Supplementary Submission No 91a

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

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Urban Taskforce
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Mr John Young
Principal Council Officer
Standing Committee on State Development
Parliament House
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SYDNEY NSW 2000

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Dear Mr Young

Re: Further submission by the Urban Taskforce to the inquiry into the NSW planning framework

In our first submission to the planning inquiry we raised with your our concern that the NSW planning system does not respect the right of property owners to use and develop their land.

NSW has had difficulty in attracting investment in recent years, in part, because of the enormous discretion wielded by planning authorities. The planning system, with its arbitrary decision making and unpredictable levies, has weakened the link between land ownership and the ability to create value by developing land.

We have decided to make this further submission to your inquiry to highlight three recent deliberate actions taken by the NSW Government to expressly reverse longstanding statutory protections safeguarding property rights. However, before we get into the detail of these three recent changes it is worth clearly setting out the value of property rights.

Firstly, we note that property rights are, unquestionably, human rights. Most major human rights documents set out to protect private property rights.[1]

Secondly, as has been stated by the United States Supreme Court, the right not to be deprived of property prevents the government

> from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[2]

Thirdly, there are strong economic arguments for high-level and serious protection of property rights. Economist, Frank Michelman,[3] asks

> [w]hen a social decision to redirect economic resources entails painfully obvious opportunity costs, how shall these costs ultimately be distributed among all the members of society? Shall the losses be left with the individuals on whom they happen first to fall, or shall they be "socialized?[4]

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[1] For example, see: article 17 of the *Universal Declaration of Human Rights* adopted by the United Nations General Assembly in 1948; article I, §10 and the fifth and fourteenth amendments to the United States *Constitution*; the Canadian Expropriations Acts; article 1 of the *European Convention on Human Rights* which, in the United Kingdom, has been adopted through the *Human Rights Act 1998*; Section 25 of the South African *Constitution; and* Section 51(xxxi) in the Australian *Constitution.*

[2] *Armstrong v. United States*, 364 US 40, 49 (1960).

[3] *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) (succinctly explained and analysed In Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 Harv. L. Rev. 997 (1999)).

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Michelman argues that losses should be socialised when it would be either inefficient or unjust to allow the government to take the property without compensation. The principal economic explanation for the compensation requirement is that otherwise the government would take an inefficiently large amount of property -- that is, the price system provides an efficient discipline on the government's "consumption" of private property.[5] Both efficiency and fairness are also invoked to limit the ability of government to expropriate property of politically vulnerable groups and individuals.[6]

There has been an increasing tendency for NSW to use town planning laws as a mechanism for seizing private property rights and using the rights for public purposes, without compensation. Three recent and current examples are set out below.

1. Taking land for a public purpose, but giving no compensation

Section 27 of the *Environment Planning and Assessment 1979* (NSW) ("EP&A Act") was introduced with the Act in 1980 and remained unamended until 2006.

During that period the section relevantly provided as follows:

> Where an environmental planning instrument reserves land for use exclusively for [public] purpose...that environmental planning instrument shall make provision for or with respect to the acquisition of that land by a public authority...

The policy basis for the section is fairly obvious. That is, if land is required for a public purpose then the financial burden of fulfilling that purpose should fall on a public authority rather than the private land owner who happens to own the land at the time.

Without the section, land could be sterilised for future public purposes and the private land owners could do nothing but continue to be responsible for the land, bear all costs of the land (including rates and taxes) and wait to see whether any public authority would ultimately wish to acquire the land.

In 2006 the *Environmental Planning and Assessment (Reserved Land Acquisition) Act* "(Reserved Land Amendment Act") commenced.

In essence, the law was amended so that an owner whose land had been reserved exclusively for a public purpose, could only require that land to be acquired if certain sections of the *Land Acquisition (Just Terms Compensation) Act 1991* ("JTC Act") applied.

Under the JTC Act,[7] before an owner could acquire acquisition of their land, the owner had to establish that they would suffer hardship if it was not acquired. The net result is that the underlying policy rationale for law is set aside, unless the owner can establish "actual hardship". The law makes it very difficult for a corporation to satisfy the hardship test – even though corporations are owned by people who have a legitimate right to expect their property rights will be respected.

In the second reading speech of the Reserved Land Acquisition Act the then Planning Minister, Frank Sartor, gave two policy reasons for change, namely -

- The EP&A Act was in conflict with the JTC Act and the amendment was required to bring them into conformity; and
- He referred to a 1998 case of *RTA v Greenfield Mountains*, where land designated for a road was no longer required for the road, and yet the land owner was able to compel acquisition of their land by the RTA (due to the land still being reserved exclusively for that purpose).

Neither of the two policy rationales set out by the Minister justified the change.

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[4] *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967), 1169.
[5] *Comparative Constitutional Law: United States/Canada*, 7th ed. 6-1.
[6] Ibid.
[7] Section 24.

Firstly, the JTC Act was introduced in 1991, some 11 years after the introduction of the EP&A Act. The government of the day was quite cognisant of the fact that owner initiated acquisitions under the JTC Act would be different to those initiated under the EP&A Act. As was stated by the then Minister in the second reading speech (our underlining):

> Though the [EP&A Act] provides for owner initiated acquisition where land is reserved for [public] purposes, this bill will extend the principle in the following ways: by applying it to all existing Environmental Planning Instruments whether or not they have acquisition clauses: by overcoming the effect of the case of *Carson v Department of Environment and Planning* ...; by placing time limits on the process ... and by including in [public] zonings ... future national parks. Authorities will not have to acquire land solely because it has diminished in value as a result of the zoning. There must be something other than the existence of the zoning; there must be hardship.[8]

It is clear that the JTC Act introduced no inconsistency whatsoever. The policy was clearly set out; namely that all new instruments made under the EP&A Act would be required to have an acquisition clause. The JTC Act would "extend" this principle to cover all existing environmental planning instruments, but in those cases, only where hardship could be established.

In a way the JTC Act was introducing a transitional provision which would ultimately fall away because ultimately, all land would be zoned under instruments made under the EP&A Act and these instruments would all have acquisition clauses.

Accordingly NSW government took a backward step by removing the requirement for the EP&A Act instruments to contain an acquisition clause.

Secondly, the rationale advanced by the Minister, based on the RTA case, is difficult to follow. Effectively, a person's land had been "sterilised" for development by having an exclusive public purpose reservation. However, the public purpose behind the reservation was no longer current. We would have thought that the policy direction to take to address this, would be to require the removal of the reservation within a particular time after the public authority had been notified. However, instead of doing this the Minister significantly curtailed the owner's rights in such circumstances. That is to say rather than amending the legislation to require the removal of an obsolete reservation, the amendment requires the owner to put up with an obsolete reservation effectively sterilising their land when, because of the obsoleteness of the reservation, the public authority is unlikely ever to initiate an acquisition.

The fundamental principle should be that where land is required for a public purpose it is the owner that should be entitled to have the authority either remove the reservation, or acquire the land.

However, given that reservations of land are sometimes made well in advance of concrete proposals and that these proposals sometimes change, there should be a notice period within which an authority can avoid the obligation to acquire the land by removing the reservation. Given the statutory processes involved and the policy decision that must proceed the statutory process (that is, the policy decision not to proceed with the project) a lengthy period is justified, perhaps one year.

In summary therefore, where land is reserved exclusively for a public purpose the owner should be given the right to serve a notice on the public authority identified. The notice would require that the public authority, either acquire the land or lift the reservation.

It's worth noting that if there was constitutional protection for private property rights, as there is in the United States, no Australian government would have the power to expropriate private land through a rezoning. According to the United States Supreme Court:

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved...--We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land ...[9]

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[8] 21 August 1991 Hansard at page 273.

[9] *Lucas v South Carolina Coastal Council*, 505 US 1003; 112 S. Ct. 2886; 120 L. Ed. 2d 798 (1992), Scalia J.

2. Stealing the existing use rights of landholders

"Existing use" rights are a landowners' right to continue a land use or operate a business that pre-date current planning controls.

Such provisions provide stability and certainty to property ownership. Without strong existing use rights, every new planning scheme is retrospective – potentially shutting down existing businesses or throwing people out of their homes. In the absence of existing use rights, governments are free to rezone (for example), high density residential land to low density; or commercial offices to light industrial. Strong existing use rights give a purchaser of land protection from arbitrary changes in a planning scheme that could either prohibit the current land uses on a site or steal away the future development potential of a site. In essence, these provisions give a land purchaser some assurance about what they're purchasing.

Until 2006 NSW law allowed existing land-uses (such a business or a home) to be enlarged, expanded or intensified, altered, extended, rebuilt, or be changed to another use, including a use that would otherwise be prohibited under the Act.[10] While development consent was still required, the approval could be granted, even if it was prohibited by a planning scheme that was made after the existing use right arose.[11] It was even possible to totally re-build buildings in accordance with existing use rights, even though a planning scheme had prohibited the given use after the existing use rights arose.[12]

In 2006 and 2007 the NSW Government changed the law to dramatically narrow the scope of existing use rights for landholders.[13] These changes meant that an existing commercial use that had been subsequently prohibited by a planning scheme could only be changed to another commercial use (and not to a prohibited light industry or residential use). Similarly, an existing light industrial use could be changed to another commercial or light industrial use, but not a prohibited residential use.[14] What's more, such changes to use are now prohibited outright if they:

- involve anything more than minor alterations or additions;
- involve an increase of more than 10 per cent in the floorspace;
- involve the rebuilding of the premises;
- involve a significant intensification of that existing use; or
- relate to premises that have a floorspace of 1,000 square metres or more.

Aside from the fact that the changes were an outrageous interference in the rights of many thousands of land owners across NSW; they were completely unnecessary. The previous law had required that a development application could be lodged and dealt with on its merits. That previous law still provided plenty of scope for a consent authority to deny development approval if a new proposed land use (put forward under existing use rights) was inconsistent with good planning principles.[15]

This is no academic debate. NSW planning schemes can and are changed to the detriment of the existing development potential of a site.[16] Any investor in NSW must now factor in the risk that development potential of land could be stolen overnight through a rezoning without compensation for any loss of value.

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[10] Cl 41, *Environmental Planning and Assessment Regulation 2000* published in Gazette No 117 of 8.9.2000, p 9935.
[11] Ibid cl 42 and cl 43.
[12] Ibid cl 44.
[13] *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006* and the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007*.
[14] *Environmental Planning and Assessment Regulation 2000*, cl 41(1) (as amended by the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007)*.
[15] *Bonim Stanmore Pty Ltd v Marrickville Council* (2007) 156 LGERA 12
[16] For an example of down zoning in action see *GPT Re Limited v Belmorgan Property Development Pty Ltd* [2008] NSWCA 256.

3. Allowing public authorities to expropriate private land for development and pocket the increase in land value

Last year, the NSW Government amended the *Transport Administration Act 1988*. It created a new government corporation "Sydney Metro". One of the powers assigned to this new corporation was the power to compulsorily acquire land. Unusually, it was given the express power to acquire land for future sale, lease or disposal.[17] This power could be used when Sydney Metro was acting as a developer, including, in the development of new retail and commercial premises.[18]

The effect of the *Land Acquisition (Just Terms Compensation) Act 1991*[19] is that the market value paid as compensation to a property owner may be discounted. The compensation will be discounted if there is any increase in value that can be attributed to the "public purpose" for which the land has been compulsorily acquired.[20] That applies, even when the "public purpose" is the acquisition of land for sale for the purposes of property development.

This allows the Sydney Metro authority to compulsorily acquire private land for development, arrange for a rezoning from government while the land is in the authority's hands, and then on-sell that land to third parties; pocketing the uplift in land value as a result of the rezoning.

This month Parliament passed the *Land Acquisition (Just Terms Compensation) Amendment Bill 2009*. At the time of writing this submission this bill was awaiting royal assent.

The effect of this bill is that councils will have wide flexibility to acquire land for the purposes of re-sale to someone else. There will be nothing stopping them from deciding to acquire, for example, land zoned for detached houses, with the express purpose of rezoning the land for retail development and pocketing the uplift in value.

There is an existing ban on councils using their compulsory powers to acquire land for re-sale. The existing ban was re-affirmed in April 2009 by the High Court in *R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council* [2009] HCA 12.

In this matter, Parramatta Council was attempting to circumvent this ban by using a loophole. The loophole involved the Council acquiring nearby land from itself at the same time as it acquired the private land. The Council tried to convince the High Court the mere fact that some of its own land would not be sold was sufficient to legitimise taking all of the private land and selling it to a third party.

The High Court rejected Parramatta Council's argument, saying that the loophole could not be used because of provisions in the *Land Acquisition (Just Terms Compensation) Act 1991*. The government's bill will re-write those provisions, so that Parramatta Council will then be able to rely on the loophole to carry out a compulsory acquisition of private land to sell it to others.

If the bill becomes law, anyone's private land can be compulsorily acquired for re-sale by the council, so long as it's near other land that is being acquired for a community purpose. Ironically, the other land might be a public street which is already in council ownership (an odd quirk of the existing law is that council can compulsorily acquire its own land).

The legislation was designed to facilitate the Civic Place redevelopment. This development would refresh a three hectare block of run-down council-owned and private properties next to the new Parramatta Transport Interchange. The development involves a new library, heritage centre and public art gallery. The development plans include piazza-style public spaces, an independent cinema, sophisticated shopping, restaurants and entertainment operating night and day.

Almost any significant new urban renewal project is likely to involve some private land. Governments and councils should have a crucial role in consolidating fragmented land parcels into single sites to enable major urban renewal. Without the power to acquire land on just terms, many derelict parts of our urban centres may never be re-built. While the government is

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[17] Section 55E.
[18] Sections 55C and 55D.
[19] Section 56.
[20] Walker Corporation Pty Limited v Sydney Harbour Foreshore Authority [2008] HCA 5.

right to introduce legislation to facilitate the Civic Place development, the government is wrong to pursue a model which deprives landholders of full compensation.

We have argued for an alternative approach which would require very different legislation from the two examples cited above. Our proposal is as follows:

- Landholders must be entitled to just terms of compensation.
- Landholder compensation must be valued based on the rezoned value of the land, following the granting of the final development approval, in connection with the urban renewal project. That is, any consequent land value uplift must flow to the landholder, rather than the acquiring state government authority.
- The actual transfer of title from the original landholder should not take place until the rezoning is completed and the development application is approved. This will permit a proper basis for striking a just terms land value. In the event that the landholder wishes to exit ownership early in the process, before these matters are finalised, they should be entitled to compensation based on what is known at the time and a subsequent additional payment based on the final increase in land value, arising from the additional permitted development potential.
- The industry, including the Urban Taskforce, must be consulted on the detail of any proposed laws.

The model proposed by the Urban Taskforce exists elsewhere. In the United Kingdom, where planning approval is granted for additional development on acquired land within ten years after a valuation date, the land owner is entitled to the difference between the amount actually received and the amount the landowner would have received if the approval had been in force when:

- the notice to compulsorily acquire was issued; or
- (in the case of a sale by agreement under the threat of compulsory acquisition) at the date of the sale contract.

NSW will be relying on the construction industry to lead us out of the recession. Property rights must be respected if investment is to return to optimum levels. The issues addressed above, together with the other issues raised in our first submission, needs to be addressed if land ownership is to retain its significance as a solid investment and key to economic growth.

Yours sincerely
Urban Taskforce Australia

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