Shirley, 'Does the Planning System Need a "Tea-Party"?' (2012) 3 *Journal of Planning Law* 242.

<sup>113</sup> Antonia Layard, 'The Localism Act 2011: What is "local" and How do we (legally) Construct it?' (2012) 14(2) *Environmental Law Review* 134.

<sup>114</sup> For the presumption in favour of development, see Brearley, above n 101, 538-539.

against a refusal or failure by a planning authority to grant planning permission, have traditionally been made to the Planning Inspectorate, which, as a public service agency, cannot be said to be independent from government in the same way as a judicial body is. Despite long-standing calls for the introduction of third-party merit appeals,<sup>115</sup> the English planning reforms fail to strengthen the weak expression of the idea of dispute resolution as an element of the ideology of public participation in planning law and policy.<sup>116</sup>

While the recent reforms to English planning law appear strongly based on the ideology of public participation, an analysis of the expression of each of the ideas of democracy, deliberation, devolution and dispute resolution in the reforms indicate that the reality is more complex. Some parts of the reforms certainly increase rights of participation, but the wider context of a duty to cooperate with the national government and a presumption in favour of development point to the continuing dominance of the ideologies of private property and public interest in planning law.

### B *The Ideology of Public Participation in the NSW Planning Law Reforms*

NSW planning law shares a similar heritage to English planning law. The *Environmental Planning & Assessment Act 1979* (NSW) was inspired by the English *Town and Country Planning Act 1947* (UK), and, like English planning law, moved progressively from a prescriptive zonal land use planning approach to a more flexible and strategic place-based planning model. Over recent years, NSW planning law has become increasingly complex and cumbersome, and has been perceived to minimise opportunities for public participation.<sup>117</sup> As in England, the new Coalition Government in NSW was elected in 2011, promising significant changes to planning law and policy in order to better integrate planning with infrastructure provision to enhance construction and development and to ‘return local planning powers to local communities’.<sup>118</sup> The Government committed to bring new comprehensive planning legislation before parliament within two years of assuming government (i.e. by 2013).<sup>119</sup> An Issues Paper into the proposed legislation was released in December 2011, with the findings of an Independent Review Panel and a review of best practice in international planning systems released concomitantly with a Green Paper outlining the contents of the new legislation in July 2012.

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That the presumption was a matter of non-legislative policy, and not of law, see the reasoning of Lord Hoffmann in *Tesco Stores v Secretary of State for the Environment* [1995] JPL 581, 595.

<sup>115</sup> See, eg, Michael Purdue, ‘The Case for Third Party Planning Appeals’ (2001) *Environmental Law Review* 83; Malcolm Grant, *Final Report on the Environmental Court Project* (UK Department of the Environment, Transport and the Regions, 2000).

<sup>116</sup> The only exception to this observation is the modest increase in rights to seek compensation for injurious affectation from the effects of development: see *Localism Act 2011* (UK) s 135.

<sup>117</sup> See, eg, Robert Ghanem, ‘Amendments to the NSW Planning System: Sidelining the Community’ (2008) 14(2) *Local Government Law Journal* 140; Zada Lipman and Robert Stokes, ‘The Technocrat is Back: Environmental Land-use Planning Reform in New South Wales’ (2008) 25 *Environmental and Planning Law Journal* 305; Amanda Kiely, ‘The Effects of the New South Wales Planning Reforms on Developers, Public Participation, and the Role of the Land & Environment Court’ (2009) 15(2) *Local Government Law Journal* 107.

<sup>118</sup> NSW Liberals and Nationals, ‘Putting the Community Back into Planning’ (2009), 1.

<sup>119</sup> The Hon Brad Hazzard MP, Minister for Planning & Infrastructure, ‘Overhaul of the Planning System Heralds a New Era in NSW’ (Media Release, 12 July 2011).



The central object of the new planning legislation will be the ‘achievement of sustainable development’ in accordance with three main tenets:

- the focus of the system should be on robust, evidence-based strategic planning that promotes economic development and protection of the environment;
- planning decisions should be devolved to the appropriate level of governance; and
- the public has a right to be involved in planning decisions that affect their community, supported by open access to all relevant data.<sup>120</sup>

In the development assessment phase, the Green Paper suggests the new legislation outline clear, simple and timely assessment processes, with a presumption that development proposals which accord with the relevant strategic plans should be approved.<sup>121</sup>

The Green Paper proposes a new hierarchy of environmental land use plans and policies to replace the existing 48 State Environmental Planning Polices (‘SEPPs’), 28 deemed SEPPs and 28 Ministerial Directions issued by the NSW Government, along with more than 300 Local Environmental Plans and thousands of Development Control Plans prepared by local councils. The new planning system will be regulated according to the following documents:

- Ten to twelve NSW Planning Policies — non-legislative policy statements from the NSW Government on major planning issues such as housing supply and affordability; employment; biodiversity conservation; agricultural resources; mining and petroleum extraction; coastal management; retail development; tourism; regional development; and infrastructure.<sup>122</sup>
- Regional Growth Plans — policy documents outlining the expectations of the NSW Government for the growth and development of specific regions of NSW over a twenty-year timeframe.
- Sub-regional Delivery Plans — spatial land use plans prepared by Regional Planning Boards detailing the distribution of development targets and the priority growth areas identified in Regional Growth Plans.
- Local Land Use Plans — the consolidated policies regulating the development and use of land within each local government area.<sup>123</sup>

As in England, the political language surrounding the NSW planning law reforms forcefully champions the ideology of public participation, with the Green Paper

<sup>120</sup> Robert Stokes, ‘Green Paper Unveils New Direction for Planning Law in NSW’ (2012) 27(8) *Australian Environment Review* 248.

<sup>121</sup> NSW Government, ‘A New Planning System for NSW’ Green Paper (July 2012), 18.

<sup>122</sup> Ibid 32.

<sup>123</sup> Each Local Land Use Plan will be prepared by the relevant local council and will contain four elements: a strategic vision (emulating the Community Strategic Plans prepared under the *Local Government Act 1993* (NSW) s 402; a Spatial Land Use Plan; an explanation of infrastructure and services required to support the strategic planning vision; and specific Development Guidelines and a process for monitoring performance against the objectives of the Plan. See NSW Government, above n 121, 38–41.

emphasising '[c]ommunity participation is at the centre of the new planning system'.<sup>124</sup>

The idea of democracy as an expression of the ideology of public participation in planning law is embodied in the concept of a 'Public Participation Charter', which will be contained in the new planning legislation and will prescribe standards of public participation in plan-making and development assessment, consistent with the NSW Government's priority of ensuring 'a strong democracy that is accountable to its community'.<sup>125</sup> Elsewhere, however, the NSW planning reforms focus on the importance of representative democracy, rather than direct democracy, with land use planning being subject to strong central control, such as the requirement that all plans be prepared in co-ordination with the State Planning Policies, which are to be issued by the NSW Cabinet.

The idea of deliberation is strongly expressed in the NSW planning reforms, with a clear emphasis on involving the public (loosely defined as the community, local government, environmental groups, stakeholders and industry<sup>126</sup>) in strategic planning. Unlike the present legislation, community consultation will be required at all levels of plan-making and clear feedback on issues raised must be provided before decisions on strategic planning are finalised.<sup>127</sup> There is strong support for the use of new technology in facilitating public participation, including the use of new media to enable interactive participation via hardware devices and e-planning tools.<sup>128</sup> New land use zones will also be created to provide regional boards and councils with an expanded range of options for expressing economic and community aspirations in spatial land use planning.<sup>129</sup> However, a clear direction of the reforms is to promote increased public participation at the strategic planning stage so that the community might 'participate in formulating the vision for a region or subregion', rather than at 'later stages', where participation should be 'simpler and more focussed'.<sup>130</sup> So, while the idea of deliberation is strongly expressed in the planning law reforms, opportunity for conversation and dialogue over plan-making and development assessment may pass before a local community is activated on a particular proposal. By giving expression to the idea of deliberation earlier in the planning process, opportunities for genuine deliberation might be thwarted, rather than created.

<sup>124</sup> Ibid 5.

<sup>125</sup> Ibid 21.

<sup>126</sup> Ibid 8.

<sup>127</sup> Under the *Environmental Planning & Assessment Act 1979* (NSW), a process of public participation is mandated for the creation of Local Environmental Plans, but not for SEPPs. See *Environmental Planning & Assessment Act 1979* (NSW) s 57(1) and s 38 respectively.

<sup>128</sup> See Tim Moore and Ron Dyer, 'Recommendations of the NSW Planning System Review, Volume 1 — Major Issues' (May 2012), 130–131 and 145; and NSW Government, above n 121, 21. The City of Sydney has recently developed a phone app to enable digital participation in local planning: see Catherine Armitage, 'Council Uses Phone Apps to Give Power to the People', *Sydney Morning Herald* (Sydney), 20 October 2012.

<sup>129</sup> So, for example, the desires of a residential community to ensure sympathetic development in their local area could be met through a 'Suburban Character Zone', focused on preserving residential amenity by specifically excluding medium and high density developments. Conversely, the economic development aspirations of a local business community could be supported by an 'Enterprise Zone' with minimal development control and investment attraction mechanisms. See NSW Government, above n 121, 42–43.

<sup>130</sup> Ibid 15.

The idea of devolution features prominently in government pronouncements on planning law reform, with a clear commitment to ‘return planning powers to local communities’.<sup>131</sup> A central principle for reform of the planning legislation is that ‘planning decisions should be made by the level of governance capable of doing so’.<sup>132</sup> Arguably, however, the Green Paper makes a less certain commitment to the principle of subsidiarity in planning law than the existing legislation, an objective of which is ‘to promote the sharing of responsibility for environmental planning between the different levels of government in the state’.<sup>133</sup> The ‘levels of governance’ referred to in the Green Paper include local governments, but also include new Regional Planning Boards, which will include representatives of the community, stakeholders, relevant local councils and NSW Government agencies, but which will not be democratic bodies.

The idea of dispute resolution as an expression of the ideology of public participation has traditionally been a strong feature of NSW planning law and policy. The creation of the Land & Environment Court of NSW in 1980, general provisions for open standing in environmental and planning laws, and a strong framework for facilitating public inquiries and independent third party decision-making has provided a robust framework for the resolution of planning disputes.<sup>134</sup> The Green Paper confirms that appeal rights to the Land and Environment Court will be maintained, and that decision-making on development applications will be delegated to independent expert panels. State and regionally significant development will continue to be assessed by the pre-existing expert planning panels,<sup>135</sup> while local development may be delegated to local expert panels in order to depoliticise decision-making on planning proposals. Panels can provide an important lower cost avenue for public participation via an expert-led process into the merits of a particular development application, and, as such, can be a useful expression of the idea of dispute resolution. The continuation of the role of the Court through traditional litigation and alternative dispute resolution, and of a system of independent expert panels, provided these panels continue to hear the views of interested communities, indicate that the idea of dispute resolution continues to be a clear expression of the ideology of public participation in NSW planning law and policy.<sup>136</sup>

#### IV CONCLUSION

Together with the ideology of private property and the ideology of public interest, the ideology of public participation is a foundational element of contemporary planning

<sup>131</sup> Ibid 55.

<sup>132</sup> Ibid 18.

<sup>133</sup> *Environmental Planning & Assessment Act 1979* (NSW) s 5(b).

<sup>134</sup> In relation to the history and operation of the Land & Environment Court, see Brian Preston, ‘Operating an Environmental Court: The Experience of the Land & Environment Court of New South Wales’ (2008) 25(6) *Environmental & Planning Law Journal* 385. In relation to the early development of public inquiries under the *Environmental Planning & Assessment Act 1979* (NSW), see Peter McEwen, ‘Commissions of Inquiry’ (1994/95) 35 *Environmental Law* 8.

<sup>135</sup> The Planning Assessment Commission and the Joint Regional Planning Panels.

<sup>136</sup> However, the recent decision by the NSW Government to cut public funding to the Environmental Defender’s Office of NSW, a public interest advocacy body that has provided legal advice and undertaken litigation in relation to a range of land use planning issues, is inimical to the idea of facilitating dispute resolution as an expression of public participation.

law and policy. This article has presented a detailed analysis of the ideology of public participation, deconstructed into its constituent 'ideas' of democracy, deliberation, devolution and dispute resolution. This analysis was then applied as a framework to discover the extent to which the ideology of public participation is actually evident in major planning law and policy reforms across two international jurisdictions. While both jurisdictions ostensibly endorse the ideology of public participation, an assessment of the reforms against each of the ideas of democracy, deliberation, devolution and dispute resolution reveal that the true picture is somewhat different. The English reforms strongly display the ideas of 'democracy' and 'devolution', with elements that demonstrate the idea of 'deliberation'. However, they only weakly reflect the idea of 'dispute resolution'. Conversely, the NSW reforms clearly express the ideas of 'dispute resolution' and 'deliberation', but do not provide strong legal expression of the ideas of 'democracy' and 'devolution'.

The political rhetoric about public participation in planning law is therefore stronger than the reflection of the central ideas that comprise public participation in planning laws themselves. This is problematic for governments, as it can raise community expectations and can even leave room for accusations of venality and insincerity. However, the fact that governments are making increasingly bold pronouncements about the importance of public participation suggests that lawmakers are aware of the power of actively listening and of involving local communities in plan-making and development assessment. If nothing else, providing strong rhetorical support to the ideology of public participation informs the culture of planning administration against the competing interests of private property and government policy.