FREEDOM OF PROPERTY — AN URBAN PLANNING PERSPECTIVE

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I. THE LEGAL LANDSCAPE

Urban planning in Australia is not a monolithic concept. The term raises questions about which of the social, economic, spatial, organisational and political aspects of a community need planning. It creates debate about the objectives and functions of planning. Significantly, it involves focussing upon another bandied expression, 'freedom of property'.

In that urban planning is seen as an attempt to accommodate a broad spectrum of interests in a broad spectrum of resources available for development, it entails a view of the community and its resources as 'a common'. This brings to the fore a meaning of 'freedom' as being accessible to or useable by all. The emphasis is on non-exclusive consumption. In that urban planning further involves a form of studied guidance it is not synonymous with 'free trade', meaning not subject to special regulation or restrictions. Both personal and market determination of property use are therefore placed at risk by urban planning.

Without a planning system, personal and market freedoms in respect of property are not necessarily less restrained. There is any number of institutional and non-institutional restraints, including landform itself. These restraints have a variety of effects on the ability and willingness of those who might otherwise control the retention, configuration, conservation, use and disposal of property. The effects may be allocative. They may be distributional. They may create choice or they may limit choice. They may promote private interest or they may sacrifice private interest in the furtherance of some aggregate public interest.

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Apart from common law limitations imposed on land-use and market influences of supply and demand as well as on land-use itself,[1] regulatory history is rich with examples of direct government intervention. Registration of specific land-based industries, such as apiaries;[2] or a genre of buildings, such as factories and shops;[3] or of classified activities, such as billiards and bagatelle;[4] or of storage of goods, such as explosives;[5] or of the vendors of professional services, such as auctioneers,[6] surveyors[7] and architects,[8] may come together in various combinations or work independently of each other with marked prohibitive and inhibitory ramifications for property freedom.

Not even residential property has escaped the regulatory hand. Regulation here has extended to fundamental property expectations and has imposed restrictions on disputation associated with such expectations. Reasonably well known is legislation requiring the making and repairing of fences by adjoining owners.[9] Perhaps less well known is legislation discouraging actions between neighbours for "trifling and long past (12 months) trespasses on land the title to which is not in dispute".[10] In stark contrast is summary offence legislation[11] which actually plugs deficiencies in private trespass law with police powers designed to crush confrontation over property development.

The facilitative side of regulation generally has been no less prominent than the restrictive side in any event. In the same breath, gaming and betting legislation has suppressed betting-houses, yet licensed racecourses.[12] Favoured landowners have been bestowed with special powers[13] and public powers have been turned to private advantage.[14] Even more readily has public sector development been given favoured treatment beyond regular public works

1 For a summary of relevant principles and readings, see P. Ryan, *Urban Development Law and Policy* (1987), Chs.3 & 4.

2 Apiaries Act 1916 (N.S.W.). Most of the examples in this paper are taken from New South Wales, but there are counterparts in the other states, as there are examples other than those chosen in New South Wales itself.

3 Factories and Shops Act 1912 (N.S.W.), repealed 1962.

4 Billiards and Bagatelle Act 1902 (N.S.W.).

5 Explosives Act 1905 (N.S.W.), repealed 1975.

6 Auctioneers' Licensing Act 1898 (N.S.W.), repealed 1941.

7 Surveyors Act 1929 (N.S.W.).

8 Architects Act 1921 (N.S.W.).

9 Dividing Fences Act 1902 (N.S.W.), repealed 1951.

10 Limitation of Actions for Trespass Act 1884 (N.S.W.), repealed 1969.

11 Summary Offences Act 1970 (N.S.W.), repealed 1979.

12 Gaming and Betting Act 1912 (N.S.W.), replacing the Games, Wagers and Betting-houses Act 1902 (N.S.W.). A game itself is not unlawful unless made so by statute: *Ex parte Mitchell* (1902) 2 SR 120; *Ex parte Little* (1902) 2 SR 444; *Re Sutton* (1918) 35 WN (NSW) 52; *Ex parte McCrohon* (1936) 53 WN (NSW) 132.

13 Church of England Trust Property Act 1917 (N.S.W.), with trust variation powers.

14 Australian Iron & Steel Limited Agreement Ratification Act 1936 (N.S.W.), including validation of certain land resumptions.

provisions.[15] Delivery of public services has been advanced by powers enabling direct invasion of property and property interests.[16]

A subordination of property interests to 'public interest', moreover, has been settled in the face of a constitutional guarantee which might suggest otherwise.[17] Although the guarantee might not be able to be by-passed through fabricating property "possession" as distinct from its "taking",[18] distinctions may gainfully be employed at the expense of property freedom along a number of lines. These include executive as opposed to legislative property acquisitions[19] and acquisitions arising by way of forfeiture, penalty and provisional tax as distinct from purposive taking of property.[20] Circumvention through "understandings" with State Governments is possible[21] and the test of "fair and just" is fundamentally a test of "unreasonableness"[22] which operates as between the acquired interest holder and the community and not as a test of precise justice to the individual.[23] Finally, where an acquisition occurs 'by agreement', without resort to compulsory powers, this is considered to constitute intrinsic evidence that an acquisition is on 'just' terms.[24]

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15 City and Suburban Electric Railways Act 1915 (N.S.W.), regarding construction and use, although note the City and Suburban Electric Railways (Resumption Rescission) Act 1917 (N.S.W.) providing for revesting and compensation rights. For a more complex legislative framework, see the Centenary Celebration Act 1887 (N.S.W.) appropriating sites and vesting them in the Chief Minister; the Centenary Park Sale Act 1904 (N.S.W.) authorising the Chief Minister to sell and lease land vested in the Chief Minister; the Centenary Park Sale (Conveyancing) Act 1905 (N.S.W.) providing for conveyance of land sold under the Centenary Park Sale Act 1904 (N.S.W.); the Centenary Celebration (Amendment) Acts 1929, 1930, 1935 (N.S.W.) vesting appropriated land in Waverley and Randwick Councils and dedicating land for hospital, public recreation and roadway purposes; the Centenary Celebration (Amendment) Act 1934 (N.S.W.) making a grant of land to the Australian Jockey Club.

16 Metropolitan Water, Sewerage and Drainage Act 1924 (N.S.W.), enabling direct entry; Conveyancing Act 1919 (N.S.W.), implying a power in leases for municipal authorities to enter for the destruction of noxious weeds and animals or to carry out repairs and so forth.

17 The provision of compensation on "just terms" for Commonwealth acquisitions under section 51 (xxxi), Commonwealth of Australia Constitution Act 1900 (U.K.). There is no equivalent provision in state constitutions and the September 1988 referendum on the Federal Constitution rejected an amendment which would subject state acquisitions to a provision similar to section 51 (xxxi).

18 *Minister of State for the Army* v. *Dalziel* (1944) 68 CLR 261, 275-276; *Bank of N.S.W.* v. *Commonwealth* (1948) 76 CLR 1, 318-319, 348-350.

19 *Re Dohnert Muller Schmidt and Co.; Attorney General Commonwealth* v. *Schmidt* (1961) 105 CLR 361, 372; *Johnston Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *Commonwealth* (1943) 67 CLR 314, 318, 325; *cf. Burmah Oil Co. (Burmah Trading) Ltd.* v. *Lord Advocate* [1965] AC 75, 101-102, 106-107.

20 *Trade Practices Commission* v. *Tooth & Co.* (1979) 16 ALR 185.

21 *Pye* v. *Renshaw* (1951) 84 CLR 58, 77-78, *cf.* 72-73 and see *Gilbert* v. *State of W.A.* (1962) 107 CLR 494, 505. The states however, cannot circumvent the particular power given to the Commonwealth to acquire from the States themselves: *Grace Bros. Pty. Ltd.* v. *Commonwealth* (1946) 72 CLR 269, 290-291; *Bank of N.S.W.* v. *Commonwealth*, note 18 *supra*, 206.

22 *Minister of State for the Army* v. *Dalziel* note 18 *supra*, 291; *Grace Bros. Pty. Ltd.* v. *Commonwealth ibid*, 280, 285-291; *McClintock* v. *Commonwealth* (1947) 75 CLR 1, 24.

23 *Grace Bros. Pty. Ltd.* v. *Commonwealth*, note 21 *supra*, 279-280, 290.

24 *Bank of N.S.W.* v. *Commonwealth*, note 18 *supra*, 264,; *Federal Council of the British Medical Association in Australia* v. *Commonwealth* (1949) 79 CLR 201, 270-271; *Poulton* v. *Commonwealth* (1953) 89 CLR 540, 573.

In addition to intervention of the above kinds, the pre-legislatively-planned community[25] was subjected to building, subdivision and road opening regulations. While such control was checked by a right of appeal, the onus on the landowners could be such that unless an appellant could bring forward "strong" reasons in support of an appeal, or show that the local control authority had acted unreasonably, the appellant could not succeed.[26] Put another way, the discretion of the appellate tribunal, although independent in nature, was not to be exercised adversely to the local authority, if after a consideration of all the circumstances, the tribunal considered that the matter was a debatable one, as to which different minds might fairly come to a different conclusion.[27] Furthermore, as the local authority was not bound by its previous decision, evidence of its decisions in similar matters carried no particular weight in appeal proceedings.[28]

Some sense of the degree of inroad on property freedom, brought about by these basic land controls, may be gauged from the consequential legal analysis associated with the imposition of subdivision approval conditions requiring a dedication of land, free of cost, for public reserve purposes. In response to the argument that such a condition was unauthorised,[29] it was pointed out that statutory control over subdivision took away the proprietary right to subdivide at will, without compensation for the loss of such right. A landowner could obtain approval for subdivision but subject to compliance with any conditions which might be bona fide imposed. If a condition required giving up some land for purposes relevant to the subdivision development, it was a misuse of terms to regard the ceded land as having been confiscated. The surrender was more in the nature of a quid pro quo for restoration of the right to subdivide. While the quid pro quo might be inadequate and while there was no legal compulsion to give up the land, though there might be real compulsion in a practical sense, the principle of statutory construction which prevented property being expropriated without compensation was inapplicable.

The inescapable effect of control was that the landowner had to decide whether the right to subdivide would be bought too dearly at the expense of

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25 When this was might vary according to one's view of 'planning', but see J. Sulman, *An Introduction to the Study of Town Planning in Australia* (1921); M. Auster, "The Regulation of Human Settlement: Public Ideas and Public Policy in New South Wales, 1788 — 1986" (1986) 3 *EPLJ* 40; A. Fogg, *Process, Procedures and Plans* (1980) on South Australia; A. Fogg, *Australian Town Planning Law: Uniformity and Change* (1974) and (1982); M. Bowman, *Australian Approaches to Environmental Management: the response of state planning* (1979). Orthodox wisdom in New South Wales sets the date as 1945 with the insertion of Part XIIA into the Local Government Act 1919 (N.S.W.).

26 *Cornwell* v. *Willoughby M.C.* (1936) 13 NSWLGR 1, concerning section 341 Local Government Act 1919 (N.S.W.).

27 *Breckenridge* v. *Drummoyne M.C.* (1936) 13 NSWLGR 76, unless the local authority had not acted in a bona fide manner.

28 *O'Carroll* v. *Randwick M.C.* (1937) 13 NSWLGR 154.

29 See *Lloyd* v. *Robinson* (1962) 107 CLR 142, 152-155.

complying with conditions. A contrary analysis was seen as unnecessarily disabling local authorities from ensuring the observance of property standards in local development. The final blow to the landowner was struck in the recognition that there was however no legal obligation on the part of a local authority to actually reserve the surrendered land for the surrendered purpose. Instead, there was a 'moral' obligation and it was justifiable to rely upon the "continuing good faith" of the administration to secure the fulfilment of the purpose in question.

Another significant feature in the unplanned town landscape was statutory zoning. This amounted essentially to an indication of where certain land-uses were permitted absolutely or with approval or were prohibited outright coupled with protection for nonconforming uses which existed prior to the zoning. It was primarily a particular form of building control to ensure local amenity.[30] It generally lacked any broader context and was characterised by an absence of debate, public input or review. Being legislative in nature it also lacked any process for appeals by affected landowners. Being non-acquisitive of property itself it attracted no compensation rights either, despite the reality that substantial regulation may be akin to actual property deprivation.[31]

Segregation of land-uses was of course formalised under zoning, although the rationale for doing so represented no particular advance on the underlying thinking of private nuisance law or of a free property market. It clearly however, took governmental intervention well beyond that which was possible under general health controls and under industry-by-industry noxious trade controls. It also appeared to be a more civilised form of exercising basic police powers.[32]

If property freedom in urbanised areas was already under so much assault in so many and so varied ways, one comes to the question of exactly what remained to be imposed under an 'urban planning' regime. Were there yet in store more substantive changes to who would constitute the urban property decision-maker or to what would constitute the decision-making base?

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30 Local Government Act 1919 (N.S.W.), section 309.

31 See *Belfast Corp.* v. *O.D. Cars Ltd.* [1960] 1 All ER 65; *Westminster Bank Ltd.* v. *Minister of Housing and Local Government* [1970] 1 All ER 734; the Uthwatt Report, Expert Committee on Compensation and Betterment, *Final Report,* Cmnd. 6386 (H.M.S.O., 1942), para. 32; R. Mathews (ed.), *Federalism and the Environment* (1985) 28-29.

32 *Village of Euclid* v. *Amber Realty Company* 272 U.S. 365 (1926) upheld the constitutionality of local zoning powers in the U.S.A. precisely on the basis that it was within the police power of the states to regulate land-use through the creation of homogeneous land-use districts. See also the Liquor Act 1912 (N.S.W.), under which objections to the grant of liquor licences could be made by three or more residents of the licensing district *or* by the owner of the subject premises *or* by any district inspector or member of the police force in charge of the district or place where the premises were situated. Grounds for objection included that the "quiet and good order of the neighbourhood . . . will be disturbed if a licence is granted".

II. THE PLANNERS MOVE IN

The more primitive types of development control were employed at a time when the dominant view was of a resource allocation system which was roughly egalitarian and when depletion of resources was not in issue.[33] As conservation moved more to the fore, land-use 'balance' became a driving force. As planners and the planned became more sophisticated balance took on less of a physical land-use connotation. Planning nowadays emphasises a need for development both to harmonise with, or serve, the social and economic conditions of a community and to harmonise with, or responsibly utilise, physical environmental features.

The resulting sum has been portrayed as an almost total decline of private property.[34] Yet another assessment would argue that that is not the freedom which has been lost. 'Balancing' has in fact led to an incremental diminution and/or degradation of the public estate. This is because the underlying concept of competing interests operates within the existing power structure which is dominated by special interests. A pluralistic planning framework shores up that structure, and, incidentally, also diminishes the freedom of choice tenet which, ironically, inspires pluralist theory.[35]

Both appraisals would appear to hold some truth. Broad-based planning with its less-exclusive consumption approach has tended to reduce market power. However, property power extends beyond that associated directly with landholdings and encompasses the mass media and income distribution. The range of development choice is an agenda set by special interests. Within that agenda any conflict 'resolution' may well be simply another exercise in 'manipulation'. Landowners and developers have probably lost far less than the conservation and social equity lobbies have gained.

Review and assessment of environmental factors and effects have been hailed as giant leaps forward in the formulation process of planning policy and in the appraisal process of development projects, yet fraught with operational obstacles.[36] Even when 'working', environmental assessment is a political tool. Neither an externalising decision-making base or process is able to defer or refuse a controversial development decision in the face of an

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33 An especially warped view to have been held in Australia, in the light of colonial history and colonial approaches as outlined, for example, by Windeyer J. in *Randwick M.C.* v. *Rutledge* (1959) 33 ALJR 367, 371-375 on the subject of "public reserves".

34 J. Sax, "Some Thoughts on the Decline of Private Property" (1983) 58 *Wash L Rev* 481.

35 J. Birkeland-Corro, "Redefining the Environmental Problem: Some Impediments to Institutional Reform" (1988) 5 *EPLJ* 109. It is interesting to match her analysis against the plea for multiple land-use and more "balance" by the Australian Mining Industry Council: "Lost in the Wilderness" *AMIC Bulletin,* (June 1988); *The Mining Review* (August 1988) 20. Another irony is contained in the earlier plea of J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68 *Mich L Rev* 471.

36 G. Bates, *Environmental Law in Australia* (1987); D. Farrier, *Environmental Law Handbook: Planning and Land Use in New South Wales* (1988).

opposing political will. Even in terms of legal acceptability, 'good' environmental assessment is tested in a way which maximises the position of a person or body with an orthodox property interest. Notions of "reasonableness" and "practicality" predominate.[37] Where one might expect a more result-oriented, 'public interest' decision-making base and process, namely in the field of heritage law where a conservation aim has been given legislative priority, the fact remains that the essential contest may not have been removed.[38]

Changing the rules of the game through environmental assessment techniques does not mean that it is a different game. Although a different outcome *might* be available, this tends to sharpen the contest and also any original mismatch of bargaining strength. Objectors to development mentally convert input opportunities to 'rights' and development proponents convert property expectations to 'rights'. The latter contestants however, are generally seen as being so much closer to the conversion in the first place, placing them in a better position to score, and thereby placing just so much more effort on the part of the objectors. This of course is as it should be in a framework of pluralism and in a socio-economic framework under which the property-haves always score against the property-have-nots.

Where the planning system removes, as it typically does, any common law right to develop land and even where it replaces that right with a right to seek development consent, following the building and subdivision control model, property controllers have clearly lost some freedom. Depending upon the available range of development options, that might be a significant loss, tantamount even to losing the property itself. To a large extent, the degree of loss is a reflection of the potency of the property controller in the totality of governing systems and this is not a simplistic equation with landholding.

The concentration of the planning system on 'development' of land, including its non-development in certain circumstances, appears to crystallise out land as the target for both freedom losses and gains in the urban environment. However, urban planning cannot be effectively divorced from general political, administrative, institutional, financial and cultural restraints both on property and other freedoms. The actual planning instrument which creates the policy blueprint for individual development decisions is the product of the coming together of these various forces in a particular location at a particular point in time. A land controller who loses or wins in the plan formulation could have lost or won irrespective of the advent of the plan. Why else is it that conservationists and social reformists without traditional property stakes are occasionally able to win on planning issues?

37 Note 1 *supra*, para. [7.10].
38 *Id.*, paras. [9.14]-[9.16].

A planned community is no more than a microcosm of the wider State. While there may appear to be an essential difference because of the existence of the plan, the plan is no more insulated from outside forces than is land. Government intervention in planning itself is a well documented aspect of the planning system.[39] Nevertheless, in that a plan might not have been subsequently diluted or set at nought, it may well have changed not simply the rules but the nature of the game for the time being.

Land controllers are truly disabled when a plan does not reflect their input at all and further input has been foreclosed. This is the reverse side of the coin for the community at large when planning proceeds, as it did in earlier days, in a vacuum with no injection of community involvement. A difficulty however with modern planning, is that it has not been systematic on the matter of foreclosure. Even here other forces may be seen at work. Where development is prohibited outright in a plan, concessions might still be available such as those associated with 'existing use' rights or with definitional incrementalism afforded by 'ancillary use' or by acquisition and compensation entitlement. There are no equivalent concessions for the public at large who have been visited with plan-approved controversial development.

Possibly a more serious threat to land controllers is offered where the plan simply restricts choice, by providing for the necessity of consent within some defined range of permissible development. Here developers are subject to uncertainty and must take calculated commercial risks to achieve a position of relative freedom. Of its nature a risk may produce very worthwhile dividends which are actually augmented as a result of planning restrictions being in place. Yet the plan has not only produced a substitute decision-maker but a new risk-taker as well. The planning consent body itself is not risk-free, especially for instance where a new development phase for an already-developed area or for an undeveloped area would be entered.

It would seem that the usual legal and administrative framework is one in which risks are able to be voluntarily encountered on all sides but with far better insulation for the planning body. Its rejection or deferral of risk however, is not necessarily linked to any wide sense of community adjustment. It is also free to identify with the risks embraced by the developer, as it could easily do where it faces the prospect of increased rating revenue through allowing development to go ahead.

Urban planning has a significant potential for breeding uncertainty. It can and does recast property rights, but not always detrimentally. It is able to effect transfers of costs and benefits in proprietary and non-proprietary ways. It may change the game, the rule of play and the players themselves. It is sometimes reformist and sometimes reactionary. It may be just as permissive as it is authoritarian. These various features however, do not set planning aside from other avenues of government intervention. What seems to set it

39 *Id.*, paras. [7.03]-[7.08].

aside is its mission for *harmonising* land-use and its allocation in a global resource allocation and consumption system. That this system is disharmonious has already been touched upon. There is however another systemic obstacle.

Property rights are cherished as being '*in rem*'. They 'run with' the subject matter of property, regardless of the specific identity of the property controller from time to time. This distinguishes property rights from those rights which are merely personal, such as those dependent upon contract. However, urban planning in practice has two main points of contact, land and people. When planning instruments focus on land, they do so on a lot by lot basis. The initial planning choices bring real people into the arena including those people associated with the subject lots. At that stage they are arguing personal choices and freedoms, albeit connected with property rights. They may argue against personal choices and freedoms held by other people who may or may not have underlying property interests.

Once planning choices have been made by the planning authority, they become temporarily set in the planning instrument. These choices may mirror one or more sets of choices advanced by community members or they may amount to a compromise between them or they may represent an agenda of self-interest or altruism on the part of the planning body or of other public authorities. When a proposal is made for specific development involving an actual site, the site owners and developers are initially able to rely on the plan to determine what is a permissible type of development. They will form, or will have already formed, expectations which might or might not be reasonable. Their expectations will be influenced by a wide variety of factors: the existing use of the site and its history of use and non-use; the use of adjoining sites and of those in the immediate vicinity, as well as other sites in the larger locality or even in other localities; the experience or inexperience of the principals as developers of similar or dissimilar proposals; the expertise and experience of their professional advisers; the wording, ambiguities, history of use, permanence or impermanence of the plan itself; financial and political bargaining positions and sensitivity to other positions will work in ways which have little or nothing to do with strict property rights either on the part of the development proponents or of opponents. Personal choices and freedoms, including elusive questions of taste, will come back into play.

The commercial prize for the successful developer is a saleable commodity which is impersonal in nature. Yet the final product will have been derived with as much personal signature as any work or art. The same holds true of the process by which the commodity changes hands. Immense effort may be expended by vendors and purchasers in tailoring the property, both physically and metaphysically, to strictly personal ends.

This Janusian element of property accounts for a considerable gap between the impersonalised ideals espoused by planners who plan off maps and statistics and a kind of property 'essence', and the reality of

three-dimensional, and even four-dimensional, property, controlled, enjoyed, encountered and simply seen by individual human beings.

Mismatch between the property and people elements of the urban scene is highlighted by the commonly used planning enforcement modes, namely the criminal prosecution and the equitable injunction. Both forms of enforcement require a 'wrongdoer', a personal target. They do not operate '*in rem*'. When the property owner is not also the property developer enforcement may be futile and may actually produce windfall gains. Take the case of litigation to enjoin the use of premises for brothels without planning consent. The owner-landlord of the premises might be in no obvious sense connected with the brothel activity but restraining orders against the actual brothel keepers commonly result merely in replaced brothel keepers. The commercial value of the property, as a brothel, does not change for the owner. Similarly, criminal enforcement against a developer who has unlawfully demolished buildings on a site visits no penalty upon the 'innocent' land-owner who now has the advantage of a vacant development site.

III. MAINTAINING THE GAPS: PLANNING NONFEASANCE

Writers in the field of environmental planning law have tended to make something of the definitions of 'environment' used in legislative frameworks.[40] The extent to which 'man'[41] dominates the definition renders it less 'environmental'. There would seem to be little room for argument on this conclusion, and one may readily applaud attempts in the environmental interest to remove human beings from the centre of the universe and also to recognise 'social groupings' as much as individual human beings. However, the more embracing the definition and the less 'anthropocentric' its focus, the more human tyranny, howsoever benign, is propelled forward. This incidentally also reinforces the basic power struggle since, of necessity, there must be someone to speak and act on behalf of a mute environment. In planning practice, advocacy rights have been extended beyond property owners but custodial rights have remained in traditional power concentrations.

Definitions and procedures may have a significant educational and value-shaping role in an urban society. They may succeed in broadening the decision-making agenda. They may provide weapons for otherwise disempowered members of society. However, by 'dehumanising' the outward manifestation of the struggle they may also risk losing any possible appeal to human ethics. Not all humans are greedy and not all greedy humans are greedy all of the time. A person who feels embattled however in a traditional

40 D. Fisher, *Environmental Law in Australia: An Introduction* (1980) 4-8; note 36 *supra*, Bates, 1-4, Farrier, 18-20.

41 With due apologies to recent 'desexing' amendments, for instance, in the 1987 amendments to the Environment Protection (Impact of Proposals) Act 1974 (Cth).

domain will more likely think in terms of survival than greed in any event. An ethical foundation which promoted, not aggravated, the human spirit may in fact do more to provide solutions to resource competition. The planning dream is for a rational and equitable resource decision. To succeed it is necessary to disavow that brand of individual freedom which eschews a corresponding individual responsibility *and* to work in an ideal world of collective freedom and collective responsibility. That world does not exist. It has been brought no closer to reality by seeking to strike the chords of urban harmony between individual and community wants on the pre-tuned instrument of land.

Being such a highly visible resource in the urban environment land is a natural instrument in more senses than one. It is the physical connection between so much of what is perceived as good and bad in the social and economic fabric of the city. It is legally disengaged from strictly personal rights and obligations. It endures however transmogrified, despite the ravages of time, the elements and humankind. It is sedentary. Its value however, is utterly in human terms. Both its use and non-use are inextricably tied to human domination and subservience. Use questions descend to levels of relativity based on competing human aspirations.[42] The higher plane of

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42 The "objects" in section 5, Environmental Planning and Assessment Act 1979 (N.S.W.) contain no ethic as such, but merely draw the lines of competition as widely as possible, *viz*:

"(a) to encourage —

(i) the proper management, development and conservation of natural and man-made resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment;

(ii) the promotion and co-ordination of the orderly and economic use and development of land;

(iii) the protection, provision and co-ordination of communication and utility services;

(iv) the provision of land for public purposes;

(v) the provision and co-ordination of community services and facilities; and

(vi) the protection of the environment;

(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State; and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment".

The criteria for individual development decisions set out in section 90 of the same Act heighten the relativities by bringing them "closer to home", for instance:

"(1) . . .

(c) the effect of that development on the landscape or scenic quality of the locality;

(d) the social effect and the economic effect of that development in the locality;

. . .

(h) the relationship of that development to development on adjoining land or on other land in the locality;

. . .

(j) the amount of traffic likely to be generated by the development, particularly in relation to the capacity of the road system in the locality and the probable effect of that traffic on the movement of traffic on that road system;

. . .

(o) the existing and likely future amenity of the neighbourhood".

so-called supra-human concern which has been engendered by depletion of stocks of more obviously non-renewable natural resources and the supra-individual concern for Aboriginal land rights represent a reordering of human priorities. The urgency which increasingly fuels these more global concerns is largely unfelt in the city. This is partly because the city has no collective sense.

Some sense of shelter urgency has been experienced. Housing stock for low to moderate income earners and for other socially disadvantaged people has been steadily diminishing, thereby providing a culture for the development of an urban planning ethic which could be far more instrumental in moving to a collective order of interdependency than have the procedural and definitional approaches of planning. Luckily for the property controller, this opportunity has not been fully realised. The planning system has become imbued with argument over the appropriate ethic. Urban consolidation policies for instance, have become confused with the economic objective of reducing governmental infrastructure costs as much with the social equity objective.

These objectives clash head-on, and the more so when market initiatives are ultimately allowed to call the development tune. Not unsurprisingly, there has been far more harmony between linked private and public economic objectives.[43] Even a clear policy to facilitate conservation of rental accommodation[44] turns on questions with an inbuilt bias on behalf of property controllers. Although the conversion of a boarding house to strata titled units may require special development consent based on an assessment of the subdivisional impact on supply of, and demand for, rental accommodation in the local area, the assessment is essentially a statistical one. Broad socio-economic indicators are used to decide whether the building in question has provided accommodation for people in rental risk categories. Rental availability in the area is arrived at from real estate figures.

Actual occupants must demonstrate their need by hypothesis. They are given no security of tenure and are helpless to prevent a building being deliberately run down, at which point the owner has a real, not a hypothetical, case for redevelopment. In that the statistics do however, have a chance of working in their favour, these occupants are better off than say long-stay caravan dwellers who have neither security of tenure nor any form of planning commitment. Consequently, it is often argued that people in such circumstances need individual rights in order for there to be a genuinely collective effort.

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43 But see G. Pund, "Housing for the Aged or Disabled: A Case Study on Support Services" (1985) 2 *EPLJ* 226; *Environmental Law Newsletter*, No. 22 (New South Wales Environmental Law Association, 1987).

44 New South Wales State Environmental Planning Policy No. 10 — Retention of Low-Cost Rental Accommodation.

Notwithstanding that membership of the collective might have been determined by modern planning legislation as being open to any person,[45] there is an inequality of status as long as initiative for action rests with property controllers relying on individual rights. The shared rights of others are so much weaker, particularly when they are restricted to ensuring adherence to the rules and when they carry with them no recognition of a stakehold interest in the property in question. However, multiple ownership fragments, rather than consolidates, resources. To provide a more rational and equitable resources position it would make more sense to take away or reduce existing property rights.

Public trust advocates[46] have pointed to historic public rights, as in fishery and navigation, which reflect a feeling that certain interests are so intrinsically important to every citizen that they should be freely available to all, and it is necessary to be especially wary lest any particular individual or group acquire the power to control them. There are also the notions underlying creation of national parks, that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace, and the recognition that certain uses, such as water uses, have a peculiarly public nature that makes their adapation to private use inappropriate. Any private rights which are permitted must incorporate the needs of others and it is encumbent upon the State to take account of the public nature and interdependency which the physical quality of the resource implies. This style of thinking leads to the proposition that the "keystone of government policy must be a recognition that land is both a basic national resource of limited or finite extent and a necessity of life".[47]

To act upon the proposition requires an acceptance that all use rights must be bought on fair social terms and that there are no 'natural' property rights which exclude the position of the rest of the community. With the possible exception of the Australian Capital Territory with its leasehold system of tenure, the proposition has not been acted upon. Instead, we have a crude balancing of unequal and unlike interests. Private and market property freedoms have not been so eroded that the property concept itself has not remained substantially intact under urban planning. This is not to say that there has not been limited recognition of community identity and power beyond that provided by representative democracy. From early days in New

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45 Epitomised in section 123, Environmental Planning and Assessment Act 1979 (N.S.W.), under which "[a]ny person may bring proceedings . . . for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach". Proceedings may be "brought by a person on his own behalf or on behalf of himself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its committee or other controlling or governing body), having like or common interests in those proceedings".

46 See J. Sax, note 35 *supra*.

47 First and Final *Reports of the Commission of Inquiry into Land Tenures* (Cth., 1973 and 1976), paras. 2.3 and 2.6 respectively.

South Wales, local government legislation has, for instance, provided for the "urban committee" in shire areas.[48]

Any number of electors[49] may petition the shire council for taking a poll on whether an "urban area" should be declared. If not less than one hundred petitioners so request, a poll must be taken and the shire council must declare an "urban area" if the poll is favourable.[50] The council then has powers with respect to the area as if it was a municipality. Any number of electors may however, petition the council for taking a poll on the establishment of an "urban committee". If not less than one hundred petitioners so request, a poll must be taken.[51] Where the poll is favourable, members of the urban committee must be elected and a shire councillor is not qualified to be elected nor to act on the committee of an urban area within the same shire.

The urban committee may fix rates for the urban area. Although the making and levying of such rates is a power retained by the council, any power of the council which it may exercise in the urban area is able to be delegated to the committee.[52] Without delegation the committee has powers to carry out functions for the purposes of any local rate levied by the council at the request of the committee and for purposes for which any monies are granted by the council for expenditure by the committee. The council however is not relieved of its reponsibility or obligation with respect to the exercise of any power, or the performance of any duty, and any legal proceedings must be brought against the council, thus missing an opportunity for interdependent responsibility in addition to interdependent power.

While it is clear that the urban committee provisions have a development bias, they do concede a genuine community role in contrast to the more tokenistic avenues of community participation available under plan-formulation and project assessment procedures. They should also be contrasted with the weaker "local committee" provisions of the same local government legislation.[53] Here, a council has a discretion to appoint a committee of local citizens to whom it may delegate the care, control and management of any work, park, reserve, cemetery or undertaking under the control of council. Expenditure of any necessary money depends upon council vote and a committee may be dissolved by the council at any time. Any conservation bias under these provisions is a poor relation to the bias of the urban committee system. Yet there would seem to be strong

48 Part XXVII, Local Government Act 1919 (N.S.W.).

49 Electors are not confined to those who hold property but include residents under Part V, Local Government Act 1919 (N.S.W.).

50 An urban area may be dissolved using the same procedure, unless the procedure is modified by ordinance: section 545.

51 Petitions and polls on committees may be embodied in and held in conjunction with petitions/polls on urban areas or subsequently or separately: section 548(4).

52 *Cf.* section 530A(2), limiting the delegation of functions.

53 Local Government Act 1919 (N.S.W.), section 527. The provision in section 309(1C)(d)(ii), enabling a majority of electors to *veto* a "residential district" zoning, was repealed when planning powers were transferred out of the Local Government Act to the Environmental Planning and Assessment Act 1979 (N.S.W.).

justification for replicating the urban committee in the shires with at least a 'bushland committee' in the municipalities.[54]

IV. THE FREEDOM BALANCE SHEET

Foregoing discussion has taken a 'worst case' line of urban planning from the standpoint of the community which may have anticipated, but not quite achieved, a certain diminution in the freedom of individual property controllers. It was suggested earlier however, that there is also a 'worst case' from the standpoint of the property owner/controller.

In particular, neighbouring occupiers sometimes seem to have gained a variant of 'right' at the expense of adjoining developers. The impact of development on views, privacy, sunlight and aesthetics may sometimes be a critical factor in refusing development consent, notwithstanding that the common law generally cedes no enforceable right of protection in such matters. There is no guarantee, however, that there will be protection under the planning system. These impacts simply arise for consideration as entries in the planning balance sheet, under headings such as 'amenity' and 'character'.

'Character' arguments are notably elusive. The concept may be used to justify development which has a sameness with features of other developments or it may disqualify development which does not preserve an existing distinctiveness from other development. It may be used to disallow development, irrespective of no-one other than a planner wanting its preservation, such as where a group of existing cottage owners wish to sell out to a developer undertaking large-scale redevelopment.

There is generally very strong pressure to 'conform', in all sorts of ways, to the prevailing ethos as determined by the local consent authority. Councils are notorious for codifying anything upon which a value judgement is required. Provided that codes are legally sustainable in the first instance, they are able to carry considerable weight when consistently applied. While they must not be so rigidly applied that they do not have regard to the individual merits of a particular proposal, they are often able to lock in development choices far more effectively than any formal planning instrument.

Planning instruments and wider legislative frameworks in any event work against individual lifestyle choices, especially where an individual may not wish to take on conventional sewerage and other services of an urbanised society. Yet, by the same token, compliance by a developer with non-planning schemes of regulation, such as health and pollution, is generally an irrelevant

54 "Bushland" value is acknowledged in New South Wales State Environmental Planning Policy No. 19 — Bushland in Urban Areas, which sets criteria for development decisions in bushland areas. It also treats bushland development as "designated" development, thereby attracting environmental assessment requirements and third party rights of appeal. It only applies however, to land reserved or zoned for open space and makes the local council the consent authority over land in which it has a strong self-interest, being land mostly in council ownership or trusteeship.

criterion on the question of whether development approval ought to be given.

Conventionality of lifestyle has created a strong bias against communal living. Apart from essentially internal property issues, such as security of occupation and freedom from liability for the unauthorised conduct of commune members, communal living raises fundamental issues of social diversity. Planning theoretically aims at non-discrimination between groups in the community on the basis of social values or objectives. The planning authority, which is usually a local elected body however, chooses among competing values and objectives. It also hopes to decide on the location and timing of development. Communes in rural areas pose a threat to this order and any concessions have generally been won only through centralist government intervention.

Even in established urban areas the use of dwelling stock for housing groups of people who do not fit a traditional 'family' model has generally raised social prejudice. Tremendous definitional refinement has been activated to either justify or deny specific instances of obvious multiple occupancy. Transience of stay, for instance, might help determine classifications as hotels, boarding or lodging houses and hostels. Purpose of stay might characterise a motel. At heart however, is a fear which comes back to basic property tenets. That is an assumed lack of residential control and its consequential amenity threat to 'regular' residents.

Again, particularly for disabled and socially disadvantaged persons, centralist intervention has been necessary to recognise that there are single household 'homes', irrespective of permanent or transitional stay, irrespective of the need for institutional type care and supervision and irrespective of fee payments for care and lodging. The wider milieu remains nevertheless, with the result that 'high quality' residential environments usually are preserved from lesser quality intrusions. Quality is essentially left to dominant local prejudices and may embrace such variables as size, style and colour of buildings, ages of residents, socio-economic and ethnic backgrounds.

That is, money does not necessarily have the loudest voice in urban development. Some common denominator may have become enshrined in the mind of the planning authority in such a way that an idiosyncratic use of land is viewed with genuine horror. Notwithstanding the perception of idiosyncracy, there is the belief that to allow it will create a legacy or precedental effect for the future, even after that 'odd' person has moved on. There is obviously a form of cultural collectivism which imbues urban planning to the possible detriment of property controllers.

From an orthodox legal perspective however, 'planning' considerations precluded economic and social considerations of a general nature,[55] thereby seeming to help make the case for a powerless community in urban planning. The reality of course is that most urban development decisions are never

55 M. Wilcox, *The Law of Land Development in New South Wales* (1967) 345.

challenged by way of appeal or judicial review and there is no necessary correlation between the planning wisdom which emanates from higher authority and the on-the-ground decisions of local planning bodies. Within the legal arena itself, the position is far from clear. Quite apart from what particular legislative planning frameworks might say, or not say, about social and economic factors, they are unable to be totally ignored.

A picture of conceptual confusion emerges as follows.[56] Economic rationalisation has been rated both an irrelevant and a relevant factor in land-use decisions. Objections from competitors have been treated as irrelevant in some cases, but damage to the economic viability of other existing businesses has also been found to be relevant. The question of economic need for a proposal has been treated as relevant but the question of 'no need' as irrelevant. Economic benefit has been accepted in relation to provision of cheaper supplies and land values, but depreciation of land value has been rejected as a valid planning consideration. Facilitation of employment prospects has been found relevant, but adding to local unemployment has been found to be irrelevant. Regional considerations have sometimes carried considerable weight, but matters of national defence have generally been thrown out of consideration.

Hardship of individual landowners might be ignored, might be used as a justification for granting development approval or might be used to justify development refusal. A need for particular forms of housing has been considered relevant, but housing needs have also been ignored. The needs of present occupants of redevelopment sites have been found to be both relevant and irrelevant considerations. Retention of useful buildings has been found to be a matter of relevant public interest, but so too has progress in architectural development. Although broad moral considerations have generally been considered to be irrelevant, serious affront to moral sensibilities, creation of irresistible allurements to children with sinister overtones, such as temptation to steal, and claims of anti-social conduct have all been found to be relevant on occasions.

In such a decision-making climate, the right of appeal conferred on developers against planning consent bodies becomes simply another risk of the planning system. The risk is magnified by the fact that third party appeal rights might exist and by 'open standing' provisions to enable legal challenges based on the validity of decisions made in the planning process.

When placed into perspective, it is easy to understand concern that public control of resources may well be synonymous with non-control and hence wasteful of resources. It is also easy to understand the strongly held position that 'environment' equates with 'anti-private property'. The position adopted in this paper however, is based on the need to be wary about

56 Note 1 *supra*, 211-218.

over-simplification. It is not possible to generalise about all land controllers by solely pointing to the fact that they all control land. It is not possible to generalise about all planning decisions by solely pointing to the fact that they all control land-use.

Freedom of property under urban planning is no less a matter of relativities than it would be without urban planning. It could be however, that the relativities are more. This engenders insecurity on the part of property controllers and insecurity increases the more that property is depersonalised by the planning process. Land, as the planning currency, nevertheless is capable of generating personal positions of strength which still skew the overall community balance at which planning notionally aims.