

**2007 PLANNING INSTITUTE OF AUSTRALIA NATIONAL CONGRESS
1 – 4 MAY 2007
PERTH CONVENTION EXHIBITION CENTRE**

Plenary Session 2: New Approaches to Traditional Planning

**“How Planning and Environmental Law Has
Shaped Our Cities”**

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In search of the ideal City

In Tim Winton's novel *The Riders* the male protagonist, in a search that is ultimately fruitless, pursues his lost love through the islands of Greek mythology and the streets and canals of various romantic European destinations. He can often sense her being or her spirit, but he can never realize her essence. A bit like those engaged in City Planning really!

We leave our own shores in search of an ideal City we hope is to be found somewhere in the ruins of an ancient city in Mesopotamia or a temple atop a mountain in Greece, or in the layout of a city built by the people who ran the Roman Empire, or in the design of a small Tuscan hill-town built to meet the promise of the Renaissance, or in the romantic capitals of Old Europe, or in the New World of North America. Sometimes we look for mysteries stored in ancient city ramparts hidden in difficult Asian terrains. Alas, we riders in search of this ideal, this Holy Grail, sometimes sense its being, its spirit, but also struggle to realize its essence.

We return to our own city shores, however, confirmed in the knowledge we in fact already possessed, that cities, including what we think of, or are taught to think of as great cities, have their own histories, their own evolution, their own struggles for acceptance, their own dynamic qualities, their own ways of responding to a changing world; their own geographies; and that there is no single model that can be taken from the shelf, marked 'Ideal City', for us to replicate in our settings.

All this confirms for us too, an often unexpressed knowledge, that people made, and still make great cities; and that cities are for people, especially those who live and work in them, and are not primarily intended to be exhibits in a long-running urban design competition. As much as cities have their own lives, their own personalities, their own mood swings, ambitions and disappointments, and influence citizens' ways of thinking and behaving, even provide meaning in their lives and at times liberate their ways of thinking and behaving, the truth remains that cities do not make people; rather people make cities and shape them to serve their own human ends. In this way, cities are or should be living examples of the democratic polity (*Reiner and Hindery 1984*).

Finally, we also come to appreciate that in Australia a city is, when all is said and done, a 'legal concept' and that, as much as they might like to be, they are not autonomous actors in the city planning process but are legally subordinate to the State or Territory governments under whose jurisdiction they fall, and are amenable

to the considerable influence of the policies and laws of the federal government in so many ways (Frug 1984).

The shaping powers of planning and environmental laws

Planning laws and environmental laws help to shape our cities in the sense that they are the ultimate reflection, in a democracy, of what citizens want their cities to be, or the processes by which they want others to make the decisions that will shape their cities. In one sense, laws really don't have lives of their own; they owe their existence to the people who made them. But in another sense, once made they do have lives of their own, just like cities and the people who live in them. They are an organic whole, dynamic, subject to evolution and change. But fundamentally they are important because of their capacity to influence, control and chart the way our cities are shaped.

Depending on the nature of these laws a city may keep nothing of historic, cultural or aesthetic significance from the past. It may be devoid of open spaces, parks, gardens and natural places. It may fail to encourage great urban design in layout or buildings. It may manage poorly the location of infrastructure designed to encourage economic development in the community. It may conspicuously neglect the welfare of some of its citizens. It may really be an urban sprawl without a centre, nothing but a series of disconnected living and working areas between freeway systems. It may be something the citizens would prefer not to have but can't change.

Ultimately, planning and environmental laws are positive statements made by citizens about what measures, constraints and processes they want in place to make their cities the sorts of places they want them to be. If citizens don't like what they have they can demand laws that will force change and protect and maintain what they want to keep.

The zoning technique and the planning scheme

City planning aficionados are often schooled in the shaping powers of planning laws by reference to the famous zoning law of New York City, a city which has long been considered one of the world's great cities. That city as we know is laid out on the quintessential grid formation, part of the city planner's tool kit since at least Roman times and touted by many as achieving an egalitarian or democratic spatial allocation of land for the benefit of all citizens of a city. Another great advantage for first time city planners, of course, is that it makes their job a pretty easy one! We are familiar with the skyscrapers and the residential apartment buildings of New York, and we know about the residential and the commercial and industrial precincts. The zoning law is credited with causing these phenomena. The question is, 'How?'

The technique of zoning land uses was a particular response to a widespread movement in industrialized countries in the late part of the 19th century and early 20th century to control the worst aspects of industrialization and growing urbanization. It reflected the relative incapacity of the common law – that body of unwritten law developed initially by the courts of England and transplanted in the British colonies in places such as North America and Australia and New Zealand – to deal with widespread incompatible land use activities in the face of enormous population increase and movement and industrialization. The law of nuisance has its role to play in settling land use disputes between private landowners, and the law of public nuisance sometimes enables wider land use problems to be ventilated, but neither has ever had as its focus the planning in advance of land uses. It was not designed with that end in mind. Nor could the private law relating to land ownership do much

to serve this end, despite the commendable efforts of courts in *Tulk v Moxhay* in 1848 to extend that law to recognize restrictive covenants designed to effect rudimentary land use controls over privately owned land.

However, the common law and private land law could hardly begin to grapple with the public policy issue of urban blight visited upon the citizens of the growing industrial cities of Britain and North America in the mid- to late 19th century. The powerhouse economies of industrialized and urbanizing countries had produced these public problems and public policy and legal solutions were required to respond adequately to them. During this time a number of public health, pollution and housing improvement measures were introduced (Bates 2002, pp 7-12 and Ch 2). Eventually the zoning law and planning scheme offered ways forward.

Zoning had the distinct advantage and conceptual base of attempting to identify potential nuisances and segregating them from other uses in ways which would prevent them from becoming nuisances. Additionally, it identified those areas of the city where certain forms of development were encouraged. It carries with it then the potential to produce a city with a built form that is both harmonious in land use and design terms.

In New York City, the *Zoning Resolution of 1916* established height and setback controls and designated residential districts that excluded what were seen as functionally incompatible uses. It fostered the iconic tall, slender towers that epitomize the city's pre- Second World War business districts and established the familiar context of three- to six-story residential buildings found in much of the city.

The usual criticism of zoning is that, unaccompanied by positive planning, it is purely negative in approach, controlling development but not imagining in any comprehensive way what the possibilities of a city might be (Stein 1974, pp 225-238).

In the early parts of the 20th century, 'Town planning' soon became a familiar catch cry throughout much of the industrialized world. In fact, the New York move to the influential zoning law was preceded in England by the introduction of the *Housing, Town Planning etc Act 1909 (UK)*, which was amended significantly in 1919 and then again in 1925 and 1932. For the first time, the art or practice of town planning was referred to by name in a British statute. It had grown out of various public health, building and local government reforms in the last half of the 19th century, and reflected the widespread movement to resolve the urban blight resulting directly and indirectly from industrialization. This movement had various components, including the City Beautiful and the Garden City movements.

By the last third of the 19th century, Baron Haussmann had achieved the replanning of central Paris and these movements were well underway. By the 1920s, Le Corbusier was producing his brilliant urban village concepts designed to consign poverty to the dust bins of history. New suburbs were being designed in many countries by reference to these new ideas. These were great days after the Great War, the war to end all wars! New Zealand and Australian States were undoubtedly influenced by these British and overseas trends, a number proposing or passing planning and development statutes of their own early on.

Planning in the New World of Australia – Perth, WA

In Western Australia, by way of example, in 1928 the *Town Planning and Development Act 1928 (WA)* (TP&D Act 1928) came into operation, having first been presented to Parliament as a Bill in 1919. Like all States, WA has primary control

over land and resource uses in the State. However, WA then didn't quite have the industrialization and urban blight of the Mother Country of England and a lot less than most of its Australian sister cities. The population of WA in 1920 was just over 330,000, with about half living in Perth. The City Fathers either were looking forward to the day the blight arrived, or more charitably, wanted to avert the inevitable coming crisis! To be fair, the latter motivation was theirs, as the parliamentary debate in 1928 on the Bill that became the 1928 Act discloses:

“Nearly every country in the world has town planning legislation and large cities are spending millions of pounds trying to remedy the mistakes of the past...”

“[The Bill] is the outcome of a small movement, inaugurated twelve years ago, by men who could see well ahead, and who were inspired by the best of motives.”

(WA Parliamentary Debates, 1928, v2, p2309, p2313)

It would be naive to think, however, that only when planning laws were introduced in Australia just after the First World War did Australian cities, like Perth, suddenly begin to take shape, or that these were the first laws to affect the shape of cities, for plainly this was not the case. But it is true to say that this was a movement of the greatest significance, a movement that has helped to produce the planning and environment laws we operate under today.

The practical position in the case of Australian cities is that they were settled as the seats of British colonial governments from 1788 onwards. Perth was settled when the first 3 ships carrying Governor James Stirling RN and his optimistic band of free settlers (including indentured labourers) arrived off Fremantle on 1 June 1829 - 178 years ago! Some of the cities were initially convict settlements, but all soon were thriving all-purpose enterprises dependant on private enterprise. The exception was The Swan River Colony at Perth which struggled financially and eventually begged London for convicts in the 1850s to provide a cheap labour source. Not really until gold was discovered at Coolgardie in 1892 and at Kalgoorlie the following year, when WA experienced the first of a number of resource booms and many emigrated from 'totherside' of the country, did the economy begin to improve and the population increase. In 1881 the population of WA was just under 30,000, with Perth's just under 9000. At the turn of the 20th century in 1901, the State's population was just over 184,000, with Perth's just over 67,000 – music one supposes to the ear of a planner!

Those portions of Perth's built environment that to the educated eye look older than others, usually date from the gold rush days and the early part of the 1900s. There are only a handful of buildings that date from the first decades of settlement in the Perth CBD, and a few more in Fremantle, the port city.

Each Australian State capital city has its own colonial and early federation history that fits more or less that of Perth, with spurts in its physical growth commensurate with flows of wealth and immigration (Statham 1989). As was the case of other parts of the New World, even more immigration and growth occurred after the Second War, but we will come to the significance of that in planning and environmental law terms soon enough.

Perth, like New York City, and most other Australian cities – with the possible exception of Sydney, which seems not to have been laid out with any plan in mind -

was initially laid out on a grid plan; as was Fremantle. City planners familiar with suburban growth in Australian cities since the 1960s, will have some sympathy, I am sure, with the task that faced the first Surveyor-General, Septimus Rowe, when he had to lay out the streets of Perth. It seems, however, that in doing so, Stirling and Rowe did what all visionary planning authorities tend to do when given a major planning challenge; they immediately ignored the official plan! The official instruction from the Colonial Secretary in London apparently was to plant the seat of government at Heathcote Point on the banks of the Swan in the present suburb of Applecross, on the south side of the river. However, our Founding Fathers unilaterally decided to plant it on the north side of the river in its present location overlooking Perth Water! (Bolton 1989) One should add that there were then: no State Administrative Tribunal to review their decision; no third parties with rights in land – the Aboriginal Noongar people who, having regard to the determination of Justice Wilcox in the Federal Court of Australia in 2006 (Noongar Native Title Determination 2006), held the native title to the land, didn't count then of course; and no third party review rights in any event!

Probably this first major city planning decision was a sensible one – emphasizing why planning from afar and on high is problematical at the best of times - because Fremantle was always going to be the port to Perth and the early agricultural area was always going to be near Guildford, upstream from Perth. A connecting road joining the three centres, with Perth in the middle would obviously be required, and in the end Perth as the seat of the new colonial government came to be where it still is today. Naturally enough, once the centres were decided and the connecting road started on, early patterns of land development followed suit (Pitt Morison and White 1981). As always, the establishment of a major road rather sewed up the immediate planning options – the die was cast; a theme I will return to in relation to the promulgation of the Perth Metropolitan Region Scheme (MRS) many years later in 1963.

So the initial planning of Perth at least happened under lawful authority and with some general guidance, but with little considered thought apart from what was important to ensure the first settlers were allocated the land they had paid for as soon as possible and that the primary means of commerce and articulation in the colony were secured. The terms on which land was initially granted required its development, to encourage the successful completion of the project. The land in the CBD was granted on lease initially for 25 years to ensure governmental needs could be reviewed during the early years.

Not all Australian cities of course followed this largely unplanned approach, Adelaide being a notable exception. EG Wakefield, the British schemer and sometime politician, had grand ideas for a colony of free settlers in South Australia, as he did for Christchurch on the South Island of New Zealand. Each was in the end nicely laid out, with wide streets and provision for extensive open space in public ownership. Colonel Light's plan for Adelaide was a wonderful vision. I should say, however, that over the years I have wondered whether Wakefield's ideas or the careful early planning of Adelaide and Christchurch has anything to do with the fact that each seems to produce the most bizarre murders! In turn this has caused me to wonder whether the corollary is, that totally unplanned cities with convict origins are the safest (if not necessarily the best) – a not entirely rhetorical meandering on my part!

Subdivision and building control

In most cities in Australia I think it is fair to say land development came first and planning later in the period up to just after the First War in the 20th century. Controls

over land grants, road opening and building ensured a measure of control over land development, but only a measure. Land subdivision control was also gradually introduced. Wilcox's assessment of the situation in New South Wales in 1919 (Wilcox 1967, p 188) is interesting as it is reasonable to suggest it reflects the situation, more or less, that had prevailed in most of the Australian cities up to that time:

'A council might now be able to avoid the worst evils of laissez-faire development, sub-standard buildings and inadequate sites, but it could do little to avoid buildings being thrust into disharmonious proximity. No building control could prevent factories and shops being placed among cottages. Economic factors were decisive, outweighing considerations of living amenity, the availability of public transport and public services, traffic problems and the preservation of natural beauty.'

Consequently, soon after the First War most Australian States had local government or related controls that controlled land development to an extent through subdivision control, zoning ordinances and building regulations (Fogg, pp 11-31). However, it was not really until after the Second War that most Australian States took seriously the need to enact and implement purpose designed planning and development controls.

Western Australia however provides an interesting example of a State that tried to get ahead of the game. Its legislative forays in the 20s were a portent of things to come. Even then the reality didn't match the theory until after the Second War when all States were effectively forced by the federal government to get into the planning business. Under the TP&D Act 1928, which was closely modelled on a New Zealand planning statute of 1926, planning and development control were brought together in the same Act, and subdivision of land into smaller parcels, the laying out of roads, and long leases were all made subject to central government agency approval. The concept of the 'town planning scheme' was introduced, enabling a local government to make a scheme to plan land uses and to regulate all manner of land development, reserve land for public uses and effect building design control – the latter being something we in Australia have seemingly been quite reluctant to do, at least until recently. (Perhaps that didn't matter, because judging from Glenn Murcutt's astute eye, our forbears all built in pretty much the same way anyway, or at least with the same materials!) The First Schedule to the Act was quite inspirational in the way it listed the wide range of matters a scheme could deal with; Nirvana was in reach – or so it seemed! However, planning was not compulsory and only a few local governments at this time took up the heroic opportunities made available to them. Probably the fact that there were not many professionals practiced in the art or skill of scheme making had something to do with it. And one imagines the strictures of the Great Depression may also have had something to do with it.

In the meantime, local government by-laws, much in the mould of the North American zoning law, together with building controls and subdivision controls continued to be used extensively in WA and elsewhere in Australia, continued to govern land use in cities.

Subdivision control remained one of the most important means of controlling land development throughout Australia in this period before the Second War. While varying degrees of subdivision control existed in the Australian colonies and States up to the time of the First War, South Australia was the first to introduce comprehensive controls with the passage of the *Subdivision of Land Act 1917 (SA)*. The *NSW Local Government Act 1919 (NSW)* was also extremely influential in this

regard. In a New World where, following the initial land grants made by the colonial governments, there was little control over the further alienation of land in smaller parcels, subdivision control made sense in the early urban and rural development of the colonies. While subdivision control could have been effected as part of a broader system of development control, the primary tool required was one that ensured streets were laid out in the most suitable areas for road making, that they were of appropriate width, that the streets laid out in one locality would actually meet the streets in another, and that essential services would be installed to avoid the creation of health hazards. Generally speaking these controls prevented the premature creation of subdivisions (Barker 1979).

Subdivision control in a city like Perth has been of the utmost importance now for the best part of a hundred years, and continues to be important. In conjunction with the statutory regional planning of the Perth metropolitan region since the late 1950s, subdivision control has been the prime factor in shaping Perth and, more indirectly, defining the City CBD. Whether the shape and its consequences, especially in terms of urban sprawl, house siting and design, and motor vehicle dependence, constitute an undeniable 'public good', one may debate; but what is undeniable is that planning laws have been used in Perth's case to set defined urban goals and, by and large, to achieve them.

The onset of regional planning

In Australia after the Second War, as large scale immigration presaged large scale urbanization and the demand for natural resources grew, both the federal government and most State governments accepted the need for regional planning; indeed the federal government demanded it. The war experience itself showed how regional planning could work. The Commonwealth Chifley Labour government as part of its post war reconstruction program, initiated an ambitious regional, economic, social and physical planning project for the whole of Australia, dividing the country into numerous regional planning areas (see Commonwealth Department of Post-War Reconstruction, *Regional Planning in Australia* (1949), discussed in Stein 1974, pp 288-291). The federal government required the States to bring in meaningful planning laws. Some were unconvinced, as in the case of Victoria, and only did so under the duress of losing federal housing funds (Eccles and Bryant 1999, pp 169- 70). Again, it is reasonable to suggest overseas influence was an important ingredient in these changes.

After the War significant changes occurred in the English planning system with the introduction of the *Town Planning Act 1947(Eng)* that brought with it the notion of universal development control - no land could be developed without approval - and a commitment to the building of new towns. This Act followed three major British planning reports: the 1940 Barlow Report on the distribution of industrial population (Barlow 1940); the 1942 Scott Report on land utilization in rural areas (Scott 1942); and the 1942 Uthwatt Report on compensation and betterment (Uthwatt 1942). (One tends to forget that policy and political life goes on even during the conduct of a major war!) Regional planning - town and country planning - became a byword in planning circles and a range of concepts, such as 'green-belts' fell into common parlance - a portent of the 'environmental decade' heralded by the 1970s.

Products - or their remnants - of this general post-war enthusiasm for planning can be seen in the regional plans put in place with a strong statutory base particularly in Sydney, Melbourne, Perth and Brisbane. The planning and development implications of these macro planning exercises were enormous, although the experiences with them were not necessarily uniform. It seems Perth's experience

may have been better than that of most other cities: perhaps because Perth had less existing development that conflicted with the new regional planning proposals; perhaps because the planning proposals were initially better thought out and gained a greater general acceptance by Perth's citizens; or perhaps because the good people of Perth were only hazily aware of the implications of what was being planned for them! It may be useful very briefly to contrast the Sydney experience with that of Perth.

For greater Sydney, it was not until the *Local Government (Town and Country Planning) Amendment Act 1945 (NSW)* was passed that comprehensive planning and development control became a legal possibility. Until 1919 such control was, in the words of Wilcox (p188), 'haphazard and weak'. Even after the 1919 amendments to the local government legislation, Wilcox (Wilcox 1967, p188) considered the powers of local governments only gave 'minimal control'.

As a result of the push of the federal government for regional planning and the State's own acceptance of the need for it, the 1945 Act saw the creation of the Cumberland County Council which was given the responsibility of preparing a planning scheme for greater Sydney, not including the City of Sydney. This was an important step as two earlier attempts to pass planning legislation had failed, and a Greater Sydney Bill of 1931 had actually passed the lower House of Parliament but later lapsed on the proroguing of Parliament. The scheme was originally intended to be only an outline scheme, with each local government making a detailed local scheme by reference to it. However, in the end a need for the exercise of some regional control powers was recognized, as was the need to remove any possible legal challenge to the scheme, and so it was eventually given a statutory basis under the *Local Government (Amendment) Act 1951 (NSW)*. Prior to this bodies such as the Department of Main Roads had already given consideration to issues affecting the development of the regional area. For example, that Department's 1945 report - 'The County of Cumberland Main Road Development Plan' - was apparently incorporated with little alteration into the Cumberland County Council's plan in 1948. While the new scheme did not cover the Sydney CBD, other planning initiatives sought to harmonize planning in the greater Sydney area with that in the CBD. However, not everything in the County of Cumberland plan, especially as to proposed major arterial roads, ultimately found acceptance. By 1977, the Wran government in NSW abandoned a number of key road proposals (Ozroads NSW).

Local government scheme making commenced once the County Scheme became law. As Wilcox explains (Wilcox 1967, pp191-192), it had never been intended that the County of Cumberland scheme should be the ultimate scheme. It was intended to be outline only, giving some control over development while local detailed schemes were made. The first such local scheme was gazetted in 1960. When made, these local schemes modified the operation of the regional scheme. As we will soon see, in this the Sydney position was the reverse of that in Perth where the regional scheme prevailed. Here we see perhaps an early sign of the tension we are all so familiar with, the relative positions of the local planning authority versus that of the state planning authority and the responsible Minister.

In 1962 it was announced that a new State Planning Authority would be established to replace the Cumberland County Council to coordinate and control town planning across the state, and the *State Planning Authority Act 1963-1965 (NSW)* came into operation. A new planning vision for the Sydney region was released in 1968, called the 'Sydney Region Outline Plan'. The Sydney Region Outline Plan abandoned the Green Belt-Satellite City concept proposed by the earlier scheme in favour of linear

development. Unlike the County of Cumberland Planning Scheme before it, the new plan was not a statutory document, with the result that it allowed greater flexibility and change but much less direct control over planning in the Sydney region.

This change from a legally enforced metropolitan region plan to one based on 'objectives' and 'principles', and without the detail of the County Scheme, affected amongst other things major road planning. The old scheme proceeded on the basis of one set of roads, whereas the new Outline Plan provided for the establishment of 'New Cities' at Campbelltown, Camden and Appin and the supporting infrastructure, including such roads as the Georges River Expressway, the Smiths Creek Bypass road and a long-term expressway linking Minto with the Princes Highway. The shape of greater Sydney was plainly affected by these unsettling developments and took time to resolve.

Turning to Perth, in March 1952 BP Australia (then the Anglo-Iranian Oil Company) reached an agreement with the State Government to build a 40 million pound oil refinery at Kwinana, just south of Perth. The Government agreed to provide infrastructure - including electricity, water, roads, railways, a safe channel to the sea and a thousand state houses at Kwinana - within three years. In October 1952 BHP agreed to construct a steel rolling mill near the refinery and thus the Kwinana industrial strip was born. The Main Roads Commissioner suggested that legislation should be passed to allow construction of 'controlled access roads' – the first to be constructed to connect Kwinana with Perth. The State Government agreed and the Main Roads Act was amended to make a provision for 'controlled access roads' before the end of 1952.

Kwinana was only the beginning of Main Roads' involvement with major metropolitan development. The need for a regional plan for Perth had been obvious for some time, but the decision to create the Kwinana industrial complex made a plan imperative and urgent. Gordon Stephenson, Professor of Civic Design at the University of Liverpool in England, was invited to prepare such a plan and he arrived in January 1953. In 1955 Stephenson and Mr JA (Alistair) Hepburn, the Town Planning Commissioner, released their *Plan for the Metropolitan Region, Perth and Fremantle, 1955* (Stephenson-Hepburn 1955). It was a publication of over 300 pages, which examined in detail every facet of life in Perth and suggested how the city might be developed for a metropolitan population likely to reach 1,400,000 by the end of the century – a pretty reliable forecast as it turned out, for in 2004 the population of Perth was estimated to be 1,454,606.

The Stephenson-Hepburn Plan proposed a road network to cope with 400% more traffic than there was in 1955 and recommended the construction of eight new highways with a total length of about 85 miles. The routes of the new major regional highways were carefully selected to provide the best locations and directions, to avoid areas of improved land where possible and to be cheaper and more effective than widening existing roads. The new highways proposed were: Perth-Kwinana Highway (Kwinana Freeway), Yanchep Highway (Mitchell Freeway), Beechboro-Gosnells Highway (Tonkin Hwy), Fremantle-Midland Junction Highway (Roe Highway), North Perimeter Highway (Reid Highway), Swan River Drive, Burswood Highway (Graham Farmer Freeway) and Kwinana-Mundijong Highway (Stephenson-Hepburn 1955). They also posited the extension of suburban rail systems, especially as the tram systems were then all but lost to Perth.

When Baron Haussmann replanned Paris from the mid-1850s, he gave great emphasis to the use of railways as commuter transport. It has served Paris well to

this day. By the time Stephenson and Hepburn were at work in Perth a hundred years later, the car was the popular and growing means of conveyance. Perth may not have exactly been planned around the car, as some North American cities were then being developed, but the emphasis in the plan was on the need to have a modern road system, supported by an effective rail system. However, in the result, apart from the three main trunk routes from Perth CBD to Midland, Armadale and Fremantle, the new suburbs to the north and south of the City created in the 60s and following were dependant on the provision of bus services as the only alternative to private cars. This remained so until very recent times. Fortunately, the infrastructure provided by the freeways has permitted the installation of commuter rail services both north and south of the Perth CBD.

The Stephenson-Hepburn Plan recommended that a regional planning authority be established to prepare a formal regional plan based on the report and to implement it. In 1959 legislation was passed – the MRTPS Act - to create the Metropolitan Region and establish an authority to formulate and administer the regional planning scheme. The following year the members of the Metropolitan Region Planning Authority (MRPA) were appointed and the initial planning scheme was revised, with important amendments, creating the Metropolitan Regional Scheme Plan, which was completed in 1962 and adopted in 1963. The MRS adopted these major road initiatives. They effectively dictated the future shape of Perth.

The MRTPS Act 1959 was repealed on 9 April 2006 and the *Planning and Development Act 2006 (WA)* (P&D Act 2005) now contains a single regime for regional planning schemes including the MRS.

The introduction of the MRS under the MRTPS Act 1959 required for the first time local governments in the metropolitan region of Perth to make local planning schemes and to ensure they conformed to the MRS. The result was a dual planning and approval system under which the MRPA (later the State Planning Commission and now the WA Planning Commission) exercised overall planning and development control under the MRS and local governments performed local planning functions and development control under local schemes. Harmonization was achieved and still is through the delegation of regional functions to local governments in many areas. However, subdivision control remained and still remains a centralized function in the hands of the present Planning Commission. Both the MRS and local schemes are underpinned by statutory plans, Statements of Planning Policy made under the current P&D Act 2005 – to which planning authorities must pay ‘due regard’ when making planning and development decisions - and non-statutory policies of the Planning Commission, supplemented by those of local governments.

The MRS has been remarkably successful having regard to the scheme’s strike rate in achieving its original vision and plan. The roads were built and the metropolitan region physically developed according to it. Development over Perth’s main underground water supply was avoided. And, importantly – as we will see – the Swan River was kept ‘front and centre’. Some major regional open space initiatives were secured, such as the Darling Range National Park (WAPC 2007). It may reasonably be said that the current shape of the greater city of Perth reflects what the MRS had in mind. Whether all Perth’s citizens would today put their hands up to support that part of Perth’s shape that resulted from West Perth/Kings Park and the Perth CBD being dissected by the Mitchell Freeway running north from the Narrows Bridge, and the consequent destruction of all but the Arch of the old Pensioners’ Barracks, is another thing.

Changing times

In 1955, and even in 1963, we were living in an era of relative post-war peace and tranquility, and optimism. The sky was the limit. The Australian economy was in various upward trajectories. People still worked on the land. Kids at school still studied science and dreamed of flying to the moon, and being nuclear physicists. While the White Australia policy was still in place, immigration was fast on the rise and Bob Menzies was still the Prime Minister of Australia! The economic, social, environmental and planning issues of the coming decades were yet to fully reveal themselves, at least in Australia.

In the United States, however, many of them were becoming obvious as the suburbs sprawled beyond traditional city limits and old parts of old cities became no-go areas. The automobile was king and the 'War on Poverty' was about to be waged. Rachel Carson in her seminal 1962 book, *Silent Spring*, was already chronicling the looming ecological crisis facing the US. The question of, 'Why do we plan cities, to what end?' was about to be asked yet again, and with renewed force.

Then the 'Environmental decade' arrived, ushered in by the United Nations Conference on the Human Environment held at Stockholm in 1972. This conference stated as its first principle, something that could well have been written by a city planner at the turn of the 20th or 21st centuries, that:

'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations ...'.

Numerous international treaties were signed around this time by many nations including Australia. The *World Heritage Convention* of 1972 was one of them. It was pursuant to the obligations Australia assumed under this convention that the federal Parliament enacted the *World Heritage Properties Conservation Act 1983 (Cth)* that protected parts of South West Tasmania from being flooded for a hydro-electricity project, and the High Court of Australia held the Act to be constitutionally valid under the Commonwealth Parliament's power under the Australian Constitution to make laws with respect to external affairs (*Tasmania v Commonwealth*).

The 70s and 80s saw a tremendous focus placed on the regulation of land and resource uses to conserve vanishing or depleted environmental resources. In Australia, the 1974 *Report of the Committee of Inquiry into the National Estate* (Hope Report 1974) commissioned by the federal Whitlam government identified the under-developed condition of laws designed to conserve the natural environment, the man-made or cultural environment and archaeological, Aboriginal and scientific areas. The ideas expressed in the Hope Report began to find frequent expression in new environmental and heritage laws at all levels of government throughout Australia.

Heritage laws

Heritage laws protecting the built environment of Australia were thin on the ground in the 60s and 70s when much urban development occurred in Australian cities. WA did not get a built heritage Act until the *Heritage Act of Western Australia 1990 (WA)* became law. One of the reasons St George's Terrace, Perth, the main street of big business in the West, has few buildings built before the 60s, is that most were

systematically demolished to accommodate the shiny new towers of the 70s and 80s before the heritage law was made. National trust functions in respect of places of historic interest and some controls in planning schemes made under the *TP&D Act 1928* were not equal to the task of saving them, although curiously if the powers to deal with heritage given by the First Schedule to the Act had been fully exploited in the MRS or local schemes, perhaps the story could have been different. The truth probably is that citizens then were insufficiently motivated to save their built heritage – they didn't care enough to keep the things that mattered when it mattered. The environmental decade was still in the making.

While in 1966 many citizens stood to try to save the Pensioners' Barracks at the top of the Terrace, only the Arch was saved. The rest had to go to make way for the Mitchell Freeway, mandated by the MRS. If ever an act of heritage vandalism were committed in this fair city, this was it. Some say sarcastically that the Parliamentary view from The Hill down the Terrace was more important than this outstanding example of convict built heritage. Perhaps we were, as citizens of a free, progressive and democratic State, anxious to eradicate this reference to our past! Not only was the building lost, but in city planning terms West Perth and Kings Park were bluntly disarticulated from the heart of the City.

The redevelopment of the site of the historic Palace Hotel in the 80s for a bank tower in the very centre of the City at least saw something saved, even if the former use was lost. Keeping a pub, even one without any beer, was seemingly important!

The reclamation of the Swan River to make way for the Narrows Bridge and its attendant circle of roads and ramps was a precursor to these heritage debates, but Mrs Bessie Reischbeith was virtually a lone voice of protest when, at the venerable age of 89 in 1963 - albeit symbolically at a late stage in the project - she waded into the Swan River in front of the bulldozers to register her contempt for progress! Only with the continuing conscription of young men and the growing controversy over conscription and the Vietnam War in the late 60s did young West Australians truly learn the meaning of civil disobedience and protest! But now they have all grown older!

The port city of Fremantle fortunately survived the period when redevelopment pressures were applied to the Perth CBD. This can be attributed to the formation of The Fremantle Society - a group of concerned residents - in 1972 and the ultimate preparedness of the local government to mark out the city's built and cultural heritage as worthy of preservation. As a result, Fremantle today has retained its 'Fremantle' streetscape in a largely low rise urban context which emphasizes its history as a maritime city. As a result it now claims over 2,000,000 visitors a year.

Environmental impact assessment, pollution control and city planning

In 1974 the Commonwealth Parliament enacted the *Environment Protection (Impact of Proposals) Act 1974 (Cth)* to ensure that any proposal that if implemented would be likely to significantly affect the environment was assessed before approval was given under federal law.

Similar laws requiring environmental impact assessment (EIA) were made by States and Territories through the 1970s. The first State to follow suit was Victoria with the *Environmental Effects Act 1978 (Vic)*. Others followed (Fowler, 1982). WA was at the forefront of these developments when the Tonkin government introduced the *Environmental Protection Act 1971 (WA)* which in time was replaced by the *Environmental Protection Act 1986 (WA)*. New South Wales enacted its far reaching *Environmental Planning and Assessment Act 1979 (NSW)* at the very end of the 70s and it reflected much of the experience with planning and environmental laws gained during the preceding decade, as discussed later.

States and Territories also introduced pollution control laws, with licensing systems not unlike those that applied in planning matters, in that they typically relied on the issuing of permits to carry out activities subject to conditions, though the administration of these laws were committed to new environmental protection agencies. Most States had rudimentary pollution control laws from the 1950s, following the great London smog disaster of 1952, which was said to have caused directly or indirectly up to 12,000 deaths from respiratory difficulties among the young and the elderly over a number of months following the event. In the 70s these laws were beginning to be upgraded. Victoria again led the way with a new Californian influenced, *Environment Protection Act 1970 (Vic)*, which Victorians rightly claim was, at its inception, only the second Act in the world to deal with the whole of the environment in a systematic and integrated way. As one Justice of the High Court remarked when that Court had occasion in 1977 to examine its thorough-going nature, 'to water one's garden' would seem to run foul of the Act (***Phosphate Co-Operative Co of Australia Ltd v Environmental Protection Authority (Vic)***). Today in Victoria, with water as scarce as it is, to water one's garden is at least an act of social irresponsibility akin to resource larceny, if not pollution!

In cities, these types of laws also influenced planning regimes. A great debate has always revolved around the extent to which planning is or should be primarily concerned with physical planning and not economic, social and environmental issues. In the 70s the view was often expressed that planning did not account for, or was not capable of adequately accounting for the environmental impacts of development proposals. Thus we saw the creation of new government agencies, like the Environmental Protection Authority (EPA) in WA, to license pollution and conduct EIA. New South Wales to a great extent answered this question by bringing planning and environmental laws together in the one Act - the *Environmental Planning and Assessment Act 1979 (NSW)* - and by making all factors relevant in planning and development control decision making.

These new environmental laws began to have an effect in the city context. In Perth, for example, in the late 1980s, a proposal for the residential subdivision of privately owned bushland adjacent to Bold Park near City Beach, not far west of the Perth CBD, was the subject of an EIA by the EPA. The EPA recommended rejection of the proposal on the conservation grounds that the remnant vegetation should not be destroyed. The land development industry expressed concern that an environmental law could 'override' the planning law where a town planning scheme already

contemplated development. While adjustments were later made to the relevant laws to harmonize the making of schemes and the operation of EIA, the proposed development did not occur. Strong community opposition to the development of the bushland, essentially for the reasons advanced by the EPA, ensured this outcome, although the collapse of the developer – the Bond Corporation and its group of companies - significantly aided the process by which the privately owned land fell into public ownership. Today the land, and other nearby land originally earmarked for urban use, forms part of the broader Bold Park conservation area which has been an A Class reserve under the *Land Administration Act 1997 (WA)* since 1998.

Conservation planning in the 70s and 80s also identified ecological problems arising from the systematic loss of native vegetation throughout the State. The '*Red Book*' data resulting from research by the Department of Environment identified numerous ecological 'systems' throughout the State, including metropolitan Perth. These systems are taken into account in planning and development, and resource allocation decision making, including in the planning of the Perth and are often protected through reservations made in planning instruments, in the exercise of EIA powers and by conditions attached to development control and resource allocation approvals. This process helps to preserve the natural places of the broader city.

The rivers, regional open space, and Kings Park

The rivers of Perth – the Swan, Helena, Southern and Canning Rivers and their tributaries - have always been a prominent aesthetic feature of the city. People everywhere seem to wax lyrical about water. It signifies consciousness and purity for poets and painters. For Aboriginal people it is usually closely associated with the Dreaming time when the world was formed. For all of us it is essential in its potable form and desirable for rest and recreation. The Stephenson/Hepburn plan had extra special regard for the Perth waterways. But over time they became ecologically weak, affected by a range of land uses, including agricultural land uses far upstream. Blue/green algae have affected the waterways with the result that fish have died from time to time in great numbers. People have not been able to safely use the rivers. *Silent Spring* has occurred all over again.

Reflecting the special regard all Western Australians hold for the Swan River, the Swan River Trust has the responsibility of directly managing the Swan River under the *Swan River Trust Act 1988 (WA)*. The Trust manages and protects the river system and works with State and local government and other bodies to provide facilities around the rivers. Development wholly within the Swan River Management Area must be approved by the Minister for the Environment, which is advised by the Trust. The Trust also provides advice to local governments and the Western Australian Planning Commission on planning issues arising when development is proposed on land that is partly within the management area or abutting it.

The Waters and Rivers Commission, set up under the *Water and Rivers Act 1995 (WA)*, have the job of preparing the State's water plan, including for Perth, as well as protecting and maintaining the ecological integrity of water resources. The Commission is integral to the administration of the *Rights in Water and Irrigation Act 1914 (WA)* which controls access to water resources throughout the State. The work of the Commission is integrated with the planning and environmental laws to ensure the overall decision making in relation to the water resources is environmentally sound.

First time visitors to Perth, and even some older residents, may occasionally register surprise at the low level of commercial development on the Swan and Canning Rivers. This is a feature that the MRS, on advice from Stephenson and Hepburn, was designed to achieve. The foreshore area along both sides of the rivers is reserved from development. Where that land is still in private ownership, approval to develop it may be denied under the *P&D Act 2005*. The WA Planning Commission has the power, as its predecessors had, to elect to acquire this land, especially when development is proposed and denied. The result is there for all to see – the river foreshores are often very public places from which citizens can gain access to the rivers themselves, beaches and pools, riverside parks, jetties, and pedestrian and bicycle paths. Commercial activities have been allowed only sparingly. For some this may be an irritation, in the sense that commercial activities are limited, but daresay the vast majority of Perth people are pleased that Professor Stephenson and Mr Hepburn considered the rivers and their environs should remain theirs in perpetuity.

The introduction of the MRS was accompanied by a very interesting revenue statute designed to achieve land use outcomes – the *Metropolitan Region Improvement Tax Act 1959 (WA)*. It is particularly worth mentioning as it does not have many imitators in Australia. The Metropolitan Region Improvement Tax (MRIT) is an annual tax based on the aggregated unimproved value of land owned (excluding exempt land) at midnight on 30 June which is situated in the metropolitan region. This is a special purpose tax collected by the Office of State Revenue and used to finance the cost of providing land for roads, open spaces, parks and similar public facilities. The MRIT is currently imposed at a rate of 0.15 cent for every dollar of the unimproved value of the land. The combination of planning for regional outcomes in the public interest and financing them in this way is a special feature of the planning system as it has evolved in Perth.

One of the more astonishing things about Perth is that the most prominent site of all, with majestic views of the City central business precinct and the Perth and Melville Waters – Kings Park – was identified by the first Surveyor General, Mr Rowe, soon after settlement in 1829 as an important place to keep in reserve and today is in a permanent reserve for botanical purposes. It truly is a jewel that surely could never be lost.

The park occupies approximately 400 hectares of Mount Eliza. Named by Governor Stirling, it honours Eliza Darling who was the wife of New South Wales Governor Ralph Darling, the man who authorized Stirling's 1827 exploratory voyage to Western Australia and later passed on to London, with approval, Stirling's recommendation that a colony be established on the Swan River.

Although nowadays it is assumed that the park's founders intended to keep the area as an oasis of native bush in the middle of a growing settlement, the record is somewhat blurred. In 1957 and again in 1959 the commitment of Western Australians to the preservation of the park was tested when proposals were put forward to build an aquatic centre on the reserve. A controversy erupted and led to the defeat in State Parliament of two Bills authorizing construction of an aquatic centre. Today the Park is protected and managed under the *Botanic Gardens and Parks Authority Act 1998 (WA)*.

The WA Planning Commission recognizes the important contribution the bush makes to the character of Perth and the lifestyle of its citizens. The Bush Forever outlines a vision that people will be able to gain access to their own 'mini Kings Park' wherever

they may live in the region (Bush Forever). Draft State Planning Policy 2.8 published for public comment in 2004 advances this vision. It seeks to maintain and protect these regionally important bush areas as part of the States' sustainability strategy (State Planning Policy 2.8 Bushland Policy for the Perth Metropolitan Region (Draft)).

Sustainable development

In 1987 the Brundtland Report, also known as *Our Common Future*, alerted the world to the urgency of making progress toward economic development that could be sustained without depleting natural resources or harming the environment (Our Common Future, 1987). The report provided a key statement on 'sustainable development', defining it as:

'Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'

The Brundtland Report was primarily concerned with securing global equity - redistributing resources towards poorer nations whilst encouraging their economic growth. The report also suggested that equity, growth and environmental maintenance are simultaneously possible and that each country is capable of achieving its full economic potential whilst at the same time enhancing its resource base. The report also recognized that achieving this equity and sustainable growth would require technological and social change.

The report highlighted three fundamental components to sustainable development: environmental protection, economic growth and social equity. The environment should be conserved and our resource base enhanced, by gradually changing the ways in which we develop and use technologies. Developing nations must be allowed to meet their basic needs of employment, food, energy, water and sanitation. If this is to be done in a sustainable manner, then there is a definite need for a sustainable level of population. Economic growth should be revived and developing nations should be allowed a growth of equal quality to the developed nations.

The Brundtland Report has been enormously influential around the world as it suggests an approach to resource use and decision making that is capable of maintaining and advancing living standards across the planet without anyone apparently losing what they have. It presents an optimistic, practical approach for phasing in necessary environmental changes within countries and between countries.

In Australia 'sustainable development' or 'ecologically sustainable development' is now a legal concept to be found in many resource, planning and environmental Acts throughout Australia (Bates 2002, Ch 5). Indeed, it is now to be found in the *Planning and Development Act 2005 (WA)* which recently replaced the 1928 TP&D Act. One of the important objectives of the new Act is '*to promote the sustainable use and development of land in the State*'.

In this context, State planning policies adopted under Part 3 of the P&D Act 2005 and planning strategies, as explained further below, are important to the overall system of planning and development control in WA. Good examples of these are: SPP 3, Urban Growth and Settlement; the "Liveable Neighbourhoods - WA Government Sustainable Cities Initiative (WAPC draft Oct 2004)"; and "Network Cities; A Community Strategy for Perth and Peel (WAPC October 2004)". Each of these has been developed in the context of the "State Sustainability Strategy". SPP3 strongly

promotes "brownfields" development in preference to continuous urban sprawl and the extension of linear coastal development along the coast, so as to contain the expansion of Perth within the Metropolitan Region. The overarching use of these policies and strategies significantly informs major subdivision and development within the Metropolitan region. In other contexts pertaining to the redevelopment of suburban central commercial districts, development proposals have been reviewed with considerable focus on Liveable Neighbourhood concepts promoting mixed commercial/residential development, higher density residential development close to public transport, "eyes on street" design concepts, pedestrian permeability and the like.

While the expression 'sustainable use and development' is not further defined in the P&D Act 2005, it will also necessarily affect the assessment of development proposals made by primary planning authorities and in review proceedings conducted by the State Administrative Tribunal. While some might want to contend that the familiar 'principles of orderly and proper planning' criterion should be sufficient to require a consideration of this objective in development assessment, its inclusion puts beyond doubt the legal propriety of inquiring whether a particular development proposal will meet 'the needs of the present without compromising the ability of future generations to meet their own needs.' The objective has already been referred to in one decision of the State Administrative Tribunal (***Mt Lawley Pty Ltd and Western Australian Planning Commission***) and has been raised in argument in another, where the decision is currently reserved by the Tribunal but should be published soon (***Moore River Company Pty Ltd and Western Australian Planning Commission***).

The introduction of the principle of sustainable development into the planning and development control system in this way also means that the same principle underlies the operation of both the planning and environmental law systems in this WA. In this context, the State Administrative Tribunal has observed that the concomitant 'precautionary principle' is one that may also affect resource decision making (see ***Lenzo and Executive Director, Department of Fisheries (WA)*** [2005] WASAT 218 at [133] and ***More and Water and Rivers Commission*** [2006] WASAT 112 at [78]-[84]).

The issue of great moment facing the world today, and discussed in so many political, social and economic forums, is climate change. It bears on sustainable use like no other. It will no doubt present fundamental challenges for planners and development control authorities in planning all cities, especially Perth in the future. In Perth's case we will be obliged to heed the dire prediction of the eminent scientist Dr Tim Flannery, 2007 Australian of the Year, that Perth is environmentally doomed! In May 2004 at the Sydney Futures conference to discuss the plan for that city's next 30 years, Dr Flannery, after pointing to the dramatic drop in rainfall in the south-west region of WA, observed (Flannery 2004):

"I think there is a fair chance Perth will be the 21st century's first ghost metropolis...It's whole primary production is in dire straits and the eastern states are only 30 years behind."

Climate change is here to stay, it seems (excusing a possible oxymoron!). We can debate the accuracy of the models and the details of the science, but we would be foolhardy to treat the phenomenon as speculative or fanciful. If we are to act

responsibly in planning the future of cities like Perth, we must plan with the reality of climate change clearly in mind.

Public interest environmental litigation

In early colonial days and before that no doubt since the Dreaming, at the foot of Mt Eliza and Kings Park near the Swan River, a freshwater spring provided the base camp and fresh water for the local Aboriginal Noongar clan. Near it later was built the original Swan Brewery, makers of the famous 'Swan Lager'. Upon proposals to redevelop the then disused industrial site in about 1989, Mr Robert Bropho commenced proceedings in the Supreme Court of Western Australia to prevent development that he feared would 'destroy or damage' the important Aboriginal site, contrary to the provisions of the *Aboriginal Heritage Act 1972 (WA)*. His case went to the High Court of Australia which ultimately ruled, as a preliminary point in the case, that the WA Development Corporation was bound to comply with the provisions of the Act and as a Crown agent was not immune from the Act's provisions (***Bropho v Western Australia***).

Bropho's case helps to identify a modern feature of planning and environmental law, and that is enforcement action taken in the courts in the public interest. In many respects public interest litigation is an example of the 'Keep the bastards honest' aphorism that endeared the late Don Chipp, founder of the Australian Democrats political party and former Commonwealth Liberal Minister, to many Australians. It is essentially an exercise in public accountability. Here we move away from the actions of the legislature which makes positive law, to the actions of courts called upon to adjudicate on an official's alleged failure to comply with the law. In many instances the alleged non-compliance is that of government or its agent. ***Bropho's case*** fell into the latter category. He pointed to a clear statutory proscription on doing certain things without approval, alleged the law was being broken by an agent of government and claimed he had the right to a remedy to restrain that breach of the law. Sometimes a well-heeled commercial competitor might commence such an action to try to upset its rival's development approval. This latter type of action hardly qualifies as public interest litigation, although it may well serve the purpose of ensuring planning authorities act scrupulously.

This type of action became reasonably common during the 80s, especially when the law governing the rights of individuals to sue became less difficult to satisfy than in earlier times and public interest in the enforcement of environmental planning laws was growing. The view is simple enough to understand – if we have these laws then they should be observed. As a phenomenon it was driven by citizen groups. The public policy of encouraging citizens to enforce laws has a long and respectable pedigree. Apart from anything else, it provides government with a relatively cheap and reliable enforcement service because those with a real interest in seeing the law enforced can be expected to act if the action they take is likely to be cost neutral or advantageous to them.

An early Australian example of the technique may be found in an 1860s Victorian colonial ordinance to prevent pollution of the River Yarra. Any person could bring a prosecution against a polluter, and was entitled to keep half the fine imposed. This provided a perfect mechanism for one factory operator on the river who needed clean water from the river to sue another who didn't care much about water quality!

In the United States, a number of federal laws provide for civil suits at the instance of private persons and the award of treble damages. For example, such damages may

be awarded by a court in the United States for wilful violation of the monopolies laws, intellectual property laws and under the racketeering legislation. All this amounts to the modern practice of outsourcing government responsibilities – in this case law enforcement.

What is important to note is that public interest litigation is often perceived by citizens to be the only way they can induce a planning or environmental authority, or a government or private developer to act rationally. This sort of litigation, though, is not usually directly concerned with the merits of a proposal, but mainly with the process by which a decision was made – although this distinction is often lost on people who are not lawyers. Take for example the 1989 decision of the Full Court of the Supreme Court of WA in ***Helena Valley/Boya Association (Inc)***. The applicant residents association objected to Planning Commission proposals to amend the MRS to allow an intensive subdivision in their locality. They believed it would alter significantly their semi-rural environment. Major amendments to the MRS can only be achieved through Parliamentary action under the MRTPS Act 1959. The residents said what was proposed was a major change, but that the Commission was treating it as a minor amendment in the ordinary way. The applicants won their case in the result, but not on this issue. The court found that the decision to amend had not been taken by the Planning Commission itself, but by a committee to whom the function had not been validly delegated. This decision was then relied on in a following case, ***Ex parte Rundle*** that was heard in the Supreme Court in 1991, in which the development of land at Hepburn Heights was challenged initially by the local government but, when it pulled out of the action, by concerned residents.

To overcome the Helena Valley/Boya decision the government introduced a Bill in the State Parliament to validate all decisions taken under the invalidly delegated authority. In the end, due to opposition party efforts in the Parliament the land at Helena Valley and Hepburn Heights was excluded from the legislation. The citizens claimed victory! As far as they were concerned the initial cases may have been won on legal 'technicalities', but this had bought them the time to lobby for what they considered to be rational environmental planning outcomes.

There are though considerable obstacles facing a public interest litigant in most States and Territories, however, and they include: satisfying the test for 'standing to sue'; in some cases having to offer an undertaking to pay the damages of any person who suffers from the grant of an interlocutory injunction (where one is granted), should the action ultimately fail; and the requirement to pay the costs to the other party should the action ultimately fail (see Schoombee, 1995; noting however that the 1998 decision of the High court of Australia in ***Oshlack v Richmond River SC*** may ameliorate this position in some cases).

The introduction of the NSW *Environmental Planning and Assessment Act 1979* was in many respects a most significant event in Australian environmental and planning law. It introduced a range of measures that have been emulated elsewhere in the country, although not universally by any means. First, it brought together many planning and environment matters in the same piece of legislation. Secondly, it expanded the focus of planning decisions into planning, social and environmental concerns. Thirdly, it made mandatory the EIA of projects likely to significantly affect the environment. Certain 'designated developments' automatically fell into this category. Fourthly, it ensured enforcement of planning and environmental laws by public agencies could occur in the one court, the Land and Environment Court of NSW. Fifthly, it enabled 'any person' to apply to the Court to enforce the Act and also gave objectors to designated development the right to seek review on the merits

of decisions they had objected to. The EP&A Act 1979 also made it clear that the Minister had the power to call in development applications to local governments, although only if they have State or regional significance.

The right of third parties to enforce environmental planning laws is considered by lawyers to be one of the great changes to Australian law, although in this particular example it is largely limited to NSW. Elsewhere in Australia, as the Helena Valley/Boya Association and Ex parte Rundle cases show, parties have to rely on general standing to sue rules. Perhaps the early success of this enforcement provision explains why we do not see many other statutory provisions like it elsewhere in Australia, although the *Heritage of Western Australia Act 1990 (WA)* has a similar provision in it permitting 'any person' to seek an injunction in the Supreme Court if the law is being broken. However, it is unused, as far as I am aware, probably because the citizen applicant would be obliged to give an undertaking as to damages to the Court in the event the Heritage Minister did not offer an undertaking.

Public interest environmental planning litigation is undoubtedly frustrating for all concerned, but it provides an important safety valve that ensures legal processes are followed properly when decisions are made that have the real potential to produce undesirable environmental planning outcomes. It thereby serves to highlight the extent to which official procedures must be followed if environmental planning processes are to have community confidence. In this it achieves a measure of public accountability. It also highlights the extent to which the public are actually, and adequately, involved in the planning process at all stages of decision making. This in turn highlights the extent to which planning and environmental laws permit a third party objector to seek review of a planning decision on the merits of a case.

Third party rights

Under the *WA Environmental Protection Act 1987 (WA)*, a citizen has an unfettered right to seek Ministerial review of any decision of the EPA in the course of the EIA process, including decisions not to assess a proposal, the level of assessment, the recommendations in any report or the conditions of development proposed. This review process is however entirely Ministerial and does not involve formal hearings or the like.

By contrast, in WA there seems to be a decided bipartisan political reluctance to extend third party merits review rights to citizens in the planning process in anything like the same way as they are available under the Environmental Protection Act. Indeed over a number years, a number of local town planning schemes that, inadvertently perhaps, accorded the right to 'any person' to seek review of planning decisions, have been amended to remove the right. It is not entirely clear that those applications for review brought by objectors under these 'any person' review provisions were devoid of merit. One suspects the overriding consideration in limiting opportunities for third party reviews are cost based.

The reluctance to extend third party review rights to citizens is usually borne of concerns that their exercise may unreasonably slow down decision making, add expense to the cost of land development and possibly even expand the opportunity for opportunistic behavior by parties opposed to development at any cost. There is plainly a public interest in having a land development that produces land for purchase or use by the public at an affordable price. Against this is the need to ensure that

environmental planning outcomes that shape our cities are the best possible ones which are supported by citizens in whose name the system operates.

The Victorian experience with third party review rights – or ‘objector appeals’ – suggests that they add value to the planning system (Eccles and Bryant, pp178-180). The experience in NSW with third party enforcement rights also suggest the system overall benefits from such citizen actions, although the range of proposals in respect of which such rights may be exercised is more limited than in Victoria. The exercise of third party review rights under the EIA system in WA also indicate that environmental decision making profits generally from such input.

Planning decision making though in WA has no real experience of public input in this way. It has not been a major feature of the WA planning system to date. Rather the public must necessarily participate through contributions to the formulation of plans and when invited to make comment on specific development proposals by planning authorities. However, third parties can apply to the relevant court or tribunal –for example to the State Administrative Tribunal in WA – for the right to make submissions in proceedings brought by others in which they have a legitimate interest. This right is given not infrequently in WA.

Whether the public should have a wider right to commence their own review proceedings in respect of certain types or classes of development in planning tribunals and courts, is a public policy issue that will never quite go away while the rights are perceived to be limited. It reflects the essential political nature of planning and environmental decision making, in that the decision making relates to matters in which citizens or particular groups are vitally interested, and where choices are constantly having to be made among competing alternatives where there often is no obviously right answer. In recognition of the nature of much of this type of decision making, the State Administrative Tribunal, when conducting a review of a planning decision, is required by the State Administrative Tribunal Act to produce ‘the correct and preferable decision’. Given the democratic nature of city planning the idea that citizens should have a real measure of direct input into the challenge of some important decisions isn’t one that can easily be dismissed.

Review of planning decisions in tribunals and courts

Every State and Territory now has an independent planning and environmental review system. This was not always the case. Each State has its own history relating to the introduction of review proceedings in planning matters. Today though around the country it is recognized that the planning and development system involves: planning, at various levels of government; coordination between different agencies of government in that process; Ministerial functions including oversight functions at different junctures of the process; and review proceedings in independent and impartial tribunals and courts.

In WA the State Administrative Tribunal (SAT) – which like the Victorian Civil and Administrative Tribunal (VCAT) is a generalist tribunal - hears and determines a wide range of development and resources review applications. It also has the function to report to the Minister on certain matters she is empowered to refer to the Tribunal. However, the Tribunal does not presently have an environmental review function, this remaining with the Minister for Environment under the *Environmental Protection Act 1986*.

The SAT recognizes that it is a part of this broader system of public administration in relation to environmental planning in the State. It recognizes too the fundamental role primary planning authorities play in making the system work. It also endeavours to tailor its decision making to the circumstances of the case coming before it, so a citizen can afford to bring their cases to the Tribunal and to represent their own interests in the Tribunal without being obliged to engage a lawyer. Nonetheless, the Tribunal recognizes that some cases are of such importance or complexity that parties will often choose to be legally represented. It goes without saying that decisions of the Tribunal not only determine the outcome of particular land use contests, but also can influence the way planning authorities subsequently approach similar planning and development issues.

In WA the development control system depends to a significant extent on the exercise of discretion by primary decision makers and the Tribunal on review. The last word on how land in the greater city of Perth can be used and developed is not usually to be found in legislation. While schemes usually identify relevant decision making criteria, guidance as to the exercise of approval powers is often to be found outside the scheme text. For example, the *Residential Planning Codes* (R Codes 2002) set out detailed residential development rules which apply as a Statement of Planning Policy under the P&D Act 2005, to which all decision makers must have regard. In some cases the matter in issue must necessarily be determined by reference to principles of orderly and proper planning in the absence of other guidance, although usually there is a policy of some sort relating to the matter in issue!. Policies, formal and informal, a most important feature of the WA system of development control. Rather the approval powers the legislation gives planning authorities are often exercised by reference to policies, some with statutory backing, but most in the nature of informal documents devised by the Planning Commission and local governments over time. Tribunal acceptance of these policies is fundamental to the workings of the system, to consistent, predictable and reliable decision making.

As I observed in ***Clive Elliott Jennings & Co Pty Ltd v Western Australian Planning Commission***, the existence of a policy cannot replace the discretion of the decision-maker in the sense that it is to be inflexibly applied regardless of the merits of the particular case. However, "the relevant consideration in many applications will be why the 'policy' should not be applied; why the planning principles that find expression in the 'policy' are not relevant to the particular application". With the confidence that the Tribunal subscribes to the view that policy is important in this way, the WA planning system has the flexibility to adapt well thought-out policies to novel situations as well as those issues that arise daily.

The conferral of discretion on decision makers and the Tribunal to determine development applications is well accepted in WA. There is a broad acceptance that planning decision making is not value free, but that if decisions are supported by reasons and made public, few complaints can be made (Proceedings of the Conference on Town Planning 1985, pp 227-228). The Tribunal is firmly committed to this approach.

Some decisions of the Tribunal will from time to time cause planners to reassess their goals and approaches. In 1989, as President of the former Town Planning Appeals Tribunal, I participated in the majority finding of the Tribunal that the proposed redevelopment of the old Emu Brewery site at the corner of Spring Street and Mounts Bay Road, Perth, near the overfly of the Mitchell Freeway, for high rise development, should be approved (***United Body Works (Qld) Pty Ltd and State***

Planning Commission). The Planning Commission opposed the proposal, principally on the ground that it was not consistent with its Parliamentary precinct policy, a policy that had been developed and applied within the Commission over a number of years. As carefully developed as it was, the Tribunal considered the merits of the proposal should see it approved, and notwithstanding that it may interrupt some views from Parliament Hill. No doubt that decision will have contributed to changed ways of looking at the western end of the CBD in planning terms. Mind you, the decision was not the first to allow development in that precinct: the QV 1 tower was already *in situ* at the corner of St George's Terrace and Milligan Street, just down the Terrace from the remains of the old Pensioners' Barracks and well within sight of the Parliament.

Decisions of the Tribunal in relation to the application of policies that govern the subdivision of rural or semi-rural lands on the outskirts of the metropolitan region, where the future planning options are under continuing consideration, also bring the decision making of the Tribunal into sharp focus. See for example the recent decision of the Tribunal in **Waddell and Western Australian Planning Commission**, in which a series of earlier decisions on the policy issue, including by the Supreme Court, were considered in the course of a decision refusing subdivision approval in such circumstances.

Decisions of the Tribunal may then, from time to time, have a direct impact on the shape of the city. Most of the time, however, they are decisions that work at the margins of the planning and development control processes.

What the Tribunal does not normally expect to do, however - even though it performs the function of a substitute decision maker when it decides matters on review - is attempt to supplant the role of the primary planning authorities in drafting regulatory schemes and developing policy. The P&D Act 2005 assigns these functions to these other bodies. The Tribunal's primary function is to interpret and apply these schemes and policies, to ensure consistency, predictability and reliability in decision making and the production of the 'correct and preferable decision' in every case.

From time to time the Tribunal may also discern what it considers to a deficiency in planning laws or the overall planning system and may choose to bring it to light. Recently, for example, the Tribunal observed a difficulty which can result from the split planning system in Western Australia, which is unique to this State, under which subdivision control and assessment is undertaken at State level whereas development control and assessment is generally undertaken at local government level. The issue was illustrated in a situation where a small residential allotment had been subdivided into two quite small allotments. The house proposed on the southern allotment, while a reasonable response to the characteristics of the approved allotment, had very poor solar access. An apparent lack of correlation between the exercise of the subdivision controls and the planning controls raised for the Tribunal the policy issue of whether, in some contexts such as urban infill, a single system of development/subdivision control and assessment may be preferable (**Boulter and City of Subiaco**). Rather than have two separate decision makers in such cases, one could give consideration to all relevant issues at the one time.

Parting reflections

As I suggested at the beginning of this paper, cities are places for people and the citizens of cities have it within their power to shape their cities, to make them the places they want them to be. Citizens in cities around the globe debate how they

want their city to work out. It is an exciting thing to be caught up in such a debate; it is the stuff of life in so many ways. After all, so many of us spend so much of our lives in cities.

A city like Perth has, I think, evolved remarkably well over the past 50 years or so since Professor Stephenson and Mr Hepburn gave us their 1955 plan for Perth and Fremantle. The citizens of Perth can look back now and with the benefit of hindsight point to things we might do differently if we were able to start over again. But we don't have that opportunity. Stephenson and Hepburn were part of the dynamic that has produced the Perth of today. Those of us who live in Perth today are part of the dynamic that will produce the Perth of the next 50 years. The challenge is ongoing and exciting.

In Perth, we will continue to confront issues concerning:

- What climate change will mean for Perth's future;
- The extent to which Perth can and should keep expanding as a suburban city;
- How to revitalize a Perth CBD that has had the blood slowly but surely drained out of it during 50 years of continuous suburban growth;
- How to reinvigorate suburban areas, particularly their central business districts;
- How to encourage people to use public transport in preference to their private cars;
- The location, density and form of development on our rivers and on the coast;
- The importance of keeping and expanding open space;
- What good urban and suburban design is, in the Perth setting;
- How to plan, design and build in ways that protect vital resources like water and maximize energy and resource efficiency;
- In short, how to achieve the sustainable use of land and resources.

Similar issues, dare say, are being and will continue to be confronted in other major Australian cities.

Planning and environmental laws provide the modern democratic context in which we deal with these issues. They will continue to facilitate and encourage the exchanges citizens must have as they strive to create their ideal City, and the tools for securing it!

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