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The Development of Local Government in Australia, Focusing on NSW: From Road Builder to Planning Agency to Servant of the State Government and Developmentalism

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Abstract

This paper follows the legal and functional advancement of local government in NSW, Australia by examining three historical stages. It commences with its nineteenth century vestiges, moving on to compulsory incorporation and the gradual changes to modern but diverse individual councils. Issues include financial scarcity, the traditional property-based stranglehold and the burgeoning sheer power of the State Government in the planning sector.

Keywords

road, nsw, developmentalism, focusing, state, australia, government, local, development, servant, agency, planning, builder

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ABSTRACT: *This paper follows the legal and functional advancement of local government in NSW, Australia by examining three historical stages. It commences with its nineteenth century vestiges, moving on to compulsory incorporation and the gradual changes to modern but diverse individual councils. Issues include financial scarcity, the traditional property-based stranglehold and the burgeoning sheer power of the State Government in the planning sector.*

Keywords: Local government history; New South Wales, Australia; the ‘ratepayer ideology’; Functional development; Environmental planning and management.

1 Introduction

This paper follows the socio-legal development of local government in New South Wales (NSW), from its original functional inflexibility to its current frustrated potential. Throughout its history, it has been muzzled by ratepayer politics, financial paucity and the shackles imposed by the colonial/State governments. The focus is on local government’s *functional* development, flavoured by environment issues.

While NSW is Australia’s most highly populated State, some of the commentary here applies also to other jurisdictions. Yet in each system, local government structures have their own legislative bases and idiosyncrasies. As often cited, local government is the creature of the State Parliaments.¹ The Australian Constitution contains no recognition of local government at all. Even though council representatives attended conventions before federation, local government was unquestionably regarded as outside the Constitutional realm (Aulich and Pietsch, 2002). Since then, two referenda in the 1970s and 1980s to alter the Constitution relating to local government were unsuccessful. Contemporary discussion and investigation (Brown, 2008) reflects former High Court Kirby J’s extra-curial opinion (1997) that ‘recognition and protection of the democratic character of local government could be an appropriate

¹ In the case of the Australian Capital Territory or Northern Territory, local government is established via federal legislation.

[constitutional] reform which would have many supporters' (p. 236). While this remains a continuing major concern for councils, the centrepiece here is local government's evolution.

The paper involves several stages:

- The vestiges of local government before compulsory incorporation in 1906;
- The slow functional development until the 1970s/1980s;
- The arrival of 'modern' local government and the growing mandate of developmentalism.

A common theme throughout all phases is the 'ratepayer ideology' (see Halligan and Paris, 1984; Mowbray, 1984), described by Parkin (1982) as an 'institutional conservatism' based on a serving private landholders (p. 106). It is the direct result of the strong property franchise upon which local government was built. In the early 1980s, Power et al (1981) advocated that the 'patterns of thinking and acting that were established in the nineteenth century ... provide the basis for, as well as the constraints on, the local government systems' (p. 98). Is this still the case?

2 Origins of Local Government in NSW

2.1 Early Colonial Incorporation

Local government remains an entrenched institution, pre-dating Federation by some six decades. Our first local authority, the Perth Town Trust, was established in 1838, only three years after British settlement. The Adelaide Municipal Council of 1840 was elected rather than appointed. As Larcombe observes (1973), the poll 'was not only the first form of local election but the first for any form of elective authority ever held in Australia' (p. 50). The legislation closely followed British statute (Lavery, 2010).

Establishment of municipal government in the eastern part of Australia was more slow-moving. In NSW, it took more than fifty years after UK settlement for Sydney Corporation, to emerge in 1842. Two reasons stand out. Firstly, most public attention would have been directed at gaining a fully representative Parliament for the colony (Larcombe, 1973). Secondly, there was the grim foresight of costly compulsory land rates. The obvious deterioration of physical conditions prompted enactment of the *Sydney City Incorporation Act 6 Vic No 3*, establishing an elected body to manage primary services such as street lighting and drainage. The law-makers forecasted that such infrastructure should be backed by a general limited rate on the 'full, fair and average annual value' of all buildings (s. 67), based on the notional amount of rent a tenant

would annually return to the landholder. Yet any concept of a wealth tax, however crude, would have been abhorrent to propertied interests.

The legislation confined the franchise to adult male ratepayers occupying buildings above a certain value (ss. 12, 24). The groundwork was set for councils to become, according to Mayne (1981), agents of property. This was reinforced by limiting civic office to ratepayers of land valued at a certain level. All this must have fuelled disinterest in local government on the part of the wider populace. Furthermore, the Sydney Corporation would have placed little or no priority on improving sanitary conditions in slum areas where the inhabitants had no voting power (Mayne, 1981).

Local government in central Sydney has suffered a lively history since its inception (Maiden, 1966). Its modern-day successor, the Sydney City Council, enjoys a quite separate history from other NSW councils having been embraced under the general legislative scheme in 1948. The original Corporation nevertheless laid down the foundations for a property-dominated municipal culture.

2.2 Governor Gipps' Rural District Councils

The comprehensive system of 'district councils' for settled and surveyed areas beyond Sydney was introduced under the *New South Wales Constitution Act 5 and 6 Vic Cap No 76 (Imp)* of 1842. This was the product of an Imperial government no longer willing to provide a 'means of defraying such expenses of or connected with the administration of justice and police within the district[s]' (s. 42). The legislation required that district councils raise, via property taxation and other 'imposts', fifty per cent of the funds for maintenance of gaols outside the convict regime due to loss of Imperial funding (s. 47; see Lavery, 2010; Barrett, 1979; Larcombe, 1973). Civic powers related to roads, bridges, public buildings and schools (s. 45). It was these latter functions that might have been of more interest to landholders. Ability to vote or stand for office relied on ownership of property valued above specific levels.

Despite the proclamation of 28 district councils, the system collapsed. Opposition to rating proved to be even stronger away from Sydney, especially where landholders had benefited from soaring property values due to government-funded infrastructure, such as railways (Gray, 2009). Financial paralysis, poor legislative architecture and community antipathy guaranteed its demise.

2.3 *Optional Incorporation*

The next move was the *Municipalities Act* of 1858 22 Vic No 13, allowing *permissive* incorporation. In response to scattered demands for new and improved local public works, especially in townships, proclamation of a municipality was available upon presentation of a petition signed by fifty or more ‘householders’ in the absence of a sufficient counter-petition (s. 2). The legislation continued to restrict voting privileges to landholders. The subsequent *Municipalities Act* of 1867 (31 Vic No 12) strengthened the unrepresentative nature further by introducing *cumulative* voting, entitling landholders to enjoy up to four votes in municipal elections according to the value of their properties (s. 52).

The statutes conferred power on municipalities to provide and maintain, for instance, roads and bridges to bring farmland closer to the market. Councils were also expected to be regulators. Statutory powers included control of public health, safety and decency, such as management of markets, cattle slaughtering and ‘suppression of ... houses of ill fame’ (ss. 71, 72). It seems that central government saw councils as convenient outposts to carry out low-key duties. In contrast, powers for human-oriented services offered wide scope for creativity, including ‘public libraries museums botanical gardens or other public places of recreation’ (ss. 71, 72) in addition to ‘care of the destitute poor and sick’ and ‘deserted children’ (s. 74). The subsequent 1867 Act conferred even broader powers, including provision of charitable ‘free infant schools for the instruction and industrial training’ of ‘children who are objects of charity’ (s. 15). It is no surprise that the provisions failed due to conservatism on behalf of both ratepayers and local representatives.

A key event in gagging municipalities at this time was the legal action by staunch anti-incorporationist Alexander Berry, who in 1828 became an appointed member of the Legislative Council (Swords, 1983). Berry had been granted land in the Shoalhaven area where he developed the ‘Coolangatta’ estate, assisted by convicts and tenant farmers, and became the prime colonial landholder in the district. But when a petition for incorporation led to proclamation of the Municipality of Shoalhaven, Berry sought judicial action against the mayor and the bailiff on the grounds that, inter alia, the constituted area was different from the district outlined in the previous petition. In fighting the issue all the way to the Privy Council, Berry was successful (*Graham v Berry* [1865] III MOORE N.S. 207). He was therefore able to retain his fiefdom,

without paying rates and keeping the bailiff away from his door. Berry was the epitome of the ratepayer ideology (see, generally, Bridges, 1992; Larcombe, 1976; Swords, 1973).

When the statutory framework was dismantled in 1906 five years after Federation, less than one per cent of NSW land area was incorporated (Bains and Miles, 1981; Larcombe, 1976). Because these lands related mostly to townships, about 25 per cent of the population lived within municipalities (Jones, 1989). The result was 192 small units, exercising only the most rudimentary of functions (McNeill, 1997; Bains and Miles, 1981). As noted by Kelly and Stoianoff (2006), local government then had ‘the stronghold of a begrudging propertied class in built-up areas’ (p. 541). At this stage, environment conservation was not an issue at all. Local ‘natural resources’ were exploited for fundamental infrastructure such as gravel and sand.

3 Incorporation and Development of NSW Local Government

3.1 Obligatory Establishment

The 1867 Act was repealed in 1906 upon compulsory incorporation in NSW, which lagged behind other jurisdictions for reasons such as continued heavy reliance on colonial government for funding (Bowman, 1983) and the central legislature’s fear of local government as a potential competitor (Jones, 1981). It appears that emergence of local government in other colonies was more spontaneous (Walmsley, 1988; Power et al, 1981). Yet in pressing for compulsory incorporation in NSW, Premier Carruthers pointed to experience elsewhere stressing that contrary to landholders’ fears, rates had not driven settlers away. He also argued that Parliament’s scant resources should be devoted to ‘the work which properly appertains to it – the true work of legislation and attention to the national requirements of the community’ (Parliamentary Debates, NSW Legislative Assembly, 27 July 1905, 1101). Accordingly, local government became compulsory in 1905-1906, apart from the Western Division.² The message was clear: State Parliament was delegating elemental tasks to its local agencies.

The *Local Government Act 1906* (LGA 1906) provided the statutory foundation, updated by the *Local Government Act 1919* (LGA 1919) which survived for over 70 years. Cumulative voting was curtailed with gradual widening of the franchise. Compulsory voting arrived in 1947, subject to a hiatus between 1968 and 1976. Whilst this might have mitigated against the

² The non-incorporation of the Western Division, comprising some 40% of the NSW land area, excluded several townships such as Broken Hill and Wilcannia. A large sector of the Western Division was incorporated during the late 1950s through the creation of new councils and the extension of existing shires.

ratepayer ideology, the position of landholders as the *direct* rate contributors might have carried considerable influence (Mowbray, 1984). Another factor was enabling women to vote in 1906 (ss. 48-49, 55-57, 63), although they were unable to stand for civic office until 1919.

Carruthers believed that the new councils merely sought the ‘powers of a glorified roads trust’ (Parliamentary Debates, NSW Legislative Assembly, 27 July 1905, 1106). Purdie (1976) aptly describes such limited functions as ‘primarily to service the property of local ratepayers’ (p. 37). Obligatory tasks under the LGA 1906 related to bread-and-butter matters such as roadworks (ss. 73(vii), 74) and township nightsoil collection (s. 74(i)). One important voluntary regulatory feature was comprehensive building control (s. 109(xliii)), which soon emerged as a core council function (Wilcox, 1967).

The LGA 1906 regime transformed the ‘capacity-to-pay’ rating model towards a ‘benefit-related’ basis based on ‘unimproved capital value’ (see LGA 1906 s 132(1)). The underlying assumption was that land values should reflect the benefits accrued from public expenditure, such as road building and maintenance. Rates therefore became an incentive to develop, with the owner of undeveloped land paying the same rate as neighbouring property that had been cleared and built upon. In rural NSW, the system provides what Young et al (1996) call a ‘perverse incentive to clear land’ for agriculture or other commercial but environmentally destructive purposes (p. 26; see also Binning et al, 1999).

3.2 Slow Development from 1919 Onwards

The LGA 1919, described by Larcombe (1978) as a ‘monument to ... conservatism’ (p. 391), nevertheless instituted three steps forward. Firstly, councils had the ability to create second-tier ‘county councils’ with upwards delegation (Kelly, 2003; Barnet, 1974; Larcombe, 1978). Secondly, subdivision was brought subdivision under council control (ss. 320-342),³ including regulation of residential density, open space sizes and amenity embellishment. Thirdly, councils could seek proclamation of ‘residential districts’ (s. 309; see Wilcox, 1967), a primitive form of zoning to prohibit uses such as ‘trades’ and ‘industries’ in designated areas (s. 309(1)(c)-(d)). This presented an initial minor step in land-use control, designed for urban environments only and directed mainly at protecting residential amenity (Proudfoot, 1992).

³ Former *Local Government Act* 1919 (NSW), ss. 320-342. Previously, s. 109(xliii) *Local Government Act* 1906 (NSW) had conferred limited and optional subdivision control power on councils.

Between the early twentieth century and the 1970s, functions in Australia ‘changed very little’ (Walmsley, 1988, p. 64). Chapman and Wood (1984) observed that local government had become ‘remarkably ossified’ (p. 30). But the commentators might have given attention to two particular areas.

3.3 Significant Functional Shifts

The first major post-war functional development was welfare and cultural services, such as subsidised meals and arts festivals (Rentschler, 1997; Miles, 1976). Council involvement mushroomed from the early 1970s onwards, prompted by novel Commonwealth funding programs (Jones, 1993; Marshall et al, 1999). But not all councils embraced this role (Oakes, 1990), demonstrating ongoing tension between modern expectations and the traditional ratepayer ideology. On the other hand, some councils had already entered this territory before the legislation entitled them to do so. Section 498A was inserted into the LGA 1919 as late as 1983 to express that councils ‘shall be deemed always to have had power to provide community welfare services’. This provides an example of bottom-up innovation assisted by Federal funding that moved beyond private property interests, aptly described as councils shifting from ‘services to ... properties’ towards a ‘services to people’ approach (Dollery et al, 2006, p. 13; see also Dollery, 2005).

Secondly, the NSW Parliament introduced a comprehensive land-use planning system in 1945 by inserting Pt XIIA into the LGA 1919. This empowered councils to prepare ‘planning scheme ordinances’ (PSOs) which could ‘contain provisions for regulating and controlling the use of land and the purposes for which land may be used’ (ss. 342C(1), 342G(2)). The ability to determine the development potential of private lands, whilst subject to the ultimate control of the State Government, pushed local government into a far more powerful realm.

Part XIIA enabled councils to regulate a far broader range of activities than under the pre-existing building, subdivision and residential district controls. It related to the *use* of land, impact on neighbours and wider environmental concerns. But councils were at first reluctant. As Wilcox cited (1967), ‘[t]o direct a scheme is one thing; to have a scheme actually prepared is another’ (p. 211). Although the legislation required appointment of a qualified person to help prepare the PSO, many councils relied on their in-house engineers (Burdess, 1984) who may have seen planning as a sideline or needless function.

Because of initial resistance to PSOs based on a desire to encourage rather than restrict land development (Harrison, 1972), the State Government imposed planning functions by handing down generic 'interim' local instruments (see LGA 1919 s. 342U). But gradually, a municipal awakening to the sheer 'political purchase' of planning powers emerged (Harrison, 1972, p. 27). Because land-use control could protect and enhance property values, zoning and related mechanisms could fit snugly into the ratepayer ideology. At the stroke of the council's planning pen, landholders could enjoy financial bonanza.

Another related matter was regional planning. The patchy emergence of local plans throughout NSW paralleled a stronger movement for integrated planning across greater Sydney, leading to the County of Cumberland Planning Scheme (CCPS). The plan harked back to garden city design illustrated as 'the classic planning statement in the garden city tradition in post-war Australia' (Freestone, 1989, p. 239). The regional scale prodded plan-makers to address matters of broader public interest beyond ratepayer preoccupations. But the experiment foundered (Winston, 1957). The Cumberland County Council (CCC) was neither a direct creature of local government nor the invention of a State Government keen to delegate away powers. It was a political compromise between two battling spheres of government (Spann, 1975). A common criticism is that the CCC became engrossed in local detail (Planning and Environment Commission (NSW), 1975), leading to friction between individual councils who were beginning to discover the advantages of their own land-use powers (Harrison, 1972). The CCC was dissolved in 1963. It was the first and final regional statutory plan placed in council hands.

3.4 Environmental Demands

The tenor of planning was to change dramatically but not necessarily at the local level. Modern environmentalism, a global movement that arose from the UK and USA which quickly spread to Australia in the 1960s and 1970s (Bates, 2010), challenged prevailing norms directed at headlong development for economic gain. Environmentalism generated awareness of the potential of the planning system to widen its net beyond avoidance of neighbourhood conflicts. Yet in local politics, Roddewig (1978) stressed that councils' chief preoccupation was still 'servicing and promotion of urban development' strengthened by the property-based rating system supported by an elected membership dominated by 'local real estate agents and small developers' (p. 41). Small-scale disputes between residents and their councils such as sale of

parkland or introduction of residential flat buildings had already arisen. These precipitated the emergence of local action groups demanding more input into planning decisions (Power, 1975). Most controversies involved inner-city middle-class residents with sufficient time, resources and expertise to defend their property investments against unresponsive developmentalist councils (Sandercock, 1978). At the rural fringe and beyond, such community action was virtually non-existent. In urban areas, a key thrust was the 'green ban' movement wherein environmental unionism protected various special places from destruction commencing with a patch of Sydney Harbour foreshore bushland in 1971 (Jakubowicz, 1984; Roddewig, 1978).

Grass-roots community support for public participation in environmental decision-making pushed the NSW Government to support statutory change embodying community consultation (Aulich, 2005; Sandercock, 1978; Power, 1975). The NSW Parliament had already amended its outdated planning laws to require councils to give public notice of proposed residential flat buildings (LGA 1919 s 342ZA). This would have appealed to urban dwellers intent on retaining local amenity. But it was not enough. Roddewig (1978) suggested that the conservative NSW Government was 'so harried by action groups that it finally had to admit that the planning and environmental laws needed a major overhaul' (p. 108). In response, the NSW Parliament replaced Pt XIIA with the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA), not only giving planning its own specialist legislation but also a clear environmental zest with local government at the coalface.

The EPAA has since developed to encompass issues such as biodiversity conservation. For instance, the *Threatened Species Conservation Act 1995* (NSW), which piggybacks on the EPAA, demands councils to take into account the level of environmental impact of development proposals on listed species, populations and ecological communities. This provides a good example of local government's functional expansion during the 1990s with environmental scientists and/or conservation officers joining the professional council echelons (Keen et al, 1994; TASQUE, 1992). But attention to biodiversity conservation has not been universal. In particular, rural councils often suffer 'limited capabilities' in funding more recent 'environmental challenges' (Daly, 2000, p. 34; see also Thomas, 2010; Pini et al, 2007). Local government is often wary of accepting fresh responsibilities due to cost implications.

The fiscal landscape had already undergone dramatic change in the early 1970s. The federal Whitlam Government saw local government as a convenient mechanism through which

to pursue its regional fiscal equalisation policy in terms of access to public services, especially in poorer outer metropolitan areas (Taylor and Garlick, 1989). One main initiative was substantial unconditional financial injection into local authorities via the States. Untied Commonwealth funding has remained a significant portion of council revenue ever since. Under PM Fraser, decision-making on municipal funding was allocated to the States with the Commonwealth dividing the funding pie between the jurisdictions (Aulich, 2005). While this loosened the ratepayer ideology, 'drip-feed' funding to remote councils continues to be 'insufficient to meet enlarged responsibilities' (Daly, 2000, p. 209). Unless professional expertise can be shared between councils, such funds may too easily be left to elementary tasks. Other than rates, local government's main revenue source is unconditional 'Federal Assistant Grants' under the *Local Government (Financial Assistance) Act 1995* (Cth).

4 1990s and Beyond: New Assertiveness and Management Styles

A specially visible and powerful impact on local government during the 1990s has been managerial change, a direct product of organisational, industrial, financial, legislative and regulatory reform that then swept across Australian local government (Sproats, 1998; Aulich, 1997; Wensig, 1997). Such moves have often led to more sophisticated management activity. They have also driven greater assertiveness on the national stage (Chapman, 1997).

The Australian Local Government Association (ALGA) has developed a sturdy national profile (Marshall and Sproats, 2000; Marshall et al, 1999; Chapman, 1997). It is ready to confront important issues of national significance, such as biodiversity conservation. But individual councils are more closely linked with their own state or territorial associations, which are more familiar with State/Territorial policy and legislation. Of course, enthusiasm at the wider national and global levels for environmental issues does not necessarily translate to sympathetic on-ground action. This reflects the sheer diversity of local bodies as well as their autonomy from their national representative organisation (Saunders, 1996).

At the local level, the LGA 1993 reached a milestone by awarding councils with an extremely broad service power: section 24 enables each council to 'provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law'. Accordingly, a council can provide any service it chooses provided it is not unlawful. It may, for

instance, provide native seedlings to local landholders and lessees or subsidise transport for the elderly and disabled. It might even provide services outside its own boundary, such as liaising with other councils in managing wildlife corridors that traverse artificial council borders. The pre-1993 problem of services being invalid unless referred to expressly or impliedly in the statute (as exemplified by the unlawful community services referred to earlier) was fixed. Purdie's (1976) unease about the 'spectre of ultra vires' (p. 151; see also Aulich, 1999) is now irrelevant. Similar provisions now apply across the country.

More recent statutory change has arisen from the *Local Government Amendment (Planning and Reporting) Act 2009* (NSW), which requires each council to prepare a 'Community Strategic Plan' (CSP). The State Government envisaged this as 'a plan for the community rather than just the council' (Department of Local Government, 2006, p. 11), identifying it as 'the highest level plan that a council will prepare' (Division of Local Government, Department of Premier and Cabinet, 2010, p. 7). The CSP is to single out the 'main priorities and inspirations for the future of the local government covering a period of 10 years' (s. 402(1)) while containing 'strategic objectives together with strategies for achieving these objectives' (s. 402(2)). Amongst other things, the CSP must address 'civic leadership, social, environmental and economic issues in an integrated manner' (s. 402(3)). This enables a council together with its community to embed environmental policy objectives relating to both private and public land. For instance, it might address both sides of national park boundaries in order to soften any inconsistencies by supporting conservation buffers. Crucially, the CSP is purely a council document. This also applies to other plans underneath the CSP, namely 'Resource Strategies' (which, unlike all the others, need not be placed on public exhibition; s. 403), Delivery Programs (s. 404) and Operational Plans (s. 405). This lack of Ministerial intrusion contrasts starkly with local government's planning powers under the EPAA.

While there is no longer any compulsion to construct a separate social/community plan, each council must still prepare a 'state of the environment' report (SoERs) (s. 128A). The statute demands that the SoER address any pertinent factors outlined in the CSP. The contents of the SoER are now far more elastic than before. They even allow for regional SoERs which is a clear step forward. The SoER is a document provided only by the council or joint councils. In both cases, implementation relies on sufficient financial resources. This is exacerbated by the fact that

NSW is the only Australian jurisdiction where councils must prepare SoERs (Pini, 2009; Harding and Traynor, 2003).

The above issues illustrate costly requirements demanded by State Government. They also demonstrate the rise of managerialism. Munro (1997) derides modern councils as mere 'contract managers' (p. 80). Several years earlier, Jones (1993) predicted there would be 'substantially less attention to human services and environmentalism' (p. 61). This paints a dim prospect for environmental efforts that exhibit no immediate returns for municipal accountants (Marshall et al, 1999). Adams and Hine (1999) are more optimistic, claiming that despite local government being 'disadvantaged and marginalised', it remains a 'key player' in environmental management (p. 193). But again, this is not the situation for *all* councils. The local government spectrum is diffuse and diverse. Yet recent reports indicate that a financial stranglehold affects councils across the board (see, for example, Fiscalstar, 2008; PricewaterhouseCoopers, 2006; Local Government and Shires Association of NSW, 2006). Functional expansion has since continued without sufficient financial support. A central reason is 'devolution' of central services, both existing and current, from central government (Dollery, 2005). Another related issue is 'cost shifting' whereby central government funds a service but later cuts off or reduces the supply pipeline.

In addition to the service provisions, councils still play a strong regulatory role, especially under the planning system. But here, several factors illustrate the weakening of local government's powers. This is not only a matter of insufficient funding. It involves powers being taken away. Several examples arise. Firstly, a 'template' was introduced in 2006 for all councils to follow in preparing their local statutory plans – i.e. local environmental plans (LEPs) (EPAA s. 33A). Although the template guarantees consistency, it stifles local creativity. A pre-template example is the 'place based' plan built on rigorous community involvement developed by Warringah Council in Sydney's north. Such innovation will not be seen again unless the State Governments loosens its reins (see Kelly and Smith, 2008; Mant, 2002; Untaro, 2002).

Secondly, the scope of 'complying development' (EPAA ss. 84-87) - i.e. where environmental assessment is replaced by a simple 'tick the box' approach – has been widened. For instance, a house covering up to 50 per cent of an allotment between 450 and 600 square metres in area fall into this category (Department of Planning, 2008). But the rule excludes driveways, terraces and swimming pools, leaving little room for setting up spaces for indigenous

vegetation. Approval of such projects may be carried out by private certifiers instead of council officers. In addition, neighbours need not be advised of the project until its completion. For example, a resident might be unaware of a proposed large house nextdoor until excavation commences.

Thirdly, the establishment of non-elected Joint Regional Assessment Panels (JRPPs, see s 23G) to review draft LEPs at the Minister's behest, and determine various development applications, diminishes the powers of elected councils. The Minister may nominate a JRPP to prepare a LEP concerning matters of various types of state/regional significance. For example, a proposal for a residential project costing between A\$10M and \$100M is taken out of a council's hands to an appointed rather than elected body. It is easy to consider some townhouse developments falling into this category. While council staff must evaluate the proposal, determination is carried out by the JRPP unless usurped by the Minister.

Finally, the newly elected State Premier O'Farrell has promised that the controversial Part 3A EPAA will be deleted in stages (O'Farrell, 2011). While Part 3A has previously brought many proposed projects to the Premier's office out of local government's hands, the question remains as to the extent to which local government will be re-empowered.

All the above features threaten local government's legitimacy. But well before these issues arose, Stein (1998) described local government's position in the planning system as having undergone 'virtual gutting' (p. 77). This leads to the impression that while the ratepayer ideology has gradually eroded in the planning context, it has been overtaken by the State Government powers in the interests of big business. Corporations that seek ministerial sanction have now replaced the likes of Alexander Berry of yesteryear. Even where a council is to determine a proposal, there is an expectation that it will be approved. In *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237, McClellan CJ of the NSW Land and Environment Court stated that 'planning decisions must generally reflect an assumption that ... development which is consistent with the zoning will be permitted' (at 435; see Farrier et al, 2007). Developmentalism continues to reign at all levels.

5 Conclusion

Local government has travelled an epic journey. It has since embraced significant functions well beyond the limited horizons of property protection and improvement up to the 1960s/70s. The

problem is not something that increased fiscal generosity from central government will necessarily fix. Whilst encouraging signs may be occurring in some places, local government's historical and cultural baggage cannot be swept aside. There is anecdotal evidence that the ratepayer ideology still exists, especially at aldermanic level. Greater focus on flexible community bottom-up approaches is warranted. The CSP and other instruments under the LGA might be able to lead the way, with closer integration between the CSP and the LEP together with greater devolution from the State Government. Of course, a council's regulatory functions are very different from its service powers. But stronger and informed community involvement may assist the elected council and its state and national bodies to push central government to move away from rigidity to allow more effective local and regional planning outcomes.

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