COMPENSATION AND PLANNING IN VICTORIA

By P. D. PHILLIPS*

Compensation is the tender spot in the anatomy of planning. The nervous impulses which flow back from the area are produced not only from actual pressure upon this sensitivity. A mere threat, a gesture, releases messages flashing to the cerebral centre. The linked reactions may reach into regions very remote from the original stimulus and may indeed produce a contortion of the whole planning *corpus*. The mere analysis or even description of the legal aspects of planning compensation may, however objective and even abstract in intention, set off a chain reaction as irrational as it is unexpected. On the other hand, if we are fortunate, description and analysis may help to reduce the inflammation at this tender spot, may discharge some of the nervous tensions which are more troublesome than any identifiable illness.

Broadly speaking, compensation preoccupies the pained attention of two vitally interested groups in the world affected by planning and planners—the government, influenced if not dominated by the Treasury, and property owners, particularly those with access to investable funds.

The first of these groups is naturally concerned with the financial and fiscal consequences or costs of the planning which it has authorized or established. Has it, unknowingly, called into existence a voracious monster, with a life and power of its own, which will swallow altogether disproportionate portions of resources? These resources are too limited in any event and too often the cause of embarrassing conflicts among those who should be friends to each other and friends of government. To avoid or abandon planning will eliminate the need for compensation. Some beautiful friendships will remain unimpaired. True it is that the general community will be the sufferer. But, in a workaday democracy, it is the particular rather than the general which often makes itself heard. True also that in the long run there will be no escape from the necessity for the planning—but merely vastly increased expenditures arising from delay or postponement. The hereafter fares as badly in competition with the here-and-now as does the general in conflict with the particular interest. The solution of these problems must be found in the moral qualities of courage and long sight which give character to governments. Perhaps this article could most usefully be written by a moral philosopher—with little concern for a mere lawyer.

Midway between these two groups stands the economist, cleaving

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to the concrete not less readily than the lawyer but not professionally trained to eschew 'value judgments' and assessments of priorities amongst the hungry sheep that look up to the lighted windows of the Treasury.

Maybe he can be of some use in devising methods for distinguishing between the 'real' and 'superficial' costs of planning. Will it be too remote from the workaday world of politics if he reminds those concerned that a transfer of assets from one form to another, from the potentiality of land utilization to expendable cash, may not constitute a genuine community 'cost' at all—may not destroy wealth or involve 'real' expenditure? Probably it will be too remote. More to the point may be an accurate analysis of the social balance sheet of any plan—the plus and minus—the concealed gains against the all too readily calculable outgoings.

The ultimate social cost is no doubt the product of a balance between the *primâ facie* cost measured in market values of the assets required for and affected by the plan, and the not so readily ascertained community gains or profits realized when the plan has matured. There are of course difficulties in calculating the items on each side of this account. It is possible that some errors arise if the *primâ facie* 'cost' to the community, in the sense of that expression indicated above, is treated as being merely the sum of the market values of land and other assets required to be used or depreciated.

Errors in this process of summation however are likely to be small in proportion to the total figures involved. When one considers the highly speculative process of estimating the total on the other side of the account—the assessment quantitatively of the gains and advantages of executing the plan—it may be doubted whether a sophisticated reconsideration of community 'costs' is likely to provide anything except an exercise in analysis. Indeed, in the long run, the balance can only be considered in the most general terms.

It has indeed been suggested that there is an actual balancing of plus and minus in the total of market values, that depreciation in the value of all land affected adversely by any plan over a substantial area will be balanced by the total of the enhancement of the value of land advantageously affected by the same plan. It is probable that the critics of this contention have made the more convincing contribution to the controversy. At all events it is for our purposes a somewhat arid controversy because it is clear that in the 'social balancing' much must be included which is not measured in market value estimation of enhancement. A new bridge or highway may be shown to affect enhancement of the values of lands in proximity. It may add to the productive potential of establishments territorially remote without altering the market value of the fixed assets of such establish-

ments. This however is a simple situation compared with the difficulty of assessing the community benefit of a park, a garden or a children's playground.

In the upshot only one conclusion emerges beyond shadow of doubt or qualification. Concentration upon the total cash sum required to pay out the compensation required, however large such a sum may be, when standing alone and detached from the balance in which it is an integer, is not a significant fact. Much of the total may represent a mere transfer, from government of cash and to government of tangible assets. Some of the total represents a transfer for cash of intangible assets—unrealized potentialities destroyed by planning. It is obvious that part only of the total constitutes a genuine cost to the community. It seems equally obvious that this part of the total will almost certainly be less than the total value of the gains. It is this broad conclusion which needs most emphasis and reiteration. At bottom the rational question comes to be a matter of priority—at any one time there is a limit to the disposable resources available to the Government. The problem, and it is narrower than sometimes is supposed, comes to be a matter not so much of 'how much' as 'when'. In this solution it is of course obvious that delay in time must generally be balanced against increases in amount.

These considerations are as obvious as they are general. They determine the broad policy considerations to be found embodied in the relevant legislation. They are not explicit in the statute book but they are, it is submitted, the matters which have or should have influenced the terms of the law itself. There is some justification for endeavouring to formulate this conception of a social calculus if only by way of setting the background for consideration of the other aspect of our problem.

The extent and nature of the provisions for, and amount of, compensation will be as vital to the individual property owner who may be a prospective recipient as to the government which must foot the bill. The considerations relevant to his situation are perhaps 'equal and opposite' to those significant for the government. Even if it be true for instance that, 'on balance' and 'over all' as a result of a plan, enhancement of land values may roughly balance with depreciation of values, it is certainly not true that in any individual case this will be so. Indeed it is obvious that where in any individual case such a balance does arise it is a demonstration of a quite remarkable coincidence. To deny compensation to all individuals who suffer the depreciation of their land because a different totality of individual landowners may gain an equivalent total enhancement, cannot be justified logically. Nor are the deficiencies of this policy cured by any insistence that a certain number of individuals are common to the two groups—

a certain number of landowners actually experiencing enhancement of some land and depreciation of other land. Again if it be contended that every landowner will gain to some extent from the plan—the answer must be that this universally-experienced gain accrues not to landowners as such but to members of the community whether owners or not. True, landowners may enjoy some gains which are additional to those of the general body of the community, but these particular gains are not necessarily balanced by any losses of these particular owners.

Once the ground is cleared of these fallacies, so obvious as hardly to need exposition, it is possible to consider the more detailed issues which explain why compensation is a 'tender spot' for landowners as well as for government. It may be useful however to keep in mind these general considerations when we come to consider the broad pattern of policy embodied in the actual provisions for compensation in the current legislation—the broad pattern of policy which determines in what situations and subject to what principles compensation may or may not be recovered.

The claimant, when he finds himself within and not excluded from the possibility of compensation, will be vitally concerned with a series of minor problems, as to the methods of assessing the amount recoverable, the equity of the process itself, the expense and time involved, and the efficiency and probity of those who perform the more important of the relevant functions. There is a tendency sometimes to discuss these matters by simply asserting that provision has been made for appropriate compensation and that there is no need to enquire further as to the operation of such provisions. If however the establishment of a plan increases the individual cases in which compensation must be ascertained then these 'lesser' problems raise matters which cannot be disregarded by planners who have any acute desire to render their 'Plans' stable and acceptable to those concerned. To recur to our earlier fantasy, the discharge of inflammation surrounding this sore spot may result from remedies imposed at varying levels of importance and complexity.

It will be possible now to examine the provisions of the Victorian legislation against these general policy considerations.

The Town and Country Planning Act 1958 contains two provisions dealing with compensation, namely sections 25 and 27, each of which has been amended by the Town and Country Planning (Amendment) Act 1959. The earlier of the two sections (section 25) incorporates the provisions of the Lands Compensation Act 1958 and the later section (section 27) incorporates Part XLIV of the Local Government Act 1958. Thus there is a substantial body of statutory law touching on compensation in the planning field. To this *lex scripta* must be added

in any particular instance the terms of any Interim Development Order or orders which may have been made under section 14 of the Town and Country Planning Act and, as will be seen hereafter, attention must be directed to inchoate planning ordinances which may not be legally operative and yet are not without effects-in-fact especially in relation to compensation and the actual mode of operation of the provisions above mentioned.

There are reasons for departing from logical considerations as to the order in time in which these provisions may operate, though no doubt the normal approach would be to consider the operation of the compensation provisions in the first instance during the currency of any Interim Development Order and then to consider the appropriate provisions operating during the currency of any Plan given legal force as an ordinance.

It is proposed however to reverse this process and to consider first the compensation provisions under an operative plan. The reasons for this proceeding will be clear enough as we proceed.

It may be suggested that this form of procedure fails to recognize that any final plan may never become operative, and, if it does so, may be in a form substantially different from any of those which have been outlined by the appropriate authorities up to the present date. These assertions may be accepted whilst at the same time adhering to the method suggested. The compensation provisions are indeed embodied in statute and cannot in themselves be altered by any subordinate law-making provisions by way of order or ordinance. On the other hand the statutory provisions will operate in particular ways by reason of the integration of the 'subordinate' provisions into the compensation machinery. In view of these considerations, until there is a plan in operation, any examination of compensation as a practical and working system is to some extent premature. In practice all parties are likely to engage in a good deal by way of anticipation.

The most important of these inchoate 'Plans' is that relating to the Melbourne and metropolitan area and known as the 'Melbourne Metropolitan Planning Scheme Ordinance'. This bears the original date of 1954 but has been amended from time to time and is now dated 20 October 1959, as submitted to the Governor-in-Council.

Any planning scheme, when operative, is likely to affect the value of land within the area of the plan in different ways. First, the scheme may prescribe limited uses for land in particular areas, that is to say it may specify purposes for which land may be used and in effect prohibit all other uses, or it may expressly prohibit, restrict or regulate specified uses. The impact upon value of restrictions of these kinds may be much greater if the use of the land existing at the time of the plan is not made a special exception from the prohibition or regula-

tion. Where the existing use conflicts with the prohibition or restriction it is often given special exception as a 'non-conforming user'.

Secondly the plan may provide for the reservation of land for some public or community use. Such a process of reservation will have two effects. It will ultimately lead to the acquisition by agreement or compulsive process of the land in question by some authority. The provisions for compensation upon acquisition in these circumstances are likely to be similar to those relating to public acquisition in a wide variety of circumstances. The acquisition may be incidental to the execution of the plan but otherwise there is no special feature of planning which should affect the assessment of compensation or the conditions on which it may be obtained.

Thirdly there is an intermediate situation. Land may be included as reserved in the plan for some public purpose, but for the time being no steps are taken to resume the area and carry out the purpose. Nevertheless the effect of the publication of the plan may be to depreciate the land by raising a shadow of future acquisition. This is a 'market' effect rather than a legal effect. Indeed the law may permit the land to be used without limitation until it is actually acquired but nevertheless the impermanence of such permitted uses may lead to a fall in value. This fall in value may be said to be due to the provisions of the Plan but not to arise from any specification of purposes for which the land may or may not be used. It arises from a specification as to a future contemplated public use.

Combined with the situation last mentioned, it may be that under general discretionary powers to permit or refuse authority to develop land within the planned area, the responsible authority may grant or refuse permission having in contemplation the future process of acquisition and the effect upon cost of acquisition of any particular development. The use of the land without permanent improvements may well be permitted because it may not have any marked effect upon the price paid when ultimately it may be acquired. The erection of expensive buildings may be prohibited as wasteful and inconsistent with the ultimate 'reserved use' and as likely to make the ultimate acquisition unduly expensive. Moreover enlargement or extension of existing uses may be prohibited from these 'economy' motives even when such enlarged or extended uses would have little or no objection from a planning point of view. Such prohibitions or restrictions upon use seem to arise out of a general power to regulate or restrict the use of land. From the point of view of compensation the reduction in value may be thought to arise in the same way as the reductions due to normal limitations of use arising from the prescription of specific areas and/or classes of use ('Zoning'). On the other hand some part, and perhaps the whole, of this loss of value may be thought to arise as an

incident of the acquisition for public purpose and anticipatory thereof. The actual cost of acquisition at the date thereof may be the less because value has already been lost by way of anticipation. From the point of view of the policy of the Planning Law with respect to compensation, the whole situation with respect to land reserved in the Plan for public purposes needs separate consideration.

Before leaving these classifications of the various ways in which the Plan may affect value of land and raise a question as to compensation, two additional matters may be considered.

The reservation of land for public purposes may affect, and appreciate or depreciate, the value of other land outside but affected by the area reserved. This may arise for instance because of depreciation upon severance where reserved land is part only of an area in the hands of one owner. On the other hand depreciation may arise without severance where land in the vicinity of land reserved is affected by the purpose of reservation. The reservation of land for (say) an infectious diseases hospital may have an effect upon all the land in the neighbourhood, and that effect may become operative immediately the Plan is published and the future purpose of the reservation is made known.

Mention of injurious affection of land (and consequential depreciation of values) naturally raises for consideration the contrasting process of betterment or appreciation in value due to planning actual or prospective. Thus the reservation of land for, say, a public park or garden may well have the effect of increasing the value of some land in the neighbourhood. Again it is worth noting that this land thus appreciated in value may be owned and hereafter retained by persons from whom the future park land is to be acquired by a process of severance, or without any severance. On the other hand there may well be lands held by other persons who are the 'accidental' beneficiaries of the reservation as they (or their successors) will be of the actual public improvement when this is brought into being. These are clear cases of betterment in situations some of which may easily enough come within the reach of specific provisions in the law dealing with compensation.

Other aspects of betterment, however, present more elusive aspects when we are considering the possibilities of modifying or qualifying the assessment of compensation. Restrictions or prohibitions on use may appreciate all or some of the land affected or may have this effect upon land not itself subject to the restrictions. Thus the value of land in an area zoned for residential purposes may be increased by the fact of zoning, by the guarantee as it were of the maintenance of the amenity of the neighbourhood. (It may also be depreciated in value of course by such zoning—but this is not relevant for present purposes.)

But the residential zone may also be increased in value because an adjoining area is zoned for some non-industrial purpose (as for example office and professional use, educational purposes). It may be suggested that considerations of betterment are irrelevant in the consideration of provisions for compensation and logically should be excluded. However two points should be noted, though not here pursued to their logical conclusions. Policy framers observing that appreciation of values accrue to property owners as a windfall addition having little relation to their own activities or virtues sometimes feel frustrated by their inability to recover for the community these increases which seem to result from community action. The result is sometimes to be found expressed in a policy which denies compensation for depreciation in situations which correspond in general character to those producing appreciation but in which the practical consequence is of an opposite or contrasting character. In effect the policy makers justify a denial of provisions for compensation when depreciation occurs by pointing to the impossibility of recovering appreciation when betterment occurs. However natural an expression this may be of human weaknesses, it is lacking in any logical basis.

There was theoretical justification for the policy attempted for some years in the United Kingdom of 'nationalizing' betterment values and compensating for depreciation due to control of use, that is for the deprivation of the right to develop. Great difficulties arose in the practical application of this conception. Moreover the economic consequences of so grave an interference with the normal enterprise stimuli were found, or thought, to be too prejudicial. At all events the attempt was abandoned. But it could be said for this policy that whilst attempting to balance depreciation and betterment 'over all' it did not fall into the error of supposing that the 'unearned' appreciation which John Doe enjoyed in respect of Blackacre provided a justification for denying compensation for depreciation which Richard Roe suffered in respect of Whiteacre.

Against the broad logical implications involved in these general considerations let us consider a more particular problem which arises. There is hardly room for questioning, in an economy of private ownership and free enterprise, that if land is taken for public purposes then at least fair market value should be paid to the owner. Doubtless there is room for discussion as to what elements should be included in this value taking all relevant moral and sociological considerations into account. If, then, planning involves resumption, planning will necessarily entail compensation. Moreover if resumption further involves loss of value by the process of severance, this presumably is a direct by-product of the resumption and therefore of the planning itself.

How then should we classify the depreciation, apart from severance, of land retained by the owner from whom a specific parcel is resumed? Is this a case of depreciation arising from the operation of planning, to be compensated only if all depreciation arising from the operation of the Plan is the subject of compensation? Or, on the contrary, is such injurious affection integrally related to the resumption for which, inevitably and upon any view, compensation must be made?

The law on this matter, as it has developed apart from planning statutes, has disclosed certain curious refinements. Thus when a claim is made for compensation for 'injurious affection' as the result of public acquisition, different considerations are applied when the claimant has had 'other land' resumed and when this has not been the case.

The rule has always been that land depreciated by the execution of public works, that is to say, by the use of land for some public purpose, is not in law considered to have suffered injurious affection, and no compensation is payable. Thus, in such a situation, the individual suffers whilst the public gain, but the individual loss remains where it falls. Perhaps any other rule would be unworkable. If the establishment of a gaol destroys the view or reduces the amenity of a building block this is unfortunate for the owner. Of course the complaint of the landowner of reduction in the value of his land may arise from a cause which would, as between ordinary citizens, give rise to a normal legal claim. A railway may cause vibrations or permit smoke or grit to escape. Such depreciating causes constitute common law nuisances and actions may be brought for damages. Success in such claims will depend on whether, upon a true view of the statute authorizing the activity, it was intended to subject the public activity to liability for private claims. Where there would be such liability for damages there may be a claim for compensation for injurious affection. This then seems to be a balancing of public purpose and private right.

But a curious qualification is found in cases where land is acquired for such public works by severance and other land is retained by the owner from whom the acquisition is made. In this case the owner can obtain compensation not merely for depreciation due to severance but depreciation of the retained land arising out of the public use of the land acquired even when such use would not constitute an actionable wrong of any kind. Thus, in the example cited, the owner of 'retained land' adjoining which a gaol is built on land resumed from him can claim any resultant depreciation as 'injurious affection', even though the depreciation does not amount to or is not analogous to any common law right to damages.

The foregoing survey raises problems without indicating solutions. It does indicate however one aspect and suggest one enquiry in this

rather elusive matter. The issues of a moral character, using that adjective in its broadest and socially most significant sense, which arise present extraordinary variety. It is this very variety which should warn against hasty or superficial solutions. The issues themselves suggest a variety of solutions, and perhaps suggest that the solutions may not all be mutually consistent. It is time then to turn to the solutions contained in the Victorian Planning Law and examine them bearing in mind this last aspect of the matter. Basically the enquiry involves scrutiny of the statute, but the practical operation of the law can better be appreciated if the two main sub-statutory instruments, the 'Greater Melbourne' Interim Development Order and the draft 'Melbourne Metropolitan Planning Scheme Ordinance' are included.

Let us begin with the most difficult as well as the most frequent class of case—and the one most characteristic of the process of planning. Any planning law will almost certainly prohibit certain uses of land in certain areas. In these or other areas it may also expressly permit certain uses but may restrict the permitted uses to a specified list and further it may regulate the permitted uses by attaching an almost infinite variety of conditions. The draft Metropolitan Ordinance does all three of these things by classifying zones and then specifying unconditional permitted uses, and permitted uses subject to expressed conditions and permitted uses subject to unexpressed conditions (that is to say conditions dependent upon the discretion of the responsible authority).

The effect of these specifications may (and will) be to depreciate in some cases the value of the land directly so affected and may also be to depreciate the value of other land not so affected. As we have noted above the effects in question may be to appreciate any of such land. Whether this is a relevant consideration in relation to compensation we will consider hereafter.

The Town and Country Planning Act of 1958, section 27 (3) (c), makes clear that no compensation will be payable for any depreciation arising from these prohibitions, restrictions, or regulations of use. This is sometimes summarily, if a little inaccurately, described as 'No compensation for zoning'. As practically the whole of the land within the area of the Plan is included in one zone or another, and is therefore subject to some prohibition restriction or regulation, it is clear that this policy of denying compensation is a far reaching one. Care must be taken not to exaggerate this extent. It must not be assumed that all the land which is subject to prohibition or restriction is depreciated. In many cases there may be no effect upon value. Again the effect of these provisions will be to appreciate some of the land to which they apply—though this will be an unusual situation. Equally whilst

in some cases other land not subject to a particular restriction may nevertheless be depreciated by the formulation of that restriction, such 'other land' may in particular circumstances be appreciated in value and this indeed may be a not uncommon consequence. Here then is a situation in which there is a potential effect upon almost the whole of the land included by the plan and in many cases a depreciatory effect. What justification can be offered for the conclusion denying compensation for this widespread depreciation?

Theoretically it is difficult to find really sound justification. If the instances of depreciation are few, nevertheless they represent cases in which public gain arising from the execution of the plan is obtained at the cost of private loss. If the instances are few the public burden of compensation is so much the less. In truth, the rarity of the occurrence cannot really be relevant. This may be tested by asking what conclusion should be drawn from supposing that the cases will be many. True, in these circumstances, the burden on the community will be very heavy. Would the disregard of the moral obligation, if it exists, be justified by saying that a large number of landowners must suffer from it? In practice the size of the total compensation will affect political judgments because it will affect budgetary possibilities. If the truth is that there is no moral justification for this policy, but because of the size of the total sum there is no practical alternative to a disregard of the moral obligation, it would be as well for us to admit this conclusion and then consider the course to be followed. If we really conclude that a large number of landowners should be penalized without moral justification, because of a community objective from which incidentally they and others will gain, we should at least do this with our eyes open.

We have indicated elsewhere that the mere fact that some individuals will gain from the imposition of restrictions and that these gains cannot be recovered by the community and will not be shared equally and are not dependent upon any particular virtues or activities of these beneficiaries is not really a relevant consideration in considering the denial of compensation to others.

It is quite true that before the advent of planning legislation in its modern form local government legislation authorized municipal authorities to make by-laws restricting the uses of land in specified areas. This was the original form of 'zoning'. So far as Victorian local government law is concerned such permitted zoning was certainly of a very simple and limited kind compared to the highly elaborated and conditioned prohibitions and restrictions of modern planning ordinances. It is sometimes said that, because there was no provision for compensation for depreciation due to zoning under Local Government Law, there is no need similarly for compensation for zoning in

Planning Law. This argument seems to imply that moral deficiencies are subject in some way to an unwritten Statute of Limitations. The practical politician, not aloof from contemplation of voters' reactions, is inclined to summarize the matter by saying that 'people are used to it'. This would however only provoke the question—'Used to what? —Injustice! Immoral political expediency!'

Even in this very workaday climate we should be inclined to ask whether the precedent of the Local Government Law really was 'on all fours'. Does the enormous increase in the possible extent and nature of the authorized restrictions and prohibitions make no difference—or the vast area over which they operate—or the number likely to be affected? These questions would require an answer if the policy is merely a practical solution of dubious morality but one to which people have become accustomed.

Whatever may have been supposed to be the policy contained in the Local Government Acts, it now becomes necessary to consider the justification for the present policy. If such can be found, it may well be that it supplies an answer also in respect of previous Local Government Law. If such cannot be found, it will hardly be necessary to consider whether the previous law also lacked justification or not. At all events it should be reasonably clear that the problem cannot be determined merely by a reference to the practice of the law in the past.

Nor is it possible to obtain guidance from consideration of what is laid down in other legal systems, close to or differing from our own. In the United States, where the issue has been debated upon very broad principles, the Supreme Court has considered in a variety of specific circumstances whether 'zoning' laws may constitute a taking of property without due process of law when there is no provision for compensation for resulting depreciation. The result has been uniform assertion of the validity of such legislation as being a proper exercise of the police power.[1]

Nearer to the question before us is the debate as to whether prohibitions or restrictions upon use without provision for compensation for consequential depreciation amounts to a 'taking of property without compensation' so as to offend against that specific prohibition contained in the Fourteenth Amendment. Whilst no decision has explicitly asserted that prohibition of use may amount to an 'uncompensated taking' the Court has suggested if the regulation of use 'goes too far' it will constitute an invalid taking without compensation.[2]

[1] *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365; *St Louis Poster Advertising Company v. St Louis* (1919) 249 U.S. 269; *Gorieb v. Fox* (1927) 274 U.S. 603.

[2] See *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393 and note as to the Federal Powers and the Fifth Amendment providing: 'Nor shall private property be taken for public use without just compensation', that an elaborate doctrine has

The conclusion from a wealth of judicial considerations is suggested that the true character of legal prohibitions and restrictions on user depends upon the degree of severity of the law in question from the point of view of a property owner. This is an empirical solution extremely characteristic of modern American law and courts invoking a measurement of facts and consequences and rejecting conceptual analyses. Moreover it is a working rule for excusing or condemning legislation as not measuring up to the qualitative sociological standard involved in the concept of 'due process of law'. It is not improbable that section 27 of the Town and Country Planning Act 1958 would be held, if subject to the jurisdiction of the Supreme Court at Washington, to be invalid because of the width and generality of its terms. It might even be held, if enacted as a Federal law, to amount in certain circumstances to an acquisition of property not upon just terms. But as to this it would appear that the High Court of Australia might take a different view.

The experience in the United Kingdom relating to compensation in connection with 'planning' has been much affected by specialized doctrine resulting from the findings of the Uthwatt Committee.[3]

It is certainly not possible to draw any useful conclusion of a general nature from the complicated history of planning legislation in the last decade and a half. The basic principles have been so vastly different from the simple enunciation of the Victorian legislation that no guidance, even of a comparative nature, can be obtained from them.

In New South Wales the actual form of the legislation is again very different. *Primâ facie* there seems to be a recognition of a right to compensation for depreciation resulting from prohibitions and restrictions upon user. This would seem to concede the broad moral contention which the Victorian law rejects. However the series of qualifications upon the general right to compensation embodied in the New South Wales law are so far reaching and so frequent in operation that the ultimate consequences may not be vastly different in the two States. If the general concession of compensation for all injurious affection seems to point to a clear moral conception, the explanation of the far reaching exceptions compels a consideration of issues no easier of solution than those which arise upon a contemplation of the position in Victoria.

The question must therefore be determined as a matter of first

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been evolved as to when restrictions amount to a 'taking' so as to necessitate compensation: *United States v. Dickinson* (1947) 331 U.S. 745; *United States v. Causby* (1946) 328 U.S. 256; *Richards v. Washington Terminal Co.* (1914) 233 U.S. 546. (Injurious affection by escape of gas and smoke from works set up under the exercise of statutory powers amounting to a 'taking of property'.)

[3] *Report of Expert Committee on Compensation and Betterment* (1942) Cmd. 6386.

impression and as a 'value judgment' in a puzzling sphere of public conduct. Needless to say few lawyers trained in the common law take readily even as an exercise to a problem which is devoid of authority and demands a social 'value judgment'.

Indeed, the legislature itself, the orthodox adjudicator upon such questions, appears to have made its decision with hesitation and reluctance. The path to the summit is not without interest for those painfully labouring over the same ground.

In 1944 the Town and Country Planning Act provided compensation for all land prejudicially affected by any interim development order or planning scheme *except* any provision in a planning scheme which could have been enforced without liability to pay compensation by any municipality independently of the Act.[4] Probably this was intended as a reference to provisions in any scheme similar to those which could have been enforced by any municipality. This exception seemed to be taking shelter in the past rather than to be expressing any principle capable of independent justification. Whatever sort of injurious affection could have been inflicted without compensation, stated Parliament, shall continue to be able to be imposed. Disregarding a specific reference to provisions imposing requirements for 'off street' loading docks for motor vehicles, the other provision specifically made free of compensation was one prescribing areas for residential, shopping, factory or like purposes.[5] This provision added nothing to the exception adopting the previously existing 'compensation-free' powers of municipalities, except that it made the destruction of an existing user by reason of some particular zoning provision and consequential immediate depreciation no longer compensable in relation to the named prescribed areas though such destruction of non-conforming user was not within the power of any municipality, being prohibited by statute. It is difficult to detect any principle in these provisions of the Act of 1944—though the general tendency was to make compensable any depreciation except that arising from a very limited form of zoning. Moreover there was no exception to the right to compensation for the depreciation due to the conditions on permits, or the necessity to obtain permits, or the depreciation due to a refusal of a permit under any interim development order. On the whole it may be suggested that Parliament in 1944 embraced in general the view that substantially all depreciation resulting from planning limitation should be made the subject of compensation. It introduced an exception which operated to take away compensation which would have been payable in respect of provisions which could affect either existing or future and merely potential user, but the operation of these exceptions was of a very

[4] S. 22. [5] S. 22.

limited character. The general principle is readily understandable. The exception can only be justified upon the basis that it had been previously accepted—and perhaps, had not apparently caused observable hardship.

By 1954 the legislature was persuaded to alter its basic attitude to this matter. The superficial form of the legislation was not changed so far as the pattern was concerned. But the real emphasis was changed completely. Compensation was now provided for any loss or damage suffered by or as a result of the operation of any interim development order or the making or enforcement of any planning scheme. Loss or damage may indeed prove to be less extensive than 'prejudicial affection'. The ascertainment of 'loss or damage' is certainly different in principle from the ascertainment of 'compensation'. This change of principle however is of relative unimportance as compared with the framework of the new exceptions to this general grant of compensation. These are no longer a mere echo of the practice of the past relating to municipalities. Any provision of an interim development order or planning scheme 'which specifies or enables to be specified the purposes for which land may be used or which prohibits restricts or regulates the use of land for specified purposes' is now excepted from the compensation provisions.[6]

Some limitations upon this exception will be noted hereafter. For the purpose of the present discussion these may be disregarded. Indeed so far as any interim development order is concerned there was not in fact any limitation upon the exception. Moreover the exception covered the whole field of the interim development order so that, *uno ictu,* there was a complete destruction of all compensation payable under this interim method of control, whereas previously there had been no exception to the full compensation for prejudicial affection resulting from the operation of the same. We shall return to this matter hereafter but it is worth mention here in relation to the general moral and sociological problems presented by the new formulation of the law.

As to the exceptions upon the exception from compensation arising from restrictions or regulations of user in a planning scheme itself, these exceptions relate to the reservation of land for public purposes and to the administrative dealing with land subject to 'non-conforming user'. Both these matters are better dealt with in connection with the specific subjects concerned, thus leaving the way clear for a consideration of the broad provisions which now grant and thereafter take away the right to compensation as provided in the Victorian Planning Law. It will be seen that examination of the course of the

[6] Town and Country Planning Act 1954, s. 8 amending s. 22 of the Act of 1944 and now embodied substantially in s. 27 of the Town and Country Planning Act 1958.

legislation reveals a *volte fâce* upon the basal issue. At the beginning, individual owner prejudice resulting from the assertion of supposed community interest is covered by compensation, with a limited exception apparently derived from an historical example and unrelated to principle. At the end of the development, individual owner prejudice is left to lie where it may fall with minor exceptions substantially connected with the resumption of property or the destruction of existing vested rights.

Having considered the various modes in which this problem may present itself, having glanced at the attitudes adopted in other jurisdictions, and having viewed the road along which the legislature has been induced to proceed in Victoria we may now ask ourselves whether this proposed law can or should be defended upon any logical or moral basis. It is legitimate to ask whether 'this proposed law' should operate because up to date the actual planning schemes which have been fully operative have not been very significant. The approval by Parliament of the Melbourne Metropolitan Plan and its implementation would however result in the application of these compensation provisions—and the extensive denial of compensation—over a wide and enormously valuable area. The consequential effects upon individuals both up to date and in the future must be accepted as very considerable indeed. Have the moral and social issues been adequately debated or sufficiently determined?

We may begin by querying whether the depreciation of land as an 'indirect effect' of planning provisions has not been bowed out of doors by substituting 'loss or damage' for 'prejudicial affection' in the compensation provisions. If the effect of restriction of the use of land in Parcel A is to reduce the value of land in Parcel B, though the latter land is not subject itself to any legal restriction or other legally operative consequence, the better opinion would appear to be that the depreciation of Parcel B is not 'loss or damage suffered as a result of the making or carrying out of any planning scheme'. It is true that section 27 (2) of the current statute refers to the loss or damage as 'such compensation' but this in itself can hardly change the meaning of 'loss or damage'. On the other hand the change from the expression in the Act of 1944 ('Compensation to all persons interested in any lands . . . prejudicially affected by the . . . carrying out of . . . any planning scheme')[7] to the present form of words is very conspicuous, and must surely have been intended to produce some definite change in the operation of the law. Thus one important sociological judgment seems to have been made in the process of weighing individual loss against community gain.

Section 27 (2) applies Part XLIV of the Local Government Act 1958

[7] S. 22.

'with respect to' the compensation, that is the loss or damage resulting from any planning scheme which is not excluded by other provisions of the statute. Section 836 (b) of the Local Government Act limits recovery to 'direct pecuniary injury' excluding 'remote indirect or speculative damages'. These expressions probably do not greatly help in determining the content of the loss or damage which is contemplated in the Town and Country Planning Act. At all events they do not encourage the view that the 'indirect effect' of restrictions in depreciating value is included in loss or damage. It may well be therefore that there is very inadequate provision made for assuring to the individual property owner that he will not be required to carry the burden which the pursuit of a community objective imposes upon him. And this doubt arises without any consideration of the specific elimination of practically all compensation claims resulting from prohibitions, restrictions and regulations of use, and upon the assumption that planning schemes may produce depreciation and claims for compensation apart from such eliminated claims.

A further highly dubious provision results from the incorporation of the part of the Local Government Act referred to. Section 836 (a) provides:

> There shall be considered in reduction of all claims for compensation any and what enhancement in value of any property of the claimant wherever situated has been or will be directly or indirectly caused, and whether any or what other immediate or proximate benefit has been gained by or will become available to such claimant by reason of the execution of any works with respect to which such claim for compensation is made or of any other works of which the said works form a part.

The difficulties in applying this section to the matters arising under the making and applying of a planning scheme are so conspicuous that no punishment would be too great for the authorities who invited Parliament to perpetrate this piece of legislation by reference. What are the works to which this section is to apply when transferred so as to govern claims for compensation under a planning scheme? Is the 'scheme' itself to be treated as a 'work' and the application of the scheme to be treated as 'the execution of the works'? The provisions are not readily applicable in terms to the new matter to which they are made applicable by reference. In the Local Government Act itself the right to compensation does not arise under Part XLIV but under some other specific provision of the statute. An examination of many of these sections indicates that the 'works' referred to will normally involve actual construction or alteration of some physical character and not the modification of incorporeal rights. On the other hand the Planning Scheme though it may in certain aspects contemplate ultimately physical constructions or alterations and may make

'provision' for such works cannot itself authorize the works. If the Scheme makes provision for 'sewage disposal'[8] so that the land adjoining the 'provided area' is depreciated in value no doubt the loss in value of the adjoining land arises by reason of the contemplated future 'execution of the works'. There may be land ten miles distant on the opposite margin of the planned area which will increase in value because of the promise of the installation of sewerage. This no doubt is an enhancement in value which will arise by reason of the execution of the works. But suppose the enhancement of some relatively distant area results from the provision for the construction of a park and garden in the planning scheme. Is this 'other works' in a scheme of which the sewerage provision forms a part? Taking the general policy of the Local Government Act (as well as the literal meaning of the words employed) it would appear that the answer would be affirmative. Yet it may be doubted whether any careful consideration was given to the application by reference of the compensation provisions of the Local Government Act with its substantial relevance to physical works to the operation of a gigantic planning scheme such as that provided by the existing Melbourne Metropolitan Plan.

Be this as it may, what is to be said as to the justification of this crude attempt to correlate enhancement ('betterment') and compensation? There cannot be any logical justification for the adoption of what seems to be a rough and ready method of protecting municipalities from extensive claims in relation to their limited public works. Let us assume under a planning scheme that an arterial highway is 'planned' involving the ultimate acquisition of land to widen the existing traffic route. The effect of the planned highway may be to depreciate the value of land adjoining the new route by reducing it to an uneconomic size. Compensation is payable for any reduction in value of this land by virtue of section 27 with its reference to the 'making' of a Planning Scheme if such depreciation occurs before any acquisition takes place. Land half a mile distant may be increased in value by reason of the anticipation of the future improvement of the highway. All the owners of this distant land will enjoy this enhancement and may translate it into cash by immediate sale. But if one of such owners happens (by mere chance) to own land which will be depreciated by the building of the road he will find his enhancement of the one subtracted from his compensation for the other. This process can be justified if all the betterment is subtracted from all the owners who benefit. But it cannot be justified when confined to the owner who has been otherwise prejudiced, and not extended to the owners who have not been prejudiced. It is provisions of this nature,

[8] Town and Country Planning Act 1958, s. 16 and Second Schedule Para. 6.

when they begin to operate on an extensive scale, which tend to bring planning into disrepute and to create substantial and justifiable hostility.

Before leaving the Local Government Act provisions, one other practical defect may be noted. Section 846 provides that whenever the compensation awarded exceeds £500 there shall be an appeal to a Justice of the Supreme Court. The provisions make clear that this appeal will involve a complete reconsideration of the whole claim with any fresh evidence which may be tendered. Thus the original hearing before a County Court Judge will be entirely wasted if either party so wishes. In view of the present standard of values and the very considerable impact of such a Planning Scheme as that contemplated for the Melbourne metropolitan area some further consideration should surely be given to a procedure which was designed long ago and for very different circumstances. It is not necessary at this stage to do more by way of re-drafting these provisions.

In the end however the debatable aspect of section 27 so far as planning schemes are concerned is to be found in connection with those provisions which exclude compensation. These are contained in sub-section 3. The first two paragraphs of the sub-section do not raise any matters of vital principle. Thus paragraph (a) deals with matters or things done after the planning scheme is operative when a permit has been issued which permit specifically negatives the absence of compensation. Paragraph (b) denies compensation for provisions requiring off street 'parking' or loading of vehicles in connection with a trade or industry. The empirical justification for denial of compensation in these two cases is not so elusive as to detain us. It is paragraph (c) of sub-section 3 which raises the fundamental question. It provides (so far as relevant to this discussion):

> No compensation shall be payable . . . in respect of . . . any provision in a planning scheme which specifies or enables to be specified the purposes for which land may be used or which prohibits restricts or regulates the use of land for specified purposes, except in so far as—
> (i) such land is land reserved for public purposes; or
> (ii) the responsible authority has by notice in writing forbidden the continued use of the land for any purpose specified in the notice which (though not actually prohibited by the planning scheme) is not in conformity with the planning scheme.

If we disregard the exceptions in paragraphs (i) and (ii) set out above, this sub-section amounts to a very general denial of compensation for depreciation arising from any planning scheme. If we subtract from such schemes all the provisions specifying or authorizing specification of purposes for which land may be used or prohibiting restricting or regulating user it can be assumed that, putting the

matter broadly, there will not be much left in any scheme and certainly there will not be much left likely to depreciate land values and raise questions of compensation. What can be thought to justify such a provision? It is not enough to say that the community cannot afford to pay the compensation which is thus eliminated. Apart from the economic reasoning involved in determining what in truth is the 'cost' of paying such compensation, if the assertion be valid, it would only raise in a roundabout way the question whether the community could afford to embark upon the plan, for, if the denial of compensation is not capable of rational moral justification it can be asserted that no free and moral community can 'afford' to perpetuate a policy based upon palpable injustice.

Nor is it possible to justify this rule upon the basis often found in our text books that it is the product of history. The rule is no older than statutory planning itself and in its present extensive form claims no more sanctity from age than can be gathered from an existence for five years. To point to a previous provision of a very different and much more limited kind—the by-law making powers of municipalities under the Local Government Act relating to the zoning of areas in the municipality—and to insist since this power did not involve the subordinate legislature in compensation—that 'history' justifies this new development of policy should not carry conviction to any fair mind if indeed there is no rational moral justification for the provision. What then can fairly be said for the Victorian legislature?

First it may be admitted that it is common enough for legislation to impose restrictions upon conduct the result of which is to reduce the profitability of some line of conduct or the potentiality of some asset. If Parliament prohibits the operation of retail shops and stores after 5.30 p.m. on Friday evenings it is arguable that shop owners may lose some trade, and in the long run some nett profits. Their shops become less valuable, as also do the shares in companies owning them. If Parliament prohibits the parking of motor cars in a defined area of the metropolis it is arguable that the freehold value of shops in the defined area may be reduced. If Parliament prescribes a minimum wage payable to (say) chefs in restaurants it is arguable that the asset value of a building specifically constructed as a restaurant may be reduced. If Parliament prohibited the sale of meat except when cut and wrapped upon marble slabs the market value of wooden chopping blocks might arguably be reduced. Presumably in most of these cases no assertion would be made that provisions for compensation should be included in the legislation or that the absence of such provisions constituted a moral blot on the legislature. Moreover the examples given are all cases

where there is a reduction in existing (and legitimate) values. The argument would be weaker in the case of the owner of a residence in the metropolis who complained of the reduction of the value of his tenement owing to some 'parking' restriction on the ground that the potential value of his building as a shop might have been reduced. An owner who complained that a building capable of conversion to a restaurant had become less valuable because of a rise in the 'margin' for chefs would be dismissed as too ingenious to be listened to. His loss would be said to be 'remote'—though the word covers an imprecise value judgment. So too in the case of a farmer complaining because a stand of large trees were the less saleable since butchers' wooden chopping blocks were no longer marketable. In a workaday world, and in a world of increasing social control, it seems generally accepted that such claims to compensation arising from the prohibitions of the statute book are outside our admitted rules of social life. The depreciatory effect of any such legislation is weighed as an element before its enactment but if the advantages are thought sufficient and the enactment is determined upon it may safely be said that compensation would be considered unjustifiable. Its absence is not a matter for criticism. Doubtless certain individuals suffer, at all events for a time, because some public advantage is being pursued. But probably it is felt this has been an inevitable product of all social advance.

On the other hand if it is desired to utilize a man's land for some specific purpose and for this reason to acquire ownership of this particular asset there seems fairly universal agreement that compensation should be made for its acquisition. In this case no doubt the community is acquiring and utilizing what the individual is himself losing. The compensation, it may seem, is paid not so much for what is lost but for what is taken or acquired. Is this really a valid distinction and does it explain the contrast which our examples have seemed to disclose? Would we be satisfied that no case for compensation arose when the community for some social purpose forbade all use of an asset and thereby rendered it substantially valueless to the individual? It is submitted that there is no fundamental difference between the destruction by public action of what a man owns and the acquisition and use by the public of what a man owns, so far as his right to compensation is concerned. In either case there may or may not be a good ground for reducing his loss—but his loss is not the less real and the less damaging in the first case than the second. Moreover if the impact of some new rule results in partial destruction of the asset—or reduction rather than destruction of its value—the situation is not essentially different.

Of course many restrictions in the use of land are not different in

kind from other legislative restrictions which may partly depreciate assets. Clearly compensation is not applicable in all these cases in modern self governing communities. A universal maximum speed limit may make very powerful motor cars less useful but no one feels that injustice results if the owners are not compensated.

The present legal provisions of the Town and Country Planning Act for compensation, or more accurately for taking away compensation are altogether too absolute. Distinctions must be drawn between depreciation which is the by-product of general regulations qualifying in some minor aspect the value of an asset of an individual citizen—which depreciation is rarely or never made the subject of compensation; and other forms of depreciation which are produced by prohibitions or restrictions upon use which constitute in effect the deliberate destruction by the community in part or in whole of the realized or potential usefulness of the land. It would not be difficult to draft provisions which would enable the tribunals concerned to work out this distinction. If there were thought to be difficulties in this regard a rough and ready rule might be found in the extent of depreciation. A loss of 10 *per centum* in value might in most cases be thought to reflect nothing more than a normal individual burden resulting from the imposition of community standards and not generally made the subject of compensation. Certainly when the loss reaches to 30 *per centum* or 40 *per centum* we are witnessing in effect a 'taking' of part of a man's property and compensation is due.

It has sometimes been suggested that the hardship resulting from the denial of compensation for depreciation from restricted user would be modified if decisions to restrict user were themselves subject to some relevant and convenient appellate or review procedure. It is important to controvert this view. In substance it amounts to saying that appeals might reduce the number (or extent) of restrictions and so eliminate these cases as cases for compensation. This is true, but it is not relevant. If a restriction is not fairly justifiable it should not be imposed. But, assuming that no restrictions are imposed which are not justifiable (either because of corrections on appeals or the wisdom originally exercised on their imposition) the case for compensation for depreciation from restriction of user is just as strong as ever it was. Compensation is not claimed, in this argument, as a means of modifying the consequence of unwisdom in imposing restrictions but as an inevitable product of the effects of wisdom in imposing them.

It is suggested that sufficient has been said to indicate that a serious review of the provisions for compensation for land injuriously affected by our planning law should be undertaken, and, when this

happens, the machinery provided for the assessment of compensation should certainly be overhauled.

When we turn to the 'exceptions to the exceptions' from compensation we do not feel that our strictures on the general plan should be qualified, or that the lack of moral or sociological principle is reduced.

The first exception permits compensation for restrictions or regulations of use of land reserved for public purposes. The need for this exception arises because of curious and complicated circumstances. No doubt if land is itself reserved in a 'plan' for public use or purpose it may by that very fact lose some value. At one stage it was possible for the owner to compel acquisition of reserved land if dissatisfied with the conditions imposed upon the same. Thus, putting the matter generally, reserved land could hardly fall below the market value at or about the date of the Plan, if the owner insisted upon his rights. Moreover if it lost potential development value by the fact of reservation this loss could have been recovered as compensation for 'injurious affection' arising from the 'making' of the plan, unless indeed the substitution of 'loss or damage' for 'injurious affection' has not taken this right away.

Under the latest proposed ordinance, provision is made in the case of land reserved for compelling acquisition within six months of notification or of eliminating the reservation. Reserved land will on the whole retain its current market value.

But if not acquired but still remaining reserved then very severe restrictions may apply to it if the Planner so chose. Thus, it is now proposed, no buildings may be altered or demolished without consent. Not even a tree may be removed. It is to the depreciation resulting from the operation of these restrictions, *inter alia,* that compensation applies. It is arguable that these 'exceptions' from the general rule denying compensation for loss resulting from restrictions cannot be justified upon any logical ground. But it may be said that restrictions will no doubt be imposed to limit the amount of future compensation upon acquisition. These 'economy' restrictions are then considered to be identified with the 'acquisition' itself and so are made compensable. It is true that other restrictions may be imposed merely as part of the general planning scheme. Loss imposed on an owner who ultimately will have his land acquired will be compensable whilst his next door neighbour who will retain his land but suffer loss from the same restrictions cannot recover. It may also be noted that the reservation (and ultimately the acquisition and public use) may reduce the value of the land of this adjoining owner—but this is (probably) not compensable 'loss or damage'.

The other exception contained in section 27 (3) (c) (ii) is so obscure

in its operation and intent as to make criticism difficult. It is not easy to understand how a responsible authority can 'forbid' the continued use of land which is not prohibited by the Plan but not in conformity with it.

Apparently some draftsmen contemplated that the Plan might contain a provision legalizing 'non-conforming user'. The use of this land would not actually be prohibited by the planning scheme although not in conformity with it. It was then further assumed that some responsible authority would or might be given power to forbid the continuation of the 'non-conforming user'. It may be said at this stage that there is no provision in the statute itself either legalizing or protecting 'non-conforming use' or authorizing an administrative authority to withdraw such a privilege. It is puzzling to know why assumptions should be made as to the possible future enactment of either of these hypothetical provisions. Indeed the creation of non-conforming user rights subject to the possibility of administrative withdrawal would be surprising. However, on the basis of these assumptions what then results? No compensation is given for the withdrawal of the non-conforming user rights since the exception only begins to operate when the rights have been withdrawn. If thereafter the use of this erstwhile 'non-conforming land' is regulated (as for example by being brought into conformity with contiguous land under the Plan) then compensation becomes payable. But what then is the loss or damage suffered as a result of the 'carrying out of the planning scheme'? Is the deprivation of the non-conforming user the 'carrying out' which is compensable? If so, this compensation was not taken away by the exception in sub-section 3 (e), since the provision authorizing the deprivation was not a provision prohibiting restricting or regulating the use of land for specified purposes. On the other hand if the compensation arises from some subsequent regulation why should this case be selected for compensation when no other cases of regulation are compensable unless this is conceived as a case of the destruction of a vested right treated as analogous to resumption? Of course all this only brings into relief the crucial question of whether compensation should be paid for the imposition of restrictions on hitherto unqualified ownership. On the whole the basic principles of compensation for loss resulting from restrictions are not made either more comprehensible or more logical by an examination of the exceptions.

Having considered the circumstances in which compensation is payable for loss or damage resulting from the making or carrying out of a planning scheme, we may, by way of contrast or comparison consider the similar provisions relating to the possibility of claims for compensation arising during the period of operation and by reason of the operation of any interim development order.

The statute[9] now provides for compensation for any loss or damage suffered by the operation of any interim development order. Any loss arising from the 'making' of the order is not compensable though in respect of a planning scheme the compensable loss embraces both that resulting from the 'making' and the 'carrying out' of the scheme. The practical consequences of this contrast are difficult to determine in the absence of actual experience. In any case the matter is of limited importance because of the exception to the general grant of compensation. No compensation is payable in respect of any provision in an interim development order which specifies the purpose for which land may be used or which prohibits restricts or regulates the use of land. When reference is made to section 14 (1) it is found that all that an interim development order may do is to regulate restrict restrain or prohibit the use or development of any land. The exception therefore covers all the provisions which may lawfully be included in an interim development order and in blanket fashion denies compensation for all possible provisions. But it achieves this result in an extraordinarily roundabout way.

It is true that section 14 (1) authorizes in an interim development order the inclusion of provisions regulating restricting restraining or prohibiting the erection construction or carrying out of any buildings or works on any land. But on the whole there seems no room for doubt that the erection, construction or carrying out of buildings or works is embraced within the concept of 'development of . . . land'. In the result then we are bound to ask whether there can be any provision of an interim development order which could be made the subject of a claim for compensation.

Suppose the Interim Development Order prohibits the construction of certain works on specified land. Admitting that this is a provision restricting the development of the land, is it not also a provision restricting the use of the land for a specified purpose? It seems unquestionable that it has this character—and is therefore excluded from the sphere of compensation.

It must be said that this position has been reached by a complete reversal of legislative policy. In the Town and Country Planning Act 1944 section 22 there was a general right to compensation for land prejudicially affected by planning, and then limited exceptions to this general right but the exceptions applied only in the case of the planning scheme itself. No exceptions applied to loss arising under interim development orders. Ten years later the position was completely reversed and all rights to compensation were expunged.[10] This certainly serves to bring into sharp relief the morality of the general provision imposing upon the individual the full loss of value arising from planning restrictions.

[9] S. 27 (1). [10] By the Town and Country Planning Act 1954.

It may be noted in passing that there is in the statute an 'exception' to the general 'exception' which has been discussed above applying to the case of land reserved for public purposes. A very nice question arises as to whether land may be 'reserved' for public purpose in an interim development order. Section 14 which authorizes the making of such orders makes clear that they may 'regulate restrict restrain or prohibit the use or development of any land' but may not do more than this.

The Interim Development Order 1959 made by the Melbourne and Metropolitan Board of Works purports to declare certain land to 'be deemed to be reserved' for purposes specified. This in itself has no effect upon any person's rights or duties. It is not in itself regulating or restricting or doing any of the particular things which the statute contemplates in an Interim Development Order. However the order forbids the use of land for any other purpose than the reservation. This may be an elaborate and roundabout method of prohibiting or restricting use but within the power of the Board. This is the view it is understood of leading counsel who have advised the Board.

The question then arises whether the joint operation amounts to a provision in the order regulating 'reserved land'. If it is so then immediate compensation can be claimed for any loss or damage resulting from this regulation in the Interim Development Order though of course effective implementing of the public use may not occur for many years. The loss or damage may represent part only of the value of the land since, until it is resumed by the public authority concerned, it may be employed in its previously existing non-conforming uses.

The better opinion would seem to be that the purported 'reservation' is not in itself of any effect since it is unauthorized. In consequence land is not in law 'reserved'. Another consequence is that compensation cannot be claimed. Whether other consequences may flow from this ineffective attempt to do more than the statute authorizes is too speculative to pursue further at this stage. In passing it may be noticed that specific statutory power does exist for 'reserving' land for public purposes in a planning scheme.[11] The view that there is no basis for a claim for compensation under the Interim Development Order gains some support from the terms of the Town and Country Planning (Amendment) Act 1959 which provides that

> any land proposed to be reserved for public purposes under a planning scheme may, before or after the adoption of the scheme by the responsible authority and before approval of the scheme by the Governor-in-Council, with the consent of the Minister, be so purchased or compulsorily taken.[12]

[11] Second Schedule para. (8). *Cf. Ibid.* para. (3).
[12] S. 2.

It seems highly unlikely that Parliament would adopt this elaborate method of describing land '*proposed* to be reserved . . . before adoption of the scheme' if in truth such land could be 'reserved' in an interim development order. Giving this odd legal effect to particular terms of an unadopted scheme is an extreme measure which would be resorted to only if no simpler and more orthodox alternative were available.

It is to be noted that under the amending Act the Board may compel resumption, involving arbitration if necessary on value, but the owner cannot compel compensation or acquisition. This situation is in contrast with that prevailing when the scheme is adopted, for then, according to the proposed terms of the ordinance, the owner may by serving a notice compel acquisition (at an arbitrated price) or abandonment of reservation within six months.

Inconsistently with the view that the true effect of section 27 (3) (c) is to exclude the possibility of compensation for loss resulting from any feasible operation of an Interim Development Order, nevertheless section 27 (4) enacts 'No liability for compensation shall arise under this Act out of the operation of any interim development order until' various elaborate procedures, including an appeal to the Minister, have been completed. It is not possible to contemplate any situation in which this section would operate, except the theoretically conceivable situation where the Interim Development Order contained a non-conforming user provision with a power in the responsible authority to withdraw the user privilege. As no such order has, it is believed, ever been approved, no further attention need be paid to the sub-section.

It is therefore submitted that the law, as it stands at present, negates all compensation during the period of interim development orders. This is not merely a complete reversal of the original parliamentary conception but morally unjustifiable and probably not appreciated by many of those who brought it about.

In particular one situation may be noted. Once it is 'proposed' that land be reserved by the promulgation of a scheme, there is likely to be a fall in its value. Certainly any owner would hesitate before embarking on any substantial development. As has been indicated no provision exists for compensation at this stage, despite loss of value. The practice has been hitherto for the responsible authority to acquire such land by mutual agreement. In fact more than £800,000 has been expended for this purpose. This is a compromise solution with conspicuous defects. No power exists to compel any reference to arbitration. The authority can fix its own standards of valuation and the owner is helpless if he will not accept these. Indeed much land has been acquired under these circumstances and, in some cases at least,

without adequate payment, but under circumstances which forced the hand of the owner. The amending Act of 1959 now authorizes these acquisitions which previously may have been carried out with insufficient legal capacity on the part of the acquiring authority. Nevertheless the owner cannot compel the submission of valuation to any independent authority. He may have strong views as to the true basis of valuation, but no means of having these views investigated unless the authority itself elects to proceed to compulsory acquisition and consequential arbitration. There can rarely be any urgency inducing the authority to adopt compulsory acquisition, especially since it may restrain any development of the land until the scheme is in operation.

From every point of view it may be thought the law introduced in 1954 relating to compensation in respect to interim development orders and their effects should be reconsidered.

So far consideration has been given to compensation for so much of the prejudicial affecting of land by reason of the planning scheme as is made compensable within the scope of the Act, and is to be found in section 27 of the statute. A planning scheme of any magnitude is likely to contemplate the acquisition of land for various planning purposes, and at various times in the future. We have seen that the publication of the proposed purpose even before acquisition in fact may reduce the value of the land. Once the scheme has been adopted there seems no reason why this loss of value should not be claimed as 'loss or damage suffered as the result of the making of the scheme'[13] unless it is held to be too remote or indirect. The possibility of future public use may have a depreciating effect even though there may not be any provision of the scheme restraining or prohibiting any use. Indeed the owner may be protected by some non-conforming user rights but may find few purchasers for his land because of the impermanence of continued user. True it is that he—or a purchaser—can force either acquisition or abandonment of reservation within a period of six months. It would seem then that the provisions for compensation or alternative resumption are reasonably adequate to cover most contingencies.

Upon the resumption itself, if agreement cannot be reached as to value, by section 25 of the Town and Country Planning Act 1958 the provisions of the Lands Compensation Act 1958 are brought into operation. It may well be that in theory no objection can be taken to this system of providing for compensation. Whatever may be the defects of the scale of compensation thus provided they are defects which apply in all other cases of public acquisition and, it may well be contended, there is no very compelling reason why attempts should

[13] S. 27 (1).

be made to improve the methods of compensation for this particular class of public acquisition so long as other such classes are left to be regulated by the existing statute.

There is however one matter of particular significance which should not be passed over, notwithstanding the force of this general contention. Section 35 of the Lands Compensation Act 1958 contains the full provisions, so far as embodied in statute, for estimating compensation in the case of acquisitions. These may be summarized as follows:

(a) Compensation is to include the value of the land.
(b) Compensation is to include damage sustained by the owner by reason of severance of the land from other of his land.
(c) Compensation is to include injurious affection of other land of the owner.
(d) Allowance shall be made for enhancement in value of adjoining land of the owner.
(e) Any other advantage which the owner may obtain 'by reason of the making of such works or undertaking'.

It will be remembered that the provisions of the Victorian statute are in contrast with those of the English Lands Clauses Acts. In particular the theory of the English law has never permitted enhancement in value resulting from any public works to be set off against the value of land acquired.[14] For reasons no doubt associated with public works in the colony in the past a different view has been taken of what justice requires in this State. It is not necessary to canvass once again the curious consequence that owners of land not within the scope of public acquisition may enjoy the enhancement in value resulting from public works whilst those who lose their land may also lose this enhancement. Whatever may be the justification for this rule in the case of a specific public work it still may not be true of comprehensive resumption as part of an extensive regional plan. On the other hand we may note the contrast with the enhancement principle in regard to compensation under planning other than for land compulsorily acquired. In that case enhancement is deductible from compensation and applies to all land of the claimant and not merely to that adjoining the subject property. It is difficult to believe that logical justification can be found for distinctions of this nature.

Again deductions may be made from the purchase price of land acquired for any other advantages. This is a vague and difficult provision. It seems singularly out of place in a planning scheme—or for that matter in a lands compensation statute.

This survey of the provisions for compensation in the current Vic-

[14] *South Eastern Railway v. L.C.C.* [1915] 2 Ch. 252.

torian Planning Law has been substantially concerned with considering the 'merits' of that law as it now stands in the statute book. On the whole the argument has insisted that some conspicuous demerits are upon examination disclosed. Perhaps it may be thought it is too late to raise these issues. Parliament has determined these issues—and at no very distant date. Since these matters must all have been considered and decided—whatever arguments may now be urged—it is fruitless to engage in a debate after the decision has been made.

If indeed the decisions were taken with a full consideration of the hardships and injustices and upon a considered determination to inflict them for adequate reasons, then the foregoing examination is not of much importance. It is more than probable, however, that the decisions may have been made without any full consideration of whether injustice is involved. The legitimate zeal of those who desire to implement a comprehensive metropolitan plan in and around Melbourne may have prevailed over the dictates of caution only because the policy of providing full and fair compensation might have stimulated the timid and inhibited desirable progress.

Enthusiasts are not unready to disregard moral considerations in the sphere of politics and to justify their action by insisting that any other course would be 'theoretical' or 'unreal'. But disregard of such considerations inevitably affects the life and standards of the community—and not infrequently, in the long run, reacts against the beneficial aspects of the proposals which have prompted the disregard in the first instance.