

HISTORY OF PLANNING LEGISLATION

1. **Pre-Legislative History of Planning Law**

Three main strands of development of pre-legislative planning law;

- (1) The role of governmental agencies in urban and rural land use controls.

It is possible to identify elements of government agency involvement in land use control at various stages in history.

The most radical form of land use control by government is the acquisition of privately owned land. This form of land use control was employed by the ancient Romans in establishing settlements in more remote regions of the Empire and for the provision of military facilities. Land which was acquired and developed in this way was then sold or leased to private ownership or possession in plots.

In Medieval England land was often resumed by the Crown for the building of fortifications and military defences.

In the C19 in some of the German states, public acquisition of land, planning of the area in question, and redistribution of land in accordance with the plan, occurred, principally in Frankfurt.

(Consider WA development scheme principles).

This type of land use control has limited application in Australia, and for the most part planning schemes imposing land use control over a framework of zones and reservations are adequate. Generally private ownership of land is not seen as inconsistent with good planning. However consider the role of resumption/development schemes in W.A., and the widespread use of land acquisition powers by planning authorities, using the procedures of the Land Administration Act 1997 and formerly the Public Works Act 1902.

- (2) The regulation of towns and countryside by local government agencies.

The rudiments of planning could be seen in isolated ordinances of medieval English boroughs dealing with some of the more serious hazards of life in those times.

Fire: Fire ordinances requiring that houses be constructed as far as possible of non-combustible materials; outlawing of wooden chimneys;

Disease: Siting of leper houses.

Subsequently establishment of workhouses.

- (3) The private sector operating within the sphere of the common law

The most notable areas of law which led the way to C21 planning controls were:

- (a) The tort of nuisance and emergence of the related principle from the case of *Rylands v. Fletcher*.

Nuisance = wrongful use of land in a way which impairs enjoyment by neighbour of the neighbour's land;

Rylands v. Fletcher = wrongfully allowing escape of dangerous things from land onto neighbouring land.

- (b) Restrictive covenant. Landowner covenanting with neighbour to refrain from specified acts on land or uses of land. Covenant enforceable by neighbour. A restrictive covenant could run with the land so as to bind (or benefit, as the case may be) successors in title to the original covenantor and covenantee.

References:

Davis, B.H. "Legal Aspects of the History and Background of Town and Country Planning" (1968-69) 3NZULR 310.

Fogg "Australian Town Planning Law: Uniformity and Change" (Revised edition, 1984) University of Queensland Press, Chapter 1

2. Legislation

C19 Origins of Planning Legislation in the UK

- (1) Population explosion, (following a previous explosion in the C 18):

1800	-	16.5 million approx.
1850	-	21 million approx.
1900	-	37 million approx.
1950	-	50 million approx.

- (2) Industrial Revolution:

Movement of population away from countryside and into urban areas.
See Telling Ch.1, p. 3.

The early industrial revolution in Britain centred around wool, cotton and in particular coal, assisted by the building of canals and later, railways.

Concentrations of population arose in the North of England, the Midlands and South Wales. Industrial towns grew in size. There were no laws regulating the zoning of land uses, and factories and houses sprang up side by side, although it must be borne in mind that most people had to live within walking distance of their work place. There were no laws requiring minimum standards of building

construction and sanitation, and the resulting foul state of houses encouraged the spread of disease. There were serious outbreaks of cholera and typhoid between 1830 and 1840.

Government action in the mid-C19

Local Boards of Health were set up on an ad hoc basis to deal with particular outbreaks but there was no ongoing government policy to deal with the problems.

In the late 1830's the government did commission a report into causes of death and destitution in London, and a further report was commissioned under the guidance of public health reformer Edwin Chadwick to carry out a similar investigation over the whole of England.

That report was published in 1842 and was followed by a Royal Commission which reported in 1844 and 1845.

In the light of these reports the Public Health Act and Nuisance Removal and Disease Prevention Act were passed in 1848.

By any modern standards of regulation of health and planning, the measures introduced by these Acts were specific and limited, but nevertheless represented significant steps forward. For example the Public Health Act established a General Board of Health which could in turn create local health boards for districts with a particularly high death rate. The boards could ensure that new and existing houses were provided with water and drainage. **The board needed to be given notices of privies and drains before it would approve the commencement of buildings.**

The Nuisance Removal and Disease Prevention Act 1848 had the narrow but significant effect of making it unlawful to build a new house which drained into an open ditch.

These initial Acts were followed in later years with further enactments of increasing scope and ambition, for example provision for ordering that a house unfit for habitation could not be used for that purpose, and laws compelling even established houses to connect with a public sewer.

In 1875 these various enactments were effectively consolidated into the Public Health Act, 1875, which applied nationally. Although enacted by the central government, the Public Health Act preserved the prevailing role of local authorities in enforcing public health laws. It is important to note that in Western Australia today, local authorities continue to exercise the primary responsibility in this area. The 1875 Act was also wider in its subject matter, and the concept of public health took on a wider compass, extending, for example, to matters such as the size of rooms, the space between houses, and the width of streets. The U.K. health laws were swiftly adopted in W.A.

Health legislation going back to 1876 forms the central core of the Health Act 1911 which continues in force today.

3. **Principal Legislative Innovations and Changes**

Six Acts following the Great Fire of London 1666. See Sharman, F.A. "Planning Law After the Great Fire of London". Also Street Improvement Acts. Town Commissioners' Legislation of C18 and early C19.

(1) Legislation prior to 1909:

- (a) Public Health Act 1848;
- (b) Nuisance Removal and Disease Prevention Act 1848;
- (c) Nuisances Removal Act 1855;
- (d) Sanitary Act 1866;
- (e) Public Health Act 1875 (preceded by local Acts);
- (f) Artisans and Labourers' Dwellings Act 1868;
- (g) Artisans and Labourers' Dwellings Improvement Acts 1875 and 1879;
- (h) Housing of the Working Classes Act 1890.

(2) New Towns Movement.

Garden Cities.

(3) Housing, Town Planning, Etc. Act 1909.

The legislation discussed above was primarily aimed at securing health and safety objectives, although the scope of health objectives had clearly widened over the decades. Regulation of land use increased significantly, however with the Housing, Town Planning, etc Act 1909. Features of this new regime:

- (a) Emergence of concepts of amenity and convenience;
- (b) Planning schemes replacing by-laws as a vehicle for land use control.

Could provide for control of appearance of buildings and uses of buildings, zoning and development applications and approvals.

Interim development control pending the coming into operation of a scheme.

Central to the Act was the zoning of land and the restriction of permissible uses on particular land.

References:

Telling Chapter 1
Fogg Chapter 1

4. **Significance of Early U.K. Legislation to W.A.**

(1) Importing of UK legislation.

The WA planning legislation (and planning legislation in the other States of Australia) can be traced to the Housing, Town Planning, etc. Act 1909 and later consolidations of that Act. Since the States, including WA, adopted their various planning statutes, the situation in Britain has moved on a great deal, and by the Town and Country Planning Act, 1947, the British model has moved to a system characterised by:

- (a) the absence of detailed zoning of land;
- (b) the introduction of development plans rather than schemes, which indicate preferred and principal uses of land rather than strict zonings;
- (c) the exercise of wide discretion by local authority by reference to the preferred uses of land and the development and the definition of the particular proposed development;
- (d) the reduction in the number of local authorities responsible for the administration of schemes and the making of decisions on development applications;
- (e) an attempt to secure more regional and integrated planning objective.

Western Australia adheres more closely to the original English model.

- (2) Relevance of UK social influences to planning legislation in W.A.
- (3) Relevance of New Zealand's Town Planning Act 1926.
- (4) Role of WA Town Planning Association in inspiring and drafting 1928 legislation.
- (5) Town Planning and Development Act 1928.

Parliamentary Debates 1928, and report of Select Committee of the Legislative Assembly 30.10.28 (1928 Parliamentary Papers Vol.11).

- (6) Significant Amendments to 1928 Act:
 - (a) Interim development control 1955 (s.7A) and 1962 (s.7B);
 - (b) Appeal to Town Planning Court - 1970;
 - (c) Review of Schemes - 1976;
 - (d) Appeal to Tribunal - 1976;
 - (e) Statements of Approved Planning Policy - 1976; amended 1978;

- (f) Extension of Ministerial functions in scheme making and amendment - 1994 amendment;
 - (g) Adjustment for EPA assessment of schemes and amendments - 1995 amendments;
 - (h) 1996 amendments giving Minister greater control over local government supervision and enforcement of schemes (ss. 18 and 18A), and extended 2002;
 - (i) 2002 abolition of Ministerial Appeals;
 - (j) 2002 recasting of scheme enforcement provisions.
- (7) The Stephenson-Hepburn Study.
- (8) Metropolitan Region Town Planning Scheme Act 1959, leading to MRS in 1963, and consequential expansion in l/a planning schemes;
- (9) Town Planning Regulations 1963 and 1967. Amendments 1996.
- (10) Original Model Scheme Text of 1967 and Model Scheme Text 1999.
- (11) Planning and Development Act 2005.

References:

Hansard 1928

Parliamentary Papers 1928 Vol 11 - *Report of Select Committee of the Assembly on Town Planning and Development Bill* - 30.10.28

Town Planning and Development Act 1928.

Metropolitan Region Town Planning Scheme Act 1959.

Western Australian Planning Commission Act 1985.

Planning and Development Act 2005 and repeal of previous 3 major Acts.

Metropolitan Region Scheme 1963.

Town Planning Regulations 1967.

Fogg, op cit., Chapter 6.

Foley, N. 1995 “*An Outline of the Evolution of Town and Regional Planning Administration in Western Australia 1927-1995.*” National Library of Australia Cataloguing in Publication data. Nedlands.

Heap, Sir Desmond “*An Outline of Planning Law*” 9th ed. Sweet & Maxwell, London.

Yiftach-El, O. and Hedgecock, D. “*Urban Regional Planning in W.A. : Historical and Critical Perspectives*” 1992 - Paradigm Press.

5. **Competing Influences on Planning Legislation**

- (1) The Common Law approach - emphasis on private proprietary rights, prevention of interference with intrusions upon property rights.
- (2) Public Interest ideology - wide discretionary powers conferred upon public administrators.
- (3) Public participation ideology - regards law as the provider of rights of participation in the land use planning process not by virtue of land ownership but by virtue of principles of democracy and justice; property-owners have no special interest; merely one of a great number to be considered; on the other hand, "public interest" not merely a matter of opinions and assumptions of administrators.

In practice, these ideologies do not always come through so clearly as McAuslan states them, but it is the essence of McAuslan's argument that -

- law,
- administration, and
- official interpretation

in the area of land use planning, are applicable in terms of these ideologies and are based on these ideologies.

- (4) Consider the possibility of other ideologies in the light of experience in the last 2 decades – especially in the evolution of environmental protection and heritage protection legislation, and impact of environmental imperatives on principles of compensation for expropriation of development rights.

References:

McAuslan "*The Ideologies of Planning Law*", Passim.

Hedgecock, D. "*Planning the Outward Growth of Australian Capital Cities*" : Perth Urban Policy and Research Vol.12 No.2 1994.

6. **Significance in W.A. of C19 Origins of U.K. Planning Law and of Social Influences**

See:

McLeod – Historical-Geographical Influences on the Form, Planning and Development of Perth – note especially statistical details on population.

WA Parliamentary Debates 1928 (especially Council).

1928 Parliamentary Papers, Vol.11 - "*Report of Select Committee of the Assembly on Town Planning and Development Bill*" - 30.10.28.

7. **Significance in W.A. of the Three “Ideologies”**

Discussion

Consider e.g.

- (1) Zoning of land to avoid conflict between incompatible land uses; compare with common law tort of nuisance - restrictive covenants.
- (2) Land Administration Act 1997 - replacing the Public Works Act 1902.
- (3) Planning and Development Act 2005. Compensation for injurious affection. Subdivision: right or privilege?
- (4) Infrastructure Cost Sharing under development schemes. Land allied with ODP or Structure Plan under zoning scheme.
- (5) Part V - Appeals, Tribunal and Ministerial - absence of appeal rights for third party objectors.
- (6) Distinction between judicial review of administrative action requiring error of law, and specialised right of appeal "de novo" on the merits.
- (7) Relevance of the status/character of the decision maker: e.g. municipal council, Minister, public servant, delegate.
- (8) Process of making and amending Town Planning Schemes, Metropolitan Region Scheme, Planning Control Area Declarations - degree of public participation and extent of notice to affected persons.
- (9) Environmental Protection Act 1986.
- (10) Heritage of Western Australia Act 1990.