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BETTERMENT & WORSENMENT:

BALANCING PUBLIC

AND PRIVATE INTERESTS

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"Secure for the Commonwealth the growing and permanent source of revenue from the State earned increment in the value of land which comes silently from the mere accretion of population and from the exercise of the power of government."

-- B.R. Wise, Federal Constitutional Convention,
Adelaide 1897.

"A satisfactory and workable solution to the joint problem of compensation and betterment is of the utmost importance if any real planning and implementation are to be achieved".

-- Western Australian Honorary Royal Commission on
Town Planning & Development Act Bill, Report 8 (1951).

"Land policy must be directed to ensuring that landowners are restricted to gains from the development or use of land and are excluded from gains associated merely with the passive holding of land".

-- First report of the Honourable Mr. Rae Else-Mitchell
Commission of Enquiry into Land Tenures, Cth. 1976. 2.7(f).

"The keystone of government policy must be a recognition that land is both a basic national resource of limited or finite extent and a necessity of life for all Australians"

-- First Else-Mitchell Report 2.3

BETTERMENT & WORSENMENT:

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PART 1. THE PROBLEM STATED

A. INTRODUCTORY

Betterment is an unearned "windfall" accruing to a landowner when land prices increase due to planning schemes & public works. There is strong landowner pressure to retain betterment, and little political support for its public collection. Worsenment" (sometimes called "injurious affection" or "wipeout") is a diminution in land price due to those causes. There is broad landowner demand for protection against worsenment.

Land is in limited supply, none of it (reclamation aside) was made by humanity, yet it is essential for human activity & livelihood. Neither the natural, inherent attributes nor the locational advantages of a site are due in any way to the landowner as such. The former are provided by Creation, the latter are due to the existence & efforts of the community at large[1] As a community grows and infrastructure improves, demand and hence land price rise steadily (although there may be intermittent depressions): certain sites (especially in the central business districts) increase in value, and fringe areas become "ripe" for development.

There are thus good moral reasons for confiscating betterment, and (to a certain extent) for compensating worsenment, which do not apply in the instance of private chattel or equity investments. Indeed, failure to obey these reasons has a profound warping effect upon the economy generally and planning itself.

This essay explores the public & private interests involved in betterment & worsenment with a view to recommending a mechanism for balancing them.

B. ASSESSMENT OF LAND VALUE

Land Valuers

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[1] 1. "Land, because of its unique nature and the crucial role it plays in human settlements, cannot be treated as an ordinary asset controlled by individuals and subject to the pressures & inefficiencies of the market. Private land ownership is also a principal instrument of accumulation and concentration of wealth and therefore contributes to social injustice; if unchecked it may become a major obstacle in the planning and implementation of development schemes. Social justice, urban renewal and development, the provision of decent dwellings and healthy conditions for the people can only be achieved if land is used in the interests of society as a whole... Public control of land use is therefore indispensable to its protection as an asset and the achievement of the long-term objectives of human settlement policies and strategies.

To exercise such control effectively, public authorities require ... appropriate legislation defining the boundaries of individual rights and public interest; and suitable instruments for assessing the value of land and transferring parts or the totality of value added by changes in use or by public investment to the community, inter alia, through taxation." Recommendations of the United Nations Habitat Conference for National Action on

Human Settlements, Vancouver 1976 [endorsed by Australia].

The transfer prices attaching to sites are the highly-subjective outcome of many variables, difficult to predict or analyze. However close attention to sale of comparable sites in the free market provides reliable valuations which are, indeed, a mainstay of the mortgage & investment industries.

Throughout Australia legislation requires details (including price) for each land sale to be provided when lodging transfers & leases for registration. These details are made available to local authorities and to the Valuer-General, whose trained valuers use them to calculate the unimproved [2]capital value of each site for rating and land tax purposes. This raw, primary data evidences the free market and cannot be manipulated.

Such valuations are usually carried out over a two or three year cycle, but with modern computer aids this could easily be done annually, even quarterly: where the valuations are fresh then the discrepancy between the valuation and actual market sales rarely exceeds 5%[3] In accepting data for establishing benchmark values upon certain types of site, valuers must be careful that the data truly reflects a free market: competition is absent in certain types of transaction, such as sales between members of a family, forced sales, purchase by adjoining owners or by mortgagees in possession, and exchanges. However, despite anomalous instances and the fluctuating incidence of a buyer's or seller's market, the marketplace for real estate is fairly orderly and rational[4]

Each valuer aims at accuracy, so as to develop a sound professional reputation by the time promotion to the middle ranks is achieved, thereby avoiding successful appeals. Appeal lies to the courts with the onus upon the valuer to establish that the valuation is "fair" (not, however, "precise"). The valuation must not be manifestly excessive or inadequate.[5] Doubts are to be resolved in favour of the taxpayer, and the existence of demand for a site may be presumed[6].

Conditioning Variables

The value of each particular site is always affected by variables e.g. the population regularly passing it; its distance from the CBD or from particular services & amenities (e.g. parks, public transport, schools, police & firestations); the availability of utilities (e.g. gas, water & electricity); its aspect, slope, elevation and vista; its size & shape; whether it is a corner location; whether it is serviced by an alley or a parking lot; its natural resources and the ease of extracting them; its soil fertility & weed infestation; its subjection to traffic noise & air pollution; and the quality of its neighbourhood (in terms of education, income, standard of buildings, civic pride, percentage of home ownership and the attitude of financial institutions).

In 1% of cases special difficulties arise, perhaps because the site is excessively large, a golf course, a claypit or an industrial site with excellent access to transportation. In such cases the

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[2] 2. In some States, e.g. Tasmania and parts of Victoria, the improved value.

[3] 3. Report of the Board of Review, appointed under the Valuation of Land Act 1952; Brisbane, Queensland; Government printer 1953 Appendix C. See also "Rating of Site Values -- Report on Pilot Project at Whitstable (U.K.)" by Mark Wilks, F.R.I.C.S. published by the (English) Rating and Valuation Association, 29 Belgrave Sq., London S.W.1 Feb. 1964.

[4] 4. John M. Copes "Reckoning with the Imperfections in the Land Market", in The Assessment of Land Value (Uni. of Wisconsin Press 1970 p.55).

[5] Report (op. cit. fn. 3) p. 1.

[6] Commissioner of Succession Duties v. Executor, Trustee and Agency Co. of S.A. Ltd. (re D.Clifford) (1947) 74 CLR 358.

valuer may lack direct data for fixing where the value attributable to a site is that lump sum which, if invested in the market, would yield interest equal to the annual rental which a *bona fide* lessee would be prepared to pay for the site. It may be necessary to consider hypothetical development and possible profits[7]

Improvements

Taxation of the improved value of sites is a disincentive to investment and promotes urban blight. Thus calculation of the "bare site" value itself becomes important.

Whenever market sales or rentals are not of bare sites then the "added value" of visible improvements (e.g. buildings, fences, tracks, orchards) must be deducted. This applies, however, only to the site in question: the effect or presence of improvements upon neighbouring sites and throughout the country are very much taken into account[8].

Valuation manuals record specifications & costs for all typical buildings & structures, including their diversity of fixtures, quality of material and workmanship. Such costs (which are constantly reviewed) are themselves gathered from construction contractors, materials estimators, insurers & financiers. Similar tables are available, based upon a variety of proven data, as to the sale price of used buildings, the life of particular types of buildings and costs of repairs or maintenance. It is, therefore, possible for a valuer to deduce the "added value" that a building, or other forms of improvements, give to a site.

Certain improvements, such as the draining of swamps, the filling of recesses, the clearing of vegetation and the application of fertilizers, tend in time to merge with the land such that the original natural quality of the site is forgotten. All Australian States now distinguish between improvements on land and improvements to or of land[9].

Ramifications of Planning & Regulation for Site Value

Planning decisions range from the creation of a vast regional growth centre, the adoption of a new strategic plan or the building of a railway or freeway to piecemeal amendments, e.g. the rezoning of one site or a heritage order on a house. Planning distorts free market forces and can have a profound effect upon the price attaching to particular sites: as, for instance, when farmland is subdivided for housing, coastal bushland is cleared for a "resort" or a swamp becomes a canal estate.

Zoning, use permits & regulations affect the value of both sites & improvements by reducing the availability of land for particular uses and operation of that use. Thus planning can radically affect the value of land, e.g. by enabling a high-demand use upon it, limiting the land available for such uses, creating monopolies or imposing developments (such as freeways of aircraft approaches) which destroy value. If zoning provides an excess of land for a particular use, such as in industrial or residential, then the "scarcity" factor disappears and the base price for land in that

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[7] DFCT v. Gold Estates Ltd.; 51 CLR 509.

[8] Tetzner v. CSR Co. Ltd., (1958) AC 50.

[9] For this distinction see the dissenting judgment of Isaacs J. in McGeoch v. Commissioner of Land Tax 43 CLR 277.

use zone diminishes.[10] Genuine farmers on urban fringes can suffer because speculative purchases (not all of which will achieve the desired rezoning) create "value-creep" which drives up the price of rural land and increases rates long before rezoning is achieved.[11]

Planning has made the valuer's task more difficult, however " long as one keeps an eye on the most economic development legally possible and does not consider redevelopment other than what is permitted by the environmental plan as it stands, most of the difficulties disappear".[12] It is the "highest & best" permissible.

use, not the actual use, which is the relevant yardstick. Where a non-conforming use exists contrary to a plan then the value of its site may be enhanced by a monopoly: it is deemed a permitted use and valued at that higher level.[13] A blanket zoning rate cannot safely be applied: other factors affect site value, and sites adjacent to a zonal boundary (e.g. residences near the ugliness, shade & privacy-intrusion of apartments) may incur extra depreciation.

Whilst movements in land value are relatively easy to define, it is virtually impossible to attribute them to any specific source. Planning schemes have a broad range of general objectives: the promotion of health & safety, enhancement of social & aesthetic values and promotion of economic efficiency. Sometimes a scheme clearly & directly adds value to a site (such as when it is rezoned from rural to urban), but usually there is a background cacophony of planning regulations -- not to mention a myriad other social, environmental & economic factors -- having some degree of bearing upon the property in question. Sometimes whole cultural seachanges (e.g. the 1970's shift to a slow development, environmentally-aware community), background regulations (e.g. prohibiting alcohol or late-night shopping) or ambient factors (distant highway noise, a vista of smoking factories or a change in community tastes) have their indirect effect. Indeed, all of such factors, although man-made, are just as relatively-arbitrary to an individual landowner as an earthquake or land-slip.

C. PLANNING AND EQUITY

The free market has been quite unable to solve such major problems of land use as overcrowding, admixture of inconsistent uses, ribbon development along main roads, loss of open space, the economic networking of utilities and the sensible provision of public amenities. This has necessitated planning schemes, which tend to be quite arbitrary as between particular proprietors of sites, inflating the land price of one and depreciating that of another haphazardly. They can redistribute values inequitably in ways which are neither earned nor deserved.

Development planning is relatively arbitrary and it is equitable for the State to recoup betterment, which is due, not to the landowner as such, but to community growth, infrastructure

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[10] This might have secondary effects however, such as attracting much industry, bidding up the wages of labour and increasing the demand for residential land.

[11] Commission of Enquiry into Land Tenures -- Final report of the Honourable Mr Rae Else-Mitchell, Cth 1976. ["Else-Mitchell report"] 2.31. E.G. a Penrith (NSW) site without improvements, which had been sold by its rural owner for $20,000 per hectare in December 1970, was sold for $155,000 per hectare in March 1973, six months after it had been rezoned as residential. Else-Mitchell report 2.27.

[12] M. D. Herps "Assessments of Site Values or Ground Rents for Rating and Taxing Purposes" in August 1984 Good Government (Association for Good Government, Sydney).

[13] N.S.W. Valuation of Land Act s.6(2).

improvement and public demand.[14] Failing to recoup betterment is also bad economics since Planning decisions can create expensive demand for infrastructure & services, and have major consequences for public expenditure. Thus public decisions create public costs but private profits.

Without appropriate adjustments, our land policies will fail both of the major criteria for their assessment: economic efficiency [making the best use of scarce resources, reflecting an accurate price without speculation, fostering enterprise] and equity [reducing inequalities of wealth & opportunity, balancing private rights over land to public needs]. The advent of planning necessitates a radical reappraisal of the rights & obligations attaching to land.[15] yet planning at present is (via uncollected betterment and the threat of paying worsenment) actually legitimizing & facilitating both economic inequities and threats eroding its own rational basis.

D. THREATS TO PLANNING GOALS

Betterment

Failure to collect betterment encourages citizens to champion or oppose (as the case may be) developments for profiteering reasons against the public interest. There is pressure to develop all and any land, regardless of need & propriety, and in the face of urgent planetary need for preserving environment & sustainability. The resultant fracas exhausts and debilitates the local community.[16] Speculative pressures unsettle folk who want to enjoy their land & homes, purchased under the reasonable belief that the existing zoning was stable in the long term.

These financial spoils also foster graft.[17] (e.g. bribes or "campaign contributions" to local councillors and their advisors), although such payments are very difficult to prove, especially as compulsory public revelation of election fund contributions has never been legislated in Queensland.[18]

Throughout Australia no party preselection system operates at local government level so as to aggregate issues as presented by interest groups, preselect candidates accountable for a broad platform, co-ordinate funding and provide the lay electorate with some guarantee of bona fides. Instead the "politics of acquaintance" applies. This is viable in rural areas with small, stable communities, but is highly unreliable in a rapid-growth, unstable community, too large to allow personal contact, where constant inflow & mobility damages the record of community contribution

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[14] Else Mitchell report (op. cit. fn 11) 2.19.

[15] See the 1946 NSW Rural Reconstruction Commission 9th report on "State Participation in Increments to Unimproved Value".

[16] P.D. Day. "Town Planning & Land Values" December 1991 Good Government 11.

[17] In 1967 the (A.L. Bennett Q.C.) Commission of Enquiry into Brisbane City Council Subdivision Use and Development of Land stopped short of finding criminality, but found favouritism for big developers and actions "in excess of power and beyond the bounds of reasonableness, fairness or business morality or ... unsupported by law". In November 1991 the Criminal Justice Commission's Report on a Public Inquiry into Payments made by Land Developers to Aldermen & Candidates for Election to the Council of the City of the Gold Coast similarly stopped short of finding criminality, but found highly suspect re-election payments to Gold Coast aldermen. The late Queensland "Minister for Everything" Russ Hinze stated quite publicly that he was "offered a bribe every day".

[18] Despite the recommendation of the CJC in the 1991 report: although there are lots of other ways to hide graft -- cash in pocket, corporate veils, bogus trusts etc.

(common in coastal Queensland, especially the southeast). Electoral systems which place a premium on personal campaigning tend to have this graft problem. Such candidates cannot rely upon party endorsement and so have incentives to chase resources and build a personal following. In such areas money buys exposure & votes, leading to a vicious circle of "development" supported by "pro-development" councillors who tend to be perpetually re-elected.[19]

Without tarring planning in principle, or all developers & councils, it must be said that the situation becomes particularly abusive where professional developers manipulate planning controls so as to pocket profits generated by community effort & environmental sacrifice. So great are the windfalls to be gathered where high-intensity rezonings are made in low-intensity zones (cornered by canny "investors" well in advance!) that, manipulated by greedy developers & corrupt councillors, schemes can be fraudulently reduced to mere ploys veiling & "legitimizing" delay in "ripeness" of market forces for sites until demand is high. In this way schemes invite their own destruction.

The present system of planning, which is secretive so as to limit market manipulation, reduce pressure & minimize exploitation, can facilitate corruption, make it difficult to achieve modification, strip a developer of his reasonable expectations and excite uneconomic "Green Bans".[20] The present system allows speculative profits to be applied to otherwise-unaffordable development and hence encourages premature development: witness inner city desolation and rural-fringe wasteland.[21] High land prices can put pressure on authorities to allow unwise densities.

Worsenment

The obligation to compensate for worsenment can, paradoxically, inhibit effort by authorities to implement publicly-desirable planning policies, such as renewal of blighted urban areas, since this would increase compensation payable in respect of sites they would like to acquire. This can tempt authorities to falsely colour certain tracts of land so as to inhibit desirable uses and thus keep prices down in case resumption is desired.

The obligation to "treat like cases alike", together with the influence of precedent and pro-development bias in the Planning & Environment Court, can pressure local authorities to refuse development permission to unobjectionable sites lest a precedent be set and neighbouring sites demand similar allocation. Similarly, local authorities can feel pressured into allowing a dubious, marginal application lest an expensive appeal be lodged.

Compensation payments for worsenment are divisible into three elements: the value of (a) the site in its current use (b) development potential attaching to it and (c) its improvements. Only the last of these properly belongs to the landowner.[22] The former two amounts are simply capitalizations of previous unearned increment (although to some extent due to community growth generally rather than to betterment specifically).

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[19] See "Democracy and the Personal Vote" Steven Reed in Electoral Studies 1994 pp. 17-28.

[20] Else-Mitchell report, (op. cit. fn. 11) 2.24.

[21] Else-Mitchell report, (op. cit. fn. 11) 2.33.

[22] Although, under the present system, the landowner did pay for (a) and should not suffer expropriation of this value, injustice need not result from doing so: see infra p. 50, fn. 145.

PART 2: BETTERMENT CAPTURE

A. MECHANISMS FOR BETTERMENT CAPTURE

The State could collect betterment (as such, and in whole or in part) from proprietors by a tax upon increased land values attributable to public works & schemes, by sale of development permission, by retaining ownership of the land and the granting of titles under leasehold and by Site Revenue[23] The former two, along with sundry piecemeal variations[24] have been attempted (to various extents) in the CANZEUS[25] countries, the third was attempted in the Australian Capital Territory[26] Site Revenue has only been tried partially & piecemeal. The third and fourth mechanisms tend to collect all unearned increments, not only betterment.

Sweeping alternative proposals are for the Crown (operating via regional development corporations) to obtain all "development rights", and for the substitution of leasehold for freehold land. Land would be acquired prior to rezoning or capital expenditure on infrastructure, and development undertaken by State corporations, thus enabling value capture. However, attempts in Europe to construct model communities have all ended dismally, and no planning & management system, even where Interim Development Controls are imposed suddenly and well in advance, could forestall speculation where landowners are permitted to keep some or all of the unearned increment in land prices generally.

B. THE "USUAL DEFECTS" IN BETTERMENT CAPTURE"

The various devices historically used for betterment capture (and for calculation of worsenment compensation) have suffered from the same basic defects, although in different proportions & mixes according to the mechanism employed. Rather than restate these repeatedly (albeit with slight variations) as regards each experiment in each country, these problems will hereinafter simply be referred to as "the usual defects".

The "usual defects" are separating increases (or decreases) in value attributable to town planning from increases (or decreases) due to other factors[27] fixing pre-development values, the arbitrariness of the percentage collected, when to collect, imposing lump-sum levies at difficult economic times, and constraint upon development.

Increases (or decreases) in land price are difficult to calculate, especially as prices tend to become inflated by speculative elements in anticipation of a scheme (the problem of "floating values"). Also, increases may not be entirely due to public works occasioned by the scheme, as distinct from public works generally, or to private investment. Doubts tend to be resolved in favour of the landowner.

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[23] See Part 6: supra p. 40.

[24] See Part 5: supra p. 32.

[25] Canada, Australia, New Zealand and United States.

[26] See Frank Brennan Canberra in Crisis Dalton, Canberra 1971.

[27] "It was found to be "quite impossible to establish the amount by which one piece of land has increased in value as a direct consequence of a restriction imposed on another and not from other causes". Town and Country Planning Bill 1947: Explanatory Memorandum Cmd. 7006 para. 22 (1947).

Where betterment is paid, land prices are likely to increase and the burden passed on to end-consumers (e.g. young homemakers & struggling small businesspeople), rather than being borne from the unearned increment accruing in the hands of the developer. Passage of the tax on to tenants or homebuyers avoids its ethical incidence.

Collection could wreak hardship e.g. against the old widow whose life-long cottage now stands upon land zoned highrise-commercial, or upon the "little man" making a small one-off subdivision of a residential block. Frequently, for political reasons, categories of land (especially residences) are exempted from betterment collections: this leads to perceived unfairness & problems of definition and ignores the huge cumulative total of the exempted benefits.

A problem arises as regards when and to what extent to capture betterment. Its collection at the time a scheme is approved, when there is only a "paper profit", creates a difficulty in calculation, since the full market effects have not "bitten": it also imposes an extra burden at the time a developer needs cash-flow for the project itself. To collect it "later" will discourage sale, hold developmental land off the market and jack the price. To collect it upon development application would discourage development and drive up prices. To collect it upon death would be biassed in favour of corporate proprietors. Payment by instalments, or over a period with interest accumulating, is only a partial solution.

Almost invariably betterment proposals create a political schism and repeal of the legislation is immediately threatened by the opposition. The result is to stymie development until the government loses office and the levy is retracted. Similarly, in some jurisdictions, landowners can tend to delay selling for redevelopment until after any applicable Statute of Limitations period had passed.

Taxation & imposts, as a method of curbing speculation, have a negative effect upon planning itself (with speculation forcing up land prices and compensation obligations threatening public need) and are far from wholly effective. Local authorities may have to compensate for piecemeal apparent "losses" on particular sites when in fact there was no true loss overall, since the value has shifted to other sites where the development is permissible under the scheme (the problem of "shifting values"). Contrariwise, developers argue that planning imposes delays & artificial constraints and locks land out of highest use, at great holding costs.

Socialization of betterment is opposed by profiteering speculators (who proffer no reasons other than loss of undeserved gains) and by some libertarians who believe that individuals can have absolute private ownership in land despite not having made the land nor the demand which increases its value. Opponents also argue that some percentage should be retained by the developer to provide incentive[28] Recapture percentages become confused where there is Capital Gains Tax.

C. HISTORICAL EXPERIENCE: UNITED KINGDOM

The history of betterment capture in the UK is one of false starts, frustration and poorly-integrated, badly-drafted, piecemeal legislation stumbling ineffectually and failing to achieve equity.

The 1909 Legislation

[28] D.G. Hagman & D. J. Miscynski (Ed.) Windfalls for Wipeouts, American Society of Planning Officials, Chicago 1978 advocate payment of 50% (p.48).

In 1894 a Select Committee of the House of Lords investigated betterment issues arising from construction of the Thames Embankment and reported:

"The principle of betterment, in other words, the principle that persons whose property has clearly been increased in market value should specially contribute to the cost of the improvement, is not in itself unjust, and such persons can equitably be required to do so."[29]

During the first decade of the 20th century, London was held to ransom by landowners, who demanded such high prices for their land that industrialists had to set up elsewhere and builders could not afford sites.[30]

In 1909 legislation[31] granted local authorities the option (unfortunately not the obligation!) to allow for collection of "betterment" and compensation for "worsenment" as a result of planning changes authorized by schemes made under it. Initially, it was proposed that the entire increase in value due to the scheme be collected when the scheme was adopted, with calculation at that date, but an arbitrary 50% was adopted as a compromise, although some 1909-Act "progeny schemes" raised up to 80%.

In 1932 the percentage was increased to a permissible 75%, claimable within 12 months of the change, with payment deferable until a change of use or disposition of the property (including a transfer or lease for 3+ years), when it was payable with interest.

Donations of property to the public, or provisions of works, were acceptable set-offs. However, a 14-year statute of limitations applied: this just caused landowners to delay activity.

Difficulties in calculation made betterment hard to recover and so crippled public ability to pay compensation or plan effectively. In order to avoid paying compensation by prohibiting development outright, authorities approved it but at artificially low densities. Very little betterment was ever actually recovered - less than L3000, and only one case went to court[32] Arguably there may have been some indirect benefits such as "persuading" recalcitrant landowners, under threat of betterment, to withdraw "worsenment" claims or to sell land to the government at a reasonable price.

This law remained until 1947, but most of the schemes ignored the opportunity, especially as regards betterment: its non-recapture simply failed to excite public grievance since the impost appeared to be just another tax. By 1942 there were only 25 schemes under the 1909 Act, 16 being less than a year old.

Earlier reports by Barlow and Scott[33] had found that failure to collect betterment was a major obstacle to effective planning. The non-political, prophetic Uthwatt Committee[34] was appointed in

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Report from the Select Committee of the House of Lords on Town Improvement (Betterment), H.C. 292 (1894).

30 Fred Harrison The Power in the Land Shepheard-Walwyn, London 1983.

31 Housing, Town Planning etc. Act ss. 54, 57 & 60.

32 R. v Webster ex p. Young (1932) 51 TLR 201.

33 Report of the Royal Commission on the Distribution of the Industrial Population, Cmnd 6153 (1940); and report of the Committee on Land Utilization in Rural Areas, Cmnd. 6378 (1919).

1941 to make an objective analysis of the problem and to advise on stabilizing the value of land required for development.

The Uthwatt Report

This report rejected nationalization of land but advocated the immediate vesting in the State of all development rights outside built up areas. The land itself would be acquired (for fair compensation but based upon actual current, rather than "highest & best", use) when ripe for development, and leased to developers (who would sub-lease to consumers) at full urban rates.

The committee also believed it was impossible to separate betterment attributable to planning decisions from increments generally, so it advocated, as a separate measure, that the annual rental value of land (excluding improvements thereon), howsoever caused, would be assessed by a central authority every five years, commencing in 1943, and thereafter 75% of the increase during that period would be payable by installments during the next five years.[35] Rural land was to be excluded since no rating mechanism existed in respect of it and valuation & collection costs would exceed benefits.

This proposal was rejected due to the impracticality & inequity of segregating rural & urban land (a reality forced upon Uthwatt, not chosen), and a sense that it taxed unrealized gains: the 1947 socialist Labour government opted instead for nationalization of development rights.

The 1948 Act

All the 1909 betterment provisions were eliminated in 1948 legislation[36], which addressed the issue bluntly by enabling public acquisition (via a Central Land Board) of land at current-use value alongside imposition of a 100% development charge upon values accruing to private owners due to planning permission: this effectively nationalized all redevelopment values in land. To ameliorate loss to owners of their development values, a sum of L300m. was made available for compensation payments in cases of hardship. The intention was to socialize the unearned increment and hold down land prices generally. Although amendments left some of the increment with proprietors, development rights still belonged to the State and refusal of planning permission tended not to be compensatable.

The scheme was rendered excessively complicated with many savings & exemptions, and it fell upon "small" people. The Conservatives pledged to repeal it, with the result that transfer of land for development purposes was smothered. Legal challenges to the Board'scompulsory purchase powers (although eventually resolved in favour of the Board) crippled its provision of development land during the critical period of 1949-52.

The Conservatives, with very poor logic or business sense, dismantled the entire scheme when they came to power in 1951, but continued to permit "acquisition at existing use value" until 1959, when public outcry forced its amendment to "market value". For 15 years no mechanism (except the general Capital Gains Tax legislation) collected the unearned increment, other than marginally though income tax and minor capital gains taxes. The main effect was to drive land prices higher by reducing incentive to release it.

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[34] Expert Committee on Compensation and Betterment, Final report, Cmd. 6386 (1942).

[35] Cmnd. 6386, pars 51-52.

[36] Town & Country Planning Act 1947 s.113(2).

The 1967 Legislation

In 1967 the Labour Government, re-elected in 1964, attempted to return to 1947 principles whilst avoiding the mistakes made then. It established[37] a Land Commission which had compulsive purchase powers and applied to private developers a complex system of assessment levying 40% (intended to increase) upon development value. Again, this initiative was threatened with polarized politics and Conservative repeal (which eventuated in 1971[38]): this kept land off the market, alienated local authorities and achieved nothing.

A property and credit boom followed. Investment went into property speculation (rather than productive enterprise) with prices skyrocketing and vast unearned profits being made. These were by no means effectively taxed, and even the Conservative government was disturbed at the burden of infrastructure falling upon Local Authorities and at the developers' practice of holding completed office towers out of the market until demand was at a frenzy. In 1974 Labour was re-elected to power and enacted penal rating provisions upon hoarded buildings[39] and adopted "Development Gains Taxes", a Conservative initiative frustrated by their recent electoral loss, as an interim measure pending a more socialist one: the Community Land Scheme.

The 1974 Community Land Scheme

This scheme facilitated community control of land development and capture of increases in land value. Two tiers (district & county) of local authority were created, with overlapping powers, and these (rather than a central authority), borrowing allocated Treasury funds, were empowered (on a scale which greatly destabilized security of tenure) to buy or resume land, or demolish structures, for development. In all instances compensation was payable upon an existing-use basis only. It was planned that the authorities would (except on minor sites) have a development monopoly. They were exempt from development tax and could keep all profits on resale, thus (in theory) both exploiting and socializing the increment, thereby establishing a permanent fund.

Private developers were, for the time being, permitted to operate, and were taxed (initially at 80% but planned to be 100%, the first L10,000 being exempt) upon the realized development value (however arising) of the land, the intention being to make speculation unprofitable and to peg land prices at existing use values.

Public sector expenditure cuts from 1976 onwards crippled establishment of the planning operation, and administrative control remained excessively centralized & bogged in detail, in reality crippling local discretions despite lip service to the contrary. In an effort to pay overheads & interest, authorities were attracted to profitable "green field" development rather than inner-city renewal. Again, the Conservatives pledged to repeal the scheme: thus it could only limp until its death[40]

Development Land Tax

The Development Land Tax provisions of the Community Land Scheme were retained under the Conservatives' legislation, but at reduced rates and in a more complex form. It taxed only

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[37] By the Land Commission Act (1967).

[38] Land Commission (Dissolution) Act, 1971.

[39] Local Government Act 1974, s.16.

[40] At the hands of the Local Government Planning and Land Act, 1980.

development values (however arising, and whether from a new scheme of not), and not increments in existing use values. Both major political parties thus endorsed this concept, so at last there was little incentive to withhold ripe land from development. However, the Conservatives introduced such a broad range of concessions that the tax, whilst remaining symbolic, failed effectively to capture more than a marginal percentage of betterment. Thus, land prices were no longer pegged, causing inflation in property prices on a scale never before witnessed in British history. As a result, residential development land sold at thirty times its agricultural value and the ratio of land price to construction costs in southeast England was 30-40% for residential and 50-75% for commercial.[41]

Betterment recoupment is now effectively abandoned in the U.K.

D. UNITED STATES OF AMERICA

Existing windfall recapture devices in the United States are limited to attempts to recoup part of the governmental costs associated with new development[42] A variety of the partial devices discussed in Part 4 have some recapture effect.

E. HISTORICAL EXPERIENCE: AUSTRALIA

Betterment capture schemes[43] were adopted, at one time or another, in several Australian States[44], but were ineffectual due to the "usual defects". Only four schemes in NSW took the legislative initiative and provided for betterment recapture, but none was ever recovered[45] The same occurred in Tasmania, despite detailed legislation[46]

No specific legislation capturing betterment now exists in Australia.

New South Wales

The one Australian experiment worth mentioning was a Conservative initiative in metropolitan Sydney between 1969 and 1973[47], which collected (for infrastructural spending, but in addition to developers' contributions) a modest & arbitrary 30% of the increase in value of rural land within the Sydney metropolitan proposed for urbanization. Base assessments were made at the time

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[41] See Hall Containment of Urban England vol.2, p.394 and Hansard HC Debates Vol. 896 col. 560 (July 31, 1975).

[42] D.G. Hagman & D. J. Miscynski (Ed.) Windfalls for Wipeouts, American Society of Planning Officials, Chicago 1978, page xxxv.

[43] Based on the U.K. 1932 Town and Country Planning Act.

[44] E.G. NSW (Town and Country Planning Act 1945 (later incorporated into the Local Government Act (1919), see A. Fogg Australian Town Planning Law (1974) p. 514); Tasmania (LGA 1962, ss.738, 739), Victoria T&CPA s.196K, and WA TPDA s.11(2).

[45] Murray Wilcox The Law of Land Development in NSW (1967) 297.

[46] Local Government Act (1962) ss.738. 739: local authorities in Tasmania do not have delegated planning powers and LGA ss.738, 739 have never been used.

[47] This experiment arose from the 1967 Report of the N.S.W. Royal Commission of Inquiry into Rating, Valuation and Local Government Finance, which recommended implementation of Betterment Charges, thereby occasioning the Land Development Contribution Act [24/1970].

the legislation was announced and were compared with the value as assessed when development approval was given. Collection was made by a State Planning Authority upon transfer or development consent.

The impost was, in a seller's market such as usually prevails in a growing community (60,000 people p.a. in the Sydney region at that time), largely passed on to the purchasers (profits in excess of 50% per annum of holding were sometimes made[48]). The rate of increase in land prices grew steeply up to repeal of the legislation in December 1973. Thereafter, in a strong economy with a growing population and "baby boomers" setting up homes, and with greed entrenched & property prices at an apparent level, this rate of climb continued.[49]

The impost was criticized for all the usual reasons: difficulty in assessing pre-development values, arbitrary percentage, no collection of betterment from other land benefited, non-application to urban areas, increased land prices, passage of impost on to homeowners. The Labor opposition threatened to repeal it in the name of helping first home buyers, thereby stalling development initiatives. In the face of a State election the Conservatives were forced to repeal the legislation in December 1973, by which time it had collected $9 million[50]. Alternative funding was sought from the Commonwealth, out of income taxes, thereby further constricting enterprise, promoting inflation, distorting the economy and enabling central powers to bind local authorities under tied grants.

Else-Mitchell Report, 1973

In 1973 a Federal Commission of Enquiry into Land Tenures[51] was appointed by the Whitlam government. This recommended that all development rights be vested in the Crown, without payment of compensation, and that statutory corporations oversee the entire development process. Title would remain vested in the Crown (except for residential sites) and land would be leased to citizens. "Land made available for income-producing purposes should be disposed of in such a way as to retain for the Crown the capitalized benefits derived from location".[52]

Prime Minister Whitlam announced[53] that the Australian Government had considered the first report [29.11.73] and supported its recommendations that any future capital profits arising from a change of land use should be retained by public authorities rather than individuals. Such a policy could be promoted into the State arena via tied grants. Following distribution of 7000 copies of the First Report, various conferences and 103 further submissions, its recommendations were modified for the Final Report. The proposal was attacked as promoting excessive bureaucracy and land nationalization, and was stymied when the Whitlam government was dismissed, destroying Australian momentum towards collection of betterment.

F. CONCLUSIONS REGARDING BETTERMENT

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[48] See generally M.T. Daly Sydney Boom, Sydney Bust George Allen & Unwin, 1982.

[49] Urban Land Prices 1968-74, NSW Department of Urban and Regional Development.

[50] R. Archer "The Sydney Betterment Levy 1969-73" Urban Issues 1976, vol. 13 p. 339 at p. 340.

[51] Chaired by Mr. Justice Else-Mitchell, who had chaired the 1967 NSW Royal Commission.

[52] Else-Mitchell Report op. cit. fn.11, 2.17(c).

[53] On 6 August 1974.

Betterment collection is more than just a capital gains tax: it is a way of facilitating community control over land and the professional operation of planning having regard to priorities without artificial hindrance. So long as unearned increments in land value can be retained by the landowner, there are powerful speculative reasons to own land (which does not depreciate in value, unless it is mined or abused), even if such tenure means holding it idle.

Betterment collection methods tend to be flawed by the "usual defects". To a limited extent improvements could be made to the betterment levy approach by making it mandatory, denying public utilities favoured treatment, collecting the betterment as an absolute figure without proof that it (or any portion thereof) was directly due to a scheme, using annual rental values (or increases thereof) specially assessed for each individual site as the collectable index, enabling acquisition of properties held idle until the Statute of Limitations period runs out, making the betterment a permanent charge on the property crystallizing upon sale or change of use, and measuring the increase in value from the date the scheme was envisaged (rather than prepared & implemented).

In fact, due to flaws induced by the "usual defects" and lack of political will, no specific betterment capture devices currently exist in CANZEUS countries. "The decision climate surrounding the demise of betterment is really a reflection of the absence of a coherent land policy".[54]

PART 3: COMPENSATION FOR WORSENMENT

A. BACKGROUND

Aim & Calculation of Worsenment Compensation

The purpose of compensation for worsenment is to place the affected proprietor in a financial position (gauged by ordinary market values, taking into account actual use of the site but ignoring "sentimental" attachment) similar to that immediately preceding the scheme, acquisition or public works[55]. To diminution of the objective market value may be added special loss occasioned by disruption to the owner's domestic & business structure. However, usually no "solatium" compensating for bother & relocation expenses is payable, although on a human level such costs are very real.

"The normal method of ascertaining the amount of compensation payable for injurious affection is the "before and after" method. That method requires ascertainment of two market values. One is the "affected" market value which is the value upon the coming into effect of some provision of a planning scheme or the imposition of some restriction imposed under the scheme, while the other is the "unaffected" market value which is based upon the hypothesis that the relevant provisions had not come into operation. The measure of the injurious affection is the difference between the unaffected and the affected market value".[56]

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[54] Patricia Ryan Urban Development Law and Policy Law Book Co. 1987 at 280.

[55] "The expression "the loss occasioned by reason of injurious affection" denotes a particular kind of loss commensurate with the diminution in value caused to the retained land by the publication, to those associated with the land market, of the kind of public use to which the acquired land is to be put". Commissioner of Highways v Tynan (1982) 53 LGRA 1 at 7.

[56] Brinsden J. (Supreme Court of WA) in Kin Kin Resorts Pty Ltd v Water Authority of Western Australia [1990] WAR 48 at 60.

Inadequacies of the Worsenment Concept

Tremendous difficulties of limiting liability and calculating loss arise in trying to compensate everyone injuriously affected, directly or remotely, by the myriad ramifications of planning decisions. Immense problems are encountered defining what actions of the Crown are pertinent when assessing injurious affection of a site. At one extreme is a crude resumption, followed closely my massive adjacent public works, but the pertinence becomes stretched when the works are minor or distant. Towards the latter end of the spectrum problems of quantification become insurmountable.

The governmental activity occasioning worsenment need not be overt planning decisions or public works. It may be "mere" regulation motivated by social, health or environmental purposes. Regulatory constrictions can effectively repress land values without amounting to planning impositions or an acquisitory "taking" for which compensation is clearly recoverable.

The immediacy of causation can also become blurred where rezonings under a scheme are "text" rather than "map" -- i.e. where the alteration is to the table of uses, rather than to the zonal boundaries, or where the zonal basis for planning is replaced by the broad discretions of a permit-based system. Planning blight, where land is indirectly affected by a distant or threatened scheme, receives no compensation in any CANZEUS country. In Australia (unlike USA), where projected zoning upon a strategic plan is a powerful developer's argument, blight is less likely.

Payment of worsenment tends to be an additional burden upon the public purse at a time when cash-flow is needed for the works themselves. Sometimes, especially under severe threat of paying worsenment, schemes are obliquely hidden behind regulatory mech-anisms, e.g. "health" restrictions or zoning of land desired for future urban as 20 ha. rural lots: these do not appear to be acquisitive at all. Courts then have difficulty scrutinizing motives.

Indeed, it is often myopic to focus on worsenment at all. Whilst some planning decisions may diminish land value, even rather directly & immediately, others (although distant) may raise it. Massive public infrastructures such as airports, deep-water ports, railways, freeways, sewerage disposal systems and public utilities generally all have an impact upon the value of land, which it is impossible to gauge, even over a long period, in isolation from other factors. In any event, the true effect of planning changes do not become apparent or measurable immediately, or even for years: any "one-off" payment of compensation is bound to be imbalanced.

Thus compensation for worsenment would be impossible to operate universally, and is only feasible (and then crudely) when the direct effects of particular, comparatively major, schemes are studied. Even then is a danger that if compensation is paid due to a downzoning or a taking, and the plan is later amended or the regulation removed, the landowner will be able to "double-dip". Clearly there would have to be a mechanism for reimbursement: a further complication.

This crudeness is exacerbated since neither of the two techniques for measuring the effect of zoning impact, conventional valuation or the statistical method of multiple regression, is very accurate. The first, as explained, is relatively crude. The second is an expensive & complicated procedure, virtually impossible to apply at non-standard sites, which involves isolating & measuring the economic implications of factors which zoning allows or prevents: it suffers from multicollinearity due to overlap of influences.

Ultimately, both methods of valuation rely upon a pre-scheme "base value" which is itself community- (not privately-) created, and which indeed already is likely to be tarnished with

"expectation value". Land attracts no price without a community, and any land price is due to the surrounding community, not the landowner. The landowner did not create his land and has no moral claim to its value. To the extent that the sum payable as worsenment compensation contains elements of unearned increment, such payment is just another form of betterment. Only where worsenment actually diminishes the value of improvements (e.g. a freeway is constructed past a mansion) is there a moral right to compensation.

B. WORSENMENT AT COMMON LAW

Land prices may be lowered by planning decisions or public works such as heritage orders, the "downzoning" of "future urban" land to "agricultural", the opening of a new highway diverting traffic off an old route, the opening of a garbage dump or sewerage works, the erection of a shading skyscraper, or the construction & use of a noisy, polluting freeway. This is "worsenment". Diminution due to deflation, action by the proprietor himself, loss of view or privacy, changes in community taste etc. are disregarded[57] Calculation of loss would be based upon values at the time the affection commenced, even if influenced by inflation.

At Common Law the Crown might not resume land (unless a Statute very clearly directed that event)[58], nor could a citizen -- even in the absence of "fault" -- reduce the value of another's property, without paying compensation. However, these protections did not extend to worsenment (which is due to public activity) where there was no actual resumption[59]. An owner had no right to compensation, where he remained in possession, merely because land was rezoned[60], or because use of the land became regulated, or because schemes or public works affected its value. "The implication is that mere rights of user are not to be regarded as 'property' in the public law context, despite some protection of such kinds of rights under private law remedies in torts or contract[61]."

Thus, at Common Law, a "lottery" situation prevailed where compensation tended to be paid when there was an actual taking (resumption), but none when the affectation was merely ancillary: this was unfair and worked hardship, resulting in statutory reform.

C. UNITED KINGDOM[62]

Initial Statutory Change

The 1909 legislation [63] amended the Common Law position by allowing compensation as a general rule when adoption of a scheme[64] diminished a site's value, or when effort was wasted

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[57] But some commentators advocate compensating ("socializing") losses due to natural disasters such as landslides, earthquakes or volcanoes: see Hagman & Miscynski op. cit. p.44.

[58]

[59] Re Ellis and Ruislip Northwood UDC [1920] 1 K.B. 342; Baker v Cumberland CC (1956) LGRA 321; Bingham v Cumberland CC (1954) 20 LGR(NSW) 1.

[60] Belfast Corp. v O.D. Cars Ltd [1969] A.C. 490.

[61] Ryan Urban Development Law & Policy Law Book Co. Sydney 1987, p.280.

[62] See Michael Purdue & Ors Planning Law and Procedure Butterworths (London) 1989.

[63] Housing Town Planning Etc. Act (1909, UK, s.58(1): "Any person whose property is injuriously affected by the making of a town planning scheme shall ... be entitled to obtain compensation in respect thereof from the responsible authority".

[64] But not when some other regulation also had the same effect: Re Ellis and the Ruislip-Northwood UDC [1920] 1 K.B. 243: the only reported case on the 1909 legislation.

attempting to comply with an existing plan rendered nugatory by adoption of another. "Good neighbour" provisions aimed at preserving the mutual amenity of an area (such as maximum heights, yard sizes, building density & height, setback, design & character etc.) were specifically noncompensable[65].

1932 Town & Country Planning Act

This legislation was comprehensively reviewed in 1932[66]. Injurious affection was extended to not only "the coming into operation of any provision contained in a scheme" but also to "the execution of any work under a scheme". In addition:--

a business could recover for damage to it occasioned by injurious affection of the property it occupied;

pre-existing lawful non-conforming uses, when injuriously affected, qualified for compensation;

(c) building preservation orders could constitute injurious affection;

(d) express exclusions (of e.g. building lines, walls impeding traffic view, businesses unloading in thoroughfares) by schemes from injurious affection were not automatic: the government on review had to find the exclusion "proper, reasonable & expedient";

compensation was payable if interim permission was granted but the proposed scheme was then abandoned;

(f) if a developer complied with conditions imposed in the context of expected public

The English compensation system was abandoned in 1947, but by then its 1932 format had been adopted in most Australian states.

The 1973 Land Compensation Act

Under s.44[67], compensation is assessable upon physical impacts by certain listed works (including highways), which are deemed to be actionable nuisances, even when merely adjacent to (rather than upon a resumed part of) land of the claimant. The Act applies where there is no compulsory acquisition.

The injury may arise from noise, vibration, smell, fumes, smoke, artificial lighting, etc. occasioned to adjacent or neighbouring land during the construction or use of public works[68], but loss of

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[65] S.59(2).

[66] Town & Country Planning Act.

[67] Of the Land Compensation Act 1973, which stemmed from a United Kingdom Justice report in 1969 "Compensation for Compulsory Acquisition and remedies for Planning Restrictions", which was followed by a 1972 White Paper on "Development & Compensation: Putting People First".

[68] Defined as roads, aerodromes and works pursuant to statutory powers.

privacy, loss of view and general loss of amenity are not prescribed factors.

Where part of a land parcel is compulsorily acquired for a scheme, the owner of the remnant may be injured by the severance itself as well as injurious affection arising from use of the severed portion. A notice objecting to a threatened severance, and requiring resumption of the entirety at full value disregarding the threatened blight, may be served (even although injurious affection is payable in respect of the remnant) and the decision appealed to the Lands Tribunal.

The legislation attempts to achieve a balance between the need for public sector schemes and the alleviation of obvious hardship, however, it evolved piecemeal and is unnecessarily complicated.

D. AUSTRALIA

In 1977 the Australian Law Reform Commission [69] advocated statutory compensation replacing the common law. Compensation rights (payable to some extent by mitigation measures) would accrue to owners & tenants of land whose property or business was affected by the construction (excluding reduction of access) or use of public works as regards noise, vibration, smell, fumes, smoke, artificial lighting, the discharge onto land of any solid or liquid substance, the loss of sunlight and air, but not loss of view. It also recommended that compensation be payable (within limits) where land was blighted, or action taken was rendered futile[70] by abandonment of a proposed scheme.

New South Wales

From 1945 to 1979 compensation was payable in respect of incoming restrictions or prohibitions of a use if the applicant showed that the use was practicable and in demand before the new scheme began[71]. "Good neighbour" restrictions were specifically non-compensable[72]. Restrictions had to be express and not merely the indirect outcome of some other restriction[73]. This tended to limit recovery to rezoning which terminated an existing right unrelated to buildings, and to instances where land was reserved for public use or purposes (including open space[74], but not including conservation zoning [75].

In fact, no compensation was ever paid. Only three cases were litigated and in none of them did the claimant recover: [76] In 1963 s.342AC(2)(h) was added to further constrict compensation,

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[69] In Working Paper No. 8 Lands Acquisition Law (1977).

[70] See e.g. Christies Stone Quarries Pty Ltd v Tea Tree Gully (1979) 43 LGRA 336 [search for alternative quarry rendered futile by aborting of acquisition scheme].

[71] NSW Local Government Act (1919) s.342AC.

[72] Section 342AC(2)(c).

[73] E.G. Use of the land only for open space, parks & recreation as in Jones v Gosford S.C. (1975) 33 LGRA 368.

[74] Baker v Cumberland CC (1956) 1 LGRA 321.

[75] Van der Meyden v MMBW [1981] TPG 550.

[76] Bingham v Cumberland CC (1954) 20 LGR(NSW) 1 (claimant received offsetting betterment); Whittle v Cumberland CC (1955) LGR(NSW) 272 (claim lodged out of time); Baker v Cumberland CC (1956) 1LGR 321 (restriction immune under "Good Neighbour" exemptions).

declaring it unavailable against the effects of rezoning except for a specified public purpose[77].

These illusory "rights" have now been jettisoned[78]: NSW (and Northern Territory) planning legislation no longer provides for compensation of "injurious affection".

Of course, councils are required to compulsorily acquire land upon just terms[79]: they must have Ministerial consent and cannot be motivated by intention to resell. Compensation is payable in respect of the remainder of a parcel not acquired, and may be swollen by the use to which the acquired land is put[80].

Financial assistance may be available under the Heritage Act for grants to owners[81] for the purpose of environmental heritage conservation, or (where there is a Permanent Conservation Order) by way of rate relief, calculated upon the basis of the existing use rather than the highest possible use[82]. There is no provision for direct financial compensation.

Victoria

As in NSW, the legislation commenced (in 1944) along the broad lines of the 1932 English legislation, but extensive exceptions were added in 1954[83] making compensation only payable where an erroneous certificate issued, a permit was revoked after reliance, or an Authority forbade a lawful non-conforming use. Under the replacement legislation[84], the owner or occupier of any land may (within two years of being refused a permit for an otherwise-permissible use) claim compensation from the authority responsible for a scheme for financial loss (plus a solatium in the case of a residence) occasioned as the natural, direct & reasonable consequence of the land being reserved for a public purpose or having its access restricted by closure of a public road.

Queensland

In 1936 Queensland adopted legislation[85] based on the 1932 English model: this still remains[86] but

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[77] Which may be deduced by the Court if there is failure to specify: Chapman v The Minister [1966] 13 LGRA 1.

[78] There is no compensation provision in the Environmental Planning & Assessment Act (1979), which has not repeated the repealed s.317AC of the Local Government Act (1919), as recommended by the Australian Law Reform Commission in Working Paper No. 8 Lands Acquisition Law (1977). No general right to compensation for injurious affection remains under the Local Government Act 1993.

[79] Under the Land Acquisition (Just Terms & Compensation) Act (1991) s.187.

[80] (E.G. an airport Moad v Orange CC (1957) 2 LGRA 171.

[81] Section 106(2).

[82] Section 124.

[83] Town and Country Planning Act ss.38(2), 24(5) and 42(1)(c).

[84] Sections 98 -- 100 of the Planning and Environment Act 1987 (Vic).

[85] Local Government Act (1936) s. 33(10)-(14).

[86] But now under the Local Government (Planning & Environment) Act 1990 s.3.5.

(unlike in England) has not been extensively constrained.

Under the Queensland legislation compensation is payable "where a person has an interest in premises within a planning scheme area and the interest is injuriously affected by the coming into force of any provision contained in the planning scheme or by a prohibition or restriction imposed by or under that scheme or Town Plan". The interest must be held at the date the scheme comes into force [87]. The term "provision" includes the colouring on scheme maps: [88]. Compensation is also recoverable where expenditure has been made in reliance upon an inaccurate certificate.

The term "injurious affection" is not defined[89] and its interpretation must be elucidated from a century of caselaw. The injurious affection must be directly attributable to the provision, not incidental to something done in order to implement a provision. In general, the term covers any infringement or curtailment of legal right to land occasioned by exercise of statutory power when, in the absence of such power, the infringement would have been actionable[90].

The legislation excludes recovery where loss is attributable to a previous building or activity being unlawful[91], or where the diminution is occasioned by "good neighbour" regulations[92]. A claim must be brought within three years[93], and the Local Authority has 40 days to decide[94]: appeal lies to the Court[95], which is, arguably, inappropriate when planning, rather than legal, issues are in dispute[96]. A statutory principle is provided for assessing compensation[97], but it is viable only by practice of land valuation.

The term covers diminution in value to retained land consequent to the use to which land resumed from that same owner is put[98]. It also applies where a provision of a scheme diminishes the market value of land[99], even as a result of a restriction imposed under a scheme[100] however the land

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[87] Bury v Epping RDC and Essex CC [1941] 1 KB 212: a premature sale divests the interest.

[88] Walton Properties v BCC 14 LGRA 379.

[89] (Although s.3.5(2) deems certain instances to suffice).

[90] McCarthy v Metropolitan Board of Works (1874) LR 8 CP 191.

[91] Sections 3.5(4)(a),(e) & (f).

[92] Section 3.5(4)(c).

[93] Local Government (Planning & Environment) Act 1990 s.3.5(7)(a).

[94] Section 3.5(10).

[95] Section 3.5(13).

[96] See P.D. Day Planning and Environment: The Philosophy & Practice of Development Contributions, Australian Institute of Urban Studies, 1982, chapter 8. These concerns are echoed in New Planning and Development Legislation, Queensland Department of Housing & Local Government Discussion Paper, November 1993.

[97] Section 3.5(8).

[98] Commissioner of Highways v Tynan (1982) 53 LGRA 1; Commonwealth of Australia v Morison (1972) 127 CLR 32.

[99] Bingham v Cumberland County Council (1954) 20 LGR(NSW) 1; Cohen v Commissioner of Main Roads (1968) 15 LGRA 423.

must be directly & expressly (not remotely, theoretically or conceivably) affected [101], and evidence (by means of comparative valuations at the highest possible use[102]) must be adduced defining the diminution[103]. Consideration must be given as to whether the claimant could minimize the diminution, whether any betterment (including to nearby land, or even to other land owned by the claimant[104] also flows from the new Scheme, and whether the diminution has been exacerbated by subsequent subdivision or amalgamation.

There are no recommendations currently foreshadowed by the government for changing the current Queensland legislation as regards betterment & worsenment[105].

E. CONCLUSION

Definition of what constitutes worsenment, and calculation of its quantum, is at best a vague & hypothetical exercise which is doubly confused by balancing betterment as a set-off. The obligation to make worsenment payments can impede & warp planning in the public interest. It is anomalous that restrictions imposed by planning instruments may entitle compensation, but restrictions imposed by e.g. building & sanitary regulations do not.

Any payment of worsenment tends to include a substantial element of "unearned increment" which is traceable to past community effort, or previously uncollected betterment, and as such is ultimately unjustifiable. The only valid elements of worsenment claims are compensation in respect of diminution in value of improvements and a generous solatium when land is resumed. Neither of these elements is adequately or explicitly recognized under CANZEUS law.

4. "WINDFALL FOR WIPEOUT" SCHEMES

At present windfalls & wipeouts are largely left to fall where they will, which can be perceived as arbitrary & capricious. The "Shifting Value" theory, put forward by the Uthwatt report, is that benefits & losses attributable to planning incidence even each other out, with little aggregate change.

This theory is impossible to sustain, even roughly, since elasticity of demand and the complex influence of externalities (such as pollution & demand for labour) are constantly fluctuating. Attempts to balance betterment collection & worsenment compensation within the one system are bound to encounter ledger imbalances, but this could be rectified by variation of rates. Community collection of betterment is based on undeniable social justice, and has a logically different basis to claims for individual compensation. The two schemes are not inextricably linked.

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[100] Albert House Ltd (In Vol. Liq.) v Brisbane CC (1968) 21 LGRA 94, where land was rezoned for civic use, thus blighting its on-sale potential once its existing use changed or expired.

[101] Folkestone v Metropolitan Planning Authority (1967) 16 LGRA 286.

[102] Spencer v Commonwealth (1907) 5 CLR 418.

[103] Walton Properties Pty Ltd v Brisbane CC (1967) 14 LGRA 379.

[104] Bingham v Cumberland CC (1954) 20 LGR(NSW) 1.

[105] See New Planning and Development Legislation, Queensland Department of Housing & Local Government Discussion Paper, November 1993.

Nevertheless, it has been proposed that recapture & mitigation techniques should seek to control benefits & losses due to planning controls within a closed system, rather than regarding the phenomena discretely: a percentage of the "windfalls" is collected into a State fund which is used to compensate the "wipeouts", thus reducing inequities. Hagman & Miscynski[106] advocate the creation in each state of a "Windfalls for Wipeouts Agency", composed of dele-gates from relevant public authorities and financed by betterment capture, which would receive claims not settled by the agency responsible for the works, and measure, collect & distribute betterment & compensation payments. "Little people", e.g. owner-occupiers of residential sites, small businesses and farms would be excluded from betterment capture (but not from worsenment compensation). Appeal on quantum (or on liability when several agencies are involved) would lie to another State Board, or to the Courts on a question of law. The quality of regular property valuation would have to be very high so as to maximize fairness and recapture.

Such techniques could force planners, especially when a local authority is called upon to contribute worsenment money, to investigate the social & financial implications of plans comprehensively & holistically, thereby curbing excessive planning zeal (especially by specialist authorities with a narrow constituency), insensitivity to minorities and conformity to the vociferous.

5. PARTIAL SOLUTIONS

A: DEVELOPER'S CONTRIBUTIONS

History & Overview

During the gold & railway booms in Australia, and prior to the 1950's generally, a subdivider had to do very little to get his return. Since then the requirements of local authorities have, with escalating Court support on grounds of "reasonableness", steadily increased from the requirement that there be access to a public road and dedication of some parkland to the current requirement that subdividers dedicate a minimum 10% as open space and make internal improvements (such as quality roads, kerb & guttering, car-parking facilities, water & sewerage) which were once provided by the ratepayer.

Development conditions should be imposed (except in the case of residential land) where new use rights are granted, enabling the community to recover the unearned value increments attributable to community growth & inflation. They are particularly necessary where a development is not contiguous to existing infrastructure, or are in an area where the lag in council programs has not yet managed to extend services. "The value or the benefit accruing from the lands being thus dealt with out of turn may be measured by an increment which may be expected to be obtained for the individual lots of land on sale"[107].

To a certain extent developers' contributions gear development to market demand, free of bureaucratic planning, and can be seen as a pragmatic ad hoc solution, which evolved by practical groping without legislation or articulate philosophy. This trend was largely a product of initiative by local authorities and the attitude of the courts and lacked legislative precision or definition.

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[106] D.G. Hagman & D. J. Miscynski (Ed.) Windfalls for Wipeouts, American Society of Planning Officials, Chicago 1978, page 49.

[107] Doonside Properties Ltd v Holroyd SC (1958) 4 LGRA 337.

This has certainly been a healthy, natural growth, which inhibited premature "leap-frogging", conserved the community finances and enabled development of the world's most sophisticated & comprehensive planning practices. In both Australia and the U.K. this growth has now found legislative expression, and broader social philosophies (such as requirements for provision of low-cost housing, or application of levies towards off-site community cultural, recreational or civic facilities) have been enabled. Another good thing about development levies is that approvals are expected to be conditional upon the public consequences being met, which is a helpful (but incomplete) constraint upon graft.

Planning Gains

"Planning Gains" (also called "Development Exactions" and "Impact Taxes" in the USA) are a socialistic or idealistic attempt to extract from developers liquid funds to pay for some of the broader, less direct, "off-site" ramifications of the development -- e.g. more schools, hospitals, police, parks & libraries. Such exactions rapidly lack clear relevance & reasonableness to the proposed development taken in isolation per se, and tend to approach illegality as ultra vires. To be legal, the levy must be relevant and reasonably related to the effect of the permitted development[108]. Such levies may nevertheless be accepted by developers unwilling to raise difficulties with local authorities.

By levying "planning gains" predictably (e.g. at a flat fee per bedroom or square metre of office space), with scientific calculations relating to real costs and avoiding profiteering, an adequate nexus & pertinence may be ensured.

Defects of Developers' Contributions

Whilst the immediate demand upon the public purse of providing infrastructure is relieved, developers' contributions are ultimately an imperfect tool to restrain the undesirable market effects of land monopoly upon the individual. To some extent (geared to the pressure of demand upon supply) the price received by the raw land vendor will be constrained by the burden of contribution to be borne by the developer. However, inescapably, land is in limited supply, it can be purchased (and its redevelopment enabled) by the wealthy, and (again to varying extents) the infrastructural costs passed on to the "little people" -- the young homebuilders, the battling businesses. The result is a sharp increase in land price as the impact of contributions (and the high interest rates incurred providing them) are passed on to ultimate consumers, who are forced to pay more, and faster, whereas previously they would have contributed through many years of rates towards the servicing of an oncoming generation.

In addition to paying an inflated lump sum for the land, the ultimate consumer is obligated thenceforth to pay rates based upon that sum: thus in effect paying twice for the infrastructure.

Furthermore, developers' contributions are relatively unpredictable, arbitrary & haphazard, unscientific as between local authorities and unreported so as to enable comparison & auditing: factors which confuse legitimacy, promote inequality, cause developer timidity and foster graft. "Contributions are "negotiated" by local councils, arbitrarily & haphazardly, and never in pursuance of any clear-cut philosophy or rationale... a sort of labyrinthine chaos prevails throughout the whole vast area of urban planning & development".[109] Local authorities should be

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[108] Granville Devts v Holroyd MC (1969) 18 LGRA 34; Buderim Projects Pty Ltd v Maroochy Shire Council 1981 QPLR 60; S.6.1(c) Local Government Planning & Environment) Act (Qld.) 1990.

[109] P.D. Day on Ockham's Razor ABC Radio Science Show 22 June 1993.

required to keep a public register indexing all contributions received to developments approved.

Development contributions can work injustice as between large & small scale operators, and those pioneering an area. The planning impact of developments may transcend the local area in respect of which contributions are applied.

Equation of Developers' Contributions with Betterment

Developer's contributions cannot be specifically equated with betterment: it would be crude to assume that they render betterment capture unnecessary. Much betterment, and unearned increment generally, accrues quite independently of subdivision & rezoning applications. The amount collected is unrelated to increases in land value. Nor, in the planning context, is collection of betterment the same thing as the offsetting of community costs. Developer contributions really confuse the situation.

B. CAPITAL GAINS TAX

Capital Gains Taxes were introduced in Australia in 1985[110] but are not specifically designed to recover betterment. CGT recoups, upon profitable transfer, increases in value (adjusted for inflation) of chattels & equities as well as real estate. However such increases are only taxed, as if they were income, at the rate pertinent to the recipient's tax bracket, and do not collect more than 48% of the increase. Increases in value of the family home, or assets acquired before 20 September 1985, are disregarded.

C. WINDFALL TAXES

Windfall taxes are purpose-specific anti-speculator taxes which are levied, usually at State level, as a percentage of the change in land value after rezoning or public expenditure. The levy is imposed variously at a set date, grant of development permission, transfer, mortgage, long-term lease or death. Usually they apply to the proprietor at the time the plan is first proposed or made, sometimes they apply only to speculators (especially where land has been held only briefly -- which can trap some innocents) and sometimes residential homeowners are exempted.

The only Australian example was the 1969-73 experiment in metropolitan Sydney[111], but similar legislation has been tried in other CANZEUS countries[112].

Windfall taxes are invariably politically controversial (and hence bedevilled by a range of debilitating & opportunistic exemptions). Most have been short-lived or loosely enforced. This encourages landowners to await their repeal before selling: development consequently languishes. Artificial constraints upon time of sale and unfair imposts upon "little people" who have (perhaps by mistake) become involved in a rapid turnover, can result. There are difficulties fixing base valuations and the percentage of increase collected is arbitrary. Collection costs can be high [113] and incidence can be avoided by corporate transfers of shares rather than title.

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[110] It was first proposed during the Whitlam Government by the Taxation Review [Asprey] Committee, 1972.

[111] Land Development Contribution Act (1970-73): see supra p. 19.

[112] E.G. Land Commission Act (1967), supra p. 16.

[113] 12.5% under the Land Commission Act (1967).

Since the windfall tax is applied once only it constrains development and drives up prices by constricting the supply of appropriate land (as owners wait to maximize their profit). This exacerbates the tendency (always present in a growing community) towards a seller's market, and enables the tax to be retrogressively passed on by developers to homeowners. If the tax is payable upfront when development permission is given (and this is often a time when the property is generating no income), the developer's cash-flow is damaged: again, development is discouraged and the higher risks & interest rates incurred are passed on to the consumer.

D. RENTAL OF CROWN LAND

The retention of land in the name of the Crown and its leasing on a long-term basis to citizens, subject to frequent reappraisals of rent, is a good solution providing that the necessary political will is present. This is the solution which was envisaged (but later abandoned) for the Bathurst/Orange and Albury/Wodonga growth centres.

It was actually adopted after Federation for the projected national capital in the daring & imaginative Canberra experiment. However in 1971 Prime Minister Gorton (in order to attract votes in a by-election) pandered to large commercial interests, betrayed the founding vision[114] and terminated the regular reappraisal of ACT land values for rental purposes in favour of municipal rates, thereby enabling private capitalization of site values. This emasculation passed almost without comment: there was no longer any political grasp of the concept unearned increment[115].

However, now that so much land has been alienated as freehold this solution is denigrated as "land nationalization" and has become politically impossible.

E. AUCTIONING/SELLING DEVELOPMENT PERMISSION

This method is defective since (by designating sites or projects) it tends to be bureaucrat-, rather than market-, driven. It also favours the wealthy, increases inter-city rich-poor gaps, and tends to supplant planning quality with municipal profiteering. The system would foster spot-zoning and would do nothing to recapture betterment pocketed by owners prior to the successfully-bidding developer.

F. SPECIAL ASSESSMENTS

Special assessments are levied so "users pay" for particular public improvements. They used to be made in olde England by ordinance upon the local populace so as to fund repair of sea-walls, sewerage projects & defence works. This approach was perforce used in America when zoning had to be (constitutionally) under Eminent Domain powers, before zoning under the police power was validated.

Special assessments are limited to localized improvements benefitting specific landowners, and are likely to be fairer than paying for them out of broad-based taxes.

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[114] "Every Dollar spent by the people of Australia in the erection of that (federal) capital will create an unearned increment in the property for miles around ... The question now is, are the people of Australia prepared to spend thousands and thousands, yea, millions and then lose the benefit of their expenditure? I say the unearned increment created by the expenditure of the people's money belongs to the people ..." King O'Malley (Lab. Tas) Commonwealth Parliamentary Debates 3:2808.

[115] See Frank Brennan Canberra in Crisis Dalton, Canberra 1971.

Subject to such limitations, "Special Assessments" could be allied with "Direct Transfers", e.g. the service station granted approval in a residential suburb would pay worsenment to the neighbours, thereby defusing many planning squabbles, which consume vast energy. Worsenment suffered due to major downzoning could be compensated by a levy upon land benefiting from that downzoning[116]. Some authors[117] suggest that the approach could now be modernized to pay for e.g. mass transport systems, by issuing municipal bonds which would be purchased by those expecting to benefit, or by requiring payments by installments adjusting (but not entirely) fluctuations in property value due to planning schemes.

These concepts create problems. Most benefits are diffused throughout a community: it is difficult to measure benefit or impact fairly, and to do so by collecting some proportion of their cost, or of increased land values in some locality, raises difficulties of (inter alia) measuring the betterment, defining those liable to pay for it and fixing when the payment should be due. To proffer municipal bonds might entice major beneficiaries, but no doubt would reward numerous freeloaders.

G. LAND TAX

Taxes upon the unimproved or site value of land do exist in Australia, both as State land tax and as rates at local government level[118]. Land has zero interjurisdictional mobility and such taxes cannot be hidden or avoided and maximize utilization of sites. Unfortunately, exemptions, gradations and thresholds occasion a sense of injustice, increase collection costs, enable manipulation & avoidance and reduce the nett revenue collected. The rate of imposition is too low to enable collection of the full rental value, and there is no specific gearing to betterment.

H. TRANSFERABLE DEVELOPMENT RIGHTS ["TDRs"]

TDRs are rights, valid within planning districts, given to owners of land which is denied (or who choose to forego, or who are not entitled to) upzoning, which are saleable to owners of land which is permitted upzoning (or additional rights upon rezoning) conditional upon enough TDRs being purchased. Transfers of TDRs would be registered centrally.

This novel land management device severs development potential from the land (and supervening airspace), making it independently marketable. It thus constrains development in the face of strong pressures, mitigates inequities (by spreading betterment throughout the land-holding community), fosters retention of private urban parks & greenbelts, and enables preservation of heritage buildings, agricultural land & environmentally-fragile habitat and the amassing of piecemeal open space at optimum locations.

Difficulties, however, arise in calculating how many, and what, TDRs should be given and to whom, what taxation implications apply to the gift and the valuation thereof, how many are required to obtain development approvals and what conditions apply to their release from the transfer zone upon e.g. demolition or destruction. Further, the system only benefits landowners, and fails to reticulate development advantages to tenants and the broader community. It does nothing to collect unearned increments generally.

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[116] See e.g. the resident-initiated Minnesota Residence District Act, 1915.

[117] D.G. Hagman & D. J. Miscynski (Ed.) Windfalls for Wipeouts, American Society of Planning Officials, Chicago 1978, Chapter 12.

[118] See infra p. 41.

I. PRIVATE NUISANCE ACTIONS

Private nuisance actions, to some extent, could be used to redress worsenment. However, its utility as a remedy is limited to gross impacts, after an expensive court procedure which can only be brought by a neighbouring landowner.

J. STAMP DUTIES

Stamp duties are an impost upon documents required to transfer property. They are like many taxes in that, ultimately, they may capture small elements of betterment. However, they are not specifically geared to increases in price (they apply even if a sale is at a diminished price), and moreover are payable by the purchaser not the vendor. They do not capture windfalls.

6. SITE REVENUE

A. INTRODUCTORY

In a Site Revenue society the annual rental value of privately-occupied sites (ignoring improvements upon them) would constitute the sole source of public finance. Sites held by elements of the Crown, churches, charities etc. would not be exempt. No other imposts of any kind would be collected, including taxes (upon income, sales, goods & services, payroll etc.) and duties (e.g. stamp, death & import duties). There would be no governmental deficit financing & highly inflationary borrowings, selfishly creating burdens for generations yet unborn: governments, like individuals and corporations, would be constrained to live within their budget. Nor, as a general rule, would the public sector be involved in business: government should only do what private enterprise cannot do[119], and to the extent that government provides goods & services, user would pay.

This system[120] is sometimes called "the Single Tax", but erroneously. The revenue collected is really a payment for services (i.e. locational advantage to monopolists over sites) provided by the community: it is not a tax at all; nor is it a "rental" since the fee simple remains with the citizen. The price[121] of a site is the transfer consideration it commands in the free market, ignoring all improvements to it[122] but in the light of its natural attributes and location amidst surrounding services, community demand & development. The annual rental value of a site is the sum which would be offered, upon the free market, for the right to occupy it (disregarding visible

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[119] "Society is produced by our wants and government by our wickedness; the former promotes our happiness positively , by uniting our affections, the latter negatively, by restraining our vices. The first is a blessing, but government, even in its best state, is but a necessary evil; in its worse state, an intolerable one." -- Tom Paine Common Sense (1776), opening paragraphs. In a Site Revenue Society "Government would change its character and would become the administration of a great co-operative society. It would become merely the agency through which common property was administered for the common benefit." -- Henry George, Progress and Poverty Schalkenbach Centenary Edition, N.Y. (1979), p. 456

[120] First propounded in detail by Henry George in Progress and Poverty (1879); Social Problems (1884); The Condition of Labour and Protection or Free Trade (1886) and A Perplexed Philosopher (1892).

[121] The "price" of a site should be distinguished from its "value". The latter is a subjective term: a site might be a precious ecological wilderness or a noisy, polluted hole to one person, but a piece of God-forsaken bush or a marvelous commercial niche to another. Nevertheless, the expert study of land prices is properly described as "valuation".

[122] (Except those which are invisible, merged with the land and requiring no maintenance -- to ignore these as well establishes the "unimproved capital value").

improvements) for one year, with a perpetual option to renew that tenure. The Nett Annual Value ["NAV"] of a site is its annual rental-value inclusive of improvements. NAV forms the rating base in the UK, much of the USA and some Australian States[123], and is a severe disincentive to making improvements, thus fostering inner-city decay.

If the full annual site rental is collected, all unearned increments (including, but not limited to, betterment) to the price of the site are recouped by the community. The price paid upon transfer of any site should equate with the market value of the improvements upon it. If the price exceeds that value then it contains an element of capitalized locational advantage and the site revenue is inadequate, whilst any shortfall indicates that the site revenue fixed for that location is excessive. The price of bare sites (which, after all, were given to, not made by, humanity) should be zero to any transferee willing to pay the annual assessment: improvements alone would provide collateral security to mortgagees.

Site Revenue does exist, in a limited form, in the collection of rates based exclusively upon unimproved or site values in Queensland[124]and New South Wales[125]. Numerous Commissions of Enquiry have endorsed this system[126], however it has been adulterated by inequitable & regressive "minimum rate" imposts and (since 1971) by Commonwealth allotment of some 2% on income tax for distribution amongst local authorities (which allotment constitutes some 15% of their income and is increasingly made as "tied grants"). Federally, the Land Tax Act, enacted in 1910 but repealed by Prime Minister Menzies in 1952, was a limited Site Revenue measure, collecting 5% of the unimproved capital value[127].

B. ASSESSMENT & COLLECTION MECHANISMS

It is simple to assess the annual rental-value of sites once expert valuers continuously observe the conditions of site transfer throughout the entire broad economy. In a Site Revenue economy, legislation would require details of all prices & rentals of sites to be reported and publicly displayed (thereby preventing graft), at local government level, upon cadastral maps marking the dimensions & boundaries of every site and the position of significant variables.

The Site Revenue would be collected at local government level (which should preferably be granted constitutional recognition) and remitted to higher levels of government in negotiated

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[123] Specifically Tasmania and some regions of Victoria, where s. 320 of the Local Government Act allows Council-initiated polls of ratepayers (who are easily confused) on the issue.

[124] Since the 1890 Valuation and Rating Act.

[125]

In 1895 the Reid government placed tax on unimproved value of land in town and country. In 1905 the Local Rating Act was passed by the government of Sir Joseph Carruthers and introduced rating upon the unimproved capital value of land throughout NSW except in the City of Sydney. Largely through the efforts of A.G. Huie it was introduced into the City of Sydney by R.D. Meaher, Lord Mayor, in 1915.

[126] E.G. Report of Sir Alan Bridge Q.C. to the NSW Government (1960), Report chaired by Ald. N.L. Buchan to Brisbane City Council (1964), Report by Committee of Enquiry under Mr. Justice Hardy to the Queensland Government (1966); Royal Commission on Rating under the Hon. Mr. Justice Else-Mitchell to the NSW Government (1967); Committee of Enquiry into Local Government Revenue Raising in Brisbane, 1987-89 (under Sir Gordon Chalk).

[127] Further elements of site- (or resource-) based revenue are present in the various royalties paid to government for use of publicly-owned minerals, forestry products, etc. in levies imposed upon crude oil and in rent for leasehold of Crown land.

proportions. The process should be co-ordinated under a Commonwealth Valuer-General, with the State Valuers-General as deputies. Valuers would distinguish how much the price or rental a site commands is due to the improvements upon it and how much to the locational value of the site itself. They would declare the annual site value applying to each site, but in doing so would be performing as scrutineers & analysers (rather than manipulators & dictators) of free market forces.

Ultimately, each valuation of a site's annual rental value must be justifiable as compared to similar sites locally & nationally. Local data must be continuously cross-checked against information from brokers, auctions, the press, advertisements, landdeveloper's brochures and advice from banks & finance agencies. An assessor, studying the flux of prices for sales & leases across an area and amassing, digesting & swapping data concerning them, will be able to establish approximate "benchmark" values for particular types & sizes of sites in particular zonings. This "benchmark" must then, with caution, be "fine tuned" in the light of conditioning variables and each site's relevant improvements. If the correct site revenue is being collected, sites should be transferred for the value of improvements alone. After a few years of high-quality valuation, as publicly displayed, annual rental-values in areas would be well known & established such that any alteration of them would be clearly & evidently traceable to the direct influence of fresh, known variables.

The annual assessment would be payable by the proprietor of each site just as rates are at present. The debt would constitute a charge against the title and could be amortised for payment after death.

C. BROAD ECONOMIC EFFECTS

The argument is conclusive that Site Revenue is a simple yet sovereign remedy for most of the economic ills of our time, including excessively-big government, rich-poor gap, unemployment, inflation, currency fluctuations, unjust enrichment, high interest rates and planning distortions.

Human life and civilization cannot exist without the use of land. Communism has failed all over the globe and it will not be tried again: it is clear that legally-assured, community-endorsed private monopoly[128] over specific sites (whether the use be agricultural, residential, commercial, industrial, etc.) is equally fundamental to human welfare.

Sites exist upon land, upon certain locations in the sea (e.g. moorings, oyster leases) and in the air (highrise buildings, flight paths, transmission wavelengths). They were given by Creation, not made by humanity (land reclamation partially aside), and there is no moral or rational basis for assertion of private ownership over them as if they were chattels created by labour. [129] Sites are a limited community resource essential for survival & civilization and economic sanity is impossible unless the community, having granted private monopoly over them, collects the full site revenue in return"[130]. Site Revenue constitutes the only logical & ethical source of public finance[131].

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[128] Sundry other minor, but equally unsupportable, monopolies exist in our society, e.g. egg & milk board quotas, pharmacy and newsagency density controls, constricted availability of taxi plates: in all instances an unearned increment accrues to the advantage artificially extended).

[129] "What would be the result in Heaven itself, if the people who should first get to Heaven were to parcel it out in big tracts amongst themselves?" Henry George "Justive the Object: Taxation the Means" [An address, San Franscisco, 7.2.1890].

[130] It is quite true that land monopoly is not the only monopoly that exists, but it is by far the greatest of monopolies -- it is a perpetual monopoly, and it is the mother of all other forms of monopoly." (Winston S. Churchill The Peoples' Rights Jonathon Cape Ed., London, 1970 at p.117). "The unearned increment in land is reaped by the land monopolist in exact proportion, no, not to the

Throughout the CANZEUS countries, indeed since Tudor times,[132] holding charges on

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service done but to the disservice done." (Speech by Churchill at Edinburgh, 17 July 1909 as reported in his Liberalism and the Social Problem.

[131] "The earth, being the birthright of all mankind, its rental is the property of the people. Thus the site rent is the debt owed to the community by every landed proprietor, the duty of the State being to collect that debt as its revenue, to utilize it for the purposes of the community and not to tax." Tom Paine, Commonsense.

[132] Prior to the reign of Henry VIII there was a veritable Golden Age for English labour. There was no extreme poverty, prosperity was everywhere and an 8-hour day was worked. Yet by 1541 there was so much misery and vagrancy that a series of Acts to aid the destitute had to be passed. By the end of the reign of Charles II the revenue collected to relieve paupers exceeded one-third of the peacetime budget. This deplorable change in the social condition of the English people was brought about by that profligate wastrel Henry VIII, who confiscated the land of the Catholic church when he broke with Rome and dissolved the monasteries. [The fortune which Henry VIII appropriated in this way was squandered in such wanton waste and boundless extravagance of lifestyle that he died in penury.]

These lands, one-third of the kingdom, had previously been available for the peoples' use, for grazing & planting, albeit under a moderate labour fee (and their subjection to mismanagement by an increasingly-corrupt clergy). Now they were confiscated and sold to the social-climbing merchant class who "regarded the land as a commodity to be dealt with like any other, for the profit to be gained, and not merely as a source of sustenance" (H.D. Traill Social England Vol. 3. p. 115). The rent for agricultural land, which had been six pence per acre annually for 300 years prior to 1550, rose to an average 45 shillings in 1879. The era of rack-renting, of the rich battening upon the poor, had arrived. See generally James Edwin Thorold Rogers The Economic Interpretation of History (1888).

Adam Smith, dependent for his leisure to write upon employment as a tutor by a landowning Duke, was unwilling to undermine land monopoly, seeing it as the mainstay of a capitalist system with which he was ideologically sympathetic. He wished to maintain the position of the wealthy landlords and asserted, with a lack of his usual care & acuteness, that free market competition would provide plenty for all. In fact, this insulated the landlords from having to compete and crippled a free-enterprise economy from the outset. The working class only had their labour left to bargain with, and that led to two centuries of strife. See generally Fred Harrison The Power in the Land, Shepheard-Walwyn Ltd, London 1983.

Marx took a wrong turning when he failed to draw proper conclusions (in Das Kapital Part 8) from his own insights into the impact of dispossession from sites upon labourers and the accretionary powers of Landowners. In the resultant communist bloc this confusion led to its own unresolved disasters. In the capitalist bloc these evils have been temporarily ameliorated for a nearly a century by the palliatives of Keynesian inflationary deficit financing and -- arising from the great Depression -- socialist welfarism: now the inevitable outcome is upon us as persistent inflation renders debt-addicted national economies hostage to the financiers behind the bond markets, and they collapse into large-scale unemployment (see generally F.A. Hayek A Tiger by the Tail: the Keynesian Legacy of Inflation Hobart Paperback, Tonbridge Printers, Kent, 1972.

All these were fatal mistakes. Due to the vested interests spawned since the 15th century and the confusion engendered by Smith, Marx & Keynes, the debate has been one of the deaf, ignoring the central issue of land monopoly for two centuries. The glimmers of insight held by Lloyd George's ruling Liberal Party during the first decade of this century were not sufficiently focussed and were swamped by a world war, a depression and Hitler's war, followed by a Cold War, all in rapid

land have been relatively mild and proprietors can hold tracts out of use pending sale at a price increased by the resultant artificial scarcity. This facilitates a vicious circle maximizing imbalance in land ownership and a rich-poor gap[133].

Site Revenue provides a severe disincentive to owning more land than one has to. Since the annual rental value collected reflects the "highest & best use" to which the market could put that site (rather than its "actual" use), Site Revenue forces optimum development & usage of, and ends speculation in, sites, assists liquidity and enhances efficient resource allocation. Unjust enrichment from "exploiting the ecosphere", "locational advantage" and "capital gains" become impossible, since the rental-value is collected and land-price is destroyed.

The expectation of pocketing the unearned increment in land prices is bad economically, since it diverts investment from productive enterprise, fosters inflation[134], encourages the holding of land off the market, and (despite popular illusion) does little to create employment or enable "trickle down" of wealth. Artificial escalation in land price diminishes the ability of site purchasers to spend on consumer goods, thereby adversely impacting across the economy, depressing activity & employment, spreading dissatisfaction & a "get rich quick" attitude, and sparking unrest over wages and political extremism.

Since Site Revenue destroys most forms of speculation, so the only feasible investment for capital would be in productive enterprise. The ever-increasing efficiency of society would threaten a continual albeit slight depreciation in the worth of money so that those with savings would be only too glad to preserve its value and to lend it without interest. Since money is properly only a medium of exchange, not a good in itself which a citizen can responsibly hold out of circulation, economic health demands that it be circulated via expenditure or loan[135].

Site Revenue meets all the criteria of a good tax[136]: it is visible & intelligible, has a high revenue potential, is economic & effective to collect, and does nothing to distort the market. Sites are essential & immovable and their supply is fixed, so collection of Site Revenue cannot warp either demand or supply (as it does with non-natural goods or services). "Tax capital and you drive it

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succession. Control of the land, governments and the global economy is now firmly in the hands of financier cartels.

[133] 50% of Australians own less than 8% of the wealth, and 1% owns 22% of the wealth: P. Raskall Journal of Political Economy No. 2, 1978. In South America 17% of landowners control 90% of the land: Susan George How the Other Half Dies, Penguin 1978.

[134] Increased land prices are inflationary in the broad economy because they increase money-supply with no commensurate increase in the goods & services that money can chase. This in turn stimulates over-capacity & over-production (often of shoddy goods, with repercussions of environmental abuse) as the comparative income of producers diminishes and they strive to ride the inflationary wave and compensate for these losses. The end-result is a rash of bankruptcies, widespread unemployment (which constitutes stagflation when accompanied by inflation), downward pressure on wages, industrial strife, destruction of initiative, a collapse in confidence and reduced land & interest rates until the bust builds to boom and the aberrant cycle repeats itself.

[135] Perhaps unnecessarily, in The Natural Economic Order (Berlin, 1929), Sylvio Gesell even proposes that a "stamp duty" be payable, on dates set without warning by a committee of the Judiciary, upon all banknotes in circulation or held by banks upon a particular day: this would pressure continual spending, investment or lending in preference to hoarding of currency.

[136] See e.g. Geoffrey Brennan and James Buchanan The Power to Tax: Analytical Foundations of a Fiscal Constitution Cambridge University Press, Cambridge 1989.

away; tax land and you drive it into use"[137].

Logically the Site Revenue fund would be more than adequate to pay for a modern government[138]. Since (a) human civilization depends upon its citizens having secure private title to land, so (b) the monopoly thus granted will possess a certain value fixed by, and reflecting, the nature of that civilization therefore (c), the annual collection of that value will suffice to fund public infrastructure for the civilization.

Since a healthy civilization is unlikely to enter retrograde decline, one would expect the site revenue fund to at least equal the sum of all present taxation (which is at the expense of site revenue), plus all unearned increments privately appropriated, plus all interest payments.

Instead of doing the simple, intelligent thing, governments worldwide (caught & distorted in the grip of vested interests) impose a welter of complex, counter-productive and inefficient taxes, upon earnings, economic activity, and even employment. At least they have, for the time being, ceased to tax windows and date palms[139].

Reduction of site-price to zero, and the release of impediments upon initiative, enterprise & productivity, would mean that everyone willing to work with hand or brain would have easy access to a site, even if only for subsistence farming or as a base for part-time work. Workers, without mortgages and with ready access to their own sites, would be in a natural, strong position against capital, which would no longer (thanks to its command of sites) be able to force wages down to subsistence level. Small business would be freed from a plethora of taxes & red tape.

With the high cost of land and the burden of tariffs removed, farmers would have more capital available for environmentally safe farming. Conservation zonings & environmental protection laws would apply to prevent destructive exploitation of sites, and polluters of the atmosphere would pay (via e.g. a fuel tax) for its cleansing by vegetation. With land easily available to every farmer, so absentee owners (especially giant corporations) would find it hard & expensive to obtain labourers & managers. Agricultural land would tend to be owned by those who actually farmed it. Downturns in world commodity markets would lower the demand for, and hence the annual rental value of, rural land affected. Farmers would no longer be able to hand on a property of certain capital worth (beyond that of its improvements) to their children, but, on the other hand, those children would not need to buy land when they struck out on their own.

Homebuilders would have easy access to sites, without being mortgaged for life, and there would be a boom in the building industry. Payment of Site Revenue could not be wholly passed on to tenants because (a) destruction of land "price" would make it much easier for folk to buy their own site and (b) landlords would be so keen to keep rental sites occupied that there would be strong competition for tenants.

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[137] Mason Gaffney "Land Planning and the Property Tax" Journal of the American Institute of Planners, May 1969 p. 178.

[138] Fred Harrison The Power in the Land Shepheard-Walwyn, London (1983) pp. 200-207 estimates that there would be an embarrassment of riches for government. Indeed, before the influence of liberal economists this was the major fear of critics (see Steven B. Cord Henry George: Dreamer or Realist? Uni. of Pennsylvania Press, 1965 p. 67. The excess can always be returned to the people equally as a dividend, as with the proceeds of the silver mines in ancient Athens.

[139] "A tax on date trees, imposed by Mohammed Ali, caused the Egyptian fellahs to cut their trees; but a tax of twice the amount imposed on the land produced no such result." Henry George Progress and Poverty Schalkenbach Foundation, New York 1958 page 409.

D. SPECIFIC PLANNING EFFECTS

Site Revenue would eliminate self-interested, secret & corrupt planning pressures, benefit government finances and reduce premature development.

Allowing speculators to retain a sizeable proportion of unearned increment (including elements of betterment) encourages their purchase of land suitable for various kinds of development and their holding same out of the market until prices escalate. This is a legalized fraud upon the community, whose needs and public works have driven up demand for sites.

By forcing the release of unused or underutilized sites and their optimum development, and by removing imposts on labour, undeveloped & degenerated sites would be improved, increasing the base value of total sites. It is illogical to fear over-stimulation of growth since major capital expenditure is unlikely without solid market research: moreover, it is the present system of speculation which forces excessive development. Developmental pressure would be reduced upon marginal land and urban sprawl & ribbon development would be constrained by the natural synergistic economies of spatial agglomeration, which foster efficient & shared infra-structures, broad choice, specialization, competition, social contact & communication.

Thus, a Site Revenue society would develop organically from a healthy economic basis, lessening the need for planning but not rendering it redundant since a major & responsible supervisory role would remain so as to preserve heritage pieces, protect public assets (e.g. CBD theatre areas) from commercial pressures, safeguard open space & environmental reserves, and constrain urban sprawl. There is a need to combine the freedom of entrepreneurial vigour with the broad responsibility of planning control.

There is no problem for site revenue with downzoning: the purchaser of undeveloped land zoned residential should pay nil (but incur site revenue liabilities). There is unlikely to be unfair or unpredictable loss if land is downzoned to agricultural or environment protection: true developmental potential (return on rents etc.) is cut, but so is the site revenue payable.

The only exception would be where worsenment actually diminishes the value of improvements to land, and in such an instance compensation should be paid.

E. POLITICAL REALITIES

Site Revenue is a completely viable solution[140] for economic & planning ills. It is neither "communist" nor "capitalist", but it has never been wholly implemented, and in fact has been deliberately repressed from public debate[141] by vested interests for over a century. Partial collection of the unearned increment was a salient theme during the formative years of ALP

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[140] All salient arguments against the Site Revenue analysis have been painstakingly dismissed by e.g. Steven B. Cord in Henry George: Dreamer or Realist (University of Pennsylvania Press 1965) and Robert V. Andelson (ed.) Critics of Henry George (Associated University Presses 1979).

[141] For instance, all advocates of the proposal, however qualified, were refused an invitation to the "National Tax Summit" called by Prime Minister Hawke in 1985, despite the reform satisfying all except the last ("popular support") of the nine "principles" supposed to qualify an invitee: no increase in overall tax burden, reduction in income tax, tax avoidance & evasion lessened, simplicity, fairness, no disadvantage to welfare dependants, no agitation of wage movements, promotional of investment, growth & employment.

politics in the 1890's[142], indeed its total collection was ALP policy in South Australia until 1905, but worker-wavering over the viability of free trade and political pandering to the middle class saw the introduction of "thresholds" and its gradual demise until in 1964 the concept was removed "by subterfuge" without debate from the ALP policy reprint.[143]

Sadly, established and vested interests "dwell upon the heights" across the globe and everywhere beat back reason & decency so as to buttress the parasitic, profiteering privilege of the powerful. Site monopolies are everywhere granted without community collection of site revenue[144]. The result is to capitalize community-generated locational advantages as "land price" and "profit" in the pockets of the "proprietors". This beats the masses into landlessness (or lifelong enslavement to mortgagees) and strips them of employment. Lulled by the "bread & circuses" of welfare & television, the masses, poorly-educated & preoccupied with survival, stumble along stunned by the enormity of the "problem".

All the most powerful sectors of society are against Site Revenue. Politicians dislike it because it decentralizes power and promotes natural peace, harmony & equality, thus ending the divisions upon which they feed: yet political manipulation of monetarism will never address the fundamentals of economic malaise. The rich and financiers, who control the media and manipulate politicians, dislike it because it ends two of the three bases for their wealth (the third is enabled by legislative interference with "morality") -- to wit pocketing the unearned increments from land monopoly (including resource exploitation) and the ability to command interest rates (which is a spin-off thereof). Trade Unionists are against Site Revenue because an independent workforce and an even distribution of capital would destroy their empire. The Middle Classes, struggling to maintain a decent living, are scared to endorse the concept because it appears to

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[142] See passim Verity Burgmann In our Time, Allen & Unwin 1985 and Airlie Worral The New Crusade: Origins, Activities and Influence of the Australian Single Tax Leagues 1889-1895 M.A. Thesis, Melbourne, 1978.

[143] See Clyde Cameron June & July 1984 Progress.

[144] Besides the partial implementation of Site Revenue in Australia as traversed, the only other attempts have been in Denmark, Singapore and Taiwan.

After lobbying for three years, in 1956 the Danish Justice Party secured a promise (largely unfulfilled) of taxes on increments in site values for its participation in a coalition government. Land speculation ceased immediately and all investment went into productivity. By 1960 a big deficit on the national balance of payments was turned into a surplus and the large foreign debt was reduced to one-quarter. Interest rates and rents diminished and there was nearly full employment. Inflation halted and there was industrial peace. Then, at the 1960 general election huge propaganda-expenditure by rich landlords and a change in the voting system halved support for the party, which lost its balance of power and the advances collapsed.

Resulting from the influence of Dr. Sun Yat Sen, taxes on increments in site values were, after 1950, in large part collected as the centrepiece of a strategy for economic recovery in Taiwan. As a result, rural incomes increasingly equalized and land came into the hands of efficient farmers rather than absentee landlords. Capital, previously bound up in land speculation, was freed for industrial investment. But the rates of rental-value collected became inadequate enabling capitalization of increments. Both deliberate speculation and widespread unearned profiteering from locational advantage returned, especially on the urban fringe: (Fred Harrison The Power in the Land Shepheard-Walwyn, London 1983, pp. 226-229).

threaten that "capitalized land price" which forms the backbone of their apparent assets[145]. The voluntarily unemployed hate the concept because it will force them to think, work and take responsibility for their own lives. These elements will combine in unsubstantiated assertion to shallowly dismiss Site Revenue as "crackpot Utopianism".

7. CONCLUSION

National & urban land policies must be based upon the only pertinent & meaningful criteria: economic efficiency, the preservation of environmental quality and social equity. These policies should enable provision of residential accommodation at an affordable cost, use rather than hoarding of land, the removal of graft and artificial frustration from the planning process, the provision of adequate employment opportunities and the achievement of a balance with the environment. Such policies, to be viable, must involve collection of all betterment (and unearned increments generally), and the restriction of compensation for worsenment to instances where the value of improvements has been diminished by public works and Planning Schemes.[146].

At present the mindset regarding land tenure and public finance, throughout the CANZEUS countries (and even worse in the rest of the world), is fundamentally flawed but institutionally preserved. Despite an impeccable foundation in theory, various motley attempts to recoup elements of betterment have been piecemeal and inconclusive[147]. Various partial solutions have been tried or even steadily adopted: betterment levies, capital gains taxes, land taxes, development fees and contributions, public acquisition at pre-development values, Crown leasehold subject to rent appraisal. All of these are fatally flawed with inevitable defects & deficiencies.

However, so entrenched are the vested interests feeding off unearned increments, interest rates and broadscale division in society that the one simple, sovereign, viable remedy -- site revenue -- has been studiously avoided.

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[145] (Even though realistically a homeowner would be no worse off selling one holding for the value of improvements alone, sans land price element, if s/he were then able to buy again elsewhere upon the same basis).

[146] "Land use decisions ... must be neutral in their effects ... so that those who are affected by public land use decisions do not enjoy windfall gains or suffer windfall losses". Else-Mitchell Report 2.17(e).

[147] "Indeed, both in the U.K. and in Australia there has been no evolutionary pattern but simply a series of on-again off-again experiments" -- P.D. Day, Planning and Development: The Philosophy and Practice of Development Contributions Australian Institute of Urban Studies, Canberra 1982, p. 17. "Compromise has no place in the initiation of ideas; it enters later when history has performed its function of erosion" -- G. Geiger The Philosophy of Henry George MacMillan N.Y. (1933) p. 474.

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