SUBMISSION BY D J HORNBY ON THE USE OF TRANSFERABLE TITLE RIGHTS (AMALGAMATION UNITS) IN THE PROPOSED MOUNT LOFTY RANGES MANAGEMENT PLAN

Under the Mount Lofty Management Plan it is considered that the continued expansion of the population of the townships of the Mount Lofty ranges is undesirable because of the impact of that population on the natural resources of the Ranges and the increased demand for the provision of services in an area with generally, high infrastructure costs. The proposed action to rectify this is to prohibit the division of residential land in all townships other than in Victor Harbour, Port Elliot, Middleton and Goolwa, except for the holders of "transferable title rights" (TTRs).

RESTRICTIONS ON LAND DIVISION

Restrictions vary depending on whether or not the subject land is within or outside the Mount Lofty Ranges Water Protection Area, within or outside a designated township and within or outside areas designated Water Resource Sensitive.

THE PROCESS OF IMPLEMENTING THE AMALGAMATION UNIT SYSTEM

"Amalgamation Units" are created by amalgamating parcels of land together. A certificate will be issued for each amalgamation unit created and they can be sold for example, by rural landholders to buyers for use with a title created for a new allotment inside a town.

"Clustered" allotments can be created for every two originally held, have an area of between 0.5 to 3 hectares but not on land designated as Water Resource Sensitive.

The result of the concept is that some land will be severely affected by the restrictions and some other land will be less affected. Preliminary research by valuers has shown an expected 50% loss in value of the value before the scheme was mooted, is common. The Mount Lofty Management Plan states three arguments to justify the use of Transferable Title Rights or Amalgamation Units. These will be considered in turn.

ARGUMENT ONE

"The requirement to purchase transferable title rights will increase the cost of developing residential land thereby restricting the population expansion' - p122.

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I submit that this will not happen. If the purchase of TTRs cost more than the marginal cost of acquiring new allotments previously that marginal cost in the long run will force land values to fall commensurate to the extra cost. Therefore in the long run, there will be the same total cost and the same supply and demand as before the new scheme (assuming everything else to be equal).

On the other hand as will be shown below under "distortions to the real estate market" there is no guarantee that the marginal cost of the Amalgamation Units will rise. This is because the cost of Unit Entitlements will ultimately, be decided by the law of supply and demand.

ARGUMENT TWO

The requirement to purchase Transferable Title Rights will create a viable market for the sale of such "rights" out of the rural areas in the Water Supply Protection Zone - p122.

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It is difficult to see what advantage such an objective will have. More importantly there are legal problems with TTRs and the scheme will distort the real estate market.

LEGAL PROBLEMS WITH TTRs

Transferable Title Rights as proposed by the Plan are similar "creatures" to "Transferable Floor Space Rights" as used in the City of Adelaide. However, they have been found not to be interests in land. In *Depsun v Tahore (1990)* NSW Conv R 55-523 the purchaser of a city building agreed with the vendor that after completion of the sale the vendor would retain the right to sell the "floating" floor space rights which attached to the subject site.

McLelland J held that the mortgagee was entitled to an order that the caveat be removed because it disclosed no caveatable interest in the land. He held that the rights were "clearly personal and not proprietary".

Similarly in *The Uniting Church v Immer* (Unreported, Young J, Supreme Ct of NSW), 1990) in which his honour held that the attempt to transfer the transferable floor space rights failed (under the particular circumstances of the case) because they not proprietary. The Council, in keeping a register of transferable floor space did not create any proprietary interest.

Although neither case gave detailed reasoning for their decision it is clear that the "right" exists only pursuant to town planning regulation. The vendor is only taking advantage of a Government "concession" designed to alleviate any injury caused by the change in planning law.

They possess a unique character, being peculiar to and arising out of a specific site and damages for breach of an agreement to transfer them may be very difficult to estimate. Therefore, the government should pass legislation to make such property an interest in land. Only when this is done is it likely that a proper real estate market can be established for such rights with the full protection of indefeasibility of title and the ability to lodge caveats.

DISTORTION TO THE REAL ESTATE MARKET

A number of problems arise with the use of Transferable Title Rights as they affect the real estate market. The Plan promotes a "pooling" of all units at the same time on a central register. This would result in a dramatic increase the supply side of the real estate market. At the same time demand will not increase and will possibly, fall after the Plan has come into operation. Therefore, a large and sudden supply of units will cause their value to fall compared to a more orderly release onto the market.

The value of the units will be an "average value" of "in globo" allotment values throughout the Mount Lofty area. In times of poor demand the value of the units will be very low the problem being compounded by the artificially high supply.

ARGUMENT THREE

"The movement of transferable title rights from the rural areas of the Water Supply Protection Zone to the townships will more equitably spread the impact of development constraints amongst land owners" - pl23.

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The major problem with this argument is the same as for Argument Two. The scheme will distort the real estate market and such distortions generally, will make the scheme less equitable.

The use of amalgamation units is an attempt at some compensation for the loss in value caused by the scheme. However, this submission argues that the use of such schemes is not the best or most equitable method of compensation.

Compensation theory states that the affected owner after receiving compensation is no worse off than he/she was before the scheme came into operation - Pastoral *Finance v The Min (* 1914) AC 1083. The most equitable way of compensating the affected owner is the use of the "injurious affection" method as was used by Cumberland County Council for the Sydney region. The compensation was assessed under s342AC (now defunct) of the Local Government Act 1919.

DEPRIVATION OR REGULATION ?

Whether or not an owner of land affected by a planning control should receive full compensation depends largely on whether or not the control is mere regulation or "deprivation" - *Freestone v Parramatta City Council* (1974), I submit that with large losses in land value caused directly by the operation of the Plan, it should be treated as deprivation.

The question then becomes one of whether or not Transferable Title Rights are sufficient compensation for such deprivation. For the reasons outlined above it would appear that the prices to be obtained will not be equivalent to the loss in value of such allotments and further, the monies received as "compensation" will not be paid at the date the Plan comes into operation.

For example, the affected owner may have to wait some time until a buyer is found for his/her Amalgamation Units. Compensation should be paid as at the date the scheme comes into effect because good compensation theory states that the effect of the scheme must be ignored - *Point Gourde v SubIntendent Of Crown Lands (1947)* AC 565.

Full compensation for compulsory taking is recognised in other legislation such as the Lands Acquisition Act. Further, full compensation for injurious affection is allowed under the Western Australian planning act.

The Planning Act 1982 under s65 allows rate relief for land reserved for future acquisition until he/she is fully compensated by acquisition by the appropriate authority. However, the owner can force acquisition under the Land Acquisition Act 1969 if he/she can prove certain "hardship" from the reservation - s65(6),(7). Therefore, the current legislation shows an ambivalent attitude towards compensation for a detrimental change in land use. On the one hand s65 provides only for rate relief until the land is resumed but s65(6),(7) provides not only for compensation due to any injurious affection but in some cases more, as under the Land Acquisition Act the compensation payable is "special value to the owner."

PROBLEM OF ACCOUNTABILITY

If the above compensation rules are not adopted in planning schemes then the planning authority is encouraged to zone away land use rights instead of resuming land and thus, having to pay full compensation. The authority becomes less accountable for it's planning actions as the results are costed.

INCREASE IN VALUE OF MARGINAL LANDS

Further distortion occurs because the Amalgamation Units are produced on marginal and poor quality land for example, rough land near Prospect Hill which can only be subdivided on paper only. Nevertheless, as the basis for the generation of units is only the area of the original allotment, such land will increase in value as the units generated will be worth as much as those generated by good land suitable for residential purposes. Such market distortions will lead to inequities as it cannot be assumed that the owner of such marginal lands deserves such a "windfall" profit. Many such owners own large and viable farms and "transfer of wealth" arguments which seem to be implied in the Plan may well not be equitable.

Further, if the Plan is attempting to transfer wealth it should clearly state such an objective.

RECOMMENDATION FOR THE USE OF A COMPENSATION FOR INJURIOUS AFFECTION SCHEME INSTEAD OF A TRANSFERABLE TITLE RIGHTS SCHEME

Injurious affection has its origins in resumption legislation and cases, as part of determining "special value to the owner" - *Bingham v CCC (1954)* The Valuer April 1955, 308. A typical scheme should allow for the recovery of betterment for example, s342AF, s342AG of the Local Government Act 1919 (NSW) (now defunct).

Such a scheme will truly compensate the affected owner as at the date of the scheme's operation based on a basic compensation principle that the affected owner is no worse off after implementation of the scheme than he/she was before. The affected owner is not disadvantaged by a possible downturn in the market place and the "flooding" of the market with Amalgamation Units.

The method of calculation is the difference between a "before and after" valuation has been well settled by a number of court cases including *Bingham.* The valuer can determine the injurious affection suffered with a high level of certainty. Under the Injurious affection scheme the authority is forced to pay for land affected. This makes the authority accountable to the public and government as it will be required to carry out a "benefit cost" analysis before implementing restrictive land use schemes.

It is submitted that the cost of compensation should be offset by a "betterment" on the "windfall" profits of an upward change in zone similar to the Betterment Tax which has been used successfully in the North Western suburbs of Sydney. This would result in a well rounded and properly taxed and properly funded town planning scheme.

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