BETWEEN RIGHTS IN THE CITY AND THE RIGHT TO THE CITY: HERITAGE, CHARACTER AND PUBLIC PARTICIPATION IN URBAN PLANNING

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Between Rights in the City and the Right to the City: Heritage, Character and Public Participation in Urban Planning

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***Abstract*.** In this chapter I examine the way in which current participatory frameworks shape planning practice, and particularly the possibilities for engagement by the public in shaping the future of their cities. Focusing on Sydney, NSW, I argue that the legal framework encourages a focus on private interests to the exclusion of broader social, environmental and economic issues. In doing so, however, the law treats these discussions of private rights as if they are representative of public interests, and heritage and character can be crucial in this process. The ideal of heritage as protecting common goods is thus subverted, reinforcing a competitive approach that is largely incompatible with the attainment of many human rights. I then argue that the right to the city offers a useful counterpoint. A particularly fluid right, the right to the city presents both a framework through which to reflect on current planning law and practice, and a point from which to expand debates on heritage and public participation more generally.

Keywords: legal geography, NIMBY, property, public interest, public participation

Close to central Sydney, Australia's largest city, in an area well-served by public transport, education, employment and other facilities, a fairly large furniture shop closed down. The

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building was sold, and an application made to the local council to redevelop the site for housing. 21 single bedroom units were to be provided, aimed at 'young professionals'.

On many counts, the proposal presented an ideal use of the site. Housing in Australia, particularly in inner city areas, is a major concern. Sydney housing is regularly ranked among the most expensive in the world, and the rate of homelessness increased by 20 per cent between the 2006 and 2011 censuses. In the area where the proposal was located, it is not unusual for queues of 50 people to attend rental viewings, ready with deposits and signed applications to try to beat the fierce competition. While not planned as affordable housing,[1] the small size of the proposed units would have put them at the cheaper end of the local market. The proposal retained most of the existing buildings, demolishing only two warehouses at the rear of the property to make way for a new apartment building. The orientation allowed good solar access for almost all of the units, reducing energy demands and increasing liveability. The location of the site (on a major road, opposite one of Sydney's largest parks, with a side street on one side and commercial premises on the other) meant that the number of neighbours was fairly small.

Despite these advantages, the proposal generated considerable concern. In an effort to block its approval, local residents held meetings and worked to recruit more supporters—putting up flyers, drafting and distributing objection letters and directly approaching surrounding neighbours to encourage them to express their opposition to council. 35 objections were lodged during the exhibition period (a significant figure given that the side street contains only 37 houses). Neighbours also raised their concerns informally to councillors and council staff, and formally at council meetings.

Drawing on professionals within the group, the campaign was well-tailored to the relevant planning rules and policies. Heritage became a key issue and a key strategy with which to argue against change. Rather than concerns regarding the number and type of people who might move into the relatively small, cheap units should the development go ahead, which could potentially be dismissed as both exclusionary and outside the remit of

[1] Affordable housing is defined in the Environmental Planning and Assessment Act 1979 (NSW) as housing for very low income households, low income households or moderate income households (s 4). These are generally defined as households earning less than 40 per cent of the median income.

the planning process, a focus on heritage conservation allowed the group to frame their advocacy around more public concerns.

The neighbours were successful in many respects. Consideration of the application was delayed by three months and, following a suggestion from council staff, the proposal was modified significantly during that time. The decision on whether to grant planning consent was made at a full council meeting, rather than by council staff or the planning committee under delegation (as would be typical for a comparable, but less-contentious development application). The Lord Mayor and two other councillors attended the site for an inspection prior to the full council meeting. The proposal was eventually approved, although its modified form was quite different from that originally put to council, and its contribution to addressing Sydney's housing problems much less: the number of dwellings was reduced from 21 to 14. Significantly, the number of one bedroom units was reduced to nine; the remainder would be larger, more expensive two and three bedroom units.

There is nothing remarkable about this example. The proposal was not unusual, the opposition was not extensive, it was not based on uncommon concerns nor supported by uncommon arguments, the delay was relatively short, and the approval was not refused. There are many, many other sites across Sydney from which similar examples could be drawn. It is precisely the ordinariness of the proposal and its progress through the planning system that is at the centre of this chapter.

As part of a broader interest in the way that the planning system structures public participation in the development of cities, this chapter examines how the law can turn planning—an inherently public and collective endeavour—into a process that emphasises private rights. This tension between public and private with respect to access to, and use of, rights language is not novel. Scholarship around the implementation of economic and social rights, for instance, has argued persuasively that those rights can be co-opted by specific segments of society, often to the prejudice of the wider community.[2] While this tension is important and resonates in the body of human rights law more generally, engagement with

[2] Dan Brinks and Varun Gauri, 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights' (2014) 12(2) *Perspectives on Politics* 375–93.

these tensions across the broader spectrum of human rights law and practice is beyond the scope of this chapter.

Focusing on the particular laws of a particular place (New South Wales (NSW) in general, and Sydney more specifically), this chapter presents a narrative about the local that has global implications. Widely recognised as a global city,[3] Sydney's connection to other world centres provides a ready argument for its relevance as a case study. As Doreen Massey has consistently argued, however, *all* places are connected and continually (re)constructed in a relational way.[4] In its focus on Sydney, this chapter thus recognises that Sydney is the product of relationships with cities, regions and nations well beyond it, and itself is an agent in the invention, coordination and production of those places. In its critique of and call for a rethinking of the role of heritage in local planning practices, my aim is to challenge the relationships of inequality that work against the attainment of human rights in Sydney and around the world.

The chapter argues that the law regulating planning in NSW encourages people to focus on private interests and, particularly, private property rights to the exclusion of broader social, environmental and economic issues in the planning process. In doing so, however, the law treats these discussions of private rights as if they are representative of public interests, for example by encouraging participants in the planning process to frame their advocacy around concerns such as heritage and character. Heritage can thus be appropriated by private interests as a means to lend legitimacy to what may be quite narrow, private concerns, often to the detriment of more communal interests. The ideal of heritage as protecting common goods for the benefit of society is subverted, and can be seen as reinforcing a competitive view of rights that is also largely incompatible with the attainment of many human rights. Heritage has long been contested, appropriated and used strategically to further a diverse range of interests. Who controls the meanings and uses of

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[3] Saskia Sassen, 'On Concentration and Centrality in the Global City' in Paul L Knox and Peter J Taylor (eds), *World Cities in a World-system* (Cambridge, Cambridge University Press 1995). The local council, the City of Sydney, actively promotes Sydney as a global city. City of Sydney, *Our Global City* www.cityofsydney.nsw.gov.au/learn/research-and-statistics/the-city-at-a-glance/our-global-city.

[4] Doreen B Massey, *For Space* (New York, SAGE, 2005); Doreen Massey, 'Geographies of Responsibility' (2004) 86 Geografiska Annaler. Series B, Human Geography 5.

heritage has been explored elsewhere,[5] and is considered further by other contributors to this volume. While these questions inform the discussion of this chapter, my focus is on the role of heritage in public participation processes as part of planning at the local level.

A key focus of the chapter is the need to reflect critically on the way in which current participatory frameworks shape planning practice, and in turn limit the possibility for other forms of engagement by the public in shaping the future of their cities. Without advocating a rejection of participatory rights or of property rights, the chapter moves from critique to suggest that Henri Lefebvre's concept of the right to the city offers a useful counterpoint to current practice. A particularly fluid right, the right to the city presents both a framework through which to reflect on current planning law and practice, and a point from which to expand debates on heritage and the practice of public participation more generally.

I. Participation and Human Rights

Planning laws across Australia, like most common law jurisdictions, make express provision for public participation in urban planning and development. The literature on public participation is extensive, and direct engagement with local communities is widely established as central to good planning.[6] Legislative provisions for participation by the public are frequently described as furthering democratic and human rights objectives,[7] and their passage traced to the civil rights and environmental movements of the 1960s and 1970s.[8]

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[5] See generally Laurajane Smith, *Uses of Heritage* (Abingdon, Routledge, 2006).

[6] Sherry R Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 *Journal of the American Institute of Planners* 216; Patsy Healey, *Collaborative Planning: Shaping Places in Fragmented Societies* (London, Macmillan, 1997); John Forester, *The Deliberative Practitioner: Encouraging Participatory Planning Processes* (Cambridge MA, MIT Press, 1999); Judith Eleanor Innes, *Planning with Complexity: An Introduction to Collaborative Rationality for Public Policy* (Abingdon, Routledge, 2010); Susan E Owens, *Land and Limits: Interpreting Sustainability in the Planning Process* 2nd edn (Abingdon, Routledge, 2011).

[7] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998 has been cited extremely widely, particularly its objective that 'In order to contribute to the protection of the right of every person of present and future

In Sydney, the rhetoric associated with the introduction of the legislation governing planning across the state of NSW, the *Environmental Planning and Assessment Act 1979* ('EPA Act'), suggested a transformative approach to public involvement in planning.[9] The provisions for public participation in the EPA Act have been lauded for their democratic and sustainability credentials[10] and, more recently, for their connection to human rights.[11]

Although the link between public participation and human rights is made by environmental groups, the relationship is by no means straightforward.[12] The rhetoric surrounding public participation largely focuses on democratic and public interest goals, but public participation is arguably intended to serve multiple—and conflicting—purposes. The provision for public participation in the EPA Act is typically traced to the influence of the celebrated green ban movement of the early 1970s.[13] However, such provisions may be traced also to the lobbying efforts of the real estate industry, which saw the lack of

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generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with this Convention.' (Art 1).

[8] Patrick McAuslan, *The Ideologies of Planning Law* 1st edn (Oxford, Pergamon Press, 1980); Peter Shapely, 'Planning, Housing and Participation in Britain, 1968–1976' (2011) 26 *Planning Perspectives* 75; Marcus B Lane, 'Public Participation in Planning: An Intellectual History' (2005) 36 *Australian Geographer* 283; Pauline M McGuirk, 'Power and Influence in Urban Planning: Community and Property Interests' Participation in Dublin's Planning System' (1995) 28 *Irish Geography* 64.

[9] New South Wales, *Debates,* House of Assembly, 17 April 1979, 4280 (Patrick Rogan); New South Wales, *Debates,* House of Assembly, 20 November 1979, 3260 (Keith O'Connell); New South Wales, *Debates*, Legislative Council, 3354 (David Landa), 3378 (Kathleen Anderson); Zada Lipman and Rob Stokes, 'The Technocrat Is Back: Environmental Land-Use Planning Reform in New South Wales' (2008) 25 *Environmental and Planning Law Journal* 305; Brendan Gleeson and Nicholas Low, '"Unfinished Business": Neoliberal Planning Reform in Australia' (2000) 18 *Urban Policy and Research* 7. Michael George, 'Towards a New Planning System: a Review of Proposals' in Leichardt Planning Forum and the Civic Design Society of UNSW, *The Inner Suburbs – Towards a New Planning System*, Papers from a conference at Balmain Town Hall, 5 April 1975.

[10] Tweed Business and Residents Focus Group Inc v Northern Region Joint Regional Planning Panel [2012] NSWLEC 166, 10–12 (Bignold J).

[11] Australian Network of Environmental Defenders Offices, 'Submission to the National Human Rights Consultation' 14.

[12] The ICCPR contains a right to participate in public affairs (Art 25), which the Human Rights Committee General Comments explain 'lies at the core of democratic government based on the consent of the people'. The right does not require direct participation, and the comments focus on the election of representatives. CCPR/C/21/Rev.1/Add.7 27 August 1996.

[13] The term 'green ban' was coined by Jack Mundey to describe the movement led by the NSW Builders' Labourers' Federation in which workers joined with community groups to delay the construction of controversial developments. With no legislative requirement for public participation then in place, green bans were used to force governments and developers to consider community concerns, with the aim of fostering more socially and environmentally sustainable development. Meredith Burgmann, *Green Bans, Red Union: Environmental Activism and the New South Wales Builders Labourers' Federation* (Sydney, UNSW Press, 1998); Richard J Roddewig, *Green Bans: The Birth of Australian Environmental Politics: A Study in Public Opinion and Participation* (Sydney, Hale & Iremonger, 1978).

opportunities for public participation as slowing the pace of development (a move counter-productive in the industry's eyes).[14] More recent planning reforms and reform proposals have used the language of democracy, sustainability and human rights, yet the push by the development industry for simpler and shorter approval processes has clearly been a major driver of modifications to the EPA Act (and a key source of criticism).[15]

The relationship between participation and human rights in the implementation of the EPA Act is thus complex. There are certainly instances where the practice of public participation in the operation of the Act has contributed to the attainment of human rights. For example, the 2013 decision by the NSW Court of Appeal to uphold the Land and Environment Court's refusal of approval for the extension of a coal mine following objections from nearby residents furthered the right to health of the local community.[16] That refusal meant that the community was spared the negative health impacts of the noise, dust and other pollution that would have resulted from the expansion of the mine.[17]

However, participation in planning has also been linked to failures to protect other human rights, particularly the right to housing.[18] While the right to housing provides that

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[14] Amelia Thorpe, 'Participation in Planning: Lessons from the Green Bans' (2013) 30 *Environmental and Planning Law Journal* 93; Zula Nittim, 'The Coalition of Resident Action Groups' in Jill Roe (ed), *Twentieth Century Sydney: Studies in Urban & Social History* (Sydney, Hale & Ironmonger in association with with the Sydney History Group, 1980).

[15] Better Planning Network Media Release, 16 April 2013.

[16] *Bulga Milbrodale Progress Association Inc v Warkworth Mining Limited & Ors* [2014] NSWCA 105. While there are no fundamental rights in the Australian Constitution, the right to health is protected in a number of international conventions to which Australia is a party. For example, Art 12 of the International Covenant on Economic, Social and Cultural Rights recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health...' and commits State Parties to take steps 'to achieve the full realization of this right'. Further recognition of the right to housing can also be found in international instruments including the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

[17] The impact of that decision has been limited, however, following legislative changes and a subsequent finding in 2015 by the NSW Planning Assessment Commission that the expansion was capable of being approved.

[18] Like the right to health, the right to housing is protected in a number of international conventions to which Australia is a party. For example, Art 25 of the Universal Declaration of Human Rights provides, 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including … housing'. Similarly, Art 11 of the International Covenant on Economic, Social and Cultural Rights recognises 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing' and commits state parties to 'take appropriate steps to ensure the realization of this right'. Further recognition of the right to housing can also be found in international instruments including the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities. Housing has been recognised as a priority in each of the three National

everyone has the right to housing that is adequate for their health and well-being, problems of supply and affordability mean that such housing is increasingly inaccessible. This is a problem not only in central Sydney, but across Australia.[19] Housing supply and affordability pose particular problems for people who are already marginalised, such as people with disabilities, ethnic minorities and Aboriginal Australians. As a result, failures to ensure that people can indeed access adequate housing are often coupled with other rights failures.

In the example discussed in the introduction, the end result was an increase in housing supply: approval was granted for 14 new dwellings. However, it was a third less than the number of dwellings that could have been built had the original proposal been approved, and the proportion of relatively-cheap one bedroom dwellings was reduced by half. The reasons for the change are difficult to discern, and it is certainly possible that council was influenced by factors other than local community opposition. However, some influence does seem likely, and would be consistent with the growing literature linking housing supply problems to public participation.

Given the advantages of the site and the amenity of the proposed dwellings, this loss is disappointing in view of the increasingly pressing need to increase the availability and affordability of housing in cities such as Sydney. On its own, this loss is fairly minor. When considered in conjunction with the many similar examples that may be found across the city, however, its significance for efforts to realise the right to housing increases. Neighbour opposition is regularly identified as a significant barrier to the provision of new housing, particularly infill housing in established areas—areas that tend to be accessible to jobs, transport, education and other services.[20] Such opposition is a particular constraint on the

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Action Plans on Human Rights prepared by the Australian government (1996, 2004, 2012, available at: www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx).

[19] Nicole Gurran and Peter Phibbs, 'Housing Supply and Urban Planning Reform: The Recent Australian Experience, 2003–2012' (2013) 13 *International Journal of Housing Policy* 381.

[20] Glen Searle, Griffith University and Urban Research Program, *Sydney's Urban Consolidation Experience Power, Politics and Community* (Brisbane, Urban Research Program, Griffith University, 2007) www.griffith.edu.au/centre/urp/urp_publications/research_papers/URP_RP12_Searle_UrbConsolSyd_final.pdf ; National Housing Supply Council, *2nd State of Supply Report* (Australian Government, 2010) ch 6; Jane-Frances Kelly, B Weidmann and M Walsh, *The Housing We'd Choose* (Melbourne, Grattan Institute, 2011) 32 http://grattan.edu.au/static/files/assets/e62ba29d/090_cities_report_housing_market.pdf; Mandy Press, *Community Engagement and Community Housing: Lessons and Practical Strategies for Local Government for Responding to Contested Community Housing Proposals* (City of Port Philip, 2009); Gethin Davison and others, *Understanding and Addressing Community Opposition to Affordable Housing Development* (Melbourne,

supply of public and affordable housing[21] and housing for people with disabilities and other special needs,[22] and thus raises particular concerns regarding the human rights of those groups.[23] It is a problem not just in Australia, but also internationally. In a Canadian context, the Ontario Human Rights Commission found that

the public controversy that is attached to affordable housing continues to be one of the biggest barriers to developing it. A key part of achieving inclusive neighbourhoods where all residents feel welcome to live, work and play is taking steps to overcome community opposition to affordable housing.[24]

Opposition to affordable housing is often based on fears of crime and reductions in property values. While frequently supported by media reports, evidence of such impacts is far from conclusive. There is little research on such impacts in Australia,[25] and one recent post-occupancy evaluation (undertaken two years after controversial affordable housing developments had been built) found neighbours had noticed little or no change in crime or

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AHURI, 2013) Final Report 211; Nicole Cook and others, 'Resident Third Party Objections and Appeals against Planning Applications: Implications for Higher Density and Social Housing' (Melbourne, AHURI, 2012) Final Report 197; Anthony Downs, 'Local Regulations and Housing Affordability' in Eran Ben-Joseph and Terry S Szold (eds), *Regulating Place: Standards and the Shaping of Urban America* (Abingdon, Routledge, 2005).

[21] Rowland Atkinson and others, *Public Housing in Australia Stigma, Home and Opportunity* (Housing and Community Research Unit, School of Sociology and Social Work, University of Tasmania 2008) www.utas.edu.au/sociology/HACRU/Discussion_Paper_No_1_2008.pdf; Keith Jacobs and Australian Housing and Urban Research Institute (eds), *What Future for Public Housing? A Critical Analysis* (Melbourne, AHURI, 2010).

[22] MJ Dear, *Not on Our Street: Community Attitudes to Mental Health Care* (London, Pion, 1982); MJ Dear, *Landscapes of Despair: From Deinstitutionalization to Homelessness* (Cambridge, Polity Press, 1987); Alun E Joseph and RA Kearns, 'Unhealthy Acts: Interpreting Narratives of Community Mental Health Care in Waikato, New Zealand' (1999) 7 *Health and Social Care in the Community* 1; Brendan Gleeson, *Geographies of Disability* (Abingdon, Routledge, 1999); Lisa Bostock and others, 'Contested Housing Landscapes? Social Inclusion, Deinstitutionalisation and Housing Policy in Australia' (2004) 39 *Australian Journal of Social Issues* (Australian Council of Social Service) http://search.ebscohost.com/login.aspx?direct=true&profile=ehost&scope=site&authtype=crawler&jrnl=01576321&AN=13081703&h=2Jwy40Zau6XmKhBAYx9O0PxCw1LRcbCjH8SoQ1guuD%2FOQ41UoLh%2BNa9OcM5%2B5KjcTAKIGuXvLyWZXnjVlWt8qw%3D%3D&crl=c; Kristian Ruming, 'Social Mix Discourse and Local Resistance to Social Housing: The Case of the *Nation Building Economic Stimulus Plan*, Australia' [2013] *Urban Policy and Research* 1.

[23] The particular housing rights of these groups are protected in treaties such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities.

[24] www.ohrc.on.ca/en/zone-housing-human-rights-and-municipal-planning#sthash.s8bvyaiN.dpuf.

[25] Craig Johnston, 'Localism and Affordable Housing' (Shelter NSW, 2012) 49 12 www.shelternsw.org.au/publications/doc_view/175-localism-and-affordable-housing.

social impacts.[26] In the US, where more research has been undertaken, studies have repeatedly challenged assumptions about negative impacts from affordable housing developments. A number of articles, including review articles synthesising numerous other studies, have concluded that there is no general negative correlation between affordable housing and reductions in neighbouring house prices.[27] In some cases, affordable housing may in fact have positive effects on property values and local amenity.[28] Despite this, neighbour opposition remains a significant barrier to affordable housing and to ensuring that everyone does indeed have access to housing that is adequate for their well-being.

II. Discourses of Objection

A significant factor explaining this tension between public participation as furthering human rights promotion, and public participation as hindering rights protection, is the way in which the law frames public participation in planning. Of course, planning law cannot assume all of the blame. In addition to the varied and, at times, conflicting objectives that provisions for participation are intended to serve, there is an inherent and widely-recognised potential for conflict between various human rights, particularly social, economic and other second and third generation rights which involve competing claims for access to scarce resources.[29] If, for example, the right to housing requires the construction of new dwellings and the right to

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[26] Davison and others, above n 20, 3.

[27] Both found the evidence inconclusive, revealing that affordable housing could have both positive and negative impacts on property values, depending on a wide range of factors. Sherry Ahrentzen, 'How does Affordable Housing Affect Surrounding Property Values?' Housing Research Synthesis Project Research Brief 1, Stardust Center for Affordable Homes and the Family (Phoenix AZ, Arizona State University, 2008). Mai Thi Nguyen, 'Does Affordable Housing Detrimentally Affect Property Values? A Review of the Literature' (2005) 20(1) *Journal of Planning Literature* 15–26.

[28] Corianne Payton Scally and Richard Koenig, 'Beyond NIMBY and Poverty Deconcentration: Reframing the Outcomes of Affordable Rental Housing Development' (2012) 22 *Housing Policy Debate* 435; Ingrid Gould Ellen and others, 'Does Federally Subsidized Rental Housing Depress Neighborhood Property Values?' (2007) 26 *Journal of Policy Analysis and Management* 257.

[29] David Beetham, 'What Future for Economic and Social Rights?' (1995) *XLIII Political Studies* 41.

health requires the construction of new hospitals, then their realisation will depend much less on the planning system than on government resources and budget priorities.

Among more critical human rights scholars, further tensions have been identified: that rights are indeterminate, incoherent and unstable, that rights cannot be separated from politics, that rights can simultaneously shield subjects from certain abuses and become tactics in their disempowerment.[30] Such tensions are clear when it comes to rights in housing. The meaning of the right to 'adequate' housing is clearly open to interpretation: what weight should be given to questions about the size of the dwelling, its condition or proximity to employment and other services in determining whether housing is adequate? To factors such as security of tenure and affordability? To the balance between the needs of existing residents, such as the group of neighbours discussed above, and those who might move in at some future point? To the personal circumstances of those in need of a home—does the UK's controversial 'bedroom tax',[31] for example, infringe the right to housing for those tenants involved?

Indeed, a central critique of human rights is the claim that they emerge from a liberal framework in which access to rights and to property are intimately connected.[32] There is thus a fundamental tension between the protection of established property interests and progress toward greater social and economic justice, the latter by its nature entailing some form of redistributive politics.[33]

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[30] Mark Tushnet, 'Essay on Rights' (1983) 62 *Texas Law Review* 1363; Martti Koskenniemi, 'The Effect of Rights on Political Culture' in Philip Alston (ed), *The European Union and Human Rights* (Oxford, Oxford University Press 1999); Wendy Brown, '"The Most We Can Hope For...": Human Rights and the Politics of Fatalism' (2004) 103 *The South Atlantic Quarterly* 451; Ben Golder, 'Human Rights Contra Critique: Preliminary Notes on the Politics of Interpretation' (2011) 17 *Australian Journal of Human Rights* 185; Frederic Megret, 'Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: the European and the American Experiences* (The Hague, TMC Asser Press, 2012).

[31] Introduced in the Welfare Reform Act 2012, this is an 'under-occupancy penalty' which reduces the amount of benefit paid to claimants if they are deemed to have too much living space in the property they are renting.

[32] Karl Marx, 'On the Jewish Question' in Robert Tucker (ed), *The Marx-Engels Reader* (New York, Norton & Company, 1978); Jennifer Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30 *Representations* 162; Anna Grear, 'Human Rights, Property and the Search for "Worlds Other"' (2012) 3 *Journal of Human Rights and the Environment* 173.

[33] AJ Van der Walt, *Property in the Margins* (Oxford, Hart Publishing, 2009) 13. See also Kevin Gray and Susan Gray, 'Private Property and Public Propriety' in Jan McLean (ed), *Property and the Constitution* (Oxford, Hart Publishing, 1999).

Such tensions are complicated further by the fact that property is itself indeterminate and unstable, a site of oppositional accounts and rival framings.[34] Despite pervasive narratives about property as fixed, certain and permanent, scholars such as Carol Rose and Nicholas Blomley have argued persuasively that property is in fact a continuing process.[35] Talking and doing are crucial: activities such as building fences, drawing maps and consulting certain stakeholders about planning proposals play a central role in the enactment of property. Such narratives and performances are significant in constituting what they narrate, rendering certain understandings of property and the rights of those who possess it persuasive, and in doing so making other possibilities more marginal. Justice is thus not merely a question of redistributing land and housing from wealthy owners to poor non-owners, but of rethinking ownership more broadly. When long-term tenants argue against the replacement of low-income rental housing with high end apartments, or squatters argue against the redevelopment of the long-abandoned buildings in which they have made their homes, it is not unusual to find some form of property rights raised among their claims.[36] Arguments over housing developments are thus much more than disputes between owners and non-owners. With ownership rights invoked on both sides, such disputes bring into question the sources and scope of the rights and responsibilities that constitute property itself.

A. Planning for Objection

Planning law does little to reduce these tensions; instead, it exacerbates them. The law governing planning in NSW, as in other jurisdictions across Australia and internationally,

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[34] Margaret Davies, *Property: Meanings, Histories and Theories* (Abingdon, Routledge-Cavendish, 2007); Joseph William Singer, *Entitlement: The Paradoxes of Property* (New Haven CT, Yale University Press, 2000); Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder CO, Westview Press 1994); Nicholas Blomley, 'Performing Property: Making the World' (2013) XXVI *Canadian Journal of Law and Jurisprudence* 23; Nicholas K Blomley, *Unsettling the City: Urban Land and the Politics of Property* (Abingdon, Routledge, 2004); Gray and Gray, ibid; Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abingdon, Routledge, 2014); Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford, Oxford University Press, 2003).

[35] Blomley, ibid; Rose, ibid.

[36] Anders Corr, *No Trespassing!: Squatting, Rent Strikes, and Land Struggles Worldwide* 1st ed (Boston MA, South End Press, 1999); Blomley, above n 34.

provides for public participation primarily through public exhibition at the development application stage. Typically, the landowner prepares a fairly detailed proposal for development (defined broadly to include changes in land use as well as physical development), which the consent authority (most often the local council for housing developments) places on public exhibition for at least 30 days before determining whether to grant consent for the development.[37] Any person may make a submission to council during the exhibition period, and the council must consider any such submissions (along with a host of other factors) in making its determination.[38] Under the EPA Act, public exhibition is required only for applications likely to have significant environmental impacts,[39] but most councils have policies supplementing this by requiring exhibition more broadly, including by notifying adjoining landowners and others whose interests are likely to be affected by the proposed development.[40] The EPA Act also provides opportunities for challenges to planning approvals in court, including merits appeals for those who object to development proposals likely to have significant impacts. [41]

In practice, those who participate in the planning process tend to have substantial financial interests at stake.[42] Understanding what is proposed and the impacts that might flow from it require considerable time and expertise, as does the preparation of a submission and, particularly, a legal challenge if approval is granted. Those who are motivated to expend the resources necessary for participation thus tend to be those who see the proposal as a threat to their private interests: neighbouring residents in the case of housing developments, competing businesses in the case of commercial developments. Occasionally, community groups with broader interests—such as environmental conservation or heritage protection—do participate in the planning process, and this has

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[37] EPA Act, ss 78A, 79(1)(a).
[38] EPA Act, ss 79(5), 79C(1)(d).
[39] EPA Act, ss 79, 77A. This is known as 'designated development', which is defined EPA Reg 2000, sch 3, pt 1.
[40] In the City of Sydney, the Notification of Planning and Development Applications Development Control Plan 2005 sets out notification and exhibition requirements for a broad range of development proposals. Available at:
www.cityofsydney.nsw.gov.au/__data/assets/pdf_file/0006/119535/DRAFT_NotificationofPlngDevApps_DCP05.pdf. Interestingly, even-well resourced non-owners such as mortgagees tend to be excluded from notification policies.
[41] EPA Act, ss 98, 123.
[42] Elizabeth Jean Taylor, 'Do House Values Influence Resistance to Development?—A Spatial Analysis of Planning Objection and Appeals in Melbourne' (2013) 31 *Urban Policy and Research* 5.

resulted in both significant improvements to particular developments, as well as the law governing planning more generally.[43] The costs of doing so are high, however, particularly if coupled with the kind of lobbying, awareness-raising and alliance-building activities that are likely to influence council approval decisions.

By focusing on those who might object to development proposals in the notification and exhibition process, the planning framework in NSW constructs public participation as an overwhelmingly negative process. The lack of attention given to alerting members of the public more broadly, much less to encouraging or supporting their participation, is evident in the issues that dominate participation processes. The complex relationships within and between cities and regions—and, particularly, the significance of decisions on planning and development for issues such as inequality, sustainability and human rights within those relationships—receive almost no attention. Rather than citizens or communities seeking to engage in making the trade-offs necessary as communities, economies and ecologies evolve over time, participants in the planning process tend instead to act as individuals focused narrowly on the protection of their private interests.[44]

This conservative focus is compounded by the fact that objections are sought late in the planning process, when changes are difficult and expensive to make. Rather than engaging the public at the conceptual or policy stage, when ideas and suggestions could much more readily be incorporated into planning proposals, calling for comments at the end of the process encourages an adversarial mode of participation. Thus, despite judicial and other rhetoric on the democratic value of participation, submissions are commonly referred to as 'objections', their authors as 'objectors'.

These problems concerning participation have generated an extensive literature critiquing and attempting to find 'solutions' to adversarial engagement by the public, which is frequently derided as NIMBY (Not In My Backyard) opposition.[45] It should be noted that

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[43] For example, Drake-Brockman v the Minister for Planning & Anor [2007] NSWLEC 490; Walker v the Minister for Planning & Ors [2007] NSWLEC 741.

[44] Alan Fogg, 'Public Participation in Australia' (1981) 52 *Town Planning Review* 259, 265.

[45] Dear, *Not on Our Street*, above n 22; Dear, *Landscapes of Despair*, aboven 22; BJ Gleeson and PA Memon, 'The NIMBY Syndrome and Community Care Facilities: A Research Agenda for Planning' (1994) 9 *Planning Practice and Research* 105; Geraint Ellis, 'Discourses of Objection: Towards an Understanding of Third-Party Rights in Planning' (2004) 36 *Environment and Planning A* 1549; Patrick Devine-Wright, 'Rethinking NIMBYism: The Role of Place Attachment and Place Identity in Explaining Place-Protective Action' (2009) 19 *Journal of*

the literature is not uncontentious, with a number of scholars highlighting the complexities and significant differences in the motivations for and ways in which members of the public engage to argue against the pejorative use of the term NIMBY to dismiss unwanted objections.[46] Despite these debates, a significant strand of the literature continues to place the blame on the particular individuals involved as somehow at fault for participating in such an unconstructive way. In line with scholars who have highlighted the contribution of structural and institutional factors to this form of participation,[47] I argue that planning law itself works to encourage such an approach.

The interests that are most clearly prioritised through the formal participation process are those relating to property, and particularly the property interests of neighbouring owner-occupiers. There are several cases in which the courts suggest that objections will primarily (perhaps exclusively) be made by adjoining property owners, and that their aim will be to protect their interests related to that property.[48] For example, in *Glowpace Pty Ltd v South Sydney City Council*, Pearlman CJ in the Land and Environment Court of NSW suggested that notification of property owners was particularly important:

> One of the important features of the EP&A Act is the opportunity for public participation in the planning and development process, and the denial of that participation to an adjoining owner is a particular consequence which in my opinion is not outweighed by the more general public need for the proposed development.[49]

Community & Applied Social Psychology 426; Ian Woodcock and others, 'Speculation and Resistance: Constraints on Compact City Policy Implementation in Melbourne' (2011) 29 *Urban Policy and Research* 343; William A Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (Cambridge MA, Harvard University Press, 2005); Phil Hubbard, 'NIMBY by Another Name? A Reply to Wolsink' (2006) 31 *Transactions of the Institute of British Geographers* 92; Geoffrey DeVerteuil, 'Where Has NIMBY Gone in Urban Social Geography?' (2013) 14 *Social & Cultural Geography* 599.

[46] Robert W Lake, 'Planners' Alchemy Transforming NIMBY to YIMBY: Rethinking NIMBY' (1993) 59 *Journal of the American Planning Association* 87; Mark Wexler, 'A Sociological Framing of the NIMBY (Not-in-My-Backyard) Syndrome' (1996) 26 *International Review of Modern Sociology* 91; Maarten Wolsink, 'Invalid Theory Impedes Our Understanding: A Critique on the Persistence of the Language of NIMBY' (2006) 31 *Transactions of the Institute of British Geographers* 85.

[47] Woodcock and others, above n 45.

[48] It should be noted that this is certainly not always the case, there have been a number of significant cases where objectors have raised issues such as ecologically sustainable development and climate change.

[49] [2000] NSWLEC 20, 27 (Pearlman CJ)(emphasis added). See also Parkes v Rastogi *and Newcastle City Council* in declaring the building approval void and ordering the restraint of further works, Pearlman CJ said that the council's argument that it was not under any obligation to notify owners of land which did not have a common boundary with the development site was flawed. Her Honour also went on to say that it is not too onerous for a council to notify, not only owners whose buildings are conterminous with the subject land, but those whose buildings are near to the subject land and who may be detrimentally affected. The obligation to notify involved a subjective decision on the part of the council as to whose land might be detrimentally affected.

In *Litevale Pty Ltd v Lismore City Council*, the NSW Court of Appeal considered the notice given for a draft local plan and a development application. Both were held to be potentially misleading and thus invalid, on the basis that the 'giving of incomplete or inaccurate information gives rise to the impression that their rights or interests will or may not be affected, so it is unnecessary for them to … inspect the relevant information.'[50] In line with Pearlman CJ's emphasis on the particular importance of participation by adjoining owners in *Glowpace*, the implication in *Litevale* is that participation is a matter of protecting rights and interests, not of contributing to the development of a plan or vision for the future.

Among the group of neighbours who opposed the housing proposal in the example outlined at the start of this chapter were people who in many ways could be described as socially progressive: people who are concerned about issues like homelessness and the crisis in housing affordability, people who volunteer for a range of community organisations. In their engagement with the planning process, however, they focused only on identifying potential (and possibly far-fetched) impacts on their own private interests to which they should object, and not the way in which the proposal related to the broader issues with which they were otherwise engaged.

Planning law also channels participation into certain language, which can compound the difficulties in balancing the social, economic and environmental issues at stake in decisions on planning and development. Although the provisions relating to public participation in the EPA Act encourage consideration of private interests, the provisions guiding councils in determining whether to grant consent for development focus on the public interest.[51] Matters of solely private interest—such as financial hardship for individuals—are expressly beyond the scope of such determinations.[52] Objections are thus likely to be strongest if they raise matters of public interest, rather than merely private concerns.

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[50] *Litevale Pty Ltd v Lismore City Council* (1997) 96 LGERA 91, 102 (Rolfe AJA). See also *Morrison Design Partnership Pty Ltd v North Sydney Council*: on question of objector being joined as a party re boarding house, the chief judge made numerous references to the importance of 'affected persons' being able to put forward issues that concern them (Preston CJ).

[51] EPA Act, s 79C.

[52] Kane v Sydney City Council (1955); Blacktown City Council v Irani (2003, LEC).

B. Heritage Objections

In this context, heritage plays an important role. Heritage claims can provide strong grounds on which to block a contentious development, particularly if the relevant site is listed on the Commonwealth or State heritage register, which requires that the development must meet the additional assessment requirements of state or federal heritage legislation.[53] Even on more minor sites involving heritage of only local significance, which are governed by the EPA Act, heritage can still provide a powerful tool for objectors. In the example outlined above, the proposal was located within a heritage conservation area identified in the council's Local Environmental Plan. There were no heritage items on the site itself and the buildings were noted as neutral elements, having been constructed after the Victorian period for which the area had been listed, and having since been significantly modified on a number of occasions. Despite these factors, the neighbours focused heavily on the need to conserve the blank walls fronting the side street—walls that had been bricked up as recently as the 1990s and which were part of buildings that had been constructed over the Victorian street pattern for which the area was listed—and considerable time was spent discussing that issue when the proposal was heard by the council Planning and Development Committee.

The neighbours' emphasis on the heritage value of these rather insignificant buildings reflects the importance of discursive strategies in the planning process. Concerns about the kinds of people who might move into new housing developments and their impacts on amenity, safety and property values carry little weight in the planning system. Confirming widely-shared understandings of the way in which planning operates in practice,[54] recent empirical research on public participation in planning found that objectors are frequently concerned about the characteristics and behaviours of affordable housing residents, but are often not inclined to raise such concerns in formal objections.[55] This is in line with the tendency noted by scholars for members of the public to engage in

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[53] Heritage Act 1977 (NSW); Environmental Protection and Biodiversity Conservation Act 1999 (Cth).

[54] In my own experience working for a housing agency in the early 2000s, heritage and character were consistently raised as objections to our proposals for affordable housing. Such objections were almost always understood to be arguments made primarily against our tenants.

[55] Davison and others, above n 20, 142.

manipulative, exclusionary and even explicitly racist ways in an effort to control the types of people living near them.[56]

Heritage offers a far more palatable strategy with which to campaign against change. Analysis of a range of groups involved in resisting infill housing construction north of Sydney revealed heritage advocacy as an approach taken by more sophisticated campaigners to assert their interests in planning disputes. More experienced groups—'groups that had established credibility and developed a detailed understanding of the planning, development and lobbying processes'—positioned themselves as 'protectors of the collective good', and their objections as in the interests of Sydney as a whole.[57] Heritage was a key strategy by which these groups asserted and protected their interests.[58] As in the example above, even minor heritage items can prove powerful as tools with which to frame arguments in the public interest.

When a development proposal does not involve a heritage item, 'character' can play a similar role.[59] The use of character to oppose development has been documented in cities across Australia and internationally.[60] In their study of objections to proposals for affordable housing in Australia, Gethin Davison et al found 62 per cent of submissions regarding a proposal in Sydney and 55 per cent of submissions regarding a proposal in Melbourne raised

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[56] Heather Campbell and Robert Marshall, 'Public Involvement and Planning: Looking beyond the One to the Many' (2000) 5 *International Planning Studies* 321; Jean Hillier, 'Puppets of Populism?' (2003) 8 *International Planning Studies* 157; Heather Campbell, 'The Darker Side of Local Communities: Is This the *Real World* of Planning?' (2005) 6 *Planning Theory & Practice* 517; Vivien Lowndes, 'Citizenship and Urban Politics' in Jonathan S Davies and David L Imbroscio (eds), *Theories of Urban Politics* 2nd edn (New York, Sage, 2009).

[57] Kristian Ruming, Donna Houston and Marco Amati, 'Multiple Suburban Publics: Rethinking Community Opposition to Consolidation in Sydney' (2012) 50 *Geographical Research* 421, 427–28.

[58] Again, such tactics are not limited to Australia. A recent Irish guide on how to 'Be a Canny Nimby' recommends heritage as an effective strategy for 'scuppering a planning ambition or two'. Niall Toner, Be a canny nimby [Eire Region] *Sunday Times* (London, 29 Aug 2010) 8.

[59] Character is not defined in the legislation and there is no generally accepted definition of the term. It tends to be discussed in cases in terms of 'harmony', 'compatibility' and 'sitting comfortably with' existing developments, and minimising noise and visual impacts on existing residents. See, eg, *Rosen v City of Sydney Council* [2012] NSWLEC 1124; *Revelop Projects Pty Limited v The Hills Shire Council* [2012] NSWLEC 1117; *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191.

[60] K Dovey, I Woodcock and S Wood, 'A Test of Character: Regulating Place-Identity in Inner-City Melbourne' (2009) 46 *Urban Studies* 2595; Gethin Davison, Kim Dovey and Ian Woodcock, '"Keeping Dalston Different": Defending Place-Identity in East London' (2012) 13 *Planning Theory & Practice* 47; Gethin Davison and Emma Rowden, '"There"s Something about Subi': Defending and Creating Neighbourhood Character in Perth, Australia' (2012) 17 *Journal of Urban Design* 189; Gethin Davison, 'An Unlikely Urban Symbiosis: Urban Intensification and Neighbourhood Character in Collingwood, Vancouver' (2011) 29 *Urban Policy and Research* 105; Kim Dovey, Ian Woodcock and Stephen Wood, 'Understanding Neighbourhood Character: The Case of Camberwell' (2009) 46 *Australian Planner* 32.

'character' to support their objection.[61] Analysis of cases in the NSW Land and Environment Court reveals similar results: heritage or character were raised in approximately three quarters of the cases involving objections to proposals for the development of affordable housing.[62]

These claims are often raised in lieu of other concerns. In their extensive study of character in suburban Melbourne over an eight year period, Kim Dovey and Ian Woodcock noted the exclusionary and 'flexible' potential of character: 'Because character is inherently social as well as spatial, objections to the wrong kind of buildings can be used as a cover to exclude the wrong kind of people.'[63] Other scholars have also noted the way in which character can be deployed by homeowners to present their interests in exclusion as altruistic or democratic.[64] As Davison et al explain:

> [T]he use of the term character by residents in Parramatta slipped easily from descriptions of physical form into descriptions of social form; objections to particular types of built form often became objections to the types of people that would inhabit them. When someone objects to a development proposal on the grounds that it will be 'out of character', do they mean that the buildings will be different to what currently exists, that the occupants will be different, or both? Is the concept of character a way for people, knowing full well that the type of occupant in a building is not a planning issue, to object to certain types of people moving into their area without them actually having to say this is in so many words?[65]

Through its emphasis on participation late in the planning process, and its focus on those who might object to development proposals, the law regulating planning in NSW constructs public participation as a highly conservative process. This is at odds with the factors specified for consideration by consent authorities when determining development applications, which focus much more on the public interest, and with the objects of the Act itself, which include the promotion of development and the provision of affordable

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[61] Davison and others, above n 20, 54; ibid 83.

[62] A search of cases involving objectors to proposals for affordable housing in the NSW Land and Environment Court produced 39 cases. Heritage or character were raised in 29 of these cases.

[63] Kim Dovey and Ian Woodcock, 'The Character of Urban Intensification: A Report on Research Projects Funded by the Australian Research Council, 2002–2010' (Melbourne, University of Melbourne 2010) 9.

[64] Margo Huxley, '"This Suburb Is of Value to the Whole of Melbourne": Save Our Suburbs and the Struggle Against Inappropriate Development' (Institute for Social Research, 2002) Working Paper 6 www.sisr.net/publications/workingpapers/wp6_huxley.pdf; Elizabeth J Taylor, 'Fast Food Planning Conflicts in Victoria 1969–2012: Is Every Unhappy Family Restaurant Unhappy in Its Own Way?' [2014] *Australian Planner* 1.

[65] Davison and others, above n 20 56.

housing.[66] The result is a somewhat conflicted process: members of the public are encouraged to identify threats to their private interests, but in raising them to frame their concerns around matters of significance to the wider community. Here, heritage and the related concept of character offer powerful discursive tools. Rather than arguments *against* the types of people who might move into the one bedroom apartments in the proposal outlined at the start of this chapter, heritage provided a way to argue *for* the buildings in question, and in turn *for* the preservation of the local community in its current form.

C. Objection and Rights

While not always successful in blocking affordable housing, the cumulative effect of these objections is significant. As in the example outlined at the start of this chapter, there are many cases where objections result in a reduction in the number of dwellings proposed.[67] It is common for developers (including affordable housing providers) facing community opposition to reduce the scale of development proposed in an effort to appease the local council. Even when objections do not result in a change to the proposal, they can still have significant impacts on housing availability and affordability by increasing costs, delays and uncertainty for developers. Cost increases of 20 per cent have been attributed to consultation processes.[68]

The problematic relationship between heritage, character and housing affordability is one that has been noted internationally. Heritage designation has had direct consequences for housing affordability in Manhattan, driving up the price of housing and making it difficult to build housing for people on low incomes, and thus serving to make heritage areas 'exclusive enclaves of the well-to-do, educated, and white.'[69] In their work on suburban New York, Jim and Nancy Duncan have argued that lifestyle and taste-based

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[66] EPA Act, ss 79C, 5.

[67] Recent examples include, Badar v Canterbury Council [2014] NSWLEC 1149; Moscaritolo and Anor v The Hills Shire Council [2013] NSWLEC 1014; Sales Search Pty Ltd v The Hills Shire Council [2013] NSWLEC 1052; Bettar v Council of the City of Sydney [2012] NSWLEC 1342; Tradelink Constructions Pty Ltd v Holroyd City Council [2012] NSWLEC 1332.

[68] Mandy Press, above n 20) 32.

[69] Edward L Glaeser, 'Preservation Follies Excessive Landmarking Threatens to Make Manhattan a Refuge for the Rich' [2010] *City Journal* www.city-journal.org/2010/20_2_preservation-follies.html.

identities, associated with an aesthetic of place preservation, serve to depoliticise claims and obscure class and power relations.[70] This results in a very uneven and inequitable geography of housing and resources such as education. It results also in 'alienation', a process through which the language of place preservation obscures many of the issues at stake. As Duncan and Duncan explain: 'the connections between aesthetics and negative geographical externalities remain obscure to those who sincerely believe that their efforts to make a lovely place will contribute to a wider society through environmental conservation.'[71] The kinds of relationships that allow some places to prosper while others fail are obscured, allowing objectors to believe also that their efforts 'have little or no negative consequences for that wider society.'[72] Similarly, in rural areas of the UK, advocacy for landscape preservation has been used to block the development of affordable housing, and in turn to push up housing prices.[73]

The impact of objections is not limited to the erosion of housing rights. Objections have significant consequences for other human rights such as freedom of religion,[74] with high numbers of objectors making it difficult for Buddhist, Hindu and, particularly, Islamic communities to obtain approval for religious schools and places of worship.[75] Even before the commencement of the formal public participation process, the high likelihood of neighbour opposition means that planners direct these groups to sites remote from their communities and poorly-served by public transport—sites located on the periphery of the

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[70] James Duncan and Nancy Duncan, 'The Aestheticisation of the Politics of Landscape Preservation' (2001) 91 *Annals of the Association of American Geographers* 387.
[71] ibid, 406–07.
[72] ibid, 406–07.
[73] John Sturzaker and Mark Shucksmith, 'Planning for Housing in Rural England: Discursive Power and Spatial Exclusion' (2011) 82 *Town Planning Review* 169.
[74] Freedom of religion is protected in a number of international treaties to which Australia is a party, including Art 18 of the International Covenant on Civil and Political Rights, as well as the Convention on the Elimination of All Forms of Racial Discrimination (Art 5) and the Convention on the Rights of the Child (Art 14).
[75] Laura Bugg and Nicole Gurran, 'Urban Planning Process and Discourses in the Refusal of Islamic Schools in Sydney, Australia' (2011) 48 *Australian Planner* 281; Laura Beth Bugg, 'Religion on the Fringe: The Representation of Space and Minority Religious Facilities in the Rural–urban Fringe of Metropolitan Sydney, Australia' (2012) 43 *Australian Geographer* 273; Leonie Sandercock, 'When Strangers Become Neighbours: Managing Cities of Difference' (2000) 1 *Planning Theory & Practice* 13; Yasmeen Vahed and Goolam Vahed, 'The Development Impact of Mosque Location on Land Use in Australia: A Case Study of *Masjid Al Farooq* in Brisbane' (2014) 34 *Journal of Muslim Minority Affairs* 66.

metropolitan area, in industrial zones, or next to incompatible uses such as municipal waste disposal sites, storage depots and used car yards.[76]

Planning law and the discourse it generates is a form of politics that organises political space, often with the aim of monopolising it. There is little room in an objection-based planning system for the public to participate in deliberations about the sorts of development that would enhance the city and the places where new development would be welcome, the ways in which issues like housing affordability and availability—along with other social, economic and environmental issues—could be addressed. A property rights-based approach to participation brings with it dangers, in particular 'the tendency to focus on narrow self-interests rather than to acknowledge interdependencies and the common good.'[77]

D. Privileging Those in Place

By channelling participation into reactions to individual proposals and by emphasising the property rights of those who might be negatively affected by such proposals, the planning system privileges the property rights of neighbours over others who might have different views on the development, particularly those who are outsiders to the area. People who might wish to buy or rent the new houses—or, less directly, to see housing affordability and availability improved and the right to housing furthered more generally by increasing housing supply, or to see environmental sustainability improved through urban consolidation—could, in theory, also participate in the planning process by making a submission in favour of new housing developments. But the process is not structured to encourage this type of participation. Not only are there less financial incentives for participation for those with more remote connections to a proposed development but, unlike neighbours and property owners who might be adversely impacted by such development, those who might *benefit* from a new development have no right to notification.

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[76] Sandercock, above n 74, 19–21.
[77] Campbell and Marshall, above n 56.

In the UK context, Alan Evans has described this situation as an 'insider-outsider problem', whereby property owners are given an additional forum to influence planning not available to the unidentified people who would live in housing if development went ahead.[78] As Evans argues, this is one of the ways in which the planning system is geared to preserving the status quo.

The privileging of the rights of those in place over those needing a place is further emphasised by the treatment of public participation in court. Paralleling the priority given to neighbouring owners in the notification of development applications, neighbours are also privileged in adjudicative practice and procedure. The NSW Land and Environment Court's Site Inspections Policy, for example, gives preference 'to those residents directly affected by proposed development, such as those living adjoining or directly opposite the site of development.' [79] Even in disputes over applications for affordable housing, the already-marginalised groups that would benefit from such developments are given little opportunity to participate.

More fundamentally, the planning framework not only privileges certain rights, and certain rights-holders, but is itself constitutive of them. In its deference to the interests of property owners, planning law plays an important role in shaping understandings of property rights, and of their relationship to other rights, such as those to adequate housing and freedom of religion. In a dispute regarding the scope of existing use rights, Kirby P in the NSW Court of Appeal expressly considered the role of the court in balancing social rights with private rights. After noting that 'a wide definition of, and generous approach to, existing use rights tends towards the protection of private interests in land where these conflict with the social interests represented by the generally applicable planning law', Kirby P went on to define the scope of the relevant property rights extremely broadly.[80] In a subsequent case in the Court of Appeal concerning the rights of the holder of an easement with regard to redevelopment of the land to which the easement applied, Kirby A-CJ (as he then was), was even more explicit in discussing the balancing between private property and

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[78] Alan W Evans, *Economics and Land Use Planning* (Oxford, Blackwell Publishing, 2004) 8.
[79] Land and Environment Court of NSW, Site Inspections Policy, 28 May 2010, cl 9.
[80] *North Sydney MC v Boyts Radio and Electrical Pty Ltd* (1989) 16 NSWLR 50. The effect of this decision was to allow a commercial warehouse in a residential area, despite an express prohibition on such warehouses under the local planning controls.

other rights, highlighting the protection given to property ownership in the Universal Declaration of Human Rights (Article 17.1). Again, the effect of the decision was to prioritise and to widen the scope of property rights.[81]

By enabling property owners to focus on ways in which their property rights could be threatened by new development, the implication in the law on public participation in planning is that those rights can and will be protected, that change can somehow be avoided. The fundamentally dynamic nature of cities, the contested nature of property itself, and the negotiations and compromises that living with others necessarily requires,[82] are brushed aside. The city is framed as a terrain of competition, not collaboration.

The planning framework not only fails to inspire the public to weigh their interests against others as an unavoidable part of living with others in cities, it allows participants to see the protection of their own interests—narrowly conceived—as championing the public interest. The public interest is a key term in planning law, as in many other areas of public law, enumerated as one of the factors that consent authorities must consider in determining an application for planning approval.[83] It is not, however, a term that is defined in legislation and as such has been the subject of a wide range of interpretations.[84] There are numerous cases where courts have described the concerns raised by objectors as 'the public interest'.[85] This occurs even when those concerns may run counter to other issues commonly understood to be in the public interest—such as increasing the supply of affordable housing. In an appeal regarding the refusal of planning consent for affordable housing in *Tradelink Constructions Pty Ltd v Holroyd City Council*, for example, Morris C expressly referred to 'the public interest in terms of issues raised by objectors',[86] despite the fact that those issues focused on the interests of the neighbouring property owners who

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[81] North Sydney Council v Ligon 302 Pty Ltd (1995) 87 LGERA 435.
[82] Massey, above n 4.
[83] EPA Act, ss79C(1)(e).
[84] Chris Wheeler, 'The Public Interest: We Know it's Important, But Do We Know What it Means?' (2006) 48 *AIAL Forum* 12.
[85] Recent examples include: APN Outdoor Pty Ltd v Council of the City of Sydney [2013] NSWLEC 1002 (LEC, Pearson C); Elassal v Sutherland Shire Council [2012] NSWLEC 1349 (LEC, Fakes C); Bettar v Council of the City of Sydney [2012] NSWLEC 1342 (LEC, Hussey C); Altex Constructions v Marrickville Council [2012] NSWLEC 1346 (LEC); Tradelink Constructions Pty Ltd v Holroyd City Council [2012] NSWLEC 1332 (LEC, Morris C); Davis v Byron Shire Council [2012] NSWLEC 1267 (LEC, Fakes C); Jamison Investments Pty Ltd v Penrith City Council [2010] NSWLEC 1194 (LEC).
[86] [2012] NSWLEC 1332, 2.

raised them.[87] In this way, planning law effectively valorises objection, fostering an adversarial culture and conflating private rights with the broader public interest.

It is important to note that this is not always the case. In *New Century Developments Pty Limited v Baulkham Hills Shire Council*, an appeal against the refusal of planning consent for the construction of a Muslim place of worship, Lloyd J found that the objectors' concerns were not in accord with the public interest.[88] Despite an exceptionally high number of neighbours raising concerns (the council received some 5,000 objections), the court found that preserving religious equality and the freedom to exercise religious beliefs outweighed the fears raised by objectors to the proposal.

However, this was an unusual case not only for the number of objections made, but also for the clearly identifiable impacts of refusing to grant consent for the proposed development. In almost all of the many cases in which proposals for affordable housing are challenged by neighbours (and, in turn, scaled down or refused), the people who might be affected by the development are clearly identifiable, but those who would benefit from it (either directly by living there, or indirectly through reduced competition for housing elsewhere) are not.[89] In *New Century Developments*, the people who were affected by the refusal to grant approval were also clearly identifiable. It was thus much easier to identify and weigh the competing interests at stake, and much harder to argue that the interests of objecting neighbours were constitutive of the public interest.

In prioritising participation by owners over participation by non-owners, the planning system makes property rights more secure and more expansive, and competing rights (to housing, to religious freedom) more tentative and aspirational. The radical, transformative promise of the provision for public participation in the EPA Act has over time been read as instead following from a much longer body of law focused on the protection of property rights. In *Tweed Business and Residents Focus Group Inc v Northern Region Joint Regional Planning Panel*, Bignold J explained that the public notification provisions of the EPA Act not only give effect to the statutory objects, but give statutory force to the common law

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[87] The issues were: traffic and parking, access, noise, loss of property value, overshadowing, 'social issues' and 'overdevelopment introducing too many people to the area'. [2012] NSWLEC 1332, 27.
[88] [2003] NSWLEC 154.
[89] The celebrated *Mt Laurel* case is a notable exception. *Southern Burlington County NAACP v Township of Mount Laurel* 67 NJ 151, 336 A.2d 713, 1975 NJ.

obligation to afford procedural fairness to those who may be affected by the development.[90] Despite the language of 'any person' in the public participation provisions of the EPA Act, the rights of those in place are privileged over those needing a place. As David Harvey argues, 'ideals of human rights have moved centre stage ethically and politically', yet 'rights of private property … trump all other notions of rights'.[91]

By in effect encouraging property-based objections, and particularly by encouraging the use of heritage and character to frame these as being in the public interest, the law on participation in planning works not only to limit the effectiveness of housing and other non-property rights in specific planning disputes but, further, to reduce their visibility in public discourse altogether. The 'alienation' described by Duncan and Duncan is evident in Sydney as in New York. With heritage and character deployed to depoliticise and even valorise exclusionary practices, the scope for debate about the existence of—much less the appropriate compromises between—competing rights and interests in the city is significantly curtailed.[92]

In highlighting problems associated with objection-based participation in planning, and particularly with the use of heritage and character to support such objections, I am not advocating the abolition of objection-based participatory rights nor the dismissal of the rights of property owners. Rather, by reference to a number of planning law cases, I am arguing for critical examination of the way in which frameworks for public participation, and the discourses that these generate, operate in practice to constrain other forms of engagement by the public in addressing the larger social, economic and environmental questions that will shape the future of their cities. Beyond the body of scholarship on NIMBYism, the problems of adversarial engagement by the public have also attracted the attention of legislators and policy-makers. In NSW, a number of reforms have been introduced to the framework for public participation since the mid-1990s, and a further

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[90] Tweed Business and Residents Focus Group Inc v Northern Region Joint Regional Planning Panel [2012] NSWLEC 166, 12. See also Csillag v Woollahra Council [2011] NSWLEC 17, 181 LGERA 141, 33 (Craig J); Vanmeld Pty Ltd v Fairfield CC (1999) 101 LGERA 297 (CA) (Spigelman CJ).

[91] David Harvey, 'The Right to the City' (2008) 53 *New Left Review* 23.

[92] Drawing on Pierre Bourdieu, Margo Huxley has argued that the use of character works to silence other debates—about the nature of property ownership, legacies of colonial domination, disparities in socioeconomic status, and inadequate provision of public, social or affordable housing—and as such constitutes symbolic violence. Huxley, above n 64, 20.

suite of changes are again under consideration.[93] While the rhetoric has promised more 'meaningful' participation and an increase in public engagement earlier in the process (when changes are less difficult to make, and thus contributions could be less adversarial), the reforms have done nothing to reorient participation away from its focus on individual property rights. If public participation is indeed to become more meaningful and constructive, there is a need to reflect much more broadly and critically on public participation, and to be open to much more radical possibilities.[94]

III. Participation and the Right to the City

How else might we understand participation in planning? Are there other frames of reference through which it might be possible to expand the discourse around public participation beyond the protection of individual rights? Henri Lefebvre's notion of 'the right to the city' offers one possible starting point for such a practice. Lefebvre proposed the right in the late 1960s, in distinction to the frameworks for public participation that were then being formalised in law.[95] While it received little attention at the time, interest in the right to the city has grown following the translation of his work into English from the 1990s, and

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[93] Robert Ghanem, 'Amendments to the NSW Planning System - Sidelining the Community' (2008) 14 *Local Government Law Journal* 140; Lipman and Stokes, above n 9; New South Wales Government, 'White Paper – A New Planning System for NSW' (2013) White Paper, www.planning.nsw.gov.au/en-us/policyandlegislation/previousstagesofplanningreview/whitepaper.aspx.

[94] To adapt the question posed by Wendy Brown with regards to international human rights discourse:
'Is the prevention or mitigation of [harm to the interests of neighbours] promised by [participatory] rights the most that can be hoped for at this point in history? Is this where we are, namely, at a historical juncture in which all more ambitious justice projects seem remote if not utopian by comparison with the task of limiting [impacts on neighbours]? Is the prospect of a more substantive democratization of power so dim that the relief and reduction of [harm to property interests] is really all that progressives can hope for? If so, then [objection-based participation] probably deserves the support of everyone who cares about such [harm]. But if there are still other historical possibilities, if progressives have not yet arrived at this degree of fatalism, then we would do well to take the measure of whether and how the centrality of [objection-based participation] discourse might render those other political possibilities more faint.' Brown, above n 30, 462.

[95] Henri Lefebvre, *Writings on Cities* (Oxford, Blackwell Publishers, 1996).

in recent years has attracted considerable attention from scholars[96] as well as activists[97] and, increasingly, international organisations and governments.[98]

The right to the city flowed from Lefebvre's understanding of the city as *oeuvre,* an unintentional and collective work of art, richly significant yet embedded in everyday life.[99] For Lefebvre, participation in the creative, daily activity by which that *oeuvre* is produced is a fundamental human need. Lefebvre was critical of contemporary trends toward state-led consultation, which he described as 'acquiescence at a small price'.[100] He was similarly critical of formal legal rights. In much the same way that participatory rights have been linked with property rights to foster an adversarial approach to public participation in contemporary planning, Lefebvre argued that formal legal rights were 'in, but often *against* society—*by*, but often *against* culture'.[101]

In contrast to the rights to participation then being formalised in law, the right to the city—to the *oeuvre,* to participation (accessing and influencing decisions that produce urban space) and appropriation (accessing, occupying and using urban space, including creating new space that meets the needs of the inhabitants of the city)—was presented by Lefebvre as a superior form of rights.[102] Unlike the right to property, with its relatively fixed boundaries, privileges and duties, the right to the city is a participatory right, a right not to preserve or contain a particular place, but to contribute to the evolution of the city.

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[96] Mark Purcell, 'Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant' (2002) 58 *GeoJournal* 99; Lynn A Staeheli, Don Mitchell and Kristina Gibson, 'Conflicting Rights to the City in New York's Community Gardens' (2002) 58 *GeoJournal* 197; Harvey, above n 91; Peter Marcuse, 'From Critical Urban Theory to the Right to the City' (2009) 13 *City* 185; Margit Mayer, 'The "Right to the City" in the Context of Shifting Mottos of Urban Social Movements' (2009) 13 *City* 362; Andy Merrifield, 'The Right to the City and beyond: Notes on a Lefebvrian Re-Conceptualization' (2011) 15 *City* 473; Lee Stickells, 'The Right To The City: Rethinking Architecture's Social Significance' (2011) 16 *Architectural Theory Review* 213; Zanny Begg and others, *The Right to the City* (Sydney, Tin Sheds Gallery, Faculty of Architecture, Design and Planning, the University of Sydney, 2011); Ruth Fincher and Kurt Iveson, 'Justice and Injustice in the City: Justice and Injustice in the City' (2012) 50 *Geographical Research* 231; Neil Brenner, Peter Marcuse and Margit Mayer, *Cities for People, Not for Profit: Critical Urban Theory and the Right to the City* (Abingdon, Routledge, 2012); Chris Butler, *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (New York, Routledge, 2012).

[97] See, eg, the Right to the City Alliance and its member organisations: righttothecity.org.

[98] See, eg, World Charter on the Right to the City (2004); City Statute (Law No 10 257 of 10 July 2001, Brazil); Montreal Charter of Rights and Responsibilities (Charte montréalaise des droits et responsabilités) (2006, Canada).

[99] Henri Lefebvre, *Writings on Cities* vol 14 (Oxford, Wiley, 1996) 66, http://ecsocman.hse.ru/text/19199985/.

[100] Ibid 145.

[101] Ibid 179.

[102] ibid 154–58, 174.

The right to the city has been mobilised in vastly different ways by different groups. Its precise contours remain the subject of debate, as Lefebvre did not define it with any precision, and offered little guidance as to how it should work in practice. Grassroots and activist organisations such as the Right to the City Alliance have adopted a radical, transformative conception of the right to the city, putting forward not just challenges to the power of states and capital, but fundamentally different organising principles to achieve what they see as a more just world.[103] Other groups—including international organisations such as UNESCO and UN-HABITAT—have instead sought to locate the right to the city within existing human rights frameworks.[104]

This openness and flexibility has been both a source of criticism and of praise. Some writers have argued that the right to the city is too abstract to offer any practical value in everyday life,[105] or that taking the right to the city seriously means situating it within existing typologies of rights.[106] Others have instead argued that this underlying openness or flexibility is a key strength of the right to the city.[107] I share this latter view.

Lefebvre was clear that the right to the city is different from other types of rights; this is what makes it valuable. Participation, he explained, is a fundamental human need, but in a creative way. As Lefebvre emphasised in his call for exploration of the 'possible-impossible' through 'concrete utopias' in which the everyday is reoriented and reappropriated, the aim is not to defend individual rights or entitlements.[108] Rather, the end goal is always unknown.

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[103] www.righttothecity.org/.

[104] For example, the World Charter for the Right to the City, developed by various nongovernmental organizations, national and international civil society networks, professional associations and forums, enumerates a number of specific rights in the city, bundling together a number of already-existing human rights (such as rights to housing, social security, work, an adequate standard of living, leisure, information, organisation and free association, food and water, freedom from dispossession, participation and self-expression, health, education, culture, privacy and security, a safe and healthy environment) and adds to these claims for additional rights (to land, sanitation, public transportation, basic infrastructure, capacity and capacity-building, access to public goods and services). www.urbanreinventors.net/3/wsf.pdf, Alison Brown and Annali Kristiansen, 'Urban Policies and the Right to the City' (2009) 8 UNESCO, Management of Social Transformations; Mayer, above n 96; Stickells, above n 96.

[105] Merrifield, above n 96.

[106] KA Attoh, 'What Kind of Right Is the Right to the City?' (2011) 35 *Progress in Human Geography* 669.

[107] Staeheli, Mitchell and Gibson, above n 96.

[108] Henri Lefebvre, *Henri Lefebvre: Key Writings* (London, Continuum, 2003) 186. The line between the right to the city and other rights is by no means bright. Other human rights are certainly not always non-creative and

Lefebvre also recognised the inherently conflictual nature of participation but, again, this was not an adversarial conflict based on the defence of property or other private rights. According to Lefebvre, the process of creativity involved in making the *oeuvre* inevitably includes struggles between factions, groups and classes involved in participation and the appropriation of urban space. Unlike the adversarial and often exclusionary effects of participation in objection-based planning, however, Lefebvre argued that participation in the right to the city works to strengthen feelings of belonging to the city.[109]

There are echoes of Lefebvre's concept of conflictual participation in the work of contemporary planning scholars exploring the potential for agonism in planning.[110] Instead of viewing disputes themselves as the problem, and conflict as undesirable, an agonistic approach asserts that planning should aim to foster 'the persistence of fair and judicious action over terrain that is unevenly and continuously contested, reinvented, and re-imagined'.[111] Rather than relying on entrenched rights-based positions and formal legal processes, agonism suggests that conflict and disorder may be used to disrupt entrenched positions and established problem-framing and resolution processes, enabling participants to move beyond competition to constructively uncover each side's interests and priorities.

Without rejecting human rights, property rights or legal avenues for objection, might there be space *between* rights in the city and the right to the city in which a different kind of participation could take place? Beyond property ownership, could appropriation—for example, working on a community garden, volunteering with a local charity or organising a street party—give rise to notification rights? Rather than encouraging people to cloak their concerns in the language of heritage and character, could a more honest process emerge?

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defensive of the status quo. Indeed, openness and flexibility are important features of other rights such as freedom of association.

[109] Lefebvre, *Writings on Cities*, above n 99, 67.

[110] Chantal Mouffe, *The Democratic Paradox* (London, Verso, 2000); Jean Hillier, '"Agon"izing Over Consensus: Why Habermasian Ideals Cannot Be "Real"' (2003) 2 *Planning Theory* 37; John Pløger, 'Strife: Urban Planning and Agonism' (2004) 3 *Planning Theory* 71; M Purcell, 'Resisting Neoliberalization: Communicative Planning or Counter-Hegemonic Movements?' (2009) 8 *Planning Theory* 140; LA Staeheli, 'Political Geography: Democracy and the Disorderly Public' (2010) 34 *Progress in Human Geography* 67; Clare Mouat, Crystal Legacy and Alan March, 'The Problem Is the Solution: Testing Agonistic Theory's Potential to Recast Intractable Planning Disputes' (2013) 31 *Urban Policy and Research* 150.

[111] Mouat, Legacy and March, ibid 154.

Could heritage become a focus for agonism and creative conflict—for debates about what we value in the city, and why?

More fundamentally, rather than encouraging people to focus on change as presenting threats to their property, could we instead encourage people to think about how the city could be improved? Rather than seeking objections, could the planning process encourage constructive proposals, and create new fora for collaboration and dialogue? Could heritage be seen as something open and evolving, rather than something closed and fixed?

Lefebvre wrote with much affection of his home town, Navarrenx, where he claimed he knew and could read every stone 'rather as botanists can tell the age of a tree by the number of rings in its trunk.'[112] In contrast to the nearby new town of Mourenx, planned by experts on modernist lines with functions highly separated, Lefebvre likened Navarrenx to a seashell: 'A living creature has slowly secreted a structure … This community has shaped its shell, building and rebuilding it, modifying it again and again according to its needs.' [113] In Mourenx, Lefebvre saw instead 'the fears modernity can arouse … the fossilized structure, powerless to reproduce anything living, but still capable of suppressing it.'[114]

As in all of his writings, Lefebvre's discussions of Navarrenx are dense and ripe for multiple interpretations. Yet his discussions do seem to speak to the issues at the heart of this chapter. The deployment of heritage by the neighbours outlined above could indeed be seen as a fearful fossilisation, suppressing the ability of the community to modify the city according to its needs. However, heritage protection does not preclude all change, and its role in planning need not be limited to arguments against development.[115] Heritage could equally be deployed to further progressive agendas: to challenge the preservation of certain aspects of the city (Victorian facades) while radically altering others (reducing the density and diversity of the inner city population). In this sense, heritage could become a key tool with which to advocate *for* the provision of affordable housing, and particularly for the smaller homes that have become so contentious.

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[112] Henri Lefebvre, 'Seventh Prelude: Notes on the New Town (April 1960)' in *Introduction to Modernity: Twelve Preludes, September 1959–May 1961* (London, Verso, 1995) 116.
[113] ibid.
[114] ibid 120.
[115] Wendy S Shaw, *Cities of Whiteness* (Oxford, Blackwell Publishing, 2007).

The challenge Lefebvre posed for the residents of modern cities speaks also to contemporary planning in Sydney: 'Our task is to construct everyday life, to produce it, to consciously create it … to find the crack for freedom to slip through, silently filling up the empty spaces, sliding through the interstices'.[116]

IV. Conclusion

The legislative framework for public participation plays a crucial role in the attainment of human rights. While some rights—particularly the right to private property—have tended to be advanced through these provisions, in many instances such laws have worked against the achievement of rights, particularly rights related to housing, disabilities and religious minorities. Through the process of participation, the inherently public, collective issues at the heart of planning tend to be recast as a matter of minimising impacts on private property.

However, while the law encourages people to focus on potential threats to their private interests, it also requires consent authorities to frame their deliberations in terms of the public interest. Participants in the planning process are thus encouraged to position their advocacy for protection of their private interests around broader concerns. In this context, 'heritage' and 'character' have been deployed strategically to further specific and at times exclusionary interests, while alluding to a more public-spirited contribution.

Concerns about 'NIMBYs' have fuelled regressive approaches to planning, including current proposals in NSW that would place the definition and protection of the public interest in the hands of the Minister. While objection-based rights would be significantly curtailed, no meaningful avenues for participation would replace them.[117] The current planning framework is frequently touted as drawing on the celebrated green ban movement of the early 1970s, and as such, as an example of best participatory practice. However, the

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[116] Lefebvre, above n 112, 124.
[117] Planning Bill 2013.

EPA Act ignored many of the most progressive aspects of the green bans and other democratic and environmental movements of the period,[118] and the failings of the framework it established should by no means be taken as an indication that a legislative mandate for participation itself is futile.

Importantly, if public participation is indeed central to good planning, and if participatory approaches do indeed further democratic and human rights objectives, the effects of the current framework require critical analysis. What are its impacts on specific rights, such as the right to housing? What are its impacts on planning deliberations more broadly, which debates are marginalised and excluded? How does this affect our ability to collectively negotiate the social, economic and environmental future of our cities?

In its focus on creative, conflictual and agonistic—rather than competitive and proprietary—participation, Lefebvre's right to the city offers a useful framework through which to undertake such reflection, and to begin to expand conceptions of heritage and the process of planning more generally. Might the idea of a city as an organic, evolving structure built and rebuilt, modified and adapted to meet the needs of its inhabitants inform a more progressive deployment of heritage in the planning process? Might there be space between rights *in* the city and the right *to* the city in which a different kind of participation could take place?

[118] Thorpe, above n 14.