

WYUNA FARMS

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Standing Committee on State Development
Legislative Council

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The following are in answer to the additional questions from members of the Committee as are formulated by the author of the NSW Farmers submission to this inquiry.

1. Dwelling entitlements

Arrangements for urban people are not necessarily appropriate for farmers. Farmers culturally and temperamentally have different requirements for personal space and territory. This is one of the reasons they have chosen the farming way of life. It follows that a retiring farmer is most unlikely to want to live in a 'granny flat'.

The most important consideration, however, is the dynamics of succession, which can be complex in a farming family and has both economic and psychological dimensions.

The farming patriarch will often than not find it difficult to relinquish control to a son or a daughter, similarly, the matriarch will usually want to stay in the original farm house.

Historically, a common scenario is for farming families to subdivide the original home from the farm, with the son building a new home.

2. Landuse planning decisions

Our point is that **local** planning decisions should be made at local level. This does not, nor should it, preclude strategic planning at higher scales. To achieve efficient planning, certain decisions need to be made at macro scale that limit and guide decisions made at lower scales. The relationship between strategic planning and what we refer to in our submission as 'landscape planning', however, must be reciprocal. Currently the connection between high level planning and local planning is broken or, at best, dysfunctional. Rigid 'top down' rules imposed by black letter law (eg threatened species legislation) limit the kinds of tradeoffs that are needed to achieve balanced outcomes on the ground and in true partnership between local stakeholders. In rural settings, certain kinds of planning decisions must be made at landscape scale. This is because the specific biophysical characteristics of the land are the critical factor in optimising landuse and top down rules will be too blunt to achieve optimal results. CMA, local government and the landowners/managers must be free to work together to design optimal mosaic landscapes that meet strategic objectives and in line with decision rules set at strategic level. These decision rules, however, and strategic plans themselves must be flexible and responsive to the information coming up from landscape level. Top down and bottom up simultaneously in an adaptive management framework.

Regards
Lorraine Wilson

Conservation through Development: The Potential for Transferable Development Rights in Queensland

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Introduction

Environmental law has a long history of direct and punitive, or 'command and control', regulation but the increasing invasiveness and costs of these regulations has generated a backlash from landholders who see these controls as an attack on their livelihoods and property rights.¹ In response, there have been increasing calls to recognise the costs of conservation and develop incentive program that distribute those costs equitably while recognising and protecting property rights.² In particular there has been renewed interest in programs that use the market to redistribute the costs and benefits of conservation. Transferable Development Rights (TDRs) are one such tool. This paper reviews the theory and practice of TDRs to determine the key requirements of a successful program and the potential for their use to conserve natural areas in Queensland.

An overview of TDRs

Transferable development rights (TDRs), are property use rights that can be transferred from one property to another by government-created programs.³ TDRs are used in land planning to allow development pressure to be redirected from high value conservation areas to more suitable areas. In most TDR programs a planning authority designates the areas it wishes to protect and allows property owners in these 'donor' areas to forgo certain development rights by placing a covenant

on their title. In return, property owners receive a transferable 'development right' which they may sell to developers or owners in designated 'receiving' areas. The receiving areas are deemed to have sufficient infrastructure, such as roads, water and sewerage, to support additional development, beyond usual planning limits, with minimal environmental, social and aesthetic impacts.

Ideally, TDR programs create a win-win outcome by compensating the owners of conserved properties, permitting developers to profit from higher densities and retaining significant areas for the benefit of the community at minimal cost to the local government.⁴

History

The TDR concept was originally derived from the English *Town and Country Act* of 1947 which allowed the separating of use rights from the underlying real estate.⁵ Its modern conception however comes from its application in the USA in the early 1960s and 1970s.⁶ The first modern TDR program aimed to resolve a planning conundrum in New York City. The city wanted to prevent the destruction and redevelopment of *historic landmark buildings* but realised that regulatory controls alone placed a large financial burden on land owners through both maintenance costs and lost potential income from redevelopment. In response, the city council amended their town plan in 1968 to allow owners

of heritage buildings to transfer potential floor space, unavailable due to heritage restrictions, to adjacent properties (see Figure 1).⁷ This allowed the adjacent properties to develop greater floor space than would have otherwise been permitted without the TDRs.

In Australia, TDR programs to conserve built heritage were incorporated into development codes in Sydney in 1971, the town planning scheme for Adelaide in 1986 and the *Town Plan for the City of Brisbane* in 1989.

In the USA, the number of communities enacting TDR programs grew after a landmark US Supreme Court case, *Penn Central Transportation Company v City of New York* (1978) 435 U.S. 920,¹ which validated the use of TDRs in New York and implied that TDRs could mitigate the effects of compulsory acquisitions.² USA law courts have since affirmed the TDR mechanism as constitutionally sound, a valuable property right, and subject to ad valorem duty.³

The concept of TDRs has also been expanded from conserving landmarks to open space preservation.⁴ A 1997 survey found that of the 112 TDR programs recorded in the USA, 63 programs focused on preserving ecologically-sensitive areas, natural areas and open space.⁵ This paper will refer to such open space programs as *natural* heritage conservation programs to differentiate them from the *built* heritage conservation programs found in the inner cities. Natural heritage programs operate on the same principles to built heritage TDRs schemes except that they allow the transfer of lot densities rather than floor space to redirect development pressure (Figure 2).

Australia has not yet applied a full TDR program to natural heritage conservation but a number of councils have implemented 'bonus' development density programs. Bonus density provisions allow owners to conserve or donate part of their property in return for developing the remainder of their site at a higher density. Under these schemes no tradeable instruments are created, there are no trades between sites and no market created in development rights therefore they are not true TDR programs. However the similarities provide some guidance for the creation of a full TDR program for natural heritage and they will be discussed further in this paper.

Rationale

This paper is concerned primarily with the potential advantages of TDRs from the perspective of law and economics.

One of the central justifications for TDR programs in law is that laws safeguarding private property rights entrench previous grants of development potential and hinder the reduction of rights to conserve public goods. TDRs offer a way of removing inappropriate development rights without unilaterally extinguishing them.¹ This is particularly an issue in the USA as the Fifth and Fourteenth amendments of their constitution preclude government from taking property for public use without just compensation and from depriving individuals of their private property without due process of law.² Queensland has no such constitutional limitation but the *Integrated Planning Act* 1997 (IPA) offers a limited right to compensation for reductions in development potential resulting from changes to the planning scheme. To make a claim, a development application must be made within two years of the property being affected by a change in the scheme.³ The application must be refused, or approved subject to conditions, under the later scheme and the property owner must demonstrate that the change to the planning scheme reduced the value of the interest in the land.⁴ The requirement for compensation is therefore significantly lower in Queensland than the USA. None the less, a unilateral reduction in development potential is still a sensitive social and political issue that is preferable to avoid where possible. TDRs offer a means of reducing development potential in the desired areas without the costs of compensation to the local authority.

Protecting property rights is only a partial justification for implementing a TDR program. They can also help correct the failure of the market to provide public goods. For example, the ability to sell unused rights helps internalise the cost of conserving natural areas which should increase supply of this public good. Also, competition amongst suppliers ensures that those conservation gains are achieved at the least overall cost.⁵ For purchasers TDRs help internalise some of the social costs of additional

development and ensure that there is not a net increase in allowable development. Also, competition amongst buyers ensures that the rights are bought by those who have the highest potential gains thus are most able to bare the costs of conservation.

An effective TDR program will assist in achieving conservation objectives by creating an active market in development rights that is enforceable within planning law. This complex overlay of principles from conservation, planning law, and economics can create tensions within a TDR program. Meeting the objectives of conservation and planning law risk severely inhibiting the ideals of an efficient market and create significant design challenges for the program. This will be demonstrated by a consideration of conservation objectives, the possible design of a TDR program in Queensland planning law and an analysis of the constraints this places on the TDR market.

Design constraints to achieve conservation objectives

One of the major complications in applying TDRs to conserve natural heritage is site variability and the lack of complete knowledge about our natural systems. Any TDR program for natural heritage conservation needs to pay close regard to exactly what each transfer is conserving or destroying to ensure there is a net benefit. Unfortunately there is a lack of reliable information on ecosystem values at a site specific scale. The assessment can be made easier by restricting transfers to within a geographic range or ecosystem type. This avoids the problem of allowing the loss of one ecosystem to fund conservation in another, such as saving dry scrub land at the expense of developing coastal wetlands. Even restricted to an ecosystem type there will be variation between sites the transfer rules have to take into account the current state of the donor site and offer density permits that reflect the gain in conservation values. As this will be different for every site each instance requires an assessment of the value of conservation land gained and the impact of additional development to ensure that there is a net gain for the environment. This would ideally be supported by a detailed, science based policy and site inspections to ensure consistent decision making.

Design constraints to achieve planning validity

The development of a TDR program in Queensland would need to be consistent with the provisions of the *Integrated Planning Act 1997* (IPA). IPA requires all local governments to develop planning schemes, which seek to achieve desired environmental outcomes (DEOs) through a development assessment process. Zones, areas or domains designate broad land use allocations in which development applications may be assessed against one or more codes. Codes contain performance criteria (PC) required to achieve DEOs, and propose Acceptable Solutions (AS) as management actions which are acceptable means of achieving the performance criteria, and consequently DEOs.

There are a number of ways a TDR program could be enabled.

One option is to include provisions within a code for a local area plan. For example the *Brisbane City Plan 2000* includes transferable floor space provisions within the *City Centre Local Plan Code* which forms part of the *City Centre Local Area Plan*.⁶ This is appropriate for built heritage conservation within the confines of the city but conserving bushland is unlikely to be confined to one local area and will be most effective when spanning both areas of high development potential and areas high conservation value.

The Gold City Council has opted to contain their density transfer scheme within a code of the *Gold Coast Planning Scheme*.⁷ Within the development code 'Reconfiguring a Lot', performance criteria PC3 states:

Ecologically significant areas located on sites identified on Overlay Map OM1 - Rural Subdivision must be protected. To determine ecologically significant areas, consideration will be given, but not limited, to:

- (a) Part 2, Division 1, Chapter 2 - Ecological Processes;
- (b) Part 3, Division 2, Chapter 1 - Nature Conservation;
- (c) Part 3, Division 3, Chapter 2 - Open Space Nature Conservation and

Chapter 3 - Rural/Nature Conservation;

- (d) Part 7, Division 3, Chapter 11 - Nature Conservation Constraint Code;
- (e) Council's organisational objectives for conserving natural assets;
- (f) Planning Scheme Policy 8 - Guidelines for Preparing Ecological Site Assessments during the Development Process.

Acceptable solutions to this performance criterion include "indicating ecologically significant areas to be protected or contributed to Council as public open space".⁸ The bonus densities achievable are summarized in table 1.

The bonuses do not allow the lot size of any hinterland subdivision to be less than 4,000 m².¹ If the protected area of land is retained in private ownership it would be expected to be properly maintained and secured by a suitable mechanism ensuring its long term protection such as a Vegetation Protection Order or registerable planning covenant.² Lot layout is expected to be informed by a site analysis that is prepared consistent with Part 11, Chapter 11 - Site Analysis and consistent with *State Planning Policy 1/92: Development and Conservation of Agricultural Land* and its supporting *Planning Guidelines – Separating Agricultural and Residential Land Uses*.³

The Gold Coast density transfer scheme would form a good template for the design of a TDR program under Queensland planning law. There are, however, some difficulties presented by IPA in the implementation of a TDR program. Firstly IPA was intended to introduce a system of 'no zone', performance based planning where as TDRs programs favour a rigid zoning system. Unlike many planning schemes in the USA, Queensland planning schemes may not prohibit certain types of developments. Every development application must be considered on its merits against performance criteria to achieve the desired environmental outcomes of the planning scheme. A planning scheme can not arbitrarily prohibit development in an area without the purchase of TDRs or grant developer extra density as of right with the purchase of a TDR.

A developer could, in theory, submit an application for a higher density allotment without a TDR and it must be considered on its merits against the performance criteria and DEOs. Occasionally the higher density allotment will be acceptable without a TDR and the application must be approved. Alternatively, even if an application is submitted with a TDR the proponent is not guaranteed approval as it may be rejected on other planning grounds. If too many applications with TDRs are rejected, or approvals without TDRs accepted, then the rights will be of little value. Consistent decision making with the local government authority is required to ensure the rights are certain and valuable. To aid consistent decision making it is important the guidelines for the generation and application of TDRs are clear and, where possible, directive rather than discretionary. Directive provisions should assure purchasers of TDRs that the rights are, to some extent, enforceable against the planning authority.

Legal nature of rights created

If the planning scheme does create enforceable rights, the question that arises is; what is the nature of these rights? This question has been considered by several Australian cases concerning built heritage TDR programs. In one of the earliest cases, *Depsun Pty Ltd v Tabore Holdings Pty Ltd* (1990) NSW Conv R 58, a vendor sought to sell their property but retain certain development rights to apply on another site. The vendor entered into a contract to this affect with a purchaser of the land relying on Sydney City Council's Development Control and Floor Space Ratio Code that enabled the transfer of development rights. The Code only made these rights available for the benefit of places and structures on the Councils heritage register and the vendor's property was at no material time on that register. After settlement of the sale the vendor attempted to secure their purported interest in the transferable floor space by registering a caveat over the land. The purchaser and a mortgagee sought to have the caveat removed.

McLelland J held, at 900, that the deed purporting to assign the benefit of "floating floor space" and treat the "space" as real property did not give rise to a "legal or equitable interest in land" capable

of being protected by a covenant under s 74F of the *Real Property Act* 1990 (NSW). His Honour held that the rights created by such an agreement were "clearly personal and not proprietary rights". McLelland J relied on the principle that the mere common assumption amongst the parties that they are dealing with an interest in land cannot make it so, citing Lord Brougham LC in *Keppell v Bailey* (1834) 2 My and K 517 at 536:

...great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote.

In the subsequent case of *Uniting Church in Australia Property Trust (NSW) v Immer* (No. 145) Pty. Ltd. (New South Wales Supreme Court, Young J 15 November 1990 unreported) a vendor of transferable floor space sought specific performance of a contract in the form of a deed to sell the floor space. This time the floor space was recorded on the Council register and the relevant TDR codes did apply. At first instance Young J refused relief stating that:

"I cannot see that the City Council, in keeping a register of bonus floor space, creates any proprietary right at all. Accordingly, it is difficult to see how a decree for specific performance could be made".

This decision was, however, reversed in the Court of Appeal (1991) 24 NSWLR 510. In that case Meagher JA. (with whom Samuels AP and Handley JA agreed) agreed with McLelland J in *Depsun* that "an air space" is not "a legal or equitable estate or interest" in land but thought that it was "debatable" whether or not the rights were "proprietary" rights. Meagher JA said (at 511) that:

"They are transferable, and I assume transmissible; they are of large commercial value; and I see no reason why they are not "proprietary" rights in the same way as goodwill, patents or shares in the capital of a company are "proprietary" rights."

The Court of Appeal decision was later reversed by the High Court but on grounds unrelated to

the character of the transferable development rights - *Immer (No. 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* (1993) 67 ALJR 537; 112 ALR 609

The Court of Appeal decision in the *Uniting Church case* was relied on by Justice Loveday in *Halwood Corporation Ltd. v Chief Commissioner of Stamp Duties* (NSW), (1992) 92 ATC 4155, in deciding whether the purported sale of floor space under Sydney's TDR provisions were "an agreement for the sale or conveyance of any property" within the meaning of section 41 of the *Stamp Duties Act* 1920 (NSW). His Honour found that it was and argued (at 4161):

The transferee of the transferable floor space has a right recognised by the Council to have a development application considered by the council taking into account the existence of the transferable floor space. This is a valuable right not possessed by an applicant for development approval without transferable floor space. The reality is that commerce regards transferable floor space as a proprietary right. The courts should do likewise.

In the Supreme Court of Queensland, Moynihan J applied these authorities in *Re FAI Leasing Pty Ltd* (Supreme Court of Queensland, unrep. 13 September 1993) to hold that "transferable site areas" under a town plan which had statutory force, while not comprising part of the fee simple in the land was "a proprietary right capable of assignment and transfer" (at p.13).

Given the proprietary and valuable nature of TDRs the Federal Commissioner for Taxation sought to apply capital gains tax to their sale under Section 160ZO of the *Income Tax Assessment Act* 1936 in *Naval, Military Airforce Club of South Australia (Incorporated) v The Commissioner of Taxation* (1994) 122 ALR 201. The majority of the Federal Court, Von Doussa J dissenting, held that the sale of TDR was a disposal of an asset resulting in a capital gain for the purposes of the *Income Tax Assessment Act* 1936.

As long as any future TDR program for natural heritage conservation maintains a central register of any rights generated and the planning scheme

requires council to consider those rights in development applications then this case law on built heritage TDR programs is likely to apply by analogy. There are two challenges to that analogy. Firstly, because development density alone is a poor surrogate for ecosystem conservation, natural heritage TDR programs require more complex transfer rules. Secondly, the performance based nature of IPA could create greater uncertainty in the nature and value of the transferable right. This reiterates the need for transfer guidelines to be as comprehensive, clear and directory as possible to ensure the rights are certain and enforceable thus proprietary and valuable.

The irony for planners is that once the rights are made enforceable and valuable they also attract State stamp duty⁵ and Commonwealth capital gains tax⁶. Manning (2001) argues that these taxes run contrary to the intention of TDRs to spread the costs of conservation across the community and the three tiers of government.⁷ They also run against the commitment of State and Federal government to “develop, improve and enhance the effective use of pricing and economic instruments as a means for achieving better management of our natural resources”.⁸ Experience in the USA indicates that TDRs will rarely fully compensate the costs of conservation unless they are associated with additional incentives such as exemption from development fees or certain taxes.⁹ For these reasons it is preferable, where possible, to exclude the initial sale of a TDR from taxation. While reduced taxation on the initial sale of a TDR would promote conservation, and therefore the generation of a public good, subsequent sales have no such effect thus a tax exemption is not required.

Effect of conservation and planning constraints on market viability

The core feature of any transferable development right program is the use of the market to redistribute the costs of conservation. While good conservation and planning guidelines are precursors to a successful TDR program they can interfere with the creation of a free market. Without an active market all other features of a TDR program will fail to achieve any

conservation goals.

Like all markets, markets in TDR must have a number of attributes before they can efficiently allocate resources, these include:

1. Relative scarcity & demand
2. Rights that are well defined, tradeable, and enforceable
3. Large numbers buyers and sellers; and
4. Low transaction cost (aided by perfect information).¹⁰

1. Relative scarcity

Relative scarcity in TDRs occurs when supply of development potential is less than demand. This means limiting supply through development restrictions and only allowing additional development through the purchase of TDRs.

Demand for development rights is the single largest determinant for the success of the program. For example, the most successful program in Australia, Sydney city, generated scarcity of development potential by significantly limiting the building height and plot ratios achievable without purchase of TDRs. Section 62 of the current draft *City of Sydney Local Environment Plan 2002* provides that an allocation of TDRs will be required for buildings in the City Centre and City Edge Zone that exceed a floor space ratio of 8:1 and height of 55 meters. A period of high growth in the city has led to a high demand for additional floorspace. A development capacity study conducted in 2001 reported that demand for office space in the city between 1991 and 2001 exceeded 100,000 square meters.¹¹ This high demand and limited supply of floorspace has resulted in active trade of TDRs. Sydney has awarded over 205,896.5 square meters of transferable floor space and approved 138,580 square meters for development, resulting in significant heritage conservation in the absence of demolition controls.¹²

In contrast Brisbane has effectively few limits on building height due the method used to calculate maximum floor space.¹³ While about 29,168 square meters of transferable floorspace has been allocated to heritage sites there have been only about six sales and three approvals for the use of TDRs in developments.¹⁴

Similarly for natural heritage conservation scarcity needs to be generated by limiting the supply of high density allotments achievable without the purchase of TDRs. For Johnstone Shire Council's bonus development right system scarcity of development potential was created under the previous planning scheme by limiting the minimum allotment size in rural zones to 20 hectares and halting extension of higher density rural residential zones.¹⁵ A review of the Johnstone Shire system in 2000 revealed that:

The concept of bonus rights and continuance of existing agricultural use rights has resulted in high levels of acceptance of the rural conservation zoning by rural landholders in the Shire. There have been 17 fully implemented development approvals (and many more applications and approvals not yet implemented) involving bonus rights and the approvals to the end of 2000 have resulted in protection of approximately 459 hectares.¹⁶

2. Well defined rights

As well as being in demand the rights must also be clearly defined, enforced and have some degree of certainty for prospective purchasers to place a value them. With heritage TDRs such as in Sydney, defining the right is relatively easy; the commodity is floorspace measured in square meters for which the commercial value can be determined from current rental rates. For natural heritage conservation however, development density alone is a poor surrogate for achieving conservation goals. For this reason comprehensive transfer rules and site inspections are required for the generation of TDRs. These rules can make it difficult for a landholder to know in advance exactly what rights they are entitled to for conserving their properties. Developers face a similar degree of uncertainty under IPA since, as submitted earlier, if the planning scheme does not contain clear, directive, and consistently applied TDR transfer rules then purchase of a TDR may not ensure any planning concessions. If the guidelines for these decisions are not comprehensive and consistently applied then considerable uncertainty can be created and TDRs

may be impossible to value.

3. Market size

When there are a small number of buyers and sellers, markets are prone to both inactivity and monopoly activity. Brisbane and Adelaide TDR markets have both suffered from inactivity after the end of the property boom of the late eighties.¹⁷

Small markets also risk the formation of a monopoly or oligopoly. This was a concern for the TDR program in Malibu Coastal Zone.¹⁸ Developers were worried that there would not be enough donor sites willing to sell at the same time to supply large development and that the small number of sellers could collude to keep the price of TDRs artificially high.¹⁹

Natural heritage TDR markets are limited by three factors:

1. To prevent the clustering of development away from infrastructure and services and to prevent the development of high conservation areas, TDR programs usually designate separate donor and receiving sites that confine all the potential sellers on one side and final purchasers on another;
2. TDR programs are also likely to be confined to the same ecosystem type in an area to avoid trading between ecosystems; and
3. Since planning is largely delegated to local governments, most TDR programs will usually be limited by the planning jurisdiction of the local government.

To counter these inherent limitations requires additional mechanisms such as allowing TDRs to be banked and purchased by third parties as an intermediate for end users. This allows investors to purchase TDRs when the property market is slow keeping the market active. The risk of monopolies can be also reduced by only allowing non-profit organizations to buy, sell and broker TDRs. In Malibu, the planning authority established a non-profit trust to purchase TDRs and ensure a dependable supply.²⁰ This alleviated many of the concerns and limitations of the small TDR market.

4. Transaction costs

The costs involved in finding buyers or sellers and forming a transaction erode any profits made

from the transaction. If the costs are high, or the procedures complex and slow, trades are inhibited. There is a significant risk of high transaction costs with a TDR program because they are rare and localised. A developer needs to know the program exists, find someone who has TDRs (and wants to sell them), fix a price and then go through the approval procedure. The program will suffer if these procedures are complex, discretionary and slow.

Active provision of information can help reduce transaction costs. To help TDR buyers find sellers in Sydney the council releases an annual newsletter with a list of all the TDRs created, transferred and applied including the companies involved.²¹

Conclusions

There is an inherent tension in TDR programs between seeking the economic efficiency of free market and controlling the market to achieve specific conservation and planning outcomes. The certainty and stability required to give value to tradable rights is also at odds with the uncertainty inherent in natural systems and the flexibility of Queensland planning law. Accordingly environmental objectives and planning law impede the efficiency of a TDR market. These impediments can be mitigated through careful design, active implementation and additional mechanisms such as TDR banks. Planners need to carefully consider whether, given the administrative intensity of a TDRs program, they are the most cost effective option available. In many cases existing programs such as conservation covenants or rezoning will be more efficient.

The most appropriate situation for the use of TDRs is likely to be emerging communities with high growth rates and capacity for additional development but limited current funding for conservation. In these areas additional development could be used to fund conservation activities.

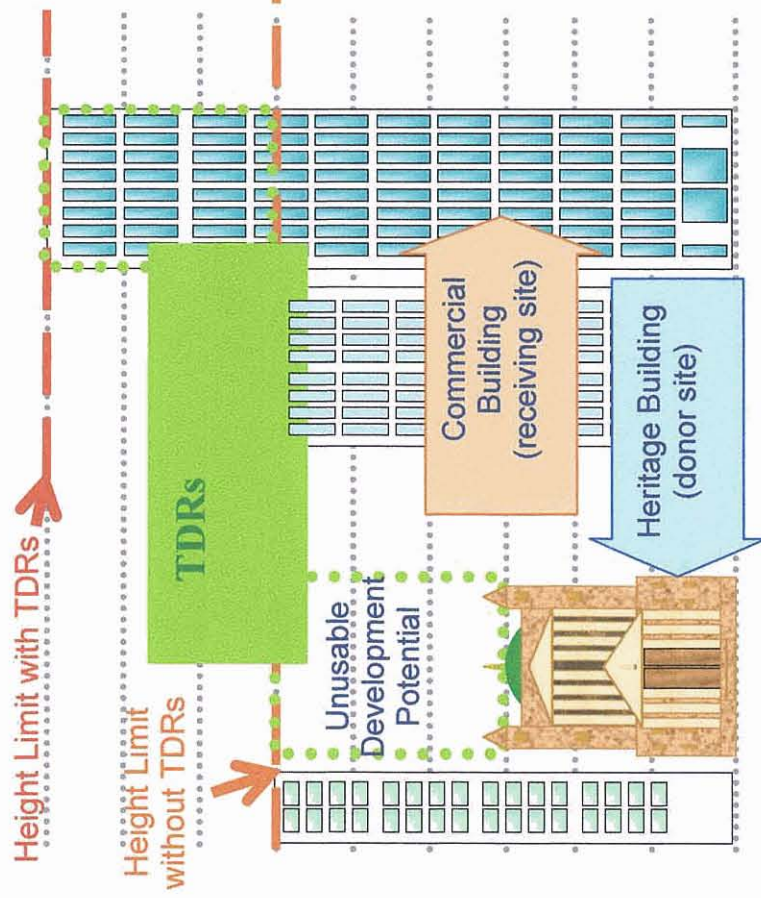


Figure 1: Transferable Development Rights (Floorspace) for Built Heritage Conservation



Figure 2: Transferable Development Rights (Lot Density) for Nature Conservation

Acceptable Solution	Percentage of land area protected or contributed to council	Maximum Lot yield for the balance of the site (using the total land area as the basis of calculation)
AS 3.2	>15%-25%	In accordance with the provisions of Overlay Map OM1 - Rural Subdivision
AS 3.3	>25%-50%	Up to 15% increase on the provisions of Overlay Map OM1 - Rural Subdivision
AS 3.4	>50%	Up to 30% increase on the provisions of Overlay Map OM1 - Rural Subdivision

Table 1: Summary of maximum lot yields achievable under the Gold Coast Planning Scheme bonus density transfer provisions

Endnotes

- ¹ The National Farmers Federation last year released a policy paper stating that “clear protection of property rights issue was the highest priority for Australian farmers” National Farmers Federation News Release, NR 02/47, 30 May, 2002 “Farmers Want Clear Protection Of Their Property Rights”
- ² The reported preference for economic incentives (see, for example, Alan S. Fogg, ‘Two Views of Law and Social Processes’ (1992) 17(1) *University of Queensland Law Journal* 1. and Grant Malcolm, ‘Financial contributions : a global perspective.’ (2000) (4) *New Zealand Law Journal* 201.) has yet to translate into action with the limited growth of incentives in Queensland swamped by additional regulation (see David James, ‘Environmental Incentives: Australian Experience with Economic Instruments for Environmental Management’ (Environment Australia, 1997). and Jackie Robinson and Sean Ryan, ‘Economic Incentives for Environmental Management in Queensland’ (Cooperative Research Center for Coastal Zone, Estuary and Waterway Management, 2002).) So the calls for more incentives continue (recent examples include Wentworth Group, ‘Wentworth Group Report to Premier Carr: A New Model For Land Conservation In New South Wales’ (2003). and Productivity Commission, *Industries, Land Use and Water Quality in the Great Barrier Reef Catchment, Research Report* (2003).)
- ³ John C. Danner, ‘TDRs - great idea but questionable value. (transferable development rights programs)’ (1997) *Appraisal Journal* 133(10).
- ⁴ Rick Pruetz, ‘Putting growth in its place with transfer of development rights’ (1998) (31) *Planning Commissioners Journal* 15.
- ⁵ John C. Danner, ‘TDRs - great idea but questionable value. (transferable development rights programs)’ (1997) *Appraisal Journal* 133(10).
- ⁶ Peter J. Pizor, ‘Making TDR work: a study of program implementation. (transfer of development rights)’ (1986) *Journal of the American Planning Association* 203(9).
- ⁷ C Arnold, *Transferable Development Rights - A planning tool for the preservation of Heritage Buildings*. (Masters of Law thesis, University of Queensland, 1991).
- ⁸ Peter J. Pizor, ‘Making TDR work: a study of program implementation. (transfer of development rights)’ (1986) *Journal of the American Planning Association* 203(9).
- ⁹ Peter J. Pizor, ‘Making TDR work: a study of program implementation. (transfer of development rights)’ (1986) *Journal of the American Planning Association* 203(9).
- ¹⁰ Donald I. Berger, ‘What are TDR’s legal considerations?’ in Rick Pruetz (ed), *Saved By Development: Preserving Environmental Areas, Farmland and Historic Landmarks with Transfer of Development Rights* (1997) 83.
- ¹¹ Peter J. Pizor, ‘Making TDR work: a study of program implementation. (transfer of development rights)’ (1986) *Journal of the American Planning Association* 203(9).
- ¹² Rick Pruetz, ‘Putting growth in its place with transfer of development rights’ (1998) (31) *Planning Commissioners Journal* 15.
- ¹³ R. P. Boast, ‘Transferable Development Rights’ (1984) *New Zealand Law Journal* 339.
- ¹⁴ John C. Danner, ‘TDRs - great idea but questionable value. (transferable development rights programs)’ (1997) *Appraisal Journal* 133(10). See also Richard A. Epstein, *Takings - Private Property and the Power of Eminent Domain* (1985).
- ¹⁵ See Schedule 10 ‘dictionary’ definition of ‘Development application (superseded planning scheme)’.
- ¹⁶ See *Integrated Planning Act* 1997, Chapter 5 part 4 ‘Compensation’ and Chris Robertson, ‘Compensation lost, compensation found: injurious affection and the Integrated Planning Act labyrinth’ (2002) 22(3) *The Proctor* 20.
- ¹⁷ J. Boyd, K. Caballero and R. Simpson, ‘The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisition’ (Resources for the Future, 1999).
- ¹⁸ See part 5.3, Appendix A and 5.5 Table 1 with reference to Appendix B part 3 ‘Illustration of transferable development rights’.
- ¹⁹ See Gold Coast Planning Scheme Part 7, Division 2, Chapter 28 - ‘Reconfiguring a Lot’, performance criteria PC3 to PC5 and acceptable solutions AS3.1 –AS5.
- ²⁰ AS 3.1
- ²¹ AS 3.6

- 22 AS 3.5
- 23 AS 3.7 – AS 3.8
- 24 This was relied on by Mullighan J in the Supreme Court of South Australia case *McEwin v. Valuer General (1993)* 169 LSJS 146.
- 25 See *Re EAI Leasing Pty Ltd* (Supreme Court of Queensland, unrep. 13 September 1993)
- 26 See *Naval, Military Airforce Club of South Australia (Incorporated) v The Commissioner of Taxation (1994)* 122 ALR 201.
- 27 Lestar Manning, 'Tradeable Development Rights' (Paper presented at the Information Forum on Market Based Instruments, 80 Ann Street, Brisbane., 2001).
- 28 National Strategy for Ecologically Sustainable Development (NSESD), Chapter 20 objective 20.1, endorsed by the Council of Australian Governments (COAG) in 1992. See also the Intergovernmental Agreement on the Environment section 3.5.4. Note that the *Taxation Laws Amendment Act (No. 2) 2001*, , amended the *Income Tax Assessment Act 1997* to provide concessional capital gains tax treatment for land owners entering into certain types of conservation covenants. A TDR program could be designed to take advantage of these tax concessions.
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- 38 Rick Pruetz, *Saved By Development: Preserving Environmental Areas, Farmland and Historic Landmarks with Transfer of Development Rights.* (1997).
- 39 Rick Pruetz, *Saved By Development: Preserving Environmental Areas, Farmland and Historic Landmarks with Transfer of Development Rights.* (1997).
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- 41 City of Sydney, 'Heritage Floor Space Update - HFS awards, sales and development news' (2002).

COPY

**Future of Farming Project –
Researching the
development, planning and
protection of agribusiness
parks, Netherlands**

Peter Lipscombe
NSW Farmers Association Central
Coast Horticultural Branch

Project Number: HG07079

HG07079

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FINAL REPORT
Project Number – HG07079

Future of Farming Project -
Researching the development, Planning and Protection of Agribusiness Parks,
Netherlands and Belgium.

May 2008

HG07079 – *Researching the development, planning and protection of Agribusiness Parks, Netherlands and Belgium*

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Purpose: The purpose of the project was to create contacts and networking opportunities with a view to researching the development, planning and protection of successful agribusiness park models and how they may be integrated into the Australian agricultural industry and using the Central Coast Plateau as a pilot.

Funding Source: Horticulture Australia Limited

Date of report: July 2008

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Tour Participants

Peter Lipscombe - Glen Ayr Kiwifruit, commercial kiwifruit producer – Somersby, NSW; President of Central Coast Plateau Chamber of Commerce; Member of NSW Farmers Association

Pamela Lipscombe – Glen Ayr Kiwifruit, commercial kiwifruit producer – Somersby, NSW

Sam Dominello – S & P Dominello Pty Ltd, commercial greenhouse flower growers, Peats Ridge, NSW; Vice President of Central Coast Plateau Chamber of Commerce; Member of NSW Farmers Association

Mandy Dominello - S & P Dominello Pty Ltd, commercial greenhouse flower growers, Peats Ridge, NSW



Mandy Dominello, Sam Dominello, Pam Lipscombe, Peter Lipscombe at Stage 1 of Agriport A7

Summary

To address the issue of rapid urban sprawl and intense competition for land in the Sydney Basin, some proactive members of both the NSW Farmers Association's Central Coast Horticultural Branch, and the Central Coast Plateau Chamber of Commerce have been seeking methods to secure the long-term viability of agriculture within the Plateau. Although the focus is on the Central Coast Plateau area, it is envisaged that this report will be applicable to other agricultural areas facing intense competition for land within Australia.

Horticulture is a green industry with clean production processes and good employment opportunities when utilizing rural resource lands close to urban sprawl. Horticulture production within close proximity to areas with high population ultimately reduces food miles and consequently reduces the carbon footprint. The carbon emissions associated with the transportation of food can account for up to 30% of total carbon emissions. Therefore, the production of food in areas as close to the end consumer as possible has environmental, social, and economic benefits to the entire community.

The study tour allowed the group to explore the concept of agribusiness parks in Holland and Belgium. Agribusiness parks focus on sustainable development through agricultural clustering and intensive farming and production practices. The concept can be applied to intensive agriculture in Australia, especially in close proximity to major cities.

Objectives of the tour

- Create contacts and networking opportunities with a view to researching the development, planning and protection of successful agribusiness park models
- Identify successful international agribusiness park models
- Network with agribusiness park experts as well as government and non-government planners where possible
- Emulate concepts from successful international agribusiness park models that, if adopted domestically, have the potential to secure the long-term viability of the agricultural industry within the Central Coast Plateau and the option of adopting throughout Australia
- Change the way horticulture is perceived and to encourage highly productive farms in urban areas
- Work with all stakeholders, particularly the public to reduce the potential for land use conflict

Tour Itinerary

Day	Date	Location 1	Location 2	Activities
1	Tues 13 May	Bianca Lelies, town		Electricity Generation
2	Wed 14	Enkhuizen		Converting salt water to fresh water
3	Thurs 15	Van Den Bos		Using by-product heat generated by coolroom motors for heating greenhouses
4	Fri 16	Agribusiness Park A7, Middenmeer		Exploring the concept of Agribusiness Parks
5				
6				
7	Mon 19	Westlands Flower Market, Westlands	Peter Pennings Nursery, Westlands	Latest marketing trends. Hot and cold water heat exchange units in greenhouse production.
		Chairman of Westland Greenport, Jos van der Knaap		Explanation of greenport concept
8	Tues 20	Ministry of Agriculture, Nature and Food Quality, Den Haag	Meeting with the Mayor of Blaidswijk;	Gain a holistic government perspective
		Bezuidenhoutseweg Burgemeester, Age Van Balen, Alison Middleton		Gain an understanding of a successful local government approach to greenport areas
9	Wed 21	Holland	Ghent University Ghent, Belgium	Prof Xavier Gellynck, Agrifood marketing and chain management Adrienn Molnar, Dept of Agricultural Economics
10	Thurs 22	As 21 May. Evelyne Goemaere, Senior Expert Rural Development and Agricultural Economics		Explanation of Belgium concept of agribusiness park

Grower Visits

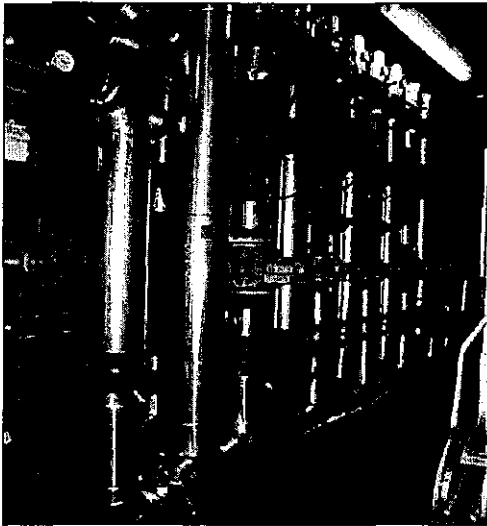
Name: Arnold Duijn

Company: Bianca Lelies

Concepts investigated: Electricity Generation; Steam Sterilising

Electricity Generation

- Generators are Natural Gas fired motors as natural gas is economically viable
- Adjust automatically to the company's electricity demands
- The heat off the exhaust is then used to heat water and then heat the greenhouses. Gives energy system a two-fold cost benefit.
- CO₂ is collected from the exhaust and pumped into some greenhouse crops to generate faster crop growth (three-fold cost benefit)



Hot Water Plumbing



Electricity generation

Steam Sterilising

- Semi trailer type tipper truck body
- Potting mix is loaded onto trailer and covered with steam tarps
- Steam injected from below for 6 hours
- Trailer tipped up and mix ready for use
- System saves between 15 to 20% fuel

Name: Frank Vahl
Company: Van den Bos
Concepts investigated: Coolroom motors by-product of heat

Coolroom enterprise

- Have approximately 4ha of Coolrooms
 - Harnesses heat from Coolroom motors and sell to neighbouring greenhouse farmers
 - Increases the sustainability of both enterprises
-

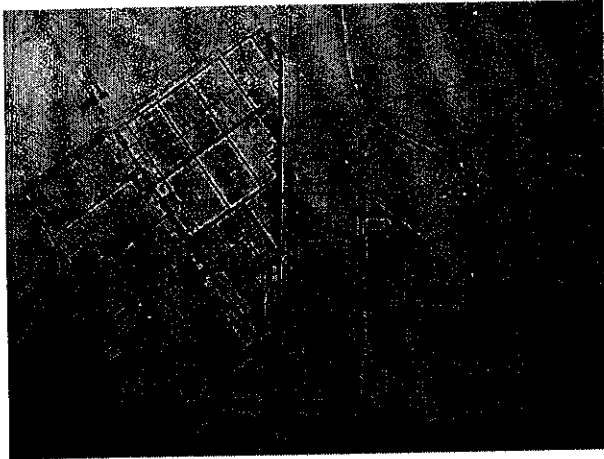
Name: Anton Hiemstra
Company: Agribusiness Park Agriport A7, Middenmeer
Contact details: www.agriporta7.nl; +31 227 656 184
Concepts investigated: Agribusiness Park Model

Key aspects of Agriport A7

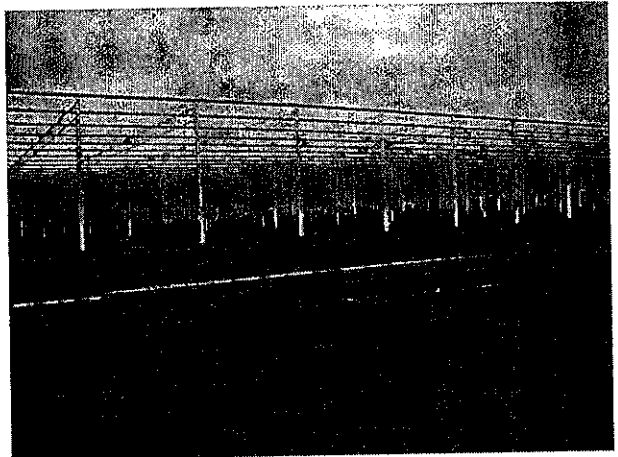
- The Agribusiness park is divided into three areas. All houses are in one section of the park, the greenhouses and packhouses in another section. This has made clustering more efficient.
- Owners choose which house block they want and cannot sell the house separately to the production land.
- Growers who purchase farms must be large scale operators. The smallest block is 20ha with a minimum of 14ha of glasshouse to be erected.
- The largest grower is 100ha
- Council are in the process of building accommodation for workers
- Council recognize the economic and social benefits back to the community and support Anton's efforts
- There are three proposed stages:
 - o **Stage 1** (sold, set up and under construction): 550ha which has 400ha of Glasshouses
 - o **Stage 2** (70% sold): Due to be completed by 2012. 550ha with 400ha of Glasshouse.
 - o **Stage 3** (at the design stage and land is being procured)
- Agriport A7 produces its own electricity, CO2 and heat by natural gas generators
- An environmental study of the whole area was performed. This meant that farmers were not burdened of doing their own individual studies.
- The local council are very proactive in working with the owners as they see economic value in the clustering concept.
- The land zoning has been changed from Agriculture to Horticulture. This created a new type of zoning to protect intensive horticulture production.

Why the Middenmeer region for a greenhouse park?

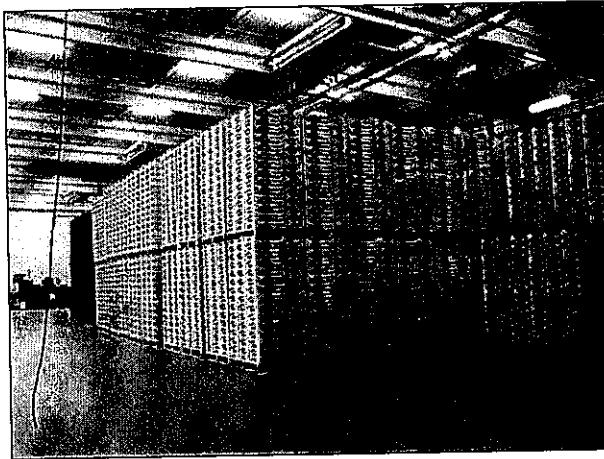
- Climate advantages (up to 8% more light than other growing regions of Holland and has a sea breeze)
- The area is next to the A7 highway/motorway which is in close proximity to fast highway transport and markets – an advantage to the cluster of farmers



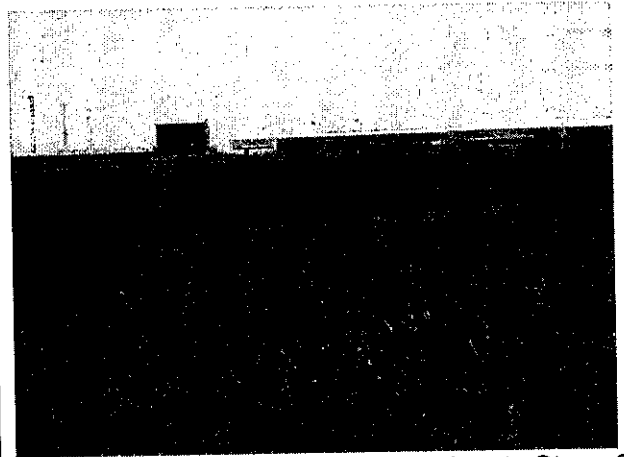
Map of Agriport A7



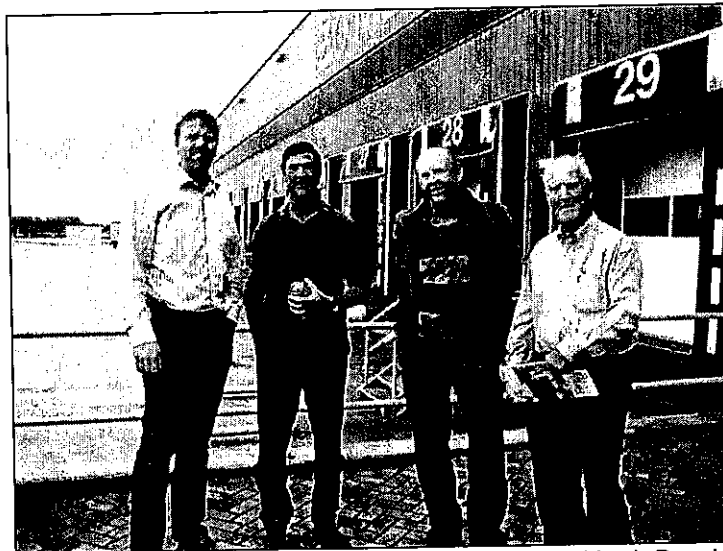
Construction of Stage 1



Produce



Stage 3, land being procured next door to Stage 2



Anton Hiemstra, Sam Dominello, Peter Lipscombe, Henk Den Hartog

Company: Westland Market, Flora Holland

Contact details: Middel Broekweg 29, PO Box 220, 2670 AE Naaldwijk, The Netherlands.

www.floraholland.nl

Telephone: +31(0)174-63 3333 Fax: +31(0)174-63 2222

Concepts investigated: Dutch Auction System; Marketing Technology

Flower Market

- Largest flower and plant auction in Holland
 - o Totally automated bidding and distribution system
 - o 14,000 trolleys per day
 - o Spending €1 billion at Aalsmeer on totally automated system building tunnels providing a direct automated rail link from Aalsmeer direct to Schipol Airport
- Updating auction system
 - o Buyers can purchase from the market from their office without physically attending markets. *Live images of flowers online*
 - o On-line auction clocks
- Currently trialing showing flowers on a screen. This saves time through trolleys not having to flow past the buyers hall



Flower Quality Control



Flower Market

Name: Peter Penning

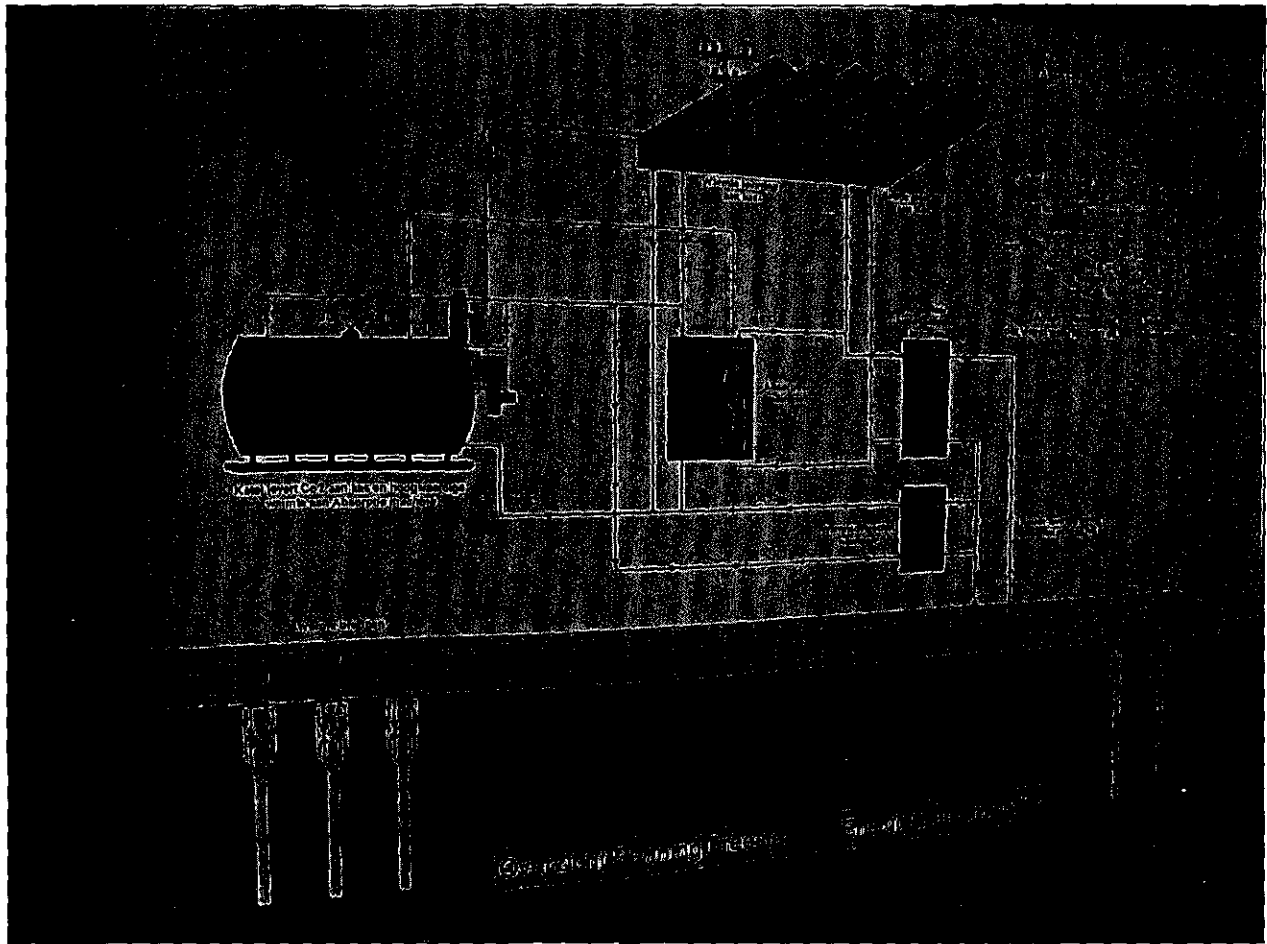
Company: Penning Freesia B.V.

Contact details: www.penningfreesia.com; +31 (0) 174 62 1221

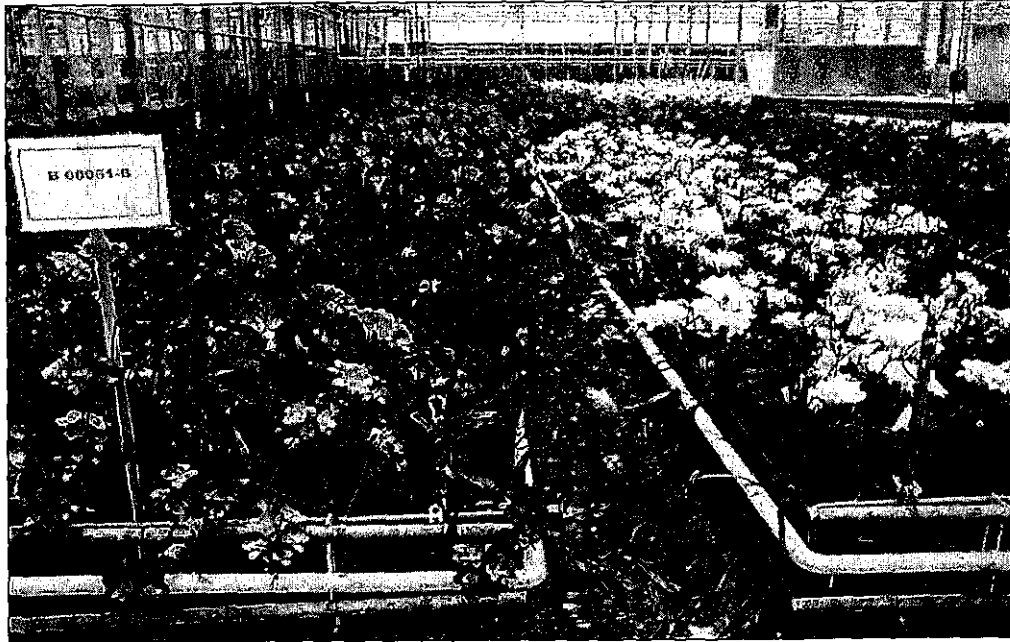
Concepts investigated: Hot and Cold water production; heat exchanger system

Water for greenhouses

- Produce hot and cold water via electricity generator to heat and cool greenhouses
- Set up large scale heat exchanger, computer controlled to heat/cool greenhouses
- In summer, stores excess hot water in underground aquifers for use in winter. Only 8% loss of heat in 6 months and reverse situation with cold water in winter.
- Storage hot and cold water aquifers are 120m apart underground
- There is a large upfront cost; however, it is cost effective in the long term



Heat Exchange System - Summer



Heat Pipes

Name: Jos van der Knapp
Company: Westland Greenport - Chairman
Contact details: www.ltoglaskrachtwestland.nl;
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Email: jos@ltoglaskrachtwestland.nl
Concepts investigated: Greenport Area

- A Greenport area is a government designated area/district for the protection of horticulture and its allied industries clustered together
- Greenport area is a clustering of like industries such as horticulture for mutual economic benefit
- There are five Greenport areas in Holland
- It is not specifically zoned and is protected by only allowing agri-related business into the Greenport district
- Greenport aims to make the Agricultural sector stronger and it is supported by the Government through legislation
- There are large economic benefits, working together brings innovative ideas and helps protect the area for the future.
- Government has set aside areas for complementary horticultural industries
- Complementary horticultural industry sectors at Greenport include plant breeders, logistic houses, irrigation specialists, spray and chemical companies etc
- A committee meets several times per year and includes representatives from each sector and includes government planners
- Each 5-10 years the whole process is reviewed



Westland Greenport

Name: Mr Age P van Balen and Miss Alison Middleton
Company: Ministry of Agriculture, Nature and Food Quality at Bezuidenhoutseweg 73
Contact details: 20401, 2500 EK 's-Gravenhage, The Netherlands
Email: a.p.van.balen@minlnv.nl or a.j.middleton@minlnv.nl
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Fax: +31 770 378 6123

Concepts investigated:

- Agri-logistics addressing problems with traffic and environment with trucks running long distances
- Environmental damage ie. Trucks running long distances
- Greenports are Government promoted and operated by the Private sector
- Benefits of Greenports include environmental, cost sharing and general economies of scale, as well as social benefits
- The bundled concentration of like-minded industries within the agribusiness park creates a culture that strengthens and encourages cooperation between the production, supply, marketing, and logistics sectors whilst drawing upon the collective knowledge
- In the government planning policy document, the government encourages the retention and strengthening of the Greenports
- Consultation is carried out with all stakeholders including non-departmental public bodies, and the business sector to ensure successful project implementation



Ministry of Agriculture Age P van Balen, Henk Den Hartog, Alison Middleton, Peter Lipscombe, Sam Dominello

Name: Ewald van Vliet
Company: Mayor of Blaidswijk
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Fax: +(010) 800 40 01

Concepts Investigated:

- Ewald is a member of the National Dutch Greenport Association Steering Committee that works on National Legislation
- There are clear rules and guidelines about what growers can do
- Local Council contributes some money toward the operation of the Greenport
- Environmental specialists are used to help deal with complaints
- Growers have restrictions on sound, noise and light pollution
- Traceability is important and everything can be identified back to the producer
- Food production is close to the market therefore less food miles
- Ewald explained 'closed greenhouse' technology using the following example
 - o Increased tomato production from 30kg/m² prior to closed greenhouse production techniques to 100kg/m² per annum after implementing closed greenhouse production techniques
 - o Glasshouses don't open to ventilate and use the cool bore water to cool
 - o Geothermal heating and cold bore water to cool greenhouses sourced from a depth of over 2kms
 - o Used plant psychology techniques to optimise yields
 - o The Dutch are currently setting up this greenhouse technology in China and England
- Discussed the need for high yield production in small spaces
- Future technology with NASA's thin wire solar radiation wire embedded in their energy screens has the potential, if used on only half of the glasshouse area in Holland, it will generate enough power to supply Holland's total electricity needs
- Ewald was open to further meetings and discussions



Henk Den Hartog, Sam Dominello, Ewald van Vliet, Peter Lipscombe

Name: Professor Dr Xavier Gellynck, Agro-food marketing and chain management
Company: University of Gent, Dept of Agricultural Economics, Faculty of Bioscience Engineering
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Name: ir. Evelyne Goemaere, Senior Expert Rural Development and Agricultural Economics
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Fax: 0032-9/244.85.99
www.vlm.be

- Farmers are their main clients. They also work with engineers, biologists, planners, and experts in environmental issues.
- Subsidised by the government to be green
- Limit the use of pesticides and maintain biodiversity
- Use industrial and organic waste to fermentation to generate 10% of power and use natural gas generators for the remaining 90%
- The government has purchased 35ha as a trial to sell back to greenhouse horticultural growers in maximum 6ha and minimum 3ha blocks, each with a dwelling development consent
- Owners must build their greenhouses within 3 years and each grower must contribute to electricity and heat generators with the other growers on the agribusiness park ie sharing infrastructure and resources



Flemish Land Agency

Prof Xavier, Adrienn Molnar, Evelyne Goemaere, Peter Lipscombe, Sam Dominello

Tour Outcomes

The tour group was fortunate to view a number of farms and agribusiness parks in greenport areas. It was obvious from what we experienced throughout our study tour to Holland and Belgium that we, in Australia, can gain from their experiences and expertise in promoting sustainable food production in close proximity to urban areas. Agribusiness Parks contribute to producing more food from less land, coupled with a reduced carbon footprint as well as being environmentally friendly. Agribusiness Parks are in close proximity to large cities ensuring that consumers are receiving fresh produce that has travelled less food miles.

The European Governments recognise the social, regional, and economic importance of agricultural clustering close to urban areas. This has led to the protection of key regions for intensive horticulture.

In Australia, urban development has been encouraged over the retention of viable agricultural activities. The current rural zoning conditions does not protect long-term farming practices and does not encourage the investment of significant farming infrastructure needed for intensive horticulture. As a result, we are losing prime agricultural resource lands to housing and rural residential/lifestylers forcing food production further from the markets and away from optimum climatic conditions; soil types, and adequate water access.

Australia has much to gain from the European experience. The forward thinking of the agribusiness parks can be used/adapted to areas within Australia. Aspects that add to the increased efficiency of intensive agriculture include reduced food miles and a reduced carbon footprint, close proximity to a labour-force and a market demanding fresh, locally grown produce whilst optimising our existing natural resources and at the same time contributing positively to our environment.

Recommendations

There are many places in Australia that are ideally situated to take advantage of this forward thinking. One such place is the Central Coast Plateau area near Gosford and only one hour from Sydney and Newcastle. This is a traditional farming area that has the climate, water and location to be a major supplier of food with the minimum carbon footprint possible as described above.

There needs to be a change in attitude and direction by all levels of government and unless this happens soon the opportunity will be lost forever. The agribusiness park concept has to be embraced so that farming has precedence in designated areas with agricultural significance over other non productive pursuits like lifestyle blocks. The current local and state government ordinances do not allow for this and town planners need to address this issue as a matter of urgency. Town planners need to understand the social, regional and economic value of intensive horticulture and its potential for realistic sustainable growth of a region.

We would like to see Planners designate particular areas or regions and encourage agribusiness parks by providing farming infrastructure such as natural gas, roads and freeway access. Areas such as the Central Coast Plateau near Gosford already has freeway access, water and good climatic conditions, and nearby natural gas. A review of current zonings and relevant changes are required so that the Agribusiness Park concept can become a reality. A change in thinking is required in all levels of government and the community to achieve this. A good starting point would be the commencement of open dialogue with all interested parties as we believe we all pursue the same objectives and want to achieve them together.

Given the current climatic issues facing the world today we feel that this should be done as a matter of urgency.

A Power Point Presentation is available for presentation upon request.

Budget

Description	Cost (\$)
Travel expenses*	28 325
Insurance	776
Accommodation	8 563
Gifts**	204
Food***	3 631
Tour Guide and Car hire	2 181
Phone and internet	800
Compilation****	4 800
Total	49 280

NB:

- * Includes airfares, train, taxi and bus costs and Belgium car hire
- ** Gifts were given to hosts
- *** Includes meals for hosts
- **** Tour preparation and estimated amount for presenting and lobbying results as well as fuel and vehicle costs

Acknowledgements

Frances Vella, Regional Service Manager, NSW Farmers Association
Peter Comensoli, Treasurer, Central Coast Horticultural Branch
Michael Champion, President, Central Coast Horticultural Branch

We would like to take this opportunity to express our sincere gratitude to our hosts in Holland and Belgium. We are hopeful that we may be able to reciprocate the hospitality extended to us in the near future.