PUBLIC PARTICIPATION IN PLANNING: LESSONS FROM THE GREENBANS

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(2013) 30 *Environmental and Planning Law Journal* 90
[2017] *UNSWLRS* 87

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Published in: *Environmental and Planning Law Journal* (2013), vol 30, pp. 90-105.

Public participation in planning: Lessons from the green bans

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This article reflects on the extent to which the green bans have influenced the framework for public participation in planning in New South Wales. It critically examines claims that the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) was best practice at the time it was passed, thus challenging suggestions that current planning problems should be attributed to amendments made since its enactment. While the green bans were a catalyst for the introduction of the EPA Act, the relationship between the bans and the legislation is more complex than generally understood. This article argues that the EPA Act took very little from the green ban movement, and as a result embedded an adversarial approach to planning that remains at the heart of current problems in New South Wales.

INTRODUCTION

The framework for planning in New South Wales is currently being overhauled. With widespread consensus that the system is failing on social, economic and environmental grounds, the government is promising to introduce a new planning framework that "places people and their choices at the heart of planning decisions about their future".[1] This article reflects on the legacy of the green bans for planning in New South Wales, and challenges the general understanding of the influence of the green ban movement on the planning framework, drawing lessons for the current reform process.

Contemporary concerns about planning in New South Wales in many ways echo those that led to the drafting of the existing legislation back in the 1970s. There are clear parallels between the economic context and the political drivers for reform, and with the focus on public participation as the area most in need of change. One notable exception is the legislative background. In the 1970s, planning was regulated in an ad hoc manner under the *Local Government Act 1919* (NSW). Today, planning is regulated under the *Environmental Planning and Assessment Act 1979* (EPA Act). While the *Local Government Act* was never intended to provide a comprehensive system for planning, the EPA Act was informed by relatively developed planning theory and practice.

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[1] New South Wales Government, *A New Planning System for NSW – Green Paper* (2012) p 2 – Minister's Foreword.

In the 1970s, the impetus for reform was more stark than today. Communities were not merely complaining about the planning system, but directly blocking new developments. Residents were uniting with unions to protect parks, heritage buildings and affordable housing through strikes known as "green bans". Such activism was unprecedented in New South Wales and internationally, and is widely recognised for its role in the creation of a new planning system. Both the green bans and the original EPA Act are fondly remembered in New South Wales, with an almost folkloric status among community and conservation groups. There is a general consensus that the EPA Act was good law when it was passed, and that the amendments are to be blamed for the poor relationships between developers, communities, councils and the State government, and hence for causing the economic, social and environmental problems that make reform necessary today.

This article suggests a counter-narrative. Rather than seeing the problems with the New South Wales planning framework as arising from amendments to the legislation, it argues the following: first, that the EPA Act in fact embedded an adversarial approach that has been a barrier to effective planning in New South Wales; secondly, that the association of the EPA Act with the green bans has contributed to a nostalgic understanding of the law, and the tendency among contemporary commentators to attribute the failings of the planning system to amendments made after the passage of the EPA Act has been a significant barrier to effective planning in New South Wales; and, thirdly, that a critical evaluation of the original EPA Act and its relationship with the green bans is necessary. Far from diminishing the achievements of the green bans, such an evaluation in fact supports a more positive understanding of the movement.

The first section outlines the drivers for reform of the planning system in New South Wales today and in the 1970s, before describing the framework established in the EPA Act and the way this is generally perceived in New South Wales. Section two gives an overview of the green ban movement, from the first ban at Kelly's Bush to the objectives and processes developed as the movement became more established in the mid 1970s. Section three examines the broader impacts of the green bans, including its influence on the development of new planning legislation. The final section discusses the relationship between the content of the EPA Act and the green bans, and reflects on how this has shaped the culture of planning in New South Wales.

REFORM OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 (NSW)

There are many parallels – political, economic, social and environmental – between the current reform process and the development of the EPA Act. Today, as in the 1970s, public participation is the key issue driving reform. This time, however, the issue is not that the legislation failed to provide for public participation, but that the framework it established has failed to live up to expectations.

The decision by the O'Farrell Government to draft new planning laws, much like that of the Wran Government in the 1970s, follows years of incremental change. Over 150 pieces of amending legislation have been passed since the enactment of the EPA Act in 1979, many introducing multiple changes. Provision for planning under the *Local Government Act* had similarly been the subject of multiple amendments by the 1970s. The need for more fundamental reform was a major issue in the 2011 election, and was also a significant issue

in the change of government in 1976. In both cases, the new governments promised to deliver radical reforms.

In 2012, as in 1979, reform of the planning framework has been identified as an important means to address housing shortages and poor economic performance in New South Wales. Efforts to stimulate growth and remove barriers to development were key objectives in 1979, with New South Wales struggling financially after the end of the long boom of the 1960s and early 1970s. Rebuilding the economy is again a priority, with another boom over and New South Wales performing badly on a range of benchmarks, particularly housing delivery, housing affordability, transport, and infrastructure costs.[2]

Today, as in the 1970s, public participation is at the heart of reform efforts. Provisions for public participation are the subject of intense criticism from almost all stakeholders.[3] Communities regularly complain about their inability to influence developments that impact on them,[4] and surveys by the Productivity Commission reveal the proportion of capital city residents agreeing that the New South Wales State government was effective in planning to be the lowest in Australia.[5] The New South Wales planning system is seen by business as the most difficult to operate under,[6] and developers complain that the system is too slow, that it imposes unreasonable burdens and that it is pushing investment out of New South Wales.[7] The situation in the 1970s was much the same: councils complained about delays and interference in local matters by the State government; developers complained about delays in the decisions; community groups complained about excessive secrecy and the inaccessibility of the State Planning Authority.[8]

As in the 1970s, there is now broad consensus that the legal framework for planning in New South Wales should be rewritten.[9] Less like the 1970s, however, is the nature of the legislation under review. The *Local Government Act* never made comprehensive provision for planning, and issues such as conservation and public participation were far removed from its objectives. The rudimentary planning framework provided in that Act emerged

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[2] Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* (2011); New South Wales Government, n 1.
[3] EDO NSW, *Reconnecting the Community with the Planning System* (2010); EDO NSW, *The State of Planning in NSW with Reference to Social and Environmental Impacts and Public Participation* (2010); Urban Development Institute of Australia (NSW), Submission to the NSW Planning Review Issues Paper – *The Way Forward for Planning in NSW?* (March 2012).
[4] EDO NSW (2010b), n 3.
[5] In New South Wales, the proportion was 14%, compared to between 17-22% in other States/Territories: Productivity Commission, n 2, p XXXVIII.
[6] Productivity Commission, n 2, p XXXVIII.
[7] New South Wales Government, *Feedback from Practitioner and Community Consultations* (Department of Planning and Infrastructure, 2012), http://www.planning.nsw.gov.au/PolicyandLegislation/ANewPlanningSystemforNSW/ConsultationSessionFeedback/tabid/598/language/en-US/Default.aspx viewed 8 January 2013; New South Wales Government, n 1, p 23; Moore T and Dyer R, *The Way Ahead for Planning in NSW, Recommendations of the NSW Planning System Review, Volume 1 – Major Issues* (NSW Government, 2012); Moore M, "Developers Use Building Data to Drive Big Changes", *Sydney Morning Herald* (10 July 2012).
[8] George M, "Towards a New Planning System: A Review of Proposals" in Leichardt Planning Forum and the Civic Design Society of UNSW, *The Inner Suburbs – Towards a New Planning System* (held at Balmain Town Hall, 5 April 1975).
[9] New South Wales Government, n 1; New South Wales Government, *The New South Wales Planning Framework* (Legislative Council Standing Committee on State Development, 2009).

over time through a number of amendments. Since 1945, councils had had the power to prepare local planning schemes and to assess development proposals. However, implementation was slow, with many councils relying on interim controls instead.[10] Where schemes were prepared, exhibition requirements were limited.[11] Only landowners could object to proposals, and the Minister then had wide discretion to alter plans before bringing them into force. Notification of development proposals was generally not required, though from 1970 notification of applications for apartment buildings was necessary. Scope for appeals was limited, with no third party appeal rights and no independent tribunal comparable to that operating in other States.[12]

With the development of planning as a profession and a public concern during the 20th century, the decision to replace that framework with tailored legislation in the 1970s was unsurprising. Unlike its predecessor, the EPA Act was intended to make comprehensive provision for planning. It created frameworks for strategic planning at State, regional and local levels, including requirements for community consultation and environmental studies to inform local and regional planning. It established a regime for development assessment, with particular requirements for notification, consultation and review regarding approvals of developments likely to have significant impacts. The EPA Act also introduced new regimes for environmental impact assessment and for review and appeals, including merits review and appeals by third parties.

There is a remarkable degree of consensus among commentators that the EPA Act was good legislation at the time it was passed. The EPA Act has been described as groundbreaking, innovative and forward-looking by a wide range of commentators, including judges,[13] community and conservation groups,[14] developers,[15] academics,[16] activists[17] and Members of Parliament,[18] as well as both the previous[19] and current State governments.[20] Consistent with this general understanding of the EPA Act, problems with the current planning system in New South Wales tend to be attributed not to the framework established in the EPA Act, but to the amendments made to it since 1979.[21]

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[10] George, n 8.
[11] Roddewig R, *Green Bans: The Birth of Australian Environmental Politics* (Hale & Iremonger, 1978) p 54.
[12] Roddewig, n 11, p 56.
[13] Stein P, "21st Century Challenges for Urban Planning: The Demise of Environmental Planning in New South Wales" in Gleeson BJ and Hanley P (eds), *Renewing Australian Planning: New Challenges, New Agendas* (Urban Research Program, Australian National University, 1998) p 74.
[14] EDO NSW (2010b), n 3, p 38.
[15] Urban Development Institute of Australia (NSW), n 3, p 8.
[16] Lipman Z and Stokes R, "The Technocrat is Back: Environmental Land-use Planning Reform in New South Wales" (2008) 25 EPLJ 305 at 305; Ryan P, "Court of Hope and False Expectations: Land and Environmental Court 21 Years On" (2002) 14 *Journal of Environmental Law* 301 at 302.
[17] Mundey J, "From Grey to Green"*, Australian Left Review* (Issue 108, December 1988/January 1989) p 18.
[18] New South Wales, *Debates,* Senate, 21 June 2011 (David Shoebridge).
[19] New South Wales Government, *Improving the NSW Planning System: Discussion Paper* (Department of Planning, 2007) p 11.
[20] New South Wales Government, n 1, p 13.
[21] Lipman and Stokes, n 16; EDO NSW (2010a), n 3; Ryan P, "Did We? Should We?: Revisiting the 70's Environmental Law Challenge in New South Wales" (2001) 18 EPLJ 561; Carr Y, "Does Pt 3A of the Environmental Planning and Assessment Act 1979 (NSW) Undermine the Objects of that Act?"

While the original EPA Act is recalled positively in New South Wales, most of its admiration has been attracted retrospectively. Back in 1979, praise, and claims regarding the revolutionary nature of the Act were rare outside of government. Wilcox, for example, argued in 1979 that the Bill was "totally unsatisfactory both in its content, its administration and in the form it takes".[22] A comparative study of Australian planning frameworks by Fogg in 1981 noted: "Some of the official propaganda for the New South Wales legislation tends to obscure the fact that only limited advances have been made."[23] Fogg found little innovation in the EPA Act, and preferred many elements of legislation passed earlier in other States.

Critiques of the legislation around the time of its passage were remarkably similar to those of today. Contemporary commentators raised concerns about the level of discretionary power given to the Minister, the inadequate provision for public participation in strategic planning and the adversarial approach to participation in development assessment.[24]

Favourable views of the EPA Act have thus developed with the passage of time. With each amendment, it could be argued, the original was itself improved. This begs the question: why has the EPA Act come to be remembered so warmly?

THE GREEN BANS

One explanation for the nostalgia around the EPA Act may be found amongst its recent praise, which frequently highlights the relationship between the EPA Act and the green ban movement.[25] The green bans were a high point for environmental activism in New South Wales and internationally – a movement that brought together diverse groups and achieved considerable successes in preserving areas, such as the Rocks, which are now highly valued parts of Sydney's heritage. The association of the EPA Act with the green bans may have helped to elevate its status, particularly among community and conservation groups. This link may also help to explain the lack of critical discussion of the regime established in the EPA Act for public participation.

(2007) 12 LGLJ 240; Ghanem R, "Amendments to the NSW Planning System – Sidelining the Community" (2009) 14 LGLJ 140.

[22] Wilcox M, "The Environmental Planning and Assessment Bill 1979: A Conceptual and Legal Framework" (paper presented at *Environmental Planning and Assessment Bill 1979: A New Era for Planning and Development in NSW*, Wentworth Hotel, Sydney, 11 June 1979).

[23] Fogg A, "Public Participation in Australia" (1981) 52 *Town Planning Review* 259 at 262.

[24] Fisher F, Comments delivered at the seminar on *Environmental Planning and Assessment Bill 1979 A New Era for Planning and Development in NSW* Wentworth Hotel, Sydney, 11 June 1979; Hort L and Mobbs M, *Outline of NSW Environmental and Planning Law* (Butterworths, 1979); Cole J, "Environmental Law and Politics" (1981) 4 UNSW Law Journal 55; New South Wales, *Debates*, Legislative Assembly, 15 November 1979 (Kevin Rizzoli).

[25] New South Wales, *Debates*, Senate, 10 October 2012 (Lee Rhiannon); Cook N, "Rethinking Public Participation: The Role of Non-experts in the Development of Third Party Objection and Appeal in the NSW Environmental Planning and Assessment Act (1979)" (paper presented at the *State of Australian Cities Conference*, Faculty of the Built Environment, UNSW, 29 November-2 December 2011); Conroy R, "Planning for Heritage Conservation and Management" in Thompson S and Maginn P (eds), *Planning Australia* (Cambridge, 2012); Gleeson B and Low N, "'Unfinished Business': Neoliberal Planning Reform in Australia" (2000) 18 *Urban Policy and Research* 7; Freestone R, "An Historical Perspective" in Thompson and Maginn, n 25.

The history and achievements of the green bans have been well-documented.[26] Drawing on that literature, this section outlines the origins, aims and approach of the green bans as a basis for reflection on the legacy of the green bans for planning law.

The first green ban was held in 1971, a time of rapid growth in Sydney. Older areas, particularly in the inner city, were quickly being redeveloped, and plans for high-rise towers, freeways and car parks promised much greater change.[27] Reflecting international trends toward greater environmental awareness and calls for greater civic participation, several groups formed in an effort to alter the course of this change.[28] These ranged from local resident action groups and heritage trusts, to State and national-level organisations, such as the New South Wales National Trust, the Nature Conservation Council and the Australian Conservation Foundation. Some were quite successful. The Paddington Society, for example, campaigned effectively to protect its terraces and open spaces from freeways and modernist redevelopment proposals. Such success was subject to political constraints and was highly variable, however: the legal framework provided limited scope for formal participation by the public beyond lobbying their elected representatives.[29]

At Hunters Hill, one group refused to accept these limited opportunities for participation in planning and joined with others to develop a new approach.[30] Calling themselves the "Battlers for Kelly's Bush", the group was comprised of 13 local women who were determined to preserve five acres of bushland that had been approved for development by AV Jennings. While strong community opposition and lobbying by the recently-formed Hunters Hill National Trust had helped secure the rejection of Jennings' original proposal, a revised plan was subsequently approved. The Battlers succeeded in making the bush an issue at the 1971 State election, but beyond this their lobbying was less successful. Inspired by Mary Campbell of the National Trust, who had advocated union involvement after the ACTU's earlier resolution to boycott drilling in the Great Barrier Reef,[31] the Battlers then began contacting unions for assistance.

The New South Wales Builders Labourers Federation (BLF) agreed to help. When the BLF informed Jennings that it would not work on the development at Kelly's Bush, Jennings responded that it would proceed with non-union labour. This changed, however, when the BLF then threatened to stop work on another Jennings project in North Sydney. Development of Kelly's Bush did not proceed.

Within weeks, the BLF was approached by other groups requesting green bans in other parts of Sydney.[32] A second ban was held to preserve a park at Eastlakes, followed by a

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[26] See in particular Roddewig, n 11; Burgmann M and Burgmann V, *Green Bans, Red Union: Environmental Activism and the New South Wales Builders Labourers' Federation* (UNSW Press, 1998); Mundey J, *Green Bans and Beyond* (Angus and Robertson, 1981).

[27] Pringle B, Mundey J and Owens J, "Social Displacement in the Inner Cities" in Australian Government Habitat Task Force, *National Report to Habitat, the UN Conference on Human Settlements* (1976).

[28] Lewi H, Nichols D, Goad P, Darian-Smith K and Willis J, "Regenerating Communities: The 1970s and Beyond" in Lewi H and Nichols D (eds), *Building Modern Australia* (UNSW Press, 2010); Nichols D, "'Boiling in Anger': Activist Local Newspapers of the 1960s and 1970s" (2005) 2 *History Australia* 1.

[29] Roddewig, n 11.

[30] Roddewig, n 11; Burgmann and Burgmann, n 26.

[31] Freestone R, *Urban Nation: Australia's Planning Heritage* (CSIRO, 2010) p 71.

[32] Roddewig, n 11.

third at the Rocks, now one of Sydney's most popular tourist destinations. Over 40 bans were held in total. Later bans protected affordable housing and heritage buildings in the city, Woolloomooloo, Darlinghurst, Kings Cross and Surry Hills, Aboriginal housing in Redfern, and open spaces including Centennial Park and the Royal Botanic Gardens. Large parts of Sydney were saved from freeway and high-rise construction plans, including areas in Ultimo, Pyrmont, Glebe, Annandale, Rozelle, Leichardt, Waterloo, Earlwood, Bankstown, Manly, Mascot and Matraville.[33] Buildings saved by the bans include the State Theatre, the Pitt St Congregational Church, and several bank buildings in Martin Place, as well as historic buildings in Bathurst, Wollongong and Newcastle.[34]

Far beyond its import in preserving bushland, the ban at Kelly's Bush was significant as an alliance between relatively affluent property owners and radical, working-class builders labourers. The BLF, whose activities had included preventing South Africa from playing at the SCG in protest of apartheid, were not one of the unions the Battlers first approached.[35] When the BLF offered to help their cause, there was some consternation among the Battlers about teaming up with such a radical group. Within the BLF, concerns had also been raised about assisting middle-class housewives. Union secretary, Jack Mundey, was a key figure in bridging the two groups, convincing BLF members to join with the argument that fights for higher wages and better conditions would be pointless if they lived in cities devoid of parks and denuded of trees.[36]

The BLF's engagement at Kelly's Bush reflected its growing interest in planning and wider social issues. From the mid-1960s, the union had been criticising the boom in office construction, predicting an oversupply of office space and calling instead for work on socially useful projects.[37] In 1970, the BLF executive had resolved to develop a "new concept of unionism" encompassing the principle of the social responsibility of labour.[38] In agreeing to help the Battlers for Kelly's Bush, the BLF required the group to demonstrate that their cause was broadly supported and not just about "a fortunate few who [wished to further] their own vested interest".[39]

The requirement for support beyond private interests was a key principle in future bans. Over the next few years, the BLF developed procedures to be used in determining whether to impose a green ban, including establishing an architecture and planning panel to review the merits of conservation.[40] The project had to be of a sufficient size, there had to be a sufficient number of people supportive of a ban, and the neighbourhood had to be supportive.[41] Resident Action Groups were consulted and their views given significant weight. In line with their philosophy that workers had a right to a say in the end result of

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[33] Burgmann M, "Green Bans Movement" in *Dictionary of Sydney* (2011).
[34] Burgmann M, "The Green Bans that Saved Sydney", *New Matilda* (19 July 2011).
[35] Freestone, n 31, p 257.
[36] Mundey, n 26.
[37] Burgmann, n 33.
[38] Burgmann, n 33.
[39] Mundey, n 26, p 81. This was done by holding a public meeting, which was attended by over 600 people.
[40] Roddewig, n 11, p 31.
[41] One example where the BLF determined not to hold a ban based on these criteria was the redevelopment of an old dairy in Vaucluse: only 50 people supported the ban, and the area was already well-provided with public open space. Roddewig, n 11, p 31.

their labour and whether it is in the best interests of the community, the union leaders also believed that residents had the right to a say in development that directly affects them.[42]

Green bans were not conceived as a long-term solution, and were not intended simply as a means to block development. Rather, by delaying projects, green bans were a means to put the community onto a footing where they could negotiate with developers and government decision-makers.[43] This tactic was very successful. In the Rocks, Glebe and Woolloomooloo, community groups were actively engaged in the preparation of development plans.[44] Plans were agreed on that were acceptable to local communities, incorporating heritage buildings, affordable housing, open space and medium-density development. The long-term success of these plans has since been recognised by business and government.[45]

Participation in the bans prompted many local residents to broaden their concerns beyond their own private interests. Mundey believed that action against developers and the State government would encourage middle-class communities to become more radical. Participants in the green bans formed new alliances, and went on to engage in wider issues. As Burgmann explains:

> [T]he ideas articulated so effectively in the green bans movement attracted people distant from any kind of left-wing milieu to… draw connections between their particular experience and wider social problems. Resident action groups broadened their focus beyond particularistic concerns and became involved in other social issues… such as low-cost housing, public transport, tenants' rights, and even prisoners' rights and urban Aboriginal land rights.[46]

The BLF members who conducted the bans were increasingly acting outside their own private interests. In 1971, the pace of development in Sydney was such that workers refusing jobs on one site would quickly find employment on another. This changed over the next couple of years. With the long boom coming to an end, participation in the green bans was increasingly damaging to the personal economic interests of union members. Recognising this, in 1973 Mundey coined the term “green ban” to distinguish these protests from “black bans”, which focused on workers’ interests.[47]

The green bans changed dramatically from the mid 1970s.[48] In 1975, following disputes between the New South Wales branch and federal council of the BLF, Mundey and 23 others were expelled from the union. Coming into power in a very different economic climate, and allegedly with support from developers,[49] new BLF secretary Norm Gallager set about reviewing the remaining bans in an effort to find employment for union members. It was also announced that no new bans would be imposed without approval from the federal council, and that the federal council would consult with other unions before granting such approval. The BLF would also require support from the National Trust, but Resident Action Groups and community wishes would cease to play any significant role.

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[42] Pringle et al, n 27, p 158
[43] Mundey, n 26, pp 82-84.
[44] Roddewig, n 11; Burgmann and Burgmann, n 26.
[45] Burgmann and Burgmann, n 26, p 201
[46] Burgmann, n 33.
[47] Mundey, n 26, p 105.
[48] Roddewig, n 11.
[49] Jakubowicz A**,** “The Green Ban Movement: Urban Struggle and Class Politics” in Halligan J and Paris C (eds), *Australian Urban Politics: Critical Perspectives* (Longman Cheshire, 1984) p 164.

Fundamental problems of land-use planning and political participation were set aside in favour of a narrow focus on heritage conservation. Neither Kelly's Bush nor the Rocks would have met the new criteria.[50]

THE GREEN BANS AND BROADER CHANGE

The influence of Sydney's green bans has been far-reaching, well beyond the particular freeways and high-rise buildings they prevented and the heritage buildings, open spaces and affordable housing they preserved.[51] The bans prompted the first federal engagement in urban affairs, with the establishment by the Whitlam Government of the Department of Urban and Regional Development.[52] A new Department for the Environment, a new Heritage Commission and a new National Parks and Wildlife Service were also introduced, as was legislation for environmental impact assessment (EIA), the *Environmental Protection (Impact of Proposals) Act 1974* (Cth).[53] Internationally, Paul Ehrlich praised the bans as the birth of urban environmentalism, and Petra Kelly was so inspired by her experience in Sydney that she established a new political party on her return to Germany, naming it the Greens.[54]

In New South Wales, the green bans are widely acknowledged for their role in reshaping the planning system.[55] In 1973, the Askin Government replaced the State Planning Authority with a new Planning and Environment Commission and established a Ministry for Planning and Environment. A lengthy consultation process was conducted on the planning system from 1974, and in 1976 draft legislation was introduced to Parliament. While the change of government later that year meant that legislation was not passed, new Premier Neville Wran agreed that the green bans were "more in the public interest than against it" and set about developing legislation to address the lack of sensible planning.[56]

In 1977, the *Heritage Act 1977* (NSW) was passed, setting up a formal framework for the conservation of buildings such as those saved by the green bans. This was followed two years later by the EPA Act, the *Legal Aid Commission Act 1979* (NSW) and the *Land and Environment Court Act 1979* (NSW). Together these new laws took New South Wales from narrow British-style town and country planning to a more modern approach.[57]

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[50] Roddewig, n 11, p 108.

[51] While green bans took place in several other cities around Australia (notably Melbourne, where a ban actually took place prior to the ban over Kelly's Bush), it was the Sydney movement that attracted most attention. Sydney's green bans were at the fore due to their location at the heart of Australia's building boom, the commitment of the New South Wales BLF, and the charismatic leadership of Jack Mundey. Burgmann and Burgmann, n 26.

[52] Roddewig, n 11.

[53] Roddewig, n 11.

[54] Brown B and Singer p, *The Greens* (Text Publishing, 1996) pp 64-65.

[55] Freestone R, "Planning Sydney: Historical Trajectories and Contemporary Debates" in Connell J (ed), *Sydney: The Emergence of a World City* (Oxford University Press, 2000); Burgmann and Burgmann, n 26; Huxley M, "Administrative Coordination, Urban Management and Strategic Planning in the 1970s" in Mamnett S and Freestone R (eds), *The Australian Metropolis: A Planning History* (Allen & Unwin, 2000); Jakubowicz**,** n 49, p 164.

[56] Burgmann and Burgmann, n 26, p 48.

[57] Stein, n 13, p 74.

Environmental considerations and public participation were emphasised, and supported through the provision of legal aid to enable the public to exercise their rights.

The role of the green bans as a trigger for both the Askin Government's legislation and the four laws passed by the Wran Government is widely acknowledged.[58] Beyond making this general link, however, few commentators give any attention to the specific influence of the green bans on the legislation. One exception to this is Ryan, who considered the possibility that the bans may have actually slowed the progress of environmental law.[59] While Ryan went on to conclude that this judgment may be too harsh, her comment is significant in identifying the complexity of the link and the lack of critical attention to it.

The influence of the bans on the EPA Act was certainly not as straightforward as the general commentary suggests. At the very least, the relationship was not linear: in developing new planning legislation, the government was not simply responding to those involved in the green bans. The development industry was active, and perhaps even more influential, in campaigns for legislative reform in the early 1970s. The Institute of Real Estate Development,[60] for example, approached various government bodies in an effort to persuade them to upgrade New South Wales' planning laws. Contemporary press reports include comments from senior members of the Institute suggesting the green bans were a direct result of the government's planning failures, and that new laws were needed to rectify the problem.[61]

More fundamentally, the green ban movement itself was not linear. The early, idealistic bans under Mundey are those that are most fondly remembered, yet by the time of the development of the EPA Act the nature and scope of the movement had changed substantially. As the following section argues, the legislation has much more in common with these later bans and this has had significant implications for planning in New South Wales.

THE GREEN BANS, THE EPA ACT AND PLANNING IN NEW SOUTH WALES

It is not enough to laud the fact that the EPA Act created formal channels for public participation in planning in New South Wales, and to lament amendments to this framework. If we are to understand why such "good" legislation has been the subject of so many amendments, there is a need to look critically at its content. Close analysis of the EPA Act suggests that much of the praise it has received has been misguided: the model for participation established in 1979 was an antagonistic one, far from the spirit of the green bans.

The elements of the EPA Act that are most commonly linked to the green bans are the concept of environmental planning (rather than treating environmental assessment and planning under separate regimes, as in other jurisdictions), and the provision for public

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[58] Sandercock L, *Public Participation in Planning* (report for the Montaro Development Commission, 1975) p 47; Burgmann and Burgmann, n 26, p 282; Cook, n 25; Jakubowicz**,** n 49, p 164.
[59] Ryan, n 21 at 569.
[60] Now the Urban Development Institute of Australia.
[61] Burgmann and Burgmann, n 26, p 280.

participation.[62] In particular, the inclusion in s 5(c) of the object "to provide increased opportunity for public involvement and participation in environmental planning and assessment", the provision for merits appeals by objectors and open standing to enforce breaches of the Act are highlighted as elements influenced by the green ban movement.

The EPA Act was innovative in bringing environmental assessment together with planning in a single legislative regime.[63] The content of environmental planning provisions, however, was less noteworthy. Environmental impact assessment had been a policy requirement in New South Wales since 1972, and was required by law in Queensland and Victoria prior to 1979.[64] The concept of environmental planning was not contested, and its implementation in New South Wales has been widely supported. As a result, the EIA regime established in Pt 5 of the EPA Act remains essentially the same today as in 1979.[65]

Much more significant was the provision in the EPA Act for public participation, and particularly the appeal rights it gave to third parties opposed to development proposals.[66] The regime it established for public participation in development assessment was different to that which it replaced, and was innovative also in comparison with other regimes in Australia. The provision for merits appeals by objectors in s 98 and for open standing to enforce breaches of the Act in s 123 were significant innovations.[67] With respect to public participation in strategic planning, the EPA Act introduced much smaller changes. Earlier legislation in Victoria and Brisbane, for example, actually provided greater scope for participation in strategic planning.[68] In contrast to EIA, debates regarding public participation have been the subject of ongoing disputes under the EPA Act, and the focus for the majority of amendments to it.

The link between objector appeals and the green bans is in some ways self-evident. The green bans involved third parties objecting to development proposals and through this either preventing or substantially altering developments. It could thus be argued that s 98, in allowing objectors to have a court review the merits of a development consent, gives legal force to the green bans approach. Like the green bans, s 98 gave communities the power to block developments, and potentially to preserve heritage buildings, open space, affordable housing and urban character. For this it is celebrated.

However, viewing s 98 as giving legislative force to the green ban approach requires a narrow conception of the movement. While such an understanding may approximate the bans as conceived under the later leadership of Gallagher, it ignores key elements that drove the establishment of the green ban movement. Section 98 does not reflect the significant objects and achievements of the bans in fostering dialogue between diverse groups, working to improve the equity and liveability of cities, and participating in

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[62] Stein, n 13; Lipman and Stokes, n 16; Angel J, "The Environment: Reform, National Parks and City Decline" in Bramston T (ed), *The Wran Era* (Federation Press, 2006); Cole n 24.
[63] Lipman and Stokes, n 16 at 305.
[64] Elliot M and Thomas I, *Environmental Impact Assessment in Australia: Theory and Practice* (5th ed, Federation Press, 2009) pp 145-165.
[65] Lyster R, Lipman Z, Wiffen G, Franklin N and Pearson L, *Environmental and Planning Law in New South Wales* (3rd ed, Federation Press, 2012) p 139.
[66] Stein, n 13, p 74; EDO NSW (2010b), n 3, p 38.
[67] Fogg, n 23 at 262.
[68] Fogg, n 23 at 262.

constructive conversations to improve the development of areas like the Rocks, Woolloomooloo and Glebe.

The broader goals and particularly the constructive approach to public participation of the green bans as developed under Mundey were considered in the development of the new planning regime. The Green Book released in 1974 proposed to increase public involvement, particularly in the earlier stages of strategic planning, and to make this effective by providing information on objectives and alternatives.[69] Local decision-making was to be strengthened, with new regional authorities proposed to review local planning schemes. Emphasis on environmental considerations and on social and economic consequences was to be increased, and broad standing was to be provided for appeals by third parties.

These elements were watered down in the proposals that followed. The Blue Book of 1975 replaced proposals for regional authorities with regional offices of the State Planning and Environment Commission, a greater role for the Minister in local plan-making and reduced scope for third party appeals.[70] Significantly, however, the Blue Book continued to emphasise the need for public participation to extend beyond notification and exhibition, which was described as inadequate in failing to allow for a two-way exchange of ideas.[71] The White Book and the draft legislation that followed moved further away from local control and meaningful engagement with the public, giving the State government a major role in certifying local planning schemes and referring to public consultation rather than participation.[72]

The Wran Government continued this trend toward consultation rather than genuine participation. To begin, the new government was criticised for the rapid pace and lack of consultation undertaken in the development of its legislation.[73] The regime it established in the EPA Act then focused narrowly on submission-making at the development assessment stage. Despite the aspirational object of increased participation in plan-making and development assessment provided in s 5(c), the EPA Act did not mandate any public participation in the making of State environmental planning policies,[74] and in the making of regional and local environmental plans required only exhibition at the draft stage. The most detailed requirements related to development assessment. For proposals falling within the category of "designated development", notice and exhibition requirements, including minimum submission periods, were specified in s 79.

In its focus on exhibition at the development assessment stage rather than more active engagement in strategic planning, the EPA Act was far from best practice. Commentators such as Sandercock and Stretton had been leading debates on planning and participation in

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[69] Minister for Planning and Environment, First Report, *Towards a New Planning System for New South Wales* (November 1974).
[70] Minister for Planning and Environment, Second Report, *Proposals for a New Planning System for New South Wales* (June 1975).
[71] Minister for Planning and Environment, n 70, p 10.
[72] New South Wales Government, *Report to the Minister for Planning and Environment Required under s 20(1) of the Environment Commission Act 1974* (Planning and Environment Commission, November 1975); *Environmental Planning Bill 1976* (NSW).
[73] New South Wales, *Debates*, Legislative Assembly, 15 November 1979 (Kevin Rizzoli, Frank Fisher).
[74] The court refused to read in any such requirement in *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31.

Australia, adding to the work of influential international planning theorists such as Arnstein, Davidoff, Jacobs and Harvey.[75] In New South Wales, there was direct experience with techniques other than traditional consultation procedures at the local level. Councils such as Leichhardt and North Sydney had gone well beyond established consultation procedures in their community engagement, using techniques such as open council meetings, open planning committees, surveys, exhibitions and precinct committees with considerable success.[76] The Green, Blue and White Books all described a wide range of techniques for public participation, including informal discussion groups, mobile exhibitions, citizen committees, surveys, participation centres and advocate planners. Beyond the aspirational s 5(c), none of this made it into the legislation.

As noted by one commentator in 1979, the approach to public participation adopted in the EPA Act was "completely negative" and more likely to degenerate into battles than to foster constructive planning.[77] The provisions in the legislation for public participation were far removed from the objectives and approaches developed in the green bans. The elements that made the bans so powerful – engagement with residents groups, review panels and requirements for broad support beyond vested interests – had little impact on the content of the EPA Act.

The EPA Act has both embodied and exacerbated a narrow view of public participation. By focusing on objection at the development assessment stage, the Act encourages negative engagement by the public. There is no framework, much less any legal requirement, for the public to engage in making the tradeoffs and difficult decisions necessary in planning for the future. Community members can simply oppose all developments, without offering any constructive alternatives.

This in turn promotes the adversarial culture that is so often criticised in Sydney. While the more positive s 5(c) has been used by the courts in interpreting other parts of the EPA Act, this has generally been linked to objection. For example, courts have strictly enforced notification and advertising requirements.[78] In doing so, they have emphasised the importance of these requirements in allowing people to make objections. Courts have also emphasised the particular importance of objection rights for property-holders. Further narrowing the scope of the Act, such judicial decisions have suggested that participation is primarily a means to protect private property rights.

In line with the Act's prioritisation of objection, public participation has largely been directed at preventing development proposals from going ahead. On some occasions, this has prompted developers and communities to enter into constructive processes. In the

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[75] See eg Arnstein S, "A Ladder of Citizen Participation" (1965) 35 *Journal of the American Planning Association* 216; Davidoff P, "Advocacy and Pluralism in Planning" (1965) 31 *Journal of the American Institute of Planners* 544; Jacobs J, *The Death and Life of Great American Cities* (Jonathan Cape, 1961); Harvey D, *Social Justice and the City* (Edward Arnold, 1973); Stretton H, *Ideas for Australian Cities* (Transit Australia Publishing, 1970); Sandercock L, *Cities for Sale* (Melbourne University Press, 1977).

[76] Sandercock, n 58.

[77] Fisher, n 24.

[78] *Litevale Pty Ltd v Lismore CC* (1997) 96 LGERA 91 (CA); *Homeworld Ballina PL v Ballina SC; Bryan v Lane Cove Council* (2007) 158 LGERA 390; *Curac v Shoalhaven CC* (1993) 81 LGERA 124; *Johnson v Lake Macquarie City Council* (1996) 91 LGERA 331; *Glowpace v South Sydney City Council* (2000) 111 LGERA 84.

redevelopment of the Carlton United Breweries site in Chippendale, a legal challenge prompted the developer to invite the objector to contribute to the revision of plans for the project.[79] This led to the inclusion of features such as onsite energy generation, car-sharing, conservation of heritage items and a new public park.[80] Such positive outcomes are not typical, however: objections and court challenges more often damage relationships, delay and increase the costs of development.[81] Litigation over planning decisions by the State government in an effort to progress the redevelopment of former industrial sites on the Balmain peninsula, for example, spanned over four years.[82]

The objection-focused framework established in the EPA Act, and particularly judicial interpretation of this as a mechanism to protect private property rights, is far removed from the social and environmental goals articulated in the green ban movement. It has also proved to be unworkable. As critics noted in 1979, the framework for public participation established in the EPA Act was bound to be controversial. In creating opportunities for communities to oppose change, to see developers as adversaries and to prioritise personal property rights without any requirement to engage in constructive planning processes, the EPA Act established a framework with little hope of success.

The many amendments made to the EPA Act since 1979 are one consequence of this negative framework. With public participation dominated by negative comments and objection to proposals, developers have increasingly looked to governments for ways to get around the resulting delays and deadlocks. Rather than responding by requiring communities to engage more constructively, these appeals have prompted successive governments to adopt strategies that reduce community involvement. As Lipman and Stokes have argued, the rhetoric associated with such changes moved progressively from the *promotion* of public participation, to *maintenance* of existing opportunities, to avoiding the subject altogether.[83]

Reforms to the framework for public participation have included expanding Ministerial call-in powers in 1985, the introduction of new categories of development with streamlined assessment processes in 1997, standardisation of local environmental plan-making in 2005 and 2008, introduction of new decision-making bodies and reduction in third party appeal rights in 2008, and – most controversially – the introduction of the highly discretionary Pt 3A process for State-significant development in 2005. These reforms have been counter-productive. They have attracted considerable criticism for weakening the participation requirements set out in the original regime.[84] Relationships have deteriorated

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[79] Munro C, "Developer to Go it Alone on Greenhouse Gases", *Sydney Morning Herald* (28 September 2007).
[80] Central Park by Frasers Broadway, *Project Overview*, http://www.frasersbroadway.com.au/broadway/po.htm viewed 8 January 2013.
[81] These comments are based on discussions with planning and planning law practitioners, including staff at the Department of Planning. Robust empirical research on participation and its outcomes on planning in New South Wales is needed.
[82] *Balmain Assn Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615; *Leichhardt MC v Minister for Planning* (1992) 78 LGERA 306; *Leichhardt Council v Minister for Planning (No 2)* (1995) 87 LGERA 78.
[83] Lipman and Stokes, n 16.
[84] Pain N, "Third Party Rights Public Participation Under the Environmental Planning and Assessment Act 1979 (NSW): Do the Floodgates Need Opening or Closing?" (1989) 6 EPLJ 26; Carr, n 21; Ghanem, n 21.

further, which in turn has generated more delays, mistrust and opposition, which in turn has prompted more amendments. Increasingly, planning decisions have attracted allegations of bias and corruption, and a range of legal challenges.[85]

The result is a situation that is strikingly similar to that of the 1970s. Dissatisfaction with the planning system is widespread, there is consensus regarding the need for new legislation, and the government is once again promising to rewrite the laws to make participation more meaningful.

CONCLUSION

The green bans were an incredibly positive movement. They were a high point of activism, and particularly of alliances between diverse groups seeking to further the public interest. Their achievements in preserving Sydney's heritage, conservation areas and affordable housing are well-recognised, as was their role in prompting the development of new planning legislation with express provisions for public participation.

Despite the aspirational object in s 5(c), the EPA Act failed to live up to the promise of the green bans. The regime it established for public participation was neither groundbreaking nor forward-looking. Exhibition and consideration of submissions were the only mandated processes in local and regional strategic planning; at the State level even these were discretionary. Public participation was concentrated on objections at the development assessment stage, encouraging opposition without any requirement to engage in the difficult decisions in planning for the future. The EPA Act embedded an adversarial approach to public participation in planning, which has been hugely problematic for New South Wales.

The failure of the EPA Act to provide for meaningful public participation may reflect the fact that it was passed long after the shift in leadership within the BLF – by 1979, the green bans had become much narrower, the economy significantly weaker and the public less engaged. More fundamentally, the regime adopted in the EPA Act may reflect how hard it is to create a legislative regime that mandates positive engagement in planning.

Reflection on the legacy of the green bans offers valuable lessons for current efforts to develop a new planning framework. As in the 1970s, the government has been making positive statements about its desire to engage the public early in the planning process. To date, however, little detail has been presented as to how this will be achieved. The experience of planning under the EPA Act shows that aspirational statements about public participation are ineffective, and specific requirements need to be included in the legislation if they are to have any impact. If we are to move beyond the current antagonism in planning, the drafters of new legislation would do well to look to the green bans as a rare instance of broad alliances fostering engagement with issues beyond limited personal interests.

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[85] *Gwandalan Summerland Point Action Group Inc v Minister for Planning* (2009) 75 NSWLR 269; 168 LGERA 269; *Sweetwater Action Group Inc v Minister for Planning and Huntlee Holdings Pty Ltd* [2011] NSWLEC 106.