

The Triumph of the Market or the Doom of History? What is the Future for Regional Towns?

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ABSTRACT

Functionally, regional towns cannot be the city states of history. By necessity, whilst regional towns exist as a centre for the catchment area that sustains it, they are nonetheless subject to and rely upon the patronage of the 'centre' that the town 'relates' to. In return for this patronage regional towns are bound by the laws made at the centre. These laws have the capacity to both help and hinder the economic development of a regional town. Viewed through the prism of power, regional towns are necessarily in an inferior relationship to the centre upon which they depend. The life force of the town can be drained by both deliberate and inadvertent decisions made at the centre. This suggests that for regional towns to prosper they must develop an effective relationship with the centre. The corollary is that a dysfunctional relationship will lead to a town being blighted. An aspect of dysfunctionality is the potential impact of planning laws made at the centre which inhibit the flow of capital into a regional town. Is it time to question the effectiveness of the bureaucratic planning model? Regional towns need a people, a place and an economy. Without all three the town will not survive. The task of Planning Laws should be to promote participation in the economy of the town. Participation does not mean facilitating noisy public meetings to denounce development. Participation means having some skin in the game. Without participation of that sort there can be no progress for the town. Instead, senescence, decay and history will be their doom. To succeed in this challenging environment regional towns may need a different type of support from the centre. Maybe regional towns don't need planning laws at all? Now that is the sort of radical idea that could lead to a revolution.

INTRODUCTION

What is the future for Regional Towns? Or perhaps more correctly, do regional towns have a future? Having spent my adult life living in regional NSW I continue to hope that regional towns will be allowed to thrive and prosper. What troubles me in harbouring this expectation and a hope that it may become a reality is an emerging sense of disconnection between the planning decision-makers and the people that live in Regional towns. Since 2007 central planners in NSW have been busy rolling out Standard Template LEP solutions in the firm

¹ **Disclaimer:** The views expressed in this paper are the author's. The contents of this paper do not represent or reflect the views of the NSW Government.

belief that this singular approach will encourage rational development.² Into this mix flows the May 2016 announcement that in NSW fourteen new regional councils have been formed. All of these new councils will have multiple regional towns within the new council area.³ But will the creation of new councils *per se* be the panacea to the malaise that afflicts many regional towns? Or is it time to consider additional and even radical solutions? It is argued here that regional towns may need to create a different type of ‘participatory planning’ dynamic namely one that encourages people not to simply have their say but rather, to have ‘skin in the game.’⁴ If the LEP is meant to be the primary vehicle that drives built form outcomes in a regional town then unless it can be shown to be a planning mechanism that is in fact ‘working’ then perhaps it is time to start to really think outside the square?

In his recent book *Cities are Good for You* Leo Hollis suggests that a city is not a ‘rational, ordered place.’ Rather, a city is a ‘complex space that has more in common with natural organisms such as a beehive or ant colonies.’⁵ This is not an uncommon thesis.⁶ What struck me was the following comment:

If planners and architects were to pay more attention to the unusual ways that complexity works, and to think more about the life of the street rather than only seeing the empty spaces between buildings, our cities could be very different, perhaps even happier, places.⁷

And that led me to ponder what would happen if regional towns were freed of the shackles of planning law?⁸ Into a disordered organic place suffering from senescence would be unleashed an equally disordered and potentially chaotic dynamic being the self-interested market force.⁹

² The Standard Instrument approach to the making of LEPs is mandated by the current s117 Direction issued in 2007 by the Department of Planning accessed at: <http://www.planning.nsw.gov.au/~media/Files/DPE/Circulars/planning-circular-new-section-117-directions-2007-07-17.ashx>.

³ On 12 May 2016 the NSW Government announced the creation of 19 new councils with in principle support for 9 other new councils. Of these new councils 14 were regional councils with the prospect of up to 4 additional new regional councils. See Stronger Councils Stronger Communities website accessed at: <https://www.strongercouncils.nsw.gov.au/>.

⁴ Here used in the sense of having something at stake. The etymological roots of this phrase are opaque. The venerable Quoteland.com identifies an early reference to this phrase in ‘Town Talk,’ *The Oakland Tribune*, April 20 1912 but notes that this cannot be the source of the phrase. It also notes the relationship of the phrase to the verb ‘to skin’ and the connection as far back as 1812 to swindling and cheating someone see <http://fourm.quoteland.com/eve/forums/a/tpc/f/99191541/m/7811039581> at 12 Sep. 2010.

⁵ Leo Hollis, *Cities are Good for You*, Bloomsbury (2013), 6.

⁶ See for example William C Baer, ‘Planning for growth and growth controls in early modern northern Europe: Part 2: the evolution of London’s practice 1580 to 1680’ (2007) 78(3) *Town Planning Review*, 258-9. Baer recognises that ‘current growth control disputes’... ‘re-enact and rehearse’ arguments ‘first uttered 400 years ago.’

⁷ Hollis above n5, 63: what really intrigued me was the comment: ‘Almost by accident, planners formed their own priesthood, wrapped up in ritual and arcane liturgy; every type of neighbourhood was anatomised and catalogued from ‘inner-ring suburbs’ to ‘central business districts’, ‘exurbs’, ‘sun-belt cities’, creating zones that were regulated into stasis, horrified by the seeming anarchy of an evolving, vibrant environment. The planners stopped talking to the people whose lives they were attempting to improve; they knew better; they spoke in an idiom that no longer connected; **and as a result their expertise was no longer challenged.**’ (emphasis added)

⁸ See the analysis of Newcastle’s CBD by Marcus Westbury, *Creating Cities*, Niche Press (2015). As Westbury notes (p 36): ‘Finally, there were the burdens of regulation and the costs of actually doing anything. Newcastle’s buildings were often old, often in a state of disrepair, and many had been empty long enough that they had missed several waves of changing safety standards and building codes.’ This is an accurate statement of most small regional towns.

⁹ I know, this is not an original thought.

In terms of built form outcomes, could the result be any worse than the reality experienced by some regional towns now? If the State is not prepared to ‘own’ the town (think Canberra) then let those with the capital and energy to invest in the town take the risk.¹⁰

REGIONAL TOWNS

Historically, towns draw on the ancient tribal tradition of humans gathering together to live in community for reasons of security.¹¹ From ancient times it has been the opportunity for trade with other places that has driven the development of towns. Towns were the centre for the market. Wealth generated from trade was reinvested into the town. Towns that generated sufficient wealth to construct infrastructure such as ports and roads became important centres in their own right. Long before there were nation-states there were city-states which thrived on trade. These centres none the less still relied upon smaller towns to supply them. From this analysis we can theorise that regional towns need a people, a place and an economy. Without all three the town will not survive. For this reason regional towns constantly face an existential threat just to continue to exist in our post-modern, globalized civilization.¹² The doom of history confronts each town as its population waxes and wanes over the passage of time.

Functionally, regional towns operate as a centre for the locale. Without such a relationship the town will become senescent, its vital population will exit and eventually the town will cease to exist. But regional towns also exist in relationship to the political centre(s) that drives the economy of the state and the nation. These centres usually have the governance node, transport nodes and the head office of businesses that the region trades with.¹³ The economy of the regional town is thus dependent upon support from this centre. Whilst ever a relationship with the centre can be sustained a regional town will be able to thrive but only if it can maintain a population that wants to live in the town and provided it can maintain an economy to generate the necessary employment to give its people the means to survive and prosper. To thrive in this milieu regional towns must defy Geoffrey West’s unified theory of urban living.¹⁴ It is a challenge that matters daily to the thirty percent of the population of

¹⁰ As William M Rohe and Lauren B Gates, *Planning with Neighbourhoods* (1985), 55 note: ‘Roszak (1973) suggests that a reliance on expert knowledge leads to a disintegration of the urban community because it robs citizens of an important reason to come together and work to solve problems in the cooperative spirit that forms community solidarity.’ Moreover, traditional public planning which relies on experts cannot incorporate the values and spirit of the community.’

¹¹ Hugh Mackay, *Advance Australia ... Where?*, (2007), 286. As a social demographer Hugh Mackay explains: ‘we are social creatures who thrive on the sense of belonging to a community.’

¹² According to *id the population experts* our capital cities accounted for approximately 77% of our population growth over the past five years. Less than one in five people now live outside the top fifty centres with 47% of Australia’s population living in Sydney and Melbourne – see: ‘Top 50 largest cities and towns in Australia in 2016’ accessed at <http://blog.id.com.au/2016/population/australian-population/latest-population-figures-top-50-largest-cities-and-towns-in-australia/>

¹³ Hollis, above n5, 62. Hollis suggests that after the fall of the Roman Empire towns assumed a vital place as centres for learning. They were the incubus for the renaissance and the enlightenment. Saint Isidore of Seville, writing in the seventh century, said of a city: ‘A City (civitas) is a multitude of people united by a bond of community, named for its ‘citizens’ (civis), that is, from the residents of the city. Now ‘Urbs’ is the name of the actual buildings, while civitas is not the stones, but the inhabitants.

¹⁴ Geoffrey West, President of Santa Fe Institute renowned for its work on Complexity Theory. Cities follow a ‘superlinear’ power law. When a city doubles its size it increases its efficiency and energy use. It also increases its per capita income and becomes a more creative ‘connected’ place. West was

NSW that chooses to live outside the limits of the mega-city in NSW.¹⁵ Sometimes the centre may shift to another place but that does not necessarily spell the end of the town, especially if the town can diversify and develop multiple relationships. But it is within this flux of elements that a regional town functions from one decade to the next, its people constantly revisiting these fundamentals and adapting to change.

For change is the other constant. It is the remorseless tyranny that has fashioned the world as we know it today. As Andrew Riemer has noted: 'A society is something fluid, constantly changing, being redefined perhaps almost as soon as it has defined itself.'¹⁶ The answer to the question what is the future for regional towns in NSW is to be found in the mechanisms that the people in regional towns employ to adapt to change. The future of regional towns is therefore firmly within the grasp of the hands of its inhabitants. How they respond to change informs the outcome and the future of the town. Thus, whilst the focus of this paper is centred in the urban planning stream the challenge it sets for participants resonates just as loudly in the realms of social policy. Seen in that light this paper is firmly in the realm of the politics of urban space. We should not be afraid to enter this space.¹⁷

COLONIAL HISTORY & PLANNING LAWS

In the context of the future of development within a regional town it is to be firmly kept in mind that regional towns are geographic and cartographic places. Atkinson reminds us that the 'conquest of Australia involved both cartographic and legal innovation.'¹⁸ Hence, the very existence of regional towns, especially in NSW, is directly related to the colonisation of Australia by the British in the nineteenth century. With the British came British law and British perceptions of social relations.¹⁹ The English free settlers who came to New South Wales brought with them what Edwards describes as a 'Traditional Identity Schema.'²⁰ It explains the early popularity of Edward Gibbon Wakefield's ideas.²¹ But from the outset these settlers would be challenged by the reality that confronted them.

named as one of Time Magazines '100 Most Influential People in the World.' See Lehrer, J, 'A Physicist Solves the City', *New York Times*, 17 December 2010.

¹⁵ According to the Australian Bureau of Statistics as at June 2011 just under two thirds of the working age population lived in Greater Sydney. Between census this population increased by 12% whereas in contrast the working age population outside Greater Sydney increased by only 6%. See: <http://www.abs.gov.au/ausstats/abs@.nsf/Products/3235.0~2011~Main+Features~New+South+Wales>

¹⁶ Andre Riemer, *Where to Now? Australia's Identity in the Nineties*, (1993) (cited in Mackay, above n11, 137)

¹⁷ John Hirst, *Looking for Australia* (2010), 256: 'Politics is simply there. We appear sometimes to believe that we have politics only because a few egomaniacs want to be politicians. To be suspicious of politicians may be no bad thing. To be suspicious of politics is unhealthy for a free people.'

¹⁸ Alan Atkinson, 'Conquest' in Deryck Schreuder (ed), *Australia's Empire* (2008), 51.

¹⁹ D M Schreuder and S Ward, 'What Became of Australia's Empire,' in Deryck Schreuder (ed), *Australia's Empire* (2008), 11: 'To make sense of that complex story, it is crucial to comprehend that core historical dynamic of the British imperial system. Without that elemental lodestone of Empire, Australian history becomes an unsecured narrative, robbed of the power of its deepest forces and atavisms.'

²⁰ L. M. Edwards, 'Ideational social capital and the civic culture: Extricating Putnam's legacy from the social capital debates' (2009) 23 *Social Epistemology* 125, 139. In a Traditional Identity Schema 'social cohesion centres on maintaining the categories [of social relationship] and their norms of behaviour.'

²¹ John Hirst, 'Empire, State, Nation' in Deryck Schreuder and Stuart Ward (eds), *Australia's Empire* (2009), 165-6: 'The plan proposed in 1829 by Edward Gibbon Wakefield (and its variants) created a device which effectively employed a tax on land (by way of land sales) to subsidize and control labour

In his book *The Shield of Achilles* Phillip Bobbitt explains the relationship between Law Strategy and History. For Bobbitt, law and strategy are not made ‘in history’, they are made ‘of history.’²² In New South Wales a new history, a new *gemeinschaft*,²³ would have to be created by its people.²⁴ With typical British industry that is what the early colonials set about to do. In the van was the military, in particular, the surveyors. But they were closely followed by (and indeed at times preceded by) free settlers.²⁵ The Mabo decision has refined our understanding of radical title.²⁶ But regardless of whether or not the land of New South Wales was ‘owned’ by the crown upon colonization,²⁷ as a matter of pragmatic reality it was the governor that had the power to alienate land. To facilitate that alienation it was important that the land of the new colony be mapped for the purpose of fractionalising the land. Mapping facilitated the land of the colony being reduced into possession so that thereafter it could be alienated, by grant or sale. Town planning in its original form.²⁸

Having secured access to land the next problem confronting the settlers, seen through the lens of their settled perceptions, was virgin territory. The ordered agricultural society, culture and patterns of settlement with which they were familiar did not exist. There were no settled parishes, boroughs, pastures, towns, roads or infrastructure. There were none of the legal

migration (by generously assisted passages). This solution yielded a general social return which attracted capital and enterprise. ... The Wakefieldian specifications ensured an ideal balance between the sexes, a particular occupational profile, and some monitoring of age, character, and origins.’

²² Phillip Bobbitt, *The Shield of Achilles, War, Peace and the Course of History* (2002), 6. Bobbitt argues that ‘without its own history, its self-understanding, no society can have either law or strategy, because it cannot be constituted as an independent entity.’

²³ Fran Tonkiss, *Space, the City and Social Theory* (2005), 12. Tonkiss suggests that *Gemeinschaft* refers ‘to a mode of interaction where social ties are based on mutual dependence, and where individual’s relations with others take place within and derive meaning from the larger group.’ This concept is to be contrasted to *Gesellschaft*, ‘a formal mode of interaction which tends to the impersonal, instrumental and voluntary.’

²⁴ John Hirst, above n17, 134. Hirst argues that Captain Arthur Phillip began the process by instituting a colonial police force staffed with convicts. As Hirst notes, Phillip ‘established the pattern of making convict status as unimportant as possible, which was the key to the easy escape Australia had from its convict origins.’

²⁵ Richard Waterhouse, ‘Settling the Land’ in Deryck Schreuder (ed), *Australia's Empire* (2008), 56: ‘Squatters became licensed agents of Empire’ ... ‘Despite the proclamation of the Limits of Location in 1826, 1829 and 1835 – which defined boundaries beyond which occupation was not permitted – [Macquarie’s] successors failed to contain a significant movement of pastoralists, their workers and stock.’

²⁶ *Mabo v Queensland* [No 2] (1991-2) 175 CLR 1, 48: ‘As the sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those parcels should be enjoyed by others and what parcels of land should be kept as the sovereign’s beneficial demise.’

²⁷ *Ibid*, 43. In particular, see the discussion: *Crown title to colonies and Crown ownership of colonial land distinguished*. Brennan CJ disagreed with the earlier view expressed by Isaacs J in *Williams v Attorney General (NSW)* (1913) 16 CLR 404, that when Governor Phillip received his commission in 1786 the ‘whole of the lands of Australia were already in law the *property* of the King of England,’ as being ‘wholly unsupported.’ Brennan’s view was that the acquisition of territory is the province of international law whereas the acquisition of property is the province of the common law. Applying the feudal doctrine of tenure, Brennan CJ (at 48) attributed to the Crown the ‘radical title to all land in the territory over which the Crown acquired sovereignty,’ this enabled the crown to grant land in the exercise of its sovereign power.

²⁸ As Robert Freestone, *Urban Nation: Australia's Planning Heritage* (2010), 48 notes, the gridiron plan ‘dominated town design’ because ‘it was an efficient means of carving up land to attractive dimensions for rapid sale and resale.’

traditions familiar to them in this new land. None of the indicia of the civilization they had left behind existed. Whilst the grace and favour of the Governor may have meant the difference between owning land or not, financial success depended upon the ability of the colonials to obtain from the Government the infrastructure that facilitated the development of the Colony. It was readily understood that individual parcels of land have no utility unless they are related to other parcels, and also to infrastructure such as roads bridges and the like. It was also fundamental that there existed a legal frame of reference to secure the benefits of property ownership. Having the ear of the Government meant the difference between towns and mere isolated hamlets. Aggregations of separate parcels, linked to community infrastructure, creates places and communities. Without these indicia of civilization, the formation of community becomes problematic. It is in community, as Tocqueville observed of the Americans, that civic culture develops.²⁹

The Australian historian John Hirst suggests that '[p]olitics is necessarily about power, about inequality.'³⁰ Land ownership allowed the community to have a voice in the development of the town. Mannheim argued that democracy 'implies a theory of power' that is about the 'ways of distributing and controlling communal power.'³¹ Hollis, referring to the city of Florence, the first 'modern' city, says succinctly that 'the design of the city is political; it is more than a place of habitation or exchange.'³² Describing the origins of Bathurst, the oldest inland city, Taussig suggests that the British set about to 'establish not so much centres of trade or communications as military outposts, strongholds from which attacks by hostile natives, if any, could be successfully withstood.'³³ But in these places created by the Government the institutions which are the indicia of power were installed. Within the stockade would be found the military (or 'police') outpost representing the law and there also was the prison for it was essential that there be order. The establishment of the nexus between the regional town and the centre of power goes back to the origins of colonial settlement.

What was perhaps unique to New South Wales was the development of a 'ratepayer ideology.'³⁴ The ratepayer ideology emerged out of the overt resistance by the people to attempts by the government to create a local government structure in the colony.³⁵ This resistance would successfully delay the implementation of municipal government until 1906

²⁹ J. Keane, *The Life and Death of Democracy* (2009), 306-311. As Keane explains:

'[Tocqueville] noted that these civil associations were small-scale affairs, and yet, within their confines, individual citizens regularly "socialise" themselves by raising their concerns beyond their selfish, tetchy, narrowly private goals. Through their participation in civil associations, they come to feel that they are *citizens*. They draw the conclusion that in order to obtain others' support, they must lend them their cooperation, as equals.'

³⁰ John Hirst, 'The distinctiveness of Australian democracy' (2002) 46(12) *Quadrant* 19, 23.

³¹ K Mannheim, *Freedom, Power and Democratic Planning* (1951), 45.

³² Hollis, above n5, 62.

³³ J C Taussig, 'How Bathurst Began,' in B Greaves (ed) *The Story of Bathurst*, 3rd ed (1976), 1.

³⁴ John Halligan and Chris Paris, 'The Politics of Local Government' in John Halligan and Chris Paris (eds), *Australian Urban Politics* (1984) 58, 61; '[t]his ideology derived from the legacy of property franchises and the centrality of property to municipal affairs. ... The effect of this ideology was to limit the number of people who could formally participate and also the content of local politics.'

³⁵ Andrew Kelly, *The role of local government in the conservation of biodiversity* (Ph. D. Thesis, University of Wollongong, 2004), 73. Kelly, citing the ratepayer ideology, suggests that municipalisation would have meant having to contribute to the cost of infrastructure provision. As Kelly notes: 'Many landholders who amassed wealth through profitable land uses and/or escalating property values owed much of their success to facilities provided by government, such as roads and bridges, without having contributed to their costs. As a result they were unwilling to embrace municipalisation.'

when the state government finally mandated the creation of municipal governments throughout NSW.³⁶ The people willingly accepted parcels of land granted by the crown, squatted on other crown land and bought land from others when it became available because of the economic opportunity it provided. As towns grew and as urbanisation became part of the fabric of society, the need for essential infrastructure grew. But this new landed class resisted paying for this infrastructure as they saw this as the responsibility of government in the new colony.³⁷ Landowners consequently benefited from ‘soaring property values due to government-funded roads and bridges’ that connected the emerging economy to established ports and trade routes.³⁸ Kelly and Mant suggest that the landed class resisted municipalisation because of the ‘grim spectre of property taxation.’³⁹ The landless people did not have to be enlisted to the resistance because of disenfranchisement by operation of law.⁴⁰

Planning law is equally about power, it is about the power of the state to regulate what occurs within the state, including what occurs in a regional town. Planning laws do not draw upon a participatory democratic tradition.⁴¹ Planning laws draw upon the historical precedent of the United Kingdom Parliament, through private bills, using the power of the law to secure and maintain control over the development of land for private purposes. The ‘topical’ nature of development and the fact that it occurs on a specific parcel of land makes planning laws vitally relevant to the people of regional towns both at a policy-making and decision-making level.⁴² Different and multiple ‘public interests’ exist at one and the same time in relation to each proposal to develop land in a town. It is out of this activity that the space which social geographers call the ‘place’ is created.⁴³ What is vital for the future of regional towns is that

³⁶ See Andrew Kelly and Natalie P Stoianoff, 'Local Government Rates in New South Wales, Australia: An Environmental Tax' in A Cavaliere et al (eds), *Critical Issues in Environmental Taxation* (2006) vol III, 111. Kelly and Stoianoff note that the 1906 act was based on the ‘Georgist Principle’ referring to American Henry George ‘who influenced the financial architecture’ of the Act based on an ‘incentive to develop’ philosophy.

³⁷ Hirst, above n21, 148. The ‘wide electorate made it easier for more people to make demands on the government – for roads, bridges, railways and local services.’ In Hirst, above n 17, 239, Hirst also makes the point that ‘[i]t was because [the colonists] were so certain that their British rights were protected that the Australians expanded the activities of the state so unconcernedly.’

³⁸ Kelly and Stoianoff, above n36, 541.

³⁹ Andrew Kelly and John Mant, 'Towards more effective structures at the local level' in Robert Freestone (ed), *Spirited Cities* (1993) , 239

⁴⁰ The NSW Constitution Act of 1848 contemplated the creation of District Councils with a land based franchise commensurate with the imposition of direct taxation based on land holdings. Governor Gipps proclaimed some twenty eight District Councils but as Kelly, above n35, 78, notes: ‘Widespread financial paralysis due to legislative problems and community antipathy guaranteed the inevitable demise of district councils.’

⁴¹ A J Scott, *The Urban Land Nexus and the State*, Routledge Library Ed (2007), 374. Scott would suggest that planning law is simply a necessary ‘ephemeral administrative media’ to the urban land nexus and that ‘in the world of actual urban planning, neither the inputs (particular problems) nor the outputs (political decisions) to and from the planning system are essentially dependent upon the specific administrative arrangements of that system.’

⁴² *The Macquarie Dictionary* (1981): ‘Topical: 3: of a place, local.’ In this paper topical is used in the context of place and locality. The *Environment Planning & Assessment Act 1979* (NSW) (EP&A Act) regulates how the development selected by the applicant will proceed in the place chosen by the applicant.

⁴³ Paul Jenkins, 'Space, Place and Territory: An Analytical Framework' in Cliff Hague and Paul Jenkins (eds), *Place Identity, Participation and Planning* (2005) 19, 20. Jenkins suggests: ‘Place on the other hand is seen as being the predominantly socio-cultural perception and definition of space,

private investment continues to flow into them. We want and need to encourage new people to elect to leave the mega-city and to come and populate these regional localities.⁴⁴

In land use planning law the mechanisms that are meant to facilitate, and therefore not obstruct, development are today created by legislation. It is axiomatic that if the legislation that regulates development does not facilitate investment in a regional town then it is time to question whether the problem is in fact the legislation and the instruments it spawns.

In the landscape that is our colonial history many regional towns could be compared to remnant paddock trees. Magnificent specimens standing testament to something that has been lost. Just like those paddock trees, because regional towns are land based economic units once located in the landscape it is difficult to transplant the town without losing something in the mix. But the corollary is that like the lonely tree on the top of the cleared paddock, once isolated it can lose the capacity to withstand external forces. To avoid this doom it is the people of the town and its leadership that must be motivated. The town is doomed if its future rests in an expectation that 'the Government' will save it. Encouraging such a frame of reference is dangerous.

PLANNING IDEOLOGIES

Patrick McAuslan's seminal work *The Ideologies of Planning Law* highlights the choices available to a government when framing land use planning systems.⁴⁵ Up until the advent of planning law in the twentieth century the ideology of private property governed the development of regional towns. Places like Bendigo and Ballarat are examples of what can be achieved when a people believe utterly in their place.⁴⁶ In Australia, since the middle of the twentieth century, McAuslan's ideology of the public interest has prevailed in terms of the governance of the built space. Law made in the centre and administered by bureaucratic planners has framed the interaction between market forces and development.⁴⁷

It is true that since the 1980s there has been a reaction against the dominance of the ideology of public interest particularly by those professing a preference for market mechanisms generally sourced to the ideas of Friedrich Hayek and the Austrian school of economics. The Austrian school advocates a return to the ideology of private property as the dominant

and is an important element of social identity – whether individual or collective – and can be understood as social geography.⁷

⁴⁴ Erhard Berner, 'The metropolitan dilemma: global society, localities and the struggle for urban land in Manila' in Ayşe Öncü and Petra Weyland (eds), *Space, Culture and Power: New identities in globalizing cities* (1997), 103. Berner argues that a locality 'is the focus of everyday life; it is not merely the place where people reside but where they spend much of their life, their *Lebenswelt* (life-world).'⁷

⁴⁵P McAuslan, *The Ideologies of Planning Law*, Urban and Regional Planning Series (1980). McAuslan identified the three grundnorm ideologies of land use planning namely: the ideology of Private Property; of the Public Interest and of Public Participation.

⁴⁶ The Traveller's Guide to the Goldfields, (2006), 44: 'All the Goldfields towns were significant and interestingly different in layout and building style. The dramas, successes, uncertainties and upheavals of mining were reflected in the built environments. The contrast between Ballarat and Bendigo can be used to make the point.'

⁴⁷ Planning laws were first introduced in NSW via the enactment of the *Local Government (Town and Country Planning) Amendment Act* (NSW) 1945 which introduced Part XIA into the Local Government Act 1919. Writing in 1946 on the achievements of the McKell government, the ALP suggested that the reason for the legislation was to arrest 'the haphazard and unregulated growth of New South Wales during the past 153 years.' Cited in Australian Labour Party, *Five critical years: story of the McKell Labour government in New South Wales, May 1941-May 1946* (1946), 48.

mechanism for determining land use planning decisions. Competing within this ideological space have been the advocates of a ‘third way.’⁴⁸ They espouse ideas associated with Jurgen Habermas and Charles Lindblom. In this conceptualisation, land use planning is about the space called the ‘neighbourhood’ but viewed as part of a wider region territorially defined by rules of governance. Adopting a place based theory of planning, Hague and Jenkins argue that urban planning is ‘a set of institutions, ideas and practices that sits within a social context and is embedded in power relations.’⁴⁹ The ideology of public participation as framed by McAuslan sits within this ideological stream in that it stands for greater participatory mechanisms as an alternative to private property (price) mechanisms.

John Keane’s theory of monitory democracy has recently located the historical development of public participation in democratic governance.⁵⁰ There is a direct correlation between the use of law as an instrument of power and the struggle of the people to participate; to wrest power from the governing elite. In democratic societies, citizenship denotes the right of a person to participate in social institutions and to exercise deliberative rights. In her seminal paper Arnstein suggested that participation ‘is the cornerstone of democracy.’⁵¹ It is here argued that in the context of regional towns the evidence suggests that seventy years of bureaucratic planning laws in NSW demonstrates that the favoured tool of central government regulation may not be the most effective mechanism to encourage capital inflows. If that is so, is it time to loosen the strictures that inhibit investment in regional spaces?

The government does not have the funds nor the inclination to prop up regional towns. The declining population of many regional towns suggests that the citizenry is silently withdrawing to places where they perceive they (and their capital) may have a future. We need to do something different to avoid blight and disinvestment in regional towns.

ZONING FOR BLIGHT OR DEVELOPMENT?

Regional towns forever exist outside the critical mass point where densities of scale familiar to the mega-city become possible. Urban density is a feature of scarcity. Land is not as scarce in regional towns as it is in major urban centres. Regional towns are creative places but they

⁴⁸ Harry Smith, 'Place Identity and Participation' in Cliff Hague and Paul Jenkins (eds), *Place Identity, Participation and Planning* (2005) 39, 49. As Smith notes:

‘The third way is different [to strong state welfarism and neo-liberal ideology]. Just as customers do have power in markets and producers seek to manipulate their preferences, so in the public arena participants also have power that politicians seek to mould and capitalize upon. Participation can be a new channel for political action, bypassing clogged arteries of traditional representative democracy. Participation can reconnect politicians and the public.’

⁴⁹ Cliff Hague and Paul Jenkins (eds), *Place Identity, Participation and Planning* (2005), 8.

⁵⁰ J. Keane, above n29, xxvii. ‘[T]he emerging historical form of “monitory” democracy is a “post-Westminster” form of democracy in which power-monitoring and power controlling devices have begun to extend sideways and downwards through the whole political order.’ Monitory democracy is differentiated from other forms of democracy (at 737) in that ‘assembly based democracy belonged to an era dominated by the spoken word, backed up by laws written on papyrus and stone, and by messages despatched by foot, or by donkey and horse. Representative democracy sprang up in the era of print culture – the book, pamphlet and newspaper, and telegraphed and mailed messages – and fell into crisis during the advent of early mass communication media, especially radio and cinema and (in its infancy) television. By contrast, monitory democracy is tied closely to the growth of multi-media-saturated societies – societies whose structures of power are continuously “bitten” by monitory institutions operating within a galaxy of media defined by the ethos of communicative abundance.’

⁵¹ Sherry R. Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) *Journal of the American Institute of Planners* 216, 216.

do not have the opportunities that exist in the centre that they relate to. If we consider the nature of regional growth in the nineteenth century and contrast it to the nature of regional growth in the twentieth century perhaps there are lessons to be learned for regional towns in the twenty first century?

Consider the regional towns of Ballarat and Bendigo. Yes, the impetus that ignited the towns was a gold boom.⁵² But the focus I want to bring to the discussion is how private capital was expended in the hope that these towns were going places. Long before there were planning laws these towns sprang from nothing more than the prospect of gold. But once formed, these towns continued to grow in the late nineteenth century impelled by the profits that the metal secured. That growth fostered an economy. I suspect that the towns grew principally because the inhabitants had an optimism which fed upon itself. The people built their city and its economy in the hope that they had found the next happening place. The experience is described in *The Traveller's guide to the Goldfields*:

The quality of the achievements by a single generation is probably unequalled in world history. All goldfields communities were remarkably free to make their own way, unaffected by the policies of overseas investors. They dug their own capital and reinvested in their own future, resulting in distinctive buildings, still visible.⁵³

In our post-modern times regional towns cannot, as a matter of strategy, aspire to be like the city states of history. The luck of gold will not be their fortune. By necessity, regional towns are now subject to and rely upon the patronage of the 'centre' that the town 'relates' to. In return for this patronage regional towns are bound by the laws made at the political centre. These laws have the capacity to both help and hinder the economic development of a regional town. For this reason regional towns are necessarily in an inferior power relationship to the political centre upon which they depend. The life force of the town can be drained by both deliberate and inadvertent decisions made at the centre. This suggests that for regional towns to prosper they must develop an effective relationship with the law making centre. The corollary is that a dysfunctional relationship will lead to a town being blighted.

An aspect of dysfunctionality is the potential impact of planning laws made at the centre which inhibit the flow of capital into a regional town.⁵⁴ Land use planning is land centric. When democratic governments formulate land use planning policy and enact law to give effect to that policy, the implementation of the policy intersects with fundamental property rights enjoyed by people who own land. Planning policy and law is therefore best understood in the socio-political dimension.⁵⁵ At a practical level, what needs to be recognised by bureaucratic planners is that they are not actually architects commissioned to build the built

⁵² Geoffrey Blainey, 'After the Gold Rush,' Inquirer, *The Australian*, 27 Aug 2016. Blaney notes that: 'In the first 40 years after the initial discoveries, gold's impact on Australia was formidable. Most historians - persuaded by the calculations of Noel G. Butlin - now believe that, for about four decades, the Australian people enjoyed the highest - or close to the highest - standard of living in the world.'

⁵³ *The Traveller's Guide to the Goldfields*, above n46, 43.

⁵⁴ As Westbury, above n8, 71 notes of Newcastle: 'Amid the daily debates about developments and daydreams, amid front-page stories and artist illustrations, between the conceptual drawings and the master plans, in Newcastle in 2008 no one really seemed to notice that real estate agents weren't returning calls.'

⁵⁵ Clive Forster, *Australian Cities: Community and Change* (1995), 71, notes:

'Australia's major cities are, above all, residential environments. Most of their built-up areas consist of houses, streets and local facilities that constitute "home" for 10 million people. The kind of housing people live in, whether it meets their needs and what they have to pay for it largely determines their standard of living.'

form envisioned by their plans. Achieving that bureaucratic vision will require different thinking.

Urban planning, in its physical manifestation, has deep historical roots.⁵⁶ In contrast, the profession known as ‘Planning’ has very shallow historical roots.⁵⁷ Land use planning, as an institution, was first promoted by the Garden Cities Association formed in Britain in 1899.⁵⁸ However, the profession of land use planning was created out of the social chaos caused by the Great Depression and the Second World War.⁵⁹ These great social moments signalled the end of laissez faire economics and the reliance by governments on the self-regulating market.⁶⁰ Bates describes the advent of planning laws as a ‘great social revolution.’⁶¹ As a matter of history, planning laws were spawned out of the earlier social revolution known as the industrial revolution. This revolution sources its genesis to a social revolution in England when the people rose up to take sovereign power over their governance after a long history of struggle. It was a struggle against tyranny resulting in what we now describe as the Westminster System of representative parliamentary government.

Planning laws are located at the intersection of property law and public interest. The subjugation of the individual’s untrammelled right to develop his property was a concomitant outcome of the necessity to create a civil society. A J Scott, writing in the 1980s, suggests that urban planning is society’s way of ‘dealing with the historical imperative of controlling the crisis-ridden land-contingent logic that constitutes the urbanization process in capitalism.’⁶²

Why is that important in a regional context? It is important because the dynamic of development operating in a regional town is different to the dynamic that may apply in the mega-city. The task of Planning Laws should be to promote participation in the economy of the regional town. But what works in the city may not work in regional towns. Viewed in this context participation does not mean facilitating noisy public meetings to denounce development. Participation means the people of the town electing to have some skin in the game by actively participating in the creation of built form and active space through

⁵⁶ AJ Brown and HM Sherrard, *Town and Country Planning* (1959), 9. Brown and Sherrard recognise the debt we owe to archaeologists who ‘have brought to light evidence that in the dawn of history man had an appreciation of planning, of civic architecture and of engineering.’

⁵⁷ Andreas Faludi, *Planning Theory* (1973), 13. Faludi suggests that:

‘one of the component elements of the definition of a profession is that its skills are based on theory.’ ... ‘[planning] developed out of architecture, engineering and surveying, its area of concern being that of “system of land use settlement,” to use a modern term.’

⁵⁸ Andrew Kelly and Christopher Smith, ‘The Capriciousness of Australian Planning Law: Zoning Objectives in NSW as a Case Study’ (2008) 26(1) *Urban Policy and Research* 83, 84. Ebenezer Howard’s garden city movement and the association ‘provided a launch for planned separation of conflicting land uses, the centrepiece of Western land use planning.’

⁵⁹ Leonardo Benevolo, *The history of the city* (1980), 928: ‘Large-scale public intervention, in order to regulate to some extent the growth of England’s cities, only became possible in the 1930s when attempts were made to tackle the effects of the 1929 crisis, ...’

⁶⁰ B. Gleeson and N. Low, ‘Revaluing planning: Rolling back Neo-liberalism in Australia’ (2000) 53 *Progress in Planning* 83, 87, 90:

‘The world society which grew during the 19th century, based on the principle that the self-regulating market was a law of nature, had catastrophically failed by the 1930s. This failure was perceived to lie not in contingent political events such as the rise of Fascism, or even the war itself, but in the socially destructive power of the unfettered market.’ ... (at 90) ‘The idea of societal planning, hitherto associated with dictatorial regimes, had to be reconciled with democracy.’

⁶¹ Gerry Bates, *Environmental Law in Australia* (7th ed, 2010), 8: ‘The environmental movement [hardly four decades old] must therefore rank as one of the great social revolutions of history.’

⁶² A J Scott, above n41, 304.

investment. Without participation of that sort there can be no economic progress for the town. Instead, senescence and decay, in short, history will be its doom. So it is hypothesized here that to succeed in this challenging development environment regional towns may need a different type of support from the political centre. The question is, if such a change were necessary would those with the levers of power want to accommodate that need?

THE TYRANNY OF REGIONALISM

Conceptually, tyranny results when a government exercises power without consent.⁶³ It was Hobbes who postulated a civil society under the dominion of a forceful sovereign. As Uhr reformulated the concept, this civil society functioned through ‘the accommodation of competing self-interests, regulated into peace and security by the forceful sovereign’.⁶⁴ Locke softened the impact of Hobb’s position by postulating the concept of popular sovereignty in which ‘legitimate government rests on the consent and not simply fear of the governed’.⁶⁵ Within this beneficial framework wealth was generated by private property. Arguably, this concept continues to have application. In a perfect world there would be a ‘free and fair dialogue’ between the government and the ‘people in the streets.’⁶⁶ This is because Locke recognised that ownership and control over land was central to a person’s ability to derive wealth.⁶⁷ Stein argues that under Locke’s conceptualisation of civil society, its purpose was to protect property rights which rights ‘precede government and are inviolable’.⁶⁸ Yet, in the history of the development of land use planning law these property rights have been interfered with regularly by a forceful sovereign, exercising coercive legislative power for the common good.⁶⁹ A recent illustration of this process can be seen in the general adoption of template LEPs throughout NSW.

The implementation of government policy is felt directly in the neighbourhood.⁷⁰ When a social minority controls parliament, it makes the laws. Regional towns have suffered from remoteness due to the tyranny of distance from the centre. Citizens of regional towns know that whoever has the ear of government calls the tune. It has been so since colonial days. Unless the regional community voice is heard in the political centre a social minority called the political elite controls both the parliamentary processes and the destiny of the regional town. This form of control is potentially despotic if it is exercised to the exclusion of the

⁶³ John Locke, *Two Treatises of Government* (1821), 360. Locke suggested in his chapter XV111, *Of Tyranny*: ‘As usurpation is the exercise of power, which another hath a right to; so *tyranny is the exercise of power beyond right*, which nobody can have a right to.’ (emphasis in original)

⁶⁴ J. Uhr, *Deliberative democracy in Australia: the changing place of parliament* (1998), 44.

⁶⁵ *Ibid.*

⁶⁶ Hollis, above n8, in the chapter ‘Inside the beehive’ writes of two cites. One encapsulating the philosophy of Hobbes and the other of Locke. The paradigmatic Hobbestown is Singapore. Newark, near New York, reflects the Lockean conception. Not pretty but pretty dynamic.

⁶⁷ Property rights are recognised by the UN Universal Declaration of Human Rights, Article 17 of which states: (1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.

⁶⁸ L. Stein, *Principles of Planning Law* (2008), 6.

⁶⁹ *Ibid.* Stein cites *Ambler v Village of Euclid* (1926) 272 U.S. 365 where the US Supreme Court determined that planning law was ‘a proper regulatory subject for the good of the community, whereby the state can modify rights associated with the free and unfettered use of one’s land.’

⁷⁰ Standing Committee on State Development, ‘Report 34: New South Wales Planning Framework’ (NSW Legislative Council 2009), 151. As the Standing Committee noted, decisions on whether or not to approve development ‘can have a profound effect on individuals and communities.’

voice of regional people.⁷¹ But participation is different to consultation.⁷² Without rights of participation, we are rendered mere subjects – in the sense of being under the dominion of a sovereign power.⁷³ There is therefore a tension between the concepts of participatory democracy (or public deliberation) and political representation.⁷⁴ And there is a tension between the role of central government and the rights of the individual.⁷⁵ Uhr suggests that the tension is about the means by which participation is made active.⁷⁶

JS Mill was undoubtedly correct when he said: ‘No man made the land. It is the original inheritance of the whole species.’⁷⁷ The difficulty that arises is that since time immemorial, man has made property laws. The inheritance has been fractionalised ever since.⁷⁸ The subdivision genie slipped out of the bottle quite some time ago.⁷⁹ Comprehensive legal

⁷¹ Mannheim, above n31, 45: ‘There is a great difference between functional and arbitrary power. Any society, however, may rightly be called despotic which permits ruling groups and individuals to wield more power than their functions require or allows them to use power arbitrarily.’

⁷² Participation was differentiated from consultation in the UK Dorby Report (1975), para 10.2 (cited in McAuslan, above n45, 16) ‘The process needs to be in effect ‘participation’ (which means taking an active part, from the outset, in the formation of ... decisions of strategic importance) rather than ‘consultation’ (which means giving the public an opportunity to express views on planning applications).’

⁷³ John Ralston Saul, *The Unconscious Civilization* (1997), 76: ‘The most powerful force possessed by the individual citizen is her own government. ... The individual has no other large organized mechanism that he can call his own. There are other mechanisms, but they reduce the citizen to the status of a subject. Government is the only organized mechanism that makes possible the level of shared disinterest known as the public good.’

⁷⁴ Sophie Body-Gendrot, *The Social Control of Cities? A comparative perspective* (2000), xix. Body-Gendrot suggests that: ‘At stake is a redrawing of what constitutes the legitimate responsibilities of individuals, collectivities, and the state.’

⁷⁵ Keane, above n29, 731-742, traces the development of ‘monitory democracy’ to the historical epoch of the immediate post war period starting with the development of the UN Declaration of Human Rights in 1948: ‘a new weapon to be used anywhere and everywhere against the presumption that the state had priority over the individual human being.’ Keane suggests that since that time: ‘the age of monitory democracy [has witnessed] constant public scrutiny and spats about power, to the point where it seems as if no organisation or leader within the fields of government or social life is immune from political trouble.’

⁷⁶ Uhr, above n 64, 11: ‘Advocates of liberal democracy have long been interested in exploring ways in which practices of active citizenship can be devised to keep alive the prospects of popular sovereignty in fact as well as in theory.’

⁷⁷ JS Mill, *Principles of Political Economy*, University of Toronto Press (1965), 230. Cited in David Farrier, *The Environmental Law Handbook* (2nd ed, 1993), 7. McAuslan, above, 45, ascribes the ‘philosophical ancestry’ of the public participation ideology to JS Mill.

⁷⁸ Compare s 88AB of the *Conveyancing Act 1919* (NSW). This is the section which deems carbon sequestration rights to be a *profit à prendre*. See also the discussion in Samantha Hepburn, ‘Carbon Rights as New Property: The Benefits of Statutory Verification’ (2009) 31 *Sydney Law Review* 239, 246. Hepburn reviews the legislative schemes for carbon rights in Australia and suggests that the schemes in Australia are in the forefront of recognition of carbon rights in the context of forestry legislation. The schemes variously seek to ‘formalise the separate proprietary existence of carbon rights.’ This is an example of a recent fractionalisation of property rights by the application of the subdivision principle. Carbon rights have become valuable, and so the market is looking for ways to commercialise the proprietary rights.

⁷⁹ At common law land in NSW was subdivided merely by deed (‘old system’ conveyancing). This gave rise to a need to register the deed to evidence the partition (in NSW see *Registration of Deeds Act 1897* (NSW)). Later, formal procedures for recognising title to land subdivided by registration of an

structures have been created to facilitate the fractionalisation of land to enable even space to be alienated by way of sale.⁸⁰ Webster and Lai describe this process as the application of the ‘subdivision rule’ to property rights.⁸¹

This discussion raises the interesting participatory question: who should have the power to control land use policy at the level of the regional town? This question is fundamental to the success or failure of regional towns.⁸² Should it be the government, the market or the people? If people who have no skin in the game can veto decisions made about property development then why is it surprising that people who have invested and who want to invest their capital in regional areas become disillusioned and frustrated.⁸³

In regional towns, with the exception perhaps of those who construct supermarkets and shopping centres, there is an implicit expectation that the people of the town are expected to invest their capital in land and businesses within the town. Yet when Government decisions divert development investment opportunities to the centre and cause the regional property market to become depressed is it a surprise that dissatisfaction will eventually feed into the political discourse? The people who own property in regional towns may well feel ‘tyrannised’ because the law made by parliament has usurped them of rights inherent to the ownership of property to develop it. Worse still, disinvestment results. Capital that may have been expended in the regional town does not eventuate.⁸⁴ Gleeson and Low view this conception of planning negatively seeing neo-liberal theories as ‘the subjugation of politics to economics.’⁸⁵ But the empty shops in the high streets of regional towns suggests that there is merit in allowing the market to assume the risk of misplaced investment.⁸⁶ This makes better

identifying plan were created by statute – see for example in NSW: *Real Property Act* 1862 and 1900 (NSW); *Local Government Act* 1906 and 1919 (NSW) and the *Conveyancing Act* 1919 (NSW).

⁸⁰ In NSW see *Strata Schemes (Freehold Development) Act* 1973.

⁸¹ Christopher Webster and Lawrence Wai-Chung Lai, *Property Rights, planning and markets: managing spontaneous cities* (2003), 11, 89: ‘Any particular configuration of property rights over a resource is a function of the value of the resource and of the costs of assigning effective property rights. ... If the value of a resource rises, or the cost of assigning property rights to a valued resource falls (due to technological or institutional innovation), then there will be a demand for a reassignment of property rights.’ (89) ‘In this way, urban land and buildings evolve by subdivision. As knowledge about a superior location spreads, the number of bids for land and buildings increases and prices rise. At some point it becomes profitable to demolish single homes and subdivide land rights into many smaller plots.’

⁸² Brown and Sherrard, above n 54, 196. Brown and Sherrard suggested, as early as the 1950s, that if we were to judge democratic systems by their results, then ‘the chaotic conditions in our towns is the result’ of too much ‘rugged individualism.’ They argued that ‘[i]n place of a discipline imposed from above by a despot or a bureaucrat, the individual must be prepared to discipline himself and to subscribe to behaviour which is for the common good rather than for his selfish ends.’

⁸³ As McAuslan, above n45, notes ‘the failure to adapt the law to meet these increased expectations [to participate] adds fuel to the flames of disillusionment and frustration with the planning system.’ Not only is it in the failure to adapt the law, it is also in the failure of politicians to articulate a vision so that the intent of the government can be discerned.

⁸⁴ As Neil Smith, *The New Urban Frontier: Gentrification and the revanchist city* (1996), 190 suggests, there is a dividing line between disinvestment and reinvestment:

‘Disinvestment involves the absolute or relative withdrawal of capital from the built environment. Reinvestment involves the return of capital to landscapes and structures that previously experienced disinvestment.’

⁸⁵ B. Gleeson and N. Low, above n 60, 97.

⁸⁶ As Westbury, above n8, 54 observes: ‘Local retailers have been out-scaled, swallowed up, bought out, merged into and marginalised by national and international chains. Many main streets –even as I understood them as a child – are gone or struggle to exist at all.’

sense if we are rejecting the vision ‘projected from the imagination of the grand wizard planner.’⁸⁷ All that the people in regional towns are seeking to do is to have the power to rebuild the town from the bottom up. It is in this context that reliance on zoning and the impact of planning law is relevant. Absent planning law the regional town would have, as Scott suggests, ‘a seamless garment of land uses forming a compact polarized agglomeration of spatially interdependent events.’⁸⁸

PARTICIPATION – THE HOLY GRAIL OF PLANNING

The favoured tool of planning is the concept of negative zoning. As a mechanism it is of only relatively recent origin being first introduced in New York in 1916. It is here posited that if the utility of legislating zoning, properly understood, is for the purpose of the end that it is a particular type of desired *and constructed* built form outcome in an urban setting, then if the evidence suggests that the desired end has not been achieved it probably means that the experiment has failed. What does that mean for the concept of participation in planning? Does it mean that urban planning cannot really be formulated along democratic lines?⁸⁹ This raises directly the issue of public participation. What ‘voting’ rights should the citizens living in the local government area have when it comes to the investment of capital in the regional town?⁹⁰

In the regional context it is not land that is in scarce supply. It is capital that is in scarce supply. Capital is only attracted to places where it perceives there is a reasonable opportunity of a return. The capital necessary to support the town will not be invested by Government as a matter of course though it will provide generous dollops from time to time. Similarly, councils do not have the financial resources to deliver the desired built form often represented in DCPs or urban Master Plans. So regardless of how careful we are in colouring the zoning map and producing award winning designs these planning measures simply do not facilitate the construction of urban spaces in regional towns. The brief historical excursus above supports the argument that the construction of built forms will occur in the absence of planning laws.⁹¹

If the theoretical intention of the legislative mechanism is to attract the market to build the desired built form then regional land use planning mechanisms will have to incorporate market incentives to attract the investment dollar to the desired place. Under the present system ‘the people,’ in reality meaning the grand wizard planners, want the built form to be constructed in a particular place on land that is not owned by ‘the people.’ Absent incentives the reality is that capital is drawn away from the regulated regional town to a place where capital perceives it will yield the best return on investment. It is here that planning laws operate as a disincentive to development. This occurs when the structure of planning laws,

⁸⁷ Hollis, above n5, 81.

⁸⁸ A J Scott, above n41, 7.

⁸⁹ The converse, argued by Elizabeth Farrelly, ‘Our cities reveal the ugly side of democracy’, *Sydney Morning Herald* (Sydney), 6-7 Oct 2007, 26, is that ‘public participation is as likely to militate against good architecture and beautiful cities as against bad or ugly ones; to enhance mediocrity at the expense of both extremes. The reasons for this go back to questions of art, control and authorship.’

⁹⁰ Rohe and Gates, above n10, 57-58 argue that: ‘[P]articipation in neighbourhood planning programs takes place within familiar local neighbourhoods, close to home and with familiar people. ... Thus, higher rates of participation are expected in neighbourhood planning programs. ... For planning to be effective it must develop a stronger political constituency among the public.’

⁹¹ Houston city has long ago rejected zoning. As Hollis notes above n5, 31, observes: ‘Houston, Texas, on the other hand, is so successful that it is expanding outwards in all directions; in the last decade over 1 million people have migrated there and have found a new home amongst the 2,000 square miles of sprawl that surround the city.’

taken as a totality, operate to inhibit development. Regional towns suffer that fate now. I am not aware of any work being done to measure what I describe as ‘silence.’ This is the antithesis of what is desired by the planning instruments. Silence is the result of the rigid application of current land use planning formulas designed along McAuslan’s ideology of the Public Interest. The result of silence is that the planning instruments remain in place but development occurs elsewhere. The price regional towns pay for accepting this land use planning regime is the unmeasured quantum of capital lost to a regional town because it is invested elsewhere.

The people who control the development of land create the ‘*umwelt*’ of the neighbourhood.⁹² Equality and access to power are essential to a functioning democracy.⁹³ It is at this junction of property rights and land use planning laws that the concept of public interest needs to be considered more closely. Who is to speak for regional towns?⁹⁴

THE ILLUSION OF PARTICIPATION

Every land use planning decision taken by government involves a conscious decision by government about the expected future built form of a locality. Decisions taken by government to impose planning instruments impact upon citizens because the plan is intended to shape the nature and character of future development that can occur in a locality. Planning laws therefore have both societal and local impacts. When a decision is made to adopt a policy to favour urban consolidation in Sydney a deliberate choice is made by government to intervene in the operation of the market.⁹⁵ Capital that may have been invested in a regional town is potentially diverted to the city - commonly called the ‘hot brick’ - because the likely return on investment or ROI is anticipated to be far greater than that which can be derived from investment in a land rich regional town. Thus, encouraging density in the mega-city distorts the property market both locally and regionally. Because regional towns are blessed with an abundance of land they will always struggle to densify. This is especially so in the CBD areas of regional towns where the template LEP usually only allows ‘shop top housing.’ By definition, this form of development excludes ground floor residential use.⁹⁶

⁹² B. Gleeson and N. Low, above n60, 151. Umwelt is the German concept for the environment which unites all semiotic processes of an organism into a whole – to function, all parts must work together co-operatively.

⁹³ Echoing Arnstein above n51, 216, the 2010 Environment Defender’s Office report ‘The State of Planning in NSW: With reference to social and environmental impacts and public participation’ (Environment Defender’s Office, 2010), 45, notes: ‘Public participation forms the cornerstone of the planning system. Planning is about people and communities and their environment, so it is essential that they have a genuine say in the future development of their areas. Further, the planning system is only workable if the community has confidence in it.’

⁹⁴ Nicholas Aroney, ‘Four reasons for an upper house : representative democracy, public deliberation, legislative outputs and executive accountability’ (2008) 29(2) *Adelaide Law Review* 205, 216. Aroney identifies the substantive theory of deliberative democracy ‘in which the virtues of participation and discussion are seen as essential to a healthy system of popular self-governance.’

⁹⁵ Robert Stokes, *The Battle for the Big Back Yard: An Examination of the Conflict Between Suburban Character and Urban Consolidation and the use of Public Participation in Managing this Conflict* (Ph.D. Thesis, Macquarie University, 2007), 1. Stokes thesis frames the contest as being ‘between the private property interest in safeguarding suburban character and the public interest in pursuing a policy of urban consolidation.’

⁹⁶ Standard Instrument Dictionary: ‘*shop top housing* means one or more dwellings located above ground floor retail premises or business premises.’

It is one thing for strip developments in Sydney located near transport nodes with zonings that permit such development to have vacant ground floor elements. At least some form of development will be constructed because the ROI stacks up. In regional towns the result is blight. If there is no ground floor tenant then there will be no incentive to build residential elements above vacant shops. The result is no development. The situation worsens when various localities within the same local government area are zoned in such a way that allows these places to compete with the intended function of the regional town.⁹⁷ Whilst such zoning theoretically creates a topical opportunity in each place, the fact of the zoning does not effectively dictate the investment decision made by those with capital. Planners are not architects with a commission to build the vision.

What can be said of such land use planning instruments is that through them the government is expressing the desire to achieve some built form outcome which it perceives the market cannot deliver without the planning instrument.⁹⁸ In this scenario, the decision-making process does not require the people to participate. The government, as the sovereign power in classic terms, makes the relevant decisions as the representative of the people. The decision is facilitated by reliance upon the advice of skilled experts in various fields. In this bureaucratic model the citizens do not have power (in the Arnstein sense) in the decision-making processes leading to the making of the planning instrument or the individual decision to approve development. The people may be consulted by the council and asked to comment, but this is tokenistic participation. In this reality, the people are, in the planning law context, mere subjects under law. It is a far cry from a participatory power sharing which is the intent of democratic institutions.⁹⁹ The function of public participation in this construct is as consumers of the product delivered as a result of the operation of the plan.

But what if the plan does not generate a built form outcome to consume? This is the situation that confronts even small developers wanting to enliven an existing space in a regional town with a new innovative vision. In regional towns the business proprietors know keenly the principle of interrelatedness. As Westbury notes, '[r]etail –or at least a lot of the infrastructure we've built for it – is interdependent.'¹⁰⁰ Lose a few shops and the CBD begins to look 'gappy.' That is the danger in regional towns. If the plan is not effective to incentivize the market to build the city then senescence and decay is the logical outcome. This is the decay caused by the development silence I refer to. The built form structures that are left in a state of disrepair or neglect are then made more difficult to 'renew' when modern regulation requires expensive up-grading. It is only the degraded brownfield sites that are renewed because they are purchased for land value and the existing structures, unless heritage

⁹⁷ Westbury, above n8, 89, describes this process in the city of Newcastle as a dysfunction that resembles 'a Rubik's cube, where no one piece could move independently. It was an accumulation of the unintended consequences of decisions made across three levels of government over dozens and probably hundreds of years.'

⁹⁸ A J Scott, above n41, 233, argues that: 'precisely because urban land development is privately controlled, the final aggregate outcomes of this process are necessarily and paradoxically out of control.' Hence the purpose of planning laws is to 'control' this process, vis (235): 'Concomitantly, collective action seeks to resolve the specific problems created by private decisionmaking and action, and to steer society as a whole into collectively rational options—consistent with existing social and property relations—that are not attainable by private action alone.'

⁹⁹ Keane, above n 29, 867. Keane says that a 'cheer' should be given to democracy 'for democratic power-sharing [which is] the best human weapon that has ever been invented against the folly and hubris that always comes with concentrations of unaccountable power.'

¹⁰⁰ Westbury above n8, 56-57. 'Modern retail is a precarious, complex and interdependent system.'

protected - which would not be unusual - can be demolished.¹⁰¹ Significant buildings, especially those that represent the heritage of the town, are left in glorious suspended animation waiting for ...? What?

It was the aggregation of separate parcels linked to community infrastructure that created these regional towns. They became places that people wanted to live in. They still do but often the missing ingredient is jobs. If regional towns are only about retail then the future is bleak as retail is experiencing its own existential reformation through the onslaught of disruptive technology like Amazon and a multitude of other on-line choices. The irony is that just when the sending of letters has died the boom in on-line trade has caused a renaissance in parcel delivery. Did the planning instruments predict this change and seek to accommodate it? No.

It is here speculated that without government interference to shape how land is to be developed the market will determine the ultimate built form of the regional town.¹⁰² Those with capital will have the power to buy land and have the incentive to develop it.¹⁰³ The motivation to do so will be the anticipation of a return on investment. If the gamble succeeds, the people will come.¹⁰⁴ The paradox is that absent people, the formation of community becomes problematic. To form community regional towns need people. To live in regional towns people need jobs and a future. The jobs are not in retail. The look of regional towns needs to adapt to this reality. To be sure, the ambience of the high street may be disrupted. But isn't that a better outcome than boarded up shops?

PREDICTING THE FUTURE FOR REGIONAL TOWNS

Under market theory, recognizing that cities are complex organisms, proponents of the theory suggest that it is best not to try to plan for future outcomes.¹⁰⁵ No conscious decision is made other than the individual decision of the transactors in the market to participate in the exchange of property rights. Through the dynamic of market exchanges the narrative of place is contested. Through the guidance of Adam Smith's invisible hand socially beneficial order will emerge out of the chaos.¹⁰⁶ The role of the government is passive. It is there to facilitate

¹⁰¹ In Nowra, NSW, where I reside, a 'Pressed metal clad industrial building' at 1 Berry Street (being a former garage now a marine repair shop) in the CBD is heritage listed in the schedule to the LEP making its redevelopment problematic.

¹⁰² A J Scott, above n41, 314, suggests that: 'As a consequence, urban planning begins to lose its Utopian and depoliticizing patina as that which 'seeks to promote human growth, and its true political nature begins to emerge with ever greater clarity.'

¹⁰³ As Mark Pennington, 'Hayekian Political Economy and the Limits of Deliberative Democracy' (2003) 51(4) *Political Studies* 722, 729, notes, the allure lies in the efficiency of the market: 'Under conditions of complexity, where millions of individual decisions must be coordinated with one another, it would be impossible for deliberative committees to comprehend the nature of the interrelationships between all relevant actors.' ... In markets, ... [t]he price system, albeit imperfectly, transmits knowledge in a compact form which represents the complex interrelated decisions of many dispersed actors.'

¹⁰⁴ Westbury, above n8, 157, is right. As he notes: 'we need to start building places and environments that initiative is attracted to. We rarely talk about initiative; we don't really have the language for it.'

¹⁰⁵ Stefano Moroni, 'Rethinking the theory and practice of land-use regulation: Towards nomocracy' 9(2) *Planning Theory* 137, 146. Moroni acknowledges the neo-liberal argument is that 'it is both impossible and undesirable to (authoritatively) plan complex social systems' such as cities.

¹⁰⁶ Adam Smith, *The Wealth of Nations* (2010), 240. As Smith argued in 1776: 'by directing [a person's] industry in such a manner as its produce may be of greatest value, he intends only his own gain: and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for society that it was no part of it. By promoting

the transaction. The function of law is to uphold the institution of property. The citizens remain consumers in the property market as a function of consumerism just as is the case now. Every individual decision to purchase land or undertake development will still impact on a locality but in an incremental and unconscious fashion.¹⁰⁷ The shape and nature of the regional town will be determined over time by the application of the ‘subdivision rule’ and by the price mechanism.¹⁰⁸

Individual decisions made to reside in a locality, to purchase land, to build or renovate commercial premises have real meaning to both the person who makes that decision and to their community. There is in fact a community of interest as these decisions are interrelated. The externalities of locality impact on the subjective enjoyment of being resident in a place as well as on the financial decision made to invest capital in a locality and/or to exploit an investment opportunity. Conversely, decisions made by others to invest or not to invest in that locality also impact directly upon the amenity of the locality and its attractiveness as such an investment opportunity.¹⁰⁹ Davies and Whinston argued, as early as 1966, that this concept was ‘so obvious as hardly to merit discussion.’¹¹⁰ Historically, this is why communities in the twentieth century sought to influence decisions made about development in the locality.

Whether the decision is about the type of zone to be applied or about the type of particular development proposed for a site; there is both self-interest and community interest in the outcome of the resultant planning decision. If you earn the right to veto development by merely being a citizen of the town will that power translate into the development of the planning vision expressed in the planning instruments?¹¹¹ Being a citizen of a regional town does not mean that you have skin in the game. But if you do have skin in the game, or want to

his own interest, he frequently promotes that of society more effectually than when he really intends to promote it.’

¹⁰⁷ Juval Portugali, 'Learning From Paradoxes about Prediction and Planning in Self-Organizing Cities' (2008) 7(3) *Planning Theory* 248, 257. Portugali goes so far as to suggest that cities are ‘*dual self-organising systems*’ (emphasis in original). Significantly, in such complex social systems: ‘the interacting elements in such systems are agent and not parts, that is, entities that have cognitive capabilities such as learning, thinking, decision-making and the like; one of these capabilities is planning – agents plan and take decisions according to their past experience (learning) and their plans.’ In this system, ‘an individual, a household, a private company or the city’s planning authority, is a planner at a certain scale.’

¹⁰⁸ Webster and Lai, above n81, 11.

¹⁰⁹ Nicole Gurrán, *Australian Urban Land Use Planning* (2007), 17: ‘Over time, the cumulative affect of many such developments can make a significant impact on the qualities of our shared urban and regional landscapes.’

¹¹⁰ Otto A Davies and AB Whinston, 'Chapter 3: The Economics of Urban Renewal' in James Q (ed) Wilson (ed), *Urban Renewal: The Record and the Controversy* (1966) 50, 53: ‘First of all, the fact that the value of any one property depends in part upon the neighbourhood in which it is located seems so obvious as hardly to merit discussion. ... Pure introspective evidence seems sufficient to indicate that persons consider the neighbourhood when deciding to buy or rent some piece of urban property. If this is the case, then it means that externalities are present in utility functions; that is to say the subjective utility or enjoyment derived from a property depends not only upon the design, state of repair, and so on of that property, but also upon the characteristics of nearby properties.’

¹¹¹ James Gray Pope, 'Republican Moments: The Role of Direct Popular Power in the American Constitutional Order' (1990) 139(2) *University of Pennsylvania Law Review* 289, 293: ‘According to Webber, power is “the possibility of imposing one’s will upon the behaviour of other persons.” Power may be, but need not be, exercised through economic or physical coercion. The “power of persuasion” is also, as the phrase indicates, a form of power.’

have skin in the game, then perhaps your voice should have the power to persuade?¹¹² Presently it is the state that has veto power. It is responsible for creating the ‘legal environment’ within which the market transactions occur. Fundamental to that legal landscape is the notion of ‘permissible development.’

It is only once the state makes development permissible in a place that a proponent can bring forward an application to develop the space. It is the state that designs the planning instrument. Through its agent, the local council, the state retains the right of veto over the submitted application as the EP& A Act confers on the council the power to reject the application. Under the design of the EP&A Act the people rarely have the right to contest the approval of the development.¹¹³ But the reality for regional towns is that despite this framework, it is the market that determines the allocation of capital. Without capital there can be no development. No built form will emerge (unless the state elects to expend its resources within the town). Irregardless of the desires of ‘the people’ there will be nothing to consume. Grand plans and award winning designs will remain dormant on the drawing boards.

THE LEGACY OF PAST DECISIONS INFECTING CURRENT CHOICES

The central difficulty for town planning is, as Portugali suggests,¹¹⁴ that it is not possible to predict (and therefore to legislate for) changes in localities over time. Without economic incentives in the planning instruments the market will not supply the built form. That the community has an interest in the resultant built form is a given. This ‘public’ interest is regularly reflected within local newspapers, not uncommonly, on the front page.¹¹⁵ The frequency with which planning matters are being politicised, made the subject of newspaper reports, media comment and even ICAC investigations suggests that there is genuine public interest in the outcome of planning and investment decisions.¹¹⁶ Out of this debate all that can be said is that the citizenry seems to have an idealised notion of built form space that is rightly offended by unsympathetic approvals and corrupt dealings. But if we are going to revitalize our regional towns we are still going to have to find ways to encourage people to come and live in them again. Preconceptions will need to be challenged and reshaped.¹¹⁷

¹¹² Webster and Lai, above n81, 70, according to market theory: ‘As the monopoly supplier of violence, the state has a fundamental role in creating a legal environment for market-based exchange and economic growth. At the minimum this includes making rules and sanctions that confer on individuals a) the secure right to exclusive use of private property, b) the rights to derive income from property and c) the right to trade (alienate) property.’

¹¹³ In NSW only a particular type of development known as designated development allows third party objector rights to appeal to the Court against the council’s grant of approval to development (EP&A Act s98).

¹¹⁴ Portugali, above n107, 250, notes that ‘current urban theory suggests that cities are complex, self-organising and non-linear systems and that as a consequence their future behaviour is in essence not predictable.’

¹¹⁵ The examples are numerous. At the time of writing the Sydney Morning Herald carried yet another report on its front page, see: J Saulwick and K Gair, ‘Sydney population boom and the only way is up and in,’ *Sydney Morning Herald* (Sydney), 12 September, 2016, 1.

¹¹⁶ Most notorious in recent years in Wollongong see ICAC, ‘Report on an Investigation into corruption allegations affecting Wollongong City Council’ (ICAC, 2008).

¹¹⁷ Ayşe Öncü, ‘The myth of the ‘ideal home’ travels across cultural borders to Istanbul’ in Ayşe Öncü and Petra Weyland (eds), *Space, Culture and Power: New identities in globalizing cities* (1997), 60. Öncü suggests that the concept of an ‘ideal home’ is a ‘global myth in the sense of discursive construct which claims for itself the moral superiority and legitimacy of a timeless and placeless truth.’ However, he concedes that the ‘optics of the local’ through which such myths are ‘mediated is always historically grounded.’

There is no manual that says that planning law must be designed according to the ideology of public interest. There are alternative planning ideologies indicating that a choice is available. The normative discourse suggests that planning laws are necessary to the public interest. Farrier argues that ‘the state has a vital interest’ in the regulation of land use because land (especially in its environmental context) is not only a scarce resource, it is irreplaceable.¹¹⁸ Yet in a capitalist society, the state has also legitimated the primacy of rights to, in and over property.¹¹⁹ When the ideology of property (which promotes the rights of individual owners of land), collides with the public interest ideology (which promotes the interests of the people as a collective),¹²⁰ the public interest is meant to prevail.¹²¹ This raises an issue of control, namely, who is best placed to determine the public interest?¹²²

If the public interest justifies the making of planning laws, and if the state has exclusive power to make such laws, then the state both defines what is in the public interest and makes lawful the dispossession of the property right. This is a valuable right. It is the right of the individual to determine how land in their ownership is to be developed. When parliament legislates to make law, it is, according to democratic theory, exercising a power conferred by the people.¹²³ Whilst the state exerts power, it is the people that are sovereign.¹²⁴ When a

¹¹⁸ Farrier, above n77, 7, endorses Mill’s concept that land is the original inheritance of the people. Yet the counter argument runs that property rights are ‘sacred’.

¹¹⁹ Uhr, above n64, 51. Uhr, referencing the Lockean conception of government, makes the point that ‘legislative power may not be used to take away subjects’ property without their “own consent, that is, the consent of the majority.”’

¹²⁰ WJV Windeyer, *Lectures on Legal History* (1938), 247. Windeyer dates the emergence of collectivism to the mid nineteenth century. This was a social moment when: ‘The idea that the state should not interfere with individual enterprise and freedom of contract gave place to a realisation that the state must interfere.’

¹²¹ And what ‘price’ should the individual/community pay? Sometimes compensation is not enough. It is difficult to quantify intangible rights such as the amenity of the neighbourhood. As the NSW Court of Appeal observed in *ING Bank (Australia) Ltd v O’Shea* [2010] NSWCA 71 (at [161]): ‘However, when compensation for loss of land rights is being considered, one must always bear in mind the aphorism of Lord Sumner cited in *Campbell JA* during the oral argument: ‘I doubt ... whether it is complete justice to allow the big man ... to have his way, and to solace the little man for his darkened and stuffy little house by giving him a cheque that he does not ask for.’ (*Leeds International Co-Operative Society Ltd v Slack* [1924] AC 851, 872)’.

¹²² In *Shoalhaven CC v Lovell* (1996) 136 FLR 58, 63, Mahoney P noted that the term ‘public interest’ was not defined in the EP&A Act. Citing with approval *O’Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ) the Land and Environment Court affirmed the following statement of principle: ‘Indeed, the expression “in the public interest”, when used in a statute classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only “in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitively extraneous to any objects the legislature could have in view”’: *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J.’

¹²³ Uhr, above n64, 25. As Uhr notes: ‘deliberative institutions are less important as generators of wisdom than as conduits of consent, providing greater certainty for the legitimacy of government which, for all practical purposes, is retained in the hands of a small ruling group performing the related functions of executive decision and judicial arbitration.’

¹²⁴ Bobbitt, above n22, 216. As Bobbitt explains, ‘[The State] came into being in order to establish a monopoly on domestic violence, which is a necessary condition for law, and to protect its jurisdiction from foreign violence, which is the basis for strategy. If the State is unable to deliver on these promises, it will be changed; if the reason it cannot deliver is rooted in its constitutional form, then that form will change. A State that could neither protect its citizens from crime nor protect its homeland from attack by other states would have ceased to fulfil its most basic reason for being.’

parliament assumes responsibility for defining the public interest, unless that interest is coincidental to the wishes of the people, a form of tyranny may arise.¹²⁵

In the context of urban planning in regional Australia I hypothesise that our faith in bureaucratic planning as the vehicle to drive development is misplaced. Our planning instruments do not routinely facilitate development in regional towns. That is neither their design nor intent. In the highly competitive market that characterises the market for development dollars, when a planning instrument encourages ‘no’ to a proposal then the development dollar will flow to the locality where the prospect of investment will yield a ‘yes.’ This does not mean that the developer will always make a profit from the investment. That is never a guaranteed result. Indeed, the risk of failure is still high. But the difference is that in the one scenario there is the prospect of investment as contrasted to the other where the result is silence and despair.

Future forecasting is problematic.¹²⁶ Can we safely predict the future for retailing? If not, will the CBDs in regional towns be commercial centres or mixed use centres? Can we safely predict the mix of uses? Is the bureaucratic planning system the right predictive tool? Does the community know better? Would leaving the decision as to what development and where to locate it to market forces be any worse? What we know as a certainty is that regional towns that lose their economic imperative lose their heart. They become ghost towns. If the aim is to avoid that outcome then we need to measure the success of our current strategies. If the current bureaucratic planning model has not been successful in staunching the drift to the big smoke, if our regional towns are losing their best and brightest, if capital has ceased to flow into the town then maybe blind adherence to the bureaucratic planning system model is misplaced?

When creating the planning instrument such as the LEP or DCP do the grand wizard planners ask: what will it take to build that there? How much will it cost to get an approval to build that? The economic reality facing the planning legislators is that if the person with capital to invest sees that a better return can be derived by investing elsewhere then that capital will flow to that other place. Do strategic planners ever engage the development world to understand its motivation? The investment of capital entails significant risks. Every developer wants certainty. Every developer wants a return, not all who develop will get that anticipated return.

REDEFINING PARTICIPATION AS SKIN-IN-THE-GAME

The overriding aim should be to build the economy of the regional town. In very small regional towns maybe the ‘anything goes’ rule is the way to go? Australia’s lack of critical mass in terms of population and our unique cultural experience as originating from a penal colony have meant that we rely more on government to provide our public spaces. But in the regional town space not only is that public dimension curtailed, the private sector dimension is also diminished. We don’t build towns like Bendigo anymore because the rivers of gold have ceased to flow.

¹²⁵ Uhr, above n64, 75-6. Uhr suggests that under Dicey’s formulation of responsible government: ‘It is not clear what protective capacity a sovereign parliament has in the event that a people or segment of people is unable to make its own case heard about oppressive legislation or illiberal government action. ... courts are only permitted to recognise rights which parliament itself has declared.’

¹²⁶ As Westbury, above n8, 158-9, observes, we live in a ‘world that is complicated and difficult to understand, where the need for things to happen quickly is battered against processes that grind slowly, and at times, not at all.’

Will it mean the end of the world? Surely there must be limits I hear you say? But zoning blights development and therefore as an instrument of the state it must be used judiciously and innovatively. In applying zoning constraints the result should not be no development. If the intent of zoning is to direct development into 'the right places' then firstly, we must recognize that in that decision to zone to permit or prohibit particular forms of development we are picking winners and creating losers. Some people will already own land in the 'right' place, so they win. Someone else already owns land not favorably zoned, so they lose. Secondly, if all we are doing is colouring the map what evidence is there that this theory has encouraged 'the right type of development' in our regional spaces? We can have magnificent regional city development plans but if no-one builds anything what is the good of the plan? Thirdly, the layers of complexity created by the planning system can mean that the left hand (wizard planners) does not know what the right hand (capital) is doing. By adopting requirements that snip developers at every turn are we are making it certain that no development will be the result?

If the practical effect of planning laws is to inhibit the expenditure of capital in regional towns then what is the purpose of retaining this model? If a building conforming to the building code is erected in the town what does it matter if the owner wants to build a shop, an office or an apartment? If the result of the interaction between the person with hopes (and capital) and the planning system is 'nothing' what have we achieved? The lion's share of development has occurred in the capitals. All roads lead to the significant infrastructure hubs of city, port and airport. Railways have come and gone from country towns. 'No critical mass' is the cry. Cars have ended the tyranny of distance but their convenience has made some regional towns dormitory suburbs. Regional towns fight for the scraps that fall from the hot brick. The key to the future for regional towns surely lies in having committed people who want to invest their capital in the venture. Miss that point at your peril.

People who choose to live in regional towns are different. But they still aspire to many of the same things as their city cousins. With so much emphasis given to investing in the mega-city, it is time to pause and consider the worth of regional towns. Do we need them? If we do, how should we promote and foster their development?

A FUTURE FOR REGIONAL TOWNS: AVOIDING THE DOOM OF HISTORY

Our colonial pioneers did not venture forth with the vision of building grand cities. They came from over the seas because there was an opportunity to make money from land.¹²⁷ A vast interior invited the opportunity to aggregate large tracts of land to a single owner. Australia was never intended to be closely urbanized. Perhaps the early settlers had a vision of leaving a legacy for family, perhaps they intended to make their fortune and run. Regardless, there were great risks but the potential for reward was there too.¹²⁸ Similarly, the reason to invest in a regional town was also commercial. Regional towns in Australia were created to serve an agricultural purpose. So the governors planned for regional towns. They were the

¹²⁷ John Hirst, above n21, 146. 'The Governor's job was to promote the development of the economy, which would enable the colony to pay its way and bring more benefit to Britain. There was a notable harmony between what the British government wanted of the governors and what the settlers wanted of the Empire.'

¹²⁸ Richard Waterhouse, above n25, 67. Waterhouse identified three different value sets: 'one related to entrepreneurship, which involved single-minded preoccupation with accumulating wealth as quickly as possible; another to a reluctant self-sufficiency, with aspirations to entrepreneurship; and a third grounded in an opposition to authority, a resentment of squatters, and (especially from the 1890s) a commitment to mateship.'

first place makers. The governors knew that parcels of land which are not interconnected with infrastructure such as roads are useless. So from the outset the Government was part of the project. A vital part of the project.

A regional town's future is not defined solely by its built form or the confidence of private capital. As Collins and Stevenson note: 'Regional development requires the synergies of a supporting organisational infrastructure.'¹²⁹ It is here that the associational life of regional towns becomes important. If we are to avoid a future for regional towns of tourism and kitsch then we have to redefine the purpose of the regional town. John Edwards says that our future success as a nation will:

depend on the decisions young people make about training and their careers, on decisions businesses make about the products they will sell and the markets they will pursue, on inventions and production enhancement in laboratories and workshops, and from decisions businesses make about adopting product innovation.¹³⁰

Regional towns need to be the places where some of these decisions are being made. We need to create spaces where these decisions are part of the fabric of what makes the town tick. If the future lies in supplying services that the world demands, what can regional towns do to meet that demand? How integral are planning laws to that future? It is here that we would do well to remember the injunction of Abraham Lincoln:

The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.¹³¹

¹²⁹ Collins and Stevenson, 'Inspiring imagination – education and learning: the university experience in the regional development cocktail,' (2004) *Conference of Australian and New Zealand Regional Science Association International*, Wollongong, 5.

¹³⁰ John Edwards, *Beyond the Boom*, Lowey Institute, 2014, 132.

¹³¹ President A Lincoln, Annual Address to US Congress, 1 December, 1862, Washington, D.C.