LIBERATING OUR CITIES

Development and zoning laws run contrary to private and public interests, writes **Alan Anderson**

'There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,' declared Sir William Blackstone in his magisterial *Commentaries on the Laws of England*.

This 'sole and despotic dominion,' which even in Blackstone's time was not truly absolute, has since been eroded by ever more intrusive regulation. The despotism of the dominion has been constrained by regimes of heritage protection, development approvals, zoning laws and environmental controls; the solitude has been interrupted by the legions of state and federal regulators, petty local bureaucrats and employees of public and increasingly private utilities who are entitled to disturb it.

The right of the landholder to build what he will and do what he pleases on his own land is now so circumscribed by regulation as to be undeserving of that name. Before erecting a new structure, or even extending an existing one, the landholder must entreat the council for permission via a cumbersome bureaucratic process. A similar process is required before he presumes to operate the most humble of businesses from his own home.

In theory, these tools are employed by the state to safeguard the interests of the broader community. One might object that, as Blackstone claimed, 'the public good is in nothing more essentially interested, than in the protection of every individual's private rights.' Yet even setting aside this liberal philosophy, we may fairly ask whether other community interests are truly being served by the current level of intrusion.

This article contends that in three important respects, the interests of the broader community are being undermined by heritage, development and zoning laws.

First, development laws constraining the efficient use of inner suburbs are the primary cause of the so-called housing crisis. In this intergenerational battle, property-owning baby boomers are exploiting the power of the state to ride roughshod over the property rights of their neighbours by preventing higher density developments that would occur in a free market. The result is that young families are being driven to the outskirts of cities and forced to endure unnecessary and time-consuming commuting, with significant detrimental impact on their quality of life.

Second, the utility of particular properties to their owners is being reduced by red tape. Lengthy and uncertain approval processes delay or prevent owners from maximising their enjoyment of their land. Zoning laws are hampering economic and social development by preventing the establishment of businesses in domestic premises. This not only reduces economic activity; it also detracts from social capital by contributing to the sense of isolation in residential areas.

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Third, the requirement of bureaucratic approval for everything down to the most minor of structural improvements greatly enhances the potential for corruption in municipal governance. Faith in our political institutions is being undermined at the lowest level, leading to the alienation of citizens from the democratic process.

The culture of uncertainty and bureaucratic permissions must be replaced with a system of predictability and strictly limited prohibitions.

While property rights cannot and should not be absolute, the sovereignty of landowners should be substantially restored, not only for their benefit but for that of the broader community. The culture of uncertainty and bureaucratic permissions must be replaced with a system of predictability and strictly limited prohibitions.

Understanding the housing crisis

One of the most prominent issues in the 2007 federal election was the so-called 'housing crisis.' The striking feature of policy responses to this issue has been the focus on demand-side solutions.

On the Labor side, the creation of concessionally taxed 'First Home Saver Accounts' is clearly predicated on the assumption that merely providing young families with additional financial muscle will solve the 'crisis.' Even Kevin Rudd's supposed supply-side solution to the rental property aspect of the 'crisis,' the provision of subsidies for those who develop housing to be leased at 'below market' rents, presumes that the problem is a lack of 'affordable' housing, not a lack of housing per se.

In fairness, some salutary efforts have been made to bribe local governments into accelerating their development approvals processes. However, the underlying principle of development and zoning restrictions—that local governments should seek to control the 'character' of their streetscapes through an approvals process—has not been questioned.

On the Coalition side, the commitment to the First Home Buyer's Grant, a policy prescription subsequently adopted by state and federal Labor governments, demonstrated a similar prejudice.

The Coalition's principal foray into the supply side was the commissioning of a land audit to identify tracts of government land that could be released to the market, and tracts of developer-owned land that were lying fallow while developers waited for their value to rise. Although worthwhile, the impact of such exercises can only ever be economically marginal, in that there is little unoccupied land in high-demand areas, and geographically marginal, in that 'land hoarding' by developers occurs only on the fringes of our cities.

Neither party has been prepared to confront the set of four basic facts that give rise to the 'crisis.'

1) Australia's population is rising.

2) The number of Australians living per dwelling is stable or declining.

3) The amount of available land within any fixed radius of our major CBDs is a static quantity.

4) The number of dwellings per unit land in our inner suburbs is constrained by development laws.

It is clear from these four facts that the percentage of Australians living within a fixed radius of our major CBDs must fall, unless one of the facts is invalidated by a change of policy. To speak, as the Prime Minister has, of 'a lack of affordable housing in our inner cities' is a euphemistic way of saying the same, given that affordability is a relative concept that can best be thought of as representing the percentage of the population who can 'afford' something.

None of the policy prescriptions advanced by our major parties addresses any of these four facts. For the sake of argument, let us assume that 'a lack of affordable housing in our inner cities' is unacceptable and consider policy options that would address each of the four facts.

First, we could stabilise Australia's population. Australians reproduce slightly below replacement rate. However, the continuing increase in life

expectancies partially negates this. Severely curtailing our immigration program is the only feasible way of implementing this policy objective. Even this solution is fraught with difficulties.

As the recently released Intergenerational Report indicates, immigration is the principal policy solution to mitigate the ageing of the population and the increase in the ratio of dependents to workers. In addition, there are national security considerations that militate against freezing our population at its current levels. History suggests it is unwise to believe we can indefinitely maintain our grip on an underpopulated but resource-rich continent. While we can continue to debate the appropriate rate of population increase, stopping it is not a plausible option.

Second, we could increase the number of people living per dwelling. No doubt there are social policies that could impact this statistic at the margins. Tax and family law policies promoting the stability of the family unit are an example. However, it would be highly optimistic to believe that we could reverse the trend towards smaller families across the developed world. Assuming that we are unwilling to implement radical policies to drive cohabitation, this second fact is also beyond our practical control.

Third, we could increase the amount of available land within any fixed radius of our major CBDs. Although some releases of Commonwealth land have achieved this at the margins, there is little scope for further release. The destruction of the limited amount of inner city parkland would also be marginal in impact, and filling in Sydney Harbour would leave that city with no redeeming features.

The third fact, that the amount of available land within any fixed radius of our major CBDs is static, is something with which we must learn to live.

Fourth, we could increase the number of dwellings per unit of land in our inner suburbs. At present, such changes are constrained by state and local development laws, with state laws effectively delegating discretion to local councils but allowing for state intervention to fast track major developments. Incremental increases in housing density, as opposed to massive mega-developments, generally fall within the purview of local government.

Unlocking our inner suburbs

The reluctance of local governments to countenance rapid increases in housing density is understandable. They are accountable to their ratepayers, not to the broader community.

The residents of a row of Paddington terraces would object strenuously to a 10-storey tenement being erected at the end of the street. It might be that the hundred young families able to move into that tenement, instead of being relegated to a distant suburb, would experience a benefit dwarfing the aesthetic detriment suffered by the 50 affected neighbours. Yet those 100 families are unidentified and unheard by the council, whereas the 50 neighbours are easily identifiable ratepayers.

Residents of inner city suburbs argue that it is appropriate for development policy to function in this way. They should be able to determine the character of 'their' suburbs without interference from outsiders. This argument ignores not only the moral claim of the landowner to determine the fate of his land, the usual objection to development laws, but also the moral claim of the broader community to break open the closed shop of our inner suburbs.

In general, the principle of subsidiarity dictates that decisions should be made at the lowest level of government consistent with the nature of the subject matter. If the residents of Burnside like their public rubbish bins painted green, allowing the state government to dictate they be painted brown is in no one's interests.

Inner city land is fundamentally a state resource, not a local one.

However, some matters are not amenable to local regulation. Tony Abbott recently called for the Murray-Darling system to come under federal control on the grounds that it is a resource shared between states; without national oversight, the temptation of the upstream state will always be to extract more water than would reflect the optimal solution from a national perspective.

Inner city land is fundamentally a state resource, not a local one. The decisions of inner city councils to stymie higher density

developments place greater strain on the transport system. They constrain the access of inner city businesses to labour. They prevent willing buyers, such as young families, and willing sellers, such as landowners wishing to erect higher density housing, from concluding transactions that would serve their interests and increase net utility in the state.

This is not to say that our inner suburbs should be forcibly converted into an ocean of high-density tower blocks. No doubt many landowners place greater value on the 'character' of their suburbs than on the potential profit of increasing density. Groups of neighbours who take this view can enter agreements governing the development of their land.

A fear of extremes is no basis on which to design an approvals process that captures the most routine of works.

I have previously argued that such agreements should be permitted to be registered as interests in the land so that they can be made binding on *bona fide* third party purchasers without notice. But where a landowner places greater economic value on the development opportunity, public policy dictates that he should be allowed to proceed.

In short, local council development restrictions both violate the rights of individual landowners and operate against the interests of the broader community. Against these charges, the defence that they serve the interests of a coterie of inner city residents is no defence at all.

Maximising utility in land use

It is not merely the prospective beneficiaries of inner suburban development who suffer detriment from development regimes. Existing residents are subjected to bureaucratic processes of Kafkaesque duration and complexity to gain approval for basic works on their own land. Approval criteria are frequently opaque and inconsistently applied. A single cantankerous neighbour can cause months of delays or block a construction altogether, even though it has minimal impact on the amenity of their own property.

We may safely assume that landowners seeking to make improvements on their land are doing so to increase its utility. Their willingness to invest tens or hundreds of thousands of dollars on extensions, modifications or wholesale reconstructions no doubt reflects their assessments of the potential increase in utility. This gives us some idea of the loss of utility implicit in preventing a construction, although we must acknowledge the potential for those funds to be redeployed.

Even where the process is not opposed by neighbours, the period to obtain approval frequently stretches to several months, during which time the associated funds will generally be sitting idle in a bank account. This delay prevents landowners from enjoying the improvement to their land for a significant period.

Supporters of the current regime use egregious examples of outrageous and ugly constructions to argue that an open slather approach to private land improvements would result in aesthetic catastrophe. Yet, just as hard cases make bad law, a fear of extremes is no basis on which to design an approvals process that captures the most routine of works.

We should think twice before presuming that regulation is the inevitable answer to undesirable conduct. Murder is rightly prohibited, but fat people wearing lycra are discouraged by social opprobrium, not legal prohibition. Similarly, although the creation of a malarial swamp on a suburban block should attract legal sanction, it is less clear that we should prohibit a landowner from adding an unsightly extension to his house.

The zoning laws that divide land into residential, commercial and industrial categories are another example of regulatory overkill. To an extent, this is reasonable. Some uses of land, such as building an abattoir or a paper mill, have substantial impacts on neighbouring properties in terms of auditory and physical pollution, although their construction in an established residential neighbourhood is precluded by economics as much as by law. Yet, if a resident in a leafy suburban street wishes to establish an art gallery or a small café in the front room, is the impact on neighbours truly sufficient to deny owners this opportunity based on a bureaucratic zoning of land?

I am reminded of my travels in Asian developing countries, where the distinction between residential and commercial zones is weaker. On many streets, a family-run café or shop on the ground floor of a residence provides a focus for late-night community life: half a dozen locals gather around a card table and sip tea while children play nearby.

It is probably not realistic to imagine the return of such vibrant community life to our suburban streets, given the pressures of modern living. Yet, the constant complaints about modern anomie in our popular culture make one wonder whether the potential exists for more small-scale, communal venues of the informal nature found in many European countries.

As with development approvals, highly prescriptive and intrusive zoning laws are a disproportionate response to the largely illusory threat of extreme abuses.

I will say more about alternatives at the conclusion of this article.

Heeding Lord Acton

Lord Acton warned long ago that 'power tends to corrupt, and absolute power corrupts absolutely.' There are few more corrupting forms of power than the authority conferred on the petty bureaucrats of state and local planning bureaucracies to exercise wide discretion over the approval of developments.

The increased regulation of political donations from property developers in New South Wales is testimony to the level of public disquiet about corruption in the industry. The ABC's successful comedy *Grassroots*, which satirised corruption in local councils, reflects a similar lack of public trust in approvals processes.

Corruption is a natural result of empowering officials to make highly discretionary decisions on matters with significant impact on individuals. For many citizens, the process of seeking a development approval represents the greatest exposure to regulatory risk that they will experience in their lives.

To an extent, the problem is intractable. The decision to build, for instance, a billion-dollar marina on the shores of Sydney Harbour is one in which the entire community has a sufficient political interest as to warrant some level of oversight to apply broad policy considerations that necessarily involve discretion.

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Yet, it is difficult to see why the same should apply to a decision to subdivide a suburban block. Surely, to the extent that standards must be applied to suburban developments, they can be codified with limited ambiguity to provide immediate guidance as opposed to months of uncertainty.

Experience with corruption in regulatory systems shows that, wherever feasible, discretion should be minimised and the subject matter of regulation should be reduced.

A new framework for urban land management

Having identified key weaknesses in the existing regulation of development and land use, here are some suggestions for improvement.

First, restrictions on suburban development should be determined at the state level. In the context of development laws that restrict the use of a scarce community resource, inner suburban land, local councils represent sectional interests. Defending the rights of the individual landowner coincides with the interests of the broader community in breaking the closed shop of our inner suburbs and giving young families an opportunity to live close to the city.

With local restrictions on inner suburban development removed, state governments could concentrate on the business of providing the infrastructure necessary to support our cities. This job would be easier, not harder, with increased housing density in the inner suburbs, enabling the economics that drive high quality and efficient transport systems such as those found in affluent high-density cities overseas.

Vesting the power to regulate property development exclusively in state governments would have the happy side-effect of eliminating

the principal opportunity for corruption in local government.

Second, the entire process of seeking approval for basic works on suburban land should be abandoned. In its place, minimalist restrictions on private suburban development should be codified with the greatest specificity possible at the state level, focusing on what constitutes an unacceptable interference with neighbouring properties rather than what constitutes an acceptable development.

At least at the level of ordinary residential and small-scale commercial development, the benefit of the doubt should be extended to the landowner and there should be no attempt to enforce this code pre-emptively. If it is alleged that the rules have been breached, the burden of proof must fall on the complainant. The risk of having to undo construction would be sufficient to deter most landowners from inappropriate developments. In the absence of convoluted local government processes that invite dispute, residents would be likely to syndicate their plans informally with neighbours and resolve differences using the commonsense that is wholly lacking in the existing system.

The reduced bureaucratic discretion implicit in this system would ensure that the corruption of local development processes did not merely migrate to the state level.

Third, zoning laws should be replaced with a scheme that similarly focuses on what is prohibited rather than what is permitted. Instead of defining acceptable uses of land, government should define unacceptable infringements on neighbouring land, including auditory and physical pollution. These unacceptable infringements would still vary geographically to reflect existing distinctions between residential and industrial areas. As with the development restrictions, the complainant would bear the burden of proof in demonstrating that a landowner was causing an unacceptable infringement on the complainant's enjoyment of his own land.

A system designed along these lines would doubtless result in a few egregious examples of inappropriate development and a number of forced demolitions or alterations. Yet, these tabloid-fodder exceptions must be weighed against the efficiency benefits of scrapping the entire development approvals process for ordinary developments. A realistic appraisal of likely costs and benefits would lead to an unquestionably positive assessment.

Australia's cities are shackled with cumbersome regulations that create problems an order of magnitude greater than those they purport to solve. Instead of maintaining systems that trust bureaucrats more than citizens, we should restore some measure of Blackstone's 'sole and despotic dominion' to our landowners. In doing so, we would rediscover an old liberal truth: that the public interest is served, not defeated, by a keen respect for individual property rights.