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Property and Planning

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Abstract. The connection between property and planning is intimate, but also uneasy. Literature linking the two is largely critical, highlighting the undesirable influence of private property on planning and its public goals. While planning tends to be presented as weaker – a process too often co-opted by powerful proprietors, exacerbating the social and ecological injustices it purports to prevent – in this chapter I argue that planning plays a fundamental role in sustaining property as an institution. Drawing together relational and performative theory with a discussion of two cases – one decided by the High Court of Australia in 1937, the other by the English Court of Appeal in 2020 – I argue that planning works not only to extend the power and wealth of property owners, but to enable property to be understood as fixed and finite. Conceptualising and regulating something so essentially relational as land as an object of private law is possible only because of the role played by planning. A fuller examination of the interconnection between property and planning is necessary to understand and address their 'darker' sides, perhaps most urgently their ongoing implication in settler-colonial practices, and also to identify and amplify more hopeful possibilities.

Keywords Dispossession; land use; legal geography; ownership; NIMBY; planning; public/private divide; relational theory; urban law; zoning.

Property and planning are deeply entangled, yet also strangely distant. While both are centrally concerned with the 'proper' use of land, they sit on opposite sides of numerous divides: most centrally, the divide between public and private law, with property understood primarily as private property, and planning as a public process. Much of the literature connecting property and planning is critical of their entanglement, highlighting the undesirable influence of one (usually property and the private interests of property owners) on the other (usually planning and the interests of the wider public). At the heart of these critiques is the tension in the divide itself, which sits uncomfortably with the essentially and fundamentally relational character of land. Planning law can be understood as an effort to mitigate this tension, a recognition that the regulation of real property cannot be contained within private law.

In this chapter, I examine the intimate connection between property and planning. The scope of the chapter is limited in two key respects. First, my focus is property and planning as they operate in Australia, primarily in Sydney, New South Wales (NSW). Connections are made with the British systems on which Australian property and planning are based, and with other systems sharing similar traditions, but I do not discuss the very rich variety of property and planning in other places. Second, my focus is on private property and public planning, and does not encompass the much fuller range of processes through which land is owned and governed.

I begin in Part 1 with an overview of literature raising concerns about the links between property and planning, particularly about the influence of private property on public planning processes and its implication in social and ecological injustices. In Part 2, I use relational and performative approaches to property to reflect on the histories of property and planning. Far from divided, I argue that property and planning are intimately connected, and that this reflects the inextricable links between rights and dispossession, owners and others, boundaries and breaches. In Part 3, I consider two cases – the recent decision of the English Court of Appeal in *Fearn v The Tate* (2020), and the earlier decision of the High Court of Australia in *Victoria Park Racing* (1937) – to illustrate this claim. These judicial efforts to regulate relationships across boundaries reveal the crucial role played by planning: not only in mitigating the private, individual and inward-looking nature of property, but in sustaining it. In the conclusion, I reflect on the significance of this connection. There is a need for planners to reflect critically on their contribution to the darker side of property, but also to pursue the more hopeful possibilities that emerge in recognising these relationships.

1. Breaching the divide

Both property and planning law regulate the use of land, yet they do so from different sides of numerous divides: most centrally, the divide between public and private law, with property generally understood as a core part of private law, and planning as a public process. Property and planning sit also on different sides of many related distinctions: between private interests and the common good, ownership and use, rules and discretion, rights and compromises, individual and collective decision-making. Property, law students are taught, is a matter of fixed rules, bounded rights and individual interests. As the *numerus clausus* doctrine makes clear, 'the system of rights *in rem* is a strictly circumscribed one, with a tight regulatory regime governing the range and form of available rights over land' (Edgeworth 2006, 388). Planning, about which law students are generally taught very little, is instead a matter of discretionary, democratic decision-making, a far less constrained and more political process, open to a potentially infinite range of regulatory possibilities.

Where planning and property are considered together, the literature is generally critical. Concerns about the distortion of public planning processes by private property interests is a central focus, with property implicated in a wide range of problems: urban sprawl and environmental degradation, racial segregation and colonial dispossession, privatisation and securitisation of public space, gentrification and the escalating housing crisis.

Much of the critical literature centres on the power of large property owners and developers to secure lucrative variations to planning processes, generating large profits with questionable public benefits (Sandercock 1975; Harvey 2005; Brenner, Marcuse, and Mayer 2012). The redevelopment of former wharves at Barangaroo in Sydney is a recent example, notorious for the degree to which planning controls have been exceeded again and again to serve the interests of powerful property developers (Rogers and Gibson 2020). As at Barangaroo, these private benefits often come with significant public costs: privatisation and securitisation of public space, spiralling municipal infrastructure costs, increasing gender and racial inequality, gentrification and displacement (Porter and Shaw 2009).

A related literature highlights contributions by smaller scale property owners, whose efforts to protect their property interests from 'locally unwanted land uses' necessary for the wider public good are frequently derided as NIMBY (not in my backyard) behaviour (Dear 1982). From affordable and higher density housing to services for vulnerable and marginalized communities,

the ability of neighbouring residents to delay and disrupt the approval of unpopular proposals is widely linked with broader patterns of environmental injustice and inequality (Hubbard 2010).

Beyond individual developments, planning principles and policies are disrupted also by landowners, both large and small, looking well beyond their backyards. There is a vast literature documenting the ways in which property owners influence the use of planning tools like zoning, heritage conservation and urban regeneration to pursue race and class-based exclusion (Babcock and Bosselman 1973; Duncan and Duncan 2004; Wright 2019). Property mechanisms like restrictive covenants and strata by-laws can also be deployed to preclude or exceed more inclusive planning processes (McKenzie 1994; Harris 2011).

Drawing together these and other issues, a more fundamental critique centres on the lack of attention paid by planners to the contribution their work makes to the 'darker' side of property (Krueckeberg 1995; Jacobs and Paulsen 2009; Blomley 2017; Porter 2018). Planning has been used to protect the property rights of the privileged through the kinds of practices described above, but also and more fundamentally, by sidestepping – and thus suppressing – debates about the scope of ownership through purportedly neutral terms and techniques like 'land use' and 'character' (Blomley 2017; Thorpe 2017a). As Donald Krueckeberg (1995, 302) argues: 'The problem with our planning tradition is that it assumes, to begin with, that what is public, what is private, and who owns what can all be accepted as clear. That is not a good beginning, because it begs the question of who has a right to what'.

While the bulk of the literature focuses on the undesirable influence of property on planning, there are also critiques in the other direction. Richard Epstien and James Ely are prominent proponents of the claim that planning goes too far in its curtailment of private property rights and market freedoms (Epstein 1998; 2008; Ely 2008).

2. Relational property

At the heart of these critiques regarding the undue influence of property on planning, and of planning on property, is the tension in the public/private divide itself (Kennedy 1982). This tension is clearly apparent with respect to land. Land is inherently relational, and the idea that land can be considered purely (or even primarily) as a matter of private rights has been widely challenged. Moving beyond essentialist (exclusion-focused) and bundle-of-sticks theorisations of property, there is a growing literature that understands property as socially constructed, contingent and contextual (Davies 2007).

As Jennifer Nedelsky (1990, 177) explains, a focus on boundaries 'turns our attention away from relationship and thus away from the true source and consequences of the patterns of power that property constitutes'. Since identity is formed through relationships, and since property both contributes and responds to relationships, a proper understanding of property must attend to the relationships through which it is shaped, and to which it gives shape. Narrative and performative understandings point also to the contextual and contingent nature of property, showing that claims about property help to constitute the things and relationships that they describe. Carol Rose (1994), for example, emphasises intersubjectivity in her account of property as a practice through which people make up their minds about the scope of proprietary rights and, importantly, seek to persuade others to do the same. Sociolegal scholarship extends these claims, revealing the multitude of ways through which property is socially, materially and relationally constructed and enacted (Cooper 2007; Blomley 2013; Thorpe 2020).

Two issues make it particularly difficult to sustain claims that the regulation of real property can be contained within private law. First, recognising private property rights means denying those rights to others. This is especially problematic in settler colonial societies like Australia, where the violent dispossession of indigenous peoples poses an unresolved and increasingly urgent challenge to the current system of property (Moreton-Robinson 2015; Brennan et al. 2015; Pay the Rent Grassroots Collective, n.d.). Private property is also implicated in many other forms of exclusion and dispossession, from early modern enclosures to the new enclosures of neoliberal governance: the privatisation of public space, public infrastructure and, especially, public housing (Blomley 2004; Harvey 2005; Hodkinson 2012). The imbalance between the rights and duties of owners and of non-owners produces radical disadvantage for some people, including exclusion 'from the means of life and the elementary bases of social interaction as a result of the cumulative impact of the rules of private and public ownership' (Waldron 2009, 32–33).

Second, the use and enjoyment of land is shaped to a large degree by the use of other land. The consequences of decisions about what happens (or does not happen) on any piece of land will often extend well beyond the boundaries of that land. How land is (or is not) developed, controlled and cared for can be very significant for neighbouring land: potentially producing direct impacts like noise, pollution or impinging on views, light and solar access; as well as indirect impacts, with decisions about planning and development influencing local 'character' and property values. Land is influenced also by activities in places much further away, shaping access to goods and opportunities like energy, transport, employment and services, as well as very basic human needs like food, clean air and water (Massey 2004). We cannot simply draw a line between one owner and another, much less between owners and non-owners.

Planning law can be understood as an effort to mitigate these tensions, a mechanism to recognise the unavoidable relationships between different places and the people who own and interact with them. In NSW, as in many comparable jurisdictions, planning law creates processes for negotiation about potential future uses of land, and for the assessment and approval of specific proposals for development. These tend to focus on the second of the two tensions noted above, operating primarily to reduce potential conflicts between different landowners. Despite the critiques of Ely, Epstein and others, this means that property owners are often very strong supporters of planning controls (Fischel 2004; Talen 2012).

Planning also encompasses techniques to address the first tension, between owners and non-owners. Planning creates processes for participation by non-owners – in NSW, any person can make a submission and even bring legal challenges to proposals likely to have a significant impact – as well as processes to further the interests of those non-owners less likely to participate. Inclusionary zoning, for example, is increasingly being used to require some proportion of new housing developments to be made affordable to people on low incomes.

The balance of critique, resting heavily with concerns about the undue influence of property, reflects the hierarchy between property and planning. Property is a core course taught to all law students, while planning is an elective not even offered at many law schools. This is also apparent in the caselaw. Judges routinely apply property concepts to planning matters, even when legislation suggests a different approach. In NSW, judicial decisions on existing uses and notification rights for landowners have significantly increased the priority given to property owners, despite legal reforms in the 1970s presented as measures to reprioritise public interests over private property rights (Edgar 1999; Thorpe 2013; 2017a).

This hierarchy reflects the much shorter history of laws expressly focused on planning. As many histories explain, the need to mitigate self-interested decision-making by property owners gained

particular urgency during the Industrial Revolution (Mumford 1961; Hall 2011; Hirt 2014). Concerns about impacts extending beyond owners' boundaries – pollution and the rapid growth of low-quality workers' housing, and particularly about the fires, plagues and fears of moral degradation that followed – were central in the passage of laws like the *Housing, Town Planning etc. Act 1909* (UK), and New York City's 1916 zoning plan. With processes requiring the preparation of planning schemes to regulate future development, the setting of minimum standards, and the assessment and approval of proposals for development, laws from this period are typically presented as the foundation of modern planning.

Property law is of course older than planning law, but their relationship is more complex than those histories suggest. Planning was practiced before the passage of laws containing words like 'planning' and 'zoning', including strategic planning, development assessment and the setting of minimum standards (Thorpe 2017b). Philip Booth (2002, 153) argues that these 'superficial similarities' are deceiving because of their different philosophical and conceptual underpinnings. Modern planning laws are fundamentally different, he contends, in their explicit emphasis on controlling the exercise of private rights so as to further the public interest. Yet, as Booth acknowledges, this distinction is not absolute: the practice of planning is often concerned with the resolution of private disputes. Despite the use of techniques like land use to distance itself from questions about who *should* own or control the land in question, planning is a matter of private rights as well as public interests.

Significantly, many early planning practices were contained within the scope of property itself. The doctrine of nuisance is a well-known example through which property recognises the relationships between land, along with participatory regulation of commons. A range of other rules and regulatory practices, many now largely forgotten, worked also to enable adjustment of the rights and responsibilities associated with particular properties. Waste, for instance, provided a mechanism to resolve disputes between successive and concurrent interests in land, and also to consider the implications of land use beyond individual boundaries. The doctrine of waste prohibited not only changes reducing the value of land but, with even greater penalties, changes *increasing* the value of land, such as converting meadow to farm land (Fraley 2017). In the UK, John Sprankling (1996, 534) argues, waste reflected 'a wood-dependent economy increasingly hobbled by a wood scarcity' and an 'unsurprising' choice not to exploit but to preserve the nation's dwindling forests. The doctrine was transformed in the US after independence, reflecting a much greater availability of land and a growing emphasis on economic development. Beating the bounds, similarly, served a dual purpose. This was an annual practice in which the parish community would walk the parish boundaries, stopping at boundary stones to chant litanies and beat willow sticks. Beating the bounds functioned to maintain property boundaries, but also to emphasise 'the property owner's responsibilities to the parish poor… reinforcing local knowledge about land and clarifying community responsibilities' (Darian-Smith 1995).

In NSW, collective concerns were expressly considered in the alienation of Crown land in the eighteenth and nineteenth centuries. Governor Hunter 'offered 100 acres and a staff of convict servants to every officer *who would cultivate*' (Scott 1916, 175, emphasis added). Under Governor Phillip, free settlers and ex-convicts 'of good conduct *and disposition to industry*' were entitled to a grant of land; women were also entitled, men were entitled to larger grants if married, and further land for each child with him at the time of the grant (Rogers 2021, emphasis added). Governor Phillip 'insisted… that land must have a particular use' (State Archives, cited in Rogers 2021,). In applications for land, prospective grantees would plead their case, setting out their good character and conduct, their family needs, and their plans for the property. When land was granted, the Crown frequently retained some rights: to take timber for naval purposes, for example, or to construct roads if needed at some point in the future.

Land has always been relational. What has shifted is the way in which the law recognises this. Like other areas of 'private' law, property creates a social, political and economic regime through its regulation of private rights, and that regime serves public values (Singer 2000; Alexander et al. 2008). The emergence of modern planning reflects not just shifts in the ways in which the decisions made by individual property owners impact upon each other, but also shifts in the nature of property as an institution. Through a process Nicole Graham (2011) describes as 'dephysicalisation', modern property has moved its focus away from land. Property still protects public values (like limiting landlords' capacity to interfere with tenants' use of property, or enabling the state to acquire land needed for public projects), but certainty has become increasingly important among those values. Pre-modern property was more concrete and contingent, with a greater capacity to recognise and respond to the relational nature of land.

While earlier forms of property encompassed a wide range of public and private interests, modern property law has come to focus on a smaller set of private rights and public values. Planning law can be understood as a response to this shift: as property has ceased to regulate many of the practices that shape relationships between land, owners and others, planning has become increasingly important. Planning not only responds to this shift, but reinforces it. By providing an alternative mechanism to manage relationships between different properties and places, planning enables property law to narrow its attention.

3. Racing and rights

Planning plays a key role in enabling property to be presented as private, bounded and certain. The much lower profile of planning than property law may be testament to its success in providing the flexibility necessary for the rigidity of rights *in rem*, the openness that allows property to close its list. This separation between private rights and collective concerns is not complete, however, boundary disputes do sometimes exceed the scope of planning. In these cases, the deeply relational nature of property is brought sharply to the fore.

The recent dispute over property in *Fearn v The Tate* (2020) followed an apparent gap in the planning process. Two London buildings – Neo Bankside, towers of glass-walled apartments on the bank of the river Thames designed by starchitect Richard Rogers, and the Blavatnik Building, an extension to the Tate Modern – were designed, approved and constructed over similar periods (2006-2012 and 2006-2016 respectively). Perhaps because of this temporal overlap, the relationship between the two developments was not adequately considered during the planning process. Most significantly, it appears that overlooking from the Tate's new viewing platform into the flats was not considered by the planning authority. With visitors to the viewing platform able to see straight into their living rooms (and frequently taking and sharing images of those views on social media), Fearn and his neighbours sought an injunction to prevent people using the platform to ogle their apartments.

Both the High Court and the Court of Appeal rejected the claim that use of the viewing platform unreasonably interfered with the claimants' enjoyment of their properties. With no reported cases confirming overlooking as a cause of action in nuisance, and several cases decided and expressing the contrary view, the court found that 'planning laws and regulations would be a better medium for controlling inappropriate overlooking than the uncertainty and lack of sophistication of an extension of the common law cause of action for nuisance' [at 83].

One of the key cases cited in *Fearn v The Tate* (2020) was *Victoria Park Racing* (1937), a foundational case in property teaching. Taylor lived opposite Victoria Park's racecourse and allowed the construction of a small viewing platform on his property from which the Commonwealth Broadcasting Corporation aired detailed commentary on races. Claiming that this caused large numbers of people to stop attending (and, importantly, paying for admission to) the races, Victoria Park brought an action in nuisance to restrain such use. The High Court rejected this claim, affirming the decision of the Supreme Court and finding that 'the defendants have not in any way interfered with the plaintiff's land or enjoyment thereof' (per Latham CJ, 1937, 493). In a much-cited comment, the Chief Judge opined, 'the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide' (1937, 494).

Students are frequently shocked by this decision. How could the law allow someone to use their land to profit from another business in this way, and should it really encourage people to construct fortresses around their properties? The answer, of course, is that these matters are regulated not through property, but through planning (and other regulations, like the licencing of broadcasting). Planning law *can* erect fences which proprietors are themselves unwilling to; it can also restrain proprietors seeking to erect excessive fencing.

Planning provides a much more effective mechanism to recognise that activities conducted within the boundaries of property can and often do have impacts beyond those boundaries. Importantly, planning allows for ongoing negotiation and collective adjustment. Instead of fixing rights and relationships in perpetuity through property, planning allows for regular reviews, democratic mechanisms to incorporate shifting scientific understandings and social values, and to weigh local concerns against wider objectives.

Planning is also more effective in a doctrinal sense. If land use was regulated solely through property, a fair degree of flexibility would be required to negotiate the way we should live together as a society. Doctrines like *numerus clausus* would struggle to accommodate changing social preferences about things like climate change or recognition of the need to remedy indigenous dispossession. The solidity of property as a matter primarily focused on the protection of predictable, private rights is enabled by the fluidity of planning.

In both *Fearn v The Tate* and our classrooms, *Victoria Park Racing* is presented as a straightforward case. Yet only three of the five judges accepted the fiction that Taylor's activities did not affect Victoria Park's enjoyment of their land: with a slightly different bench, perhaps the decision would have gone the other way. In dissent, Rich J (1937, 501) stressed the 'interdependent' nature of land, and the absence of absolute rights in property. Reasonableness and the balancing of neighbours' interests were explained as far more important. Evatt J emphasised the duties owed between neighbours, concluding similarly that 'the plaintiff should not be remitted either to self-help or to legislative aid, but that he is entitled to redress from the law' (1937, 522).

What made *Victoria Park Racing* so contested was the absence of planning. It was not until 1945 that anything like a modern planning system operated in NSW, and not until 1979 that a comprehensive planning framework was introduced (Thorpe 2013). Without a process to balance competing interests, the pressure on property to recognise and respond to the relational nature of land was far greater.

Over time, with more and more detail added to the planning framework in NSW (and many other jurisdictions), less and less attention has been directed within property to the implications of land use beyond the boundaries of ownership. As the recent decision in *Fearn v The Tate* shows, however, the relational nature of land cannot be excluded altogether.

Conclusion

The relationship between property and planning is a source of tension. For many, the influence of property on planning gives cause for concern. Too often, critics argue, private property interests distort the public goals of planning, worsening the inequality, environmental degradation and inefficiencies that planning is supposed to avoid. For others, concern runs the other way, with planning creating unreasonable restrictions on the rights of private owners.

There is a doctrinal tension too. Planning can be understood as a central contributor to a very long process in which property law has distanced itself from the relational nature of land. Since planning is 'fundamentally about the allocation, distribution and alteration of property rights' (Jacobs and Paulsen 2009, 135), more attention must be directed to the complicity of planning in relationships between owners and others. As *Fearn v The Tate* makes clear, however, that process of distancing is incomplete. A fuller acknowledgement of the relationship between property and planning is urgently needed, especially in settler colonial societies like Australia (Porter 2017). Developing practices of accountability – like the recent work on Australian legacies of British slavery, tracking compensation paid to former British slave owners to property investments in Australian colonies (Lester and Vanderbyl 2020); or the effort to plan and design with Country through the NSW Ochre Grid (Government Architect of NSW 2020) – might help to break down this separation, and perhaps also begin the work needed to develop what Ananya Roy calls an 'ethics of postcoloniality' (Roy 2006, 24).

While planning plays a central role in supporting and sustaining property as an institution focused primarily on rights that are private, bounded and fixed, neither planning nor property are completely contained by that focus. The unavoidably relational nature of land means that planning connects to the darker side of property, but it also connects to more hopeful possibilities. As Antonia Layard (2018, 463) explains, 'there are different ways of *doing* property… including ethical landlordism, rent controls, security of tenure, state-led construction of affordable housing, community public spaces, social retail ventures, to name just a few'. Planning has very powerful tools to encourage these more public property practices: zoning certain uses in and out, providing incentives to encourage particular types of development, imposing conditions on development consent, and, in NSW at least, not just limiting but overriding private property rights (*Environmental Planning and Assessment Act 1979*, s 3.16).

For all its implication in inequality, dispossession and environmental destruction, there is another strand in property that connects to propriety. Ownership is linked also with stewardship, care and responsibility, efforts to include rather than exclude (Cooper 2007; Freyfogle 2007; Davies 2012; Eizenberg 2012; Dawney, Kirwan, and Brigstocke 2016). There is a need for much greater attention to these aspects, including how they might enable more inclusive and sustainable forms of planning. As I have argued elsewhere, everyday engagements with property provide fertile sites for reflection on more hopeful forms of ownership (Thorpe 2020). Property is shaped through official actions like passing legislation, deciding cases and registering titles, but it is also shaped through more mundane performances like car parking, cleaning, and choosing where to walk and where to stop. Everyday enactments can be significant determinants of outcomes on the ground, including planning but also policing and the many other processes through which property is enacted and enforced, sometimes even more so than formal property rights. As we think about different ways of doing property, we need to examine the social understandings that underpin property in all of its forms. Planning must engage explicitly with the full range of

property practices, and in doing so explore how we might reflect and reinforce more caring and inclusive ways to live on land together.

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