TO: PRODUCTIVITY COMMISSION OF AUSTRALIA

FROM: Donovan D. Rypkema, Heritage Strategies International

SUBJECT: Productivity Commission Draft Report

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Introduction to the Submission to the draft Report of the Productivity Commission Inquiry into the Conservation of Australia's Historic Heritage Places

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Australia is looked to by other countries in both the developed and the developing world as a model of how to protect a relatively recent, but equally important, built heritage in a democratic political system and a market driven economic system.

The adoption of the recommendations of the Productivity Council's Draft Report would essentially destroy what has been demonstrated as an effective, if imperfect, system. And that system would be dismantled not because of actual, demonstrated harms, but based on a narrow ideological perspective of property rights.

The entire definition of "heritage" would be based, not on knowledgeable evaluation by specialist in the field, but rather on the negotiating ability of a local official and the short term revenues in a local government treasury.

It seems to be to be an allusion that these recommendations are proffered to correct current deficiencies in the heritage protection system. Rather, it seems to me to be the opening shot of a broad based attacked on the entire system of land use controls. Not a single argument that is used in the Draft Report could not be just modestly repackaged next year or the year after for a repeal of environmental laws, zoning acts, subdivision regulations, and anti-sprawl legislation.

Not being intimately familiar with the Australian political and local government system, I have not commented on the proposal to fully subsume heritage boards within the planning framework. But I am very suspicious that it is one more strategy to turn any heritage protections into regulatory eunuchs.

Had this Draft Report only had implications for Australia, it is doubtful that as an American I would have spent the time to read the entire report, many of the submissions, and write 15 pages of commentary. This is an international affront to the built heritage of all of us. I sincerely believe this is not a document with which to compromise. I believe this report needs to be loudly, strongly, and publicly rejected for what it is.

d rypkema

January 26, 2006

Here is what I regard as the most important issues in the draft Report:

1. **The Draft Report is not a document one would expect from a highly respected government research agency. This presents to me is an ideological document espousing a libertarian "property rights" philosophy far outside the mainstream of thought in Europe, Canada, or even in property rights obsessed America.**

2. **If accepted and adopted by the Government of Australia, this approach to heritage conservation will have serious adverse effects on historic properties, not just in Australia, but will provide ammunition for anti-preservation movements and rabid "property rights" proponents throughout the world.**

3. **If carried to its logical conclusions, the approach advocated in the Draft Report will have serious and adverse impacts on land use planning in general, and environmental and anti-sprawl efforts in particular.**

4. **The entire document is driven by the *Idée Fixe* of the government paying for *conservation agreements.* It seems to me that it's likely this solution was predetermined and every argument, citation, and critique appears to have been chosen for inclusion in the Draft Report to support what seem to me to be their already decided conclusions.**

This document is what one would expect from an ideological "think tank". The writers have utilized every rhetorical trick in the book to make the document appear balanced and thoughtful, including:

- Quoting highly selective portions of submissions, sometimes out of context, and often when the entirety of the submission encourages actions that are polar opposite of the conclusions they reach.

- Citing unsupported posits within submissions as "proof" of their otherwise unsupported and undocumented claims.

- Setting up "straw-men" arguments to bolster their "credibility" as they sequentially knock them down.

- Using the old economists' trick of "see, I've proven it in this graph here" to make arguments of spurious objectivity.

- Fully accepting unsubstantiated claims, while choosing to dismiss research cited in submissions as inadequate.

- Establishing false and self-serving equations.

- Making *prima facie* claims with no definitions attached.

What's Right with the Draft Report

The above notwithstanding, there are important, useful conclusions reached by the report. Specifically noteworthy are:

1. Regulations (sticks) should be balanced with incentives (carrots).

2. There are insufficient incentives currently.

3. Preservation (or Conservation) easements (Agreements) can play an important role in an overall heritage strategy.

4. Costs of historic preservation are vastly easier to calculate than benefits.

There may be other valid conclusions that someone more familiar with the actual practice of heritage conservation in Australia may identify.

What's Wrong with the Draft Report

I have tried to sort out the problems with this report in ten broad categories:

1. Invalid Use of "Evidence"

2. Sloppy use of terms

3. Failure to undertake their own research

4. Apparent Ideological Bias

5. Extension of conclusions

6. Narrow definition of the principle of 'subsidiarity'

7. Establishment of an unequal "equation" as hurdle

8. What the authors don't mention

9. "Economic hardship" and "Reasonable return"

10. Sole reliance on the Conservation Agreement concept

The following provides brief examples and/or comments in each of these areas.

1. Invalid Use of "Evidence"

Throughout the document, "evidence" is presented to justify the conclusions; "evidence" that doesn't meet basic standards of evidence from legal, professional or academic standards. There are six categories of this serious deficiency.

1a *Assume as fact.*

There are numerous statements throughout the report making an unsupported posit. Here is a sample:

a) "…added conservation costs of operation, maintenance, and use restrictions." Evidence provided that there are added costs? None.

b) "…added costs of its conservation." Evidence that there are added costs? None.

c) "Owners suffer an erosion of property rights and potential loss of value…encourage degradation and destruction of those values." Evidence? None

d) "…this has led to poor outcomes…inappropriate listing imposing unwarranted costs…" Evidence? None.

e) "The community has an incentive to over-list (or be non-selective) as they do not bear the costs of conservation" Evidence that this is happening? None.

1b *Misrepresentation by omission*.

The report is clearly meant to demonstrate that the current system is out of control and that the problems identified affect hundreds of thousands of properties. **At the same time the report seems to limit itself to individually landmarked buildings, not structures within heritage districts**. Nowhere is it pointed out that the vast majority of those nearly 200,000 Historic Heritage Places on statutory lists are not individually landmarked properties but are buildings within historic districts.

1c *Denigration of the research of others*

No original research was done for this report to demonstrate any of the "harms" that heritage listing allegedly creates. Instead, the authors fall back on denigrating actual research that doesn't support their conclusion. For example:

- "In studies of average price movements it may also be difficult to distinguish between the impact of listing, per se, and the effects of the existing heritage attributes."

- "Contingent valuation may also produce inconsistent community valuations of the benefits of undertaking conservation."

- "This 'broad sweep' approach to historic heritage conservation at the national level may be of limited relevance in the current policy framework…"

It is perfectly appropriate to critique the research of others. But basic professionalism would require that either:

a) one had research evidencing opposite conclusions and/or

b) one set a high standard for the "evidence" he/she presented.

Instead, the authors of the report reject research that's been done while repeatedly citing and quoting as "evidence" totally unsupported (and in many cases unsupportable) comments that show up in submissions.

1d *The outright silly.*

Sometimes the authors intellectually embarrass themselves by making statements that are outright silly. For example saying that as proof that the market will take care of historic buildings, the fact that heritage places existed before there were any regulations and "…were therefore conserved through private initiative." The answer then is to expect heritage properties to be preserved with no regulatory framework? Patently absurd, and the authors surely know that.

1e *Selective citation*

The authors of the report often cite submissions to the Productivity Commission. But they do so when the quotation selected fits their predetermined conclusion AND they choose to ignore parts *of the same submissions* that don't fit their needs. A few examples should suffice.

- A very thoughtful Margrit J Stocker made a useful submission to the Commission. The report authors choose to quote her saying, "As soon as a modest property is heritage listed it loses sale value", which of course was posited without evidence.

  But more significant is what Ms. Stocker wrote that the authors didn't cite, "…without clear guidelines (enforceable rules) and a body that has "teeth" we as a nation could again face the pressures to get rid of our old buildings that people faced in the 1970s". But, of course, the authors' proposal is to remove any "teeth" to protect heritage, so Ms. Stocker wasn't quoted in this regard.

  The idea with which the report authors are obsessed is paying people to compensate them for maintaining their heritage buildings. Ms. Stocker has a similar idea, "I think it would be appropriate if each local council arborist took responsibility of these trees and care of other natural heritage - and this should be at the local council's expense." What's the difference? If Ms. Stocker should receive public money for having her property listed, why shouldn't she receive public money for maintaining her trees, for which she is also responsible? That didn't fit the authors' agenda, so wasn't cited.

  In fact, Ms. Stocker had a whole range of good ideas for assisting owners of heritage properties…much better then the ones the ultimately advocated by the report. They quoted Ms. Stoker selectively when her unsupported comment supported their case: they ignored Ms. Stocker's good ideas.

- The authors selectively cite Dr. Lynne Armitage saying, "A property's development/redevelopment potential…is frequently reduced…" they fail to note that the majority of the studies cited by Dr. Armitage indicated that heritage listing tended to have a positive effect on property values.

Further, throughout the report the authors claim that heritage listing creates uncertainty and that uncertainty causes a diminution of value. But one of Dr. Armitage's principal findings was that the future value of the heritage-listed asset would be *more* certain.

1f *Argument by vignette*

The authors also rely on proof by vignette. For example,

"Not too long ago near Warrnambool a landowner arranged to sell the original homestead on his property to a building relocation company. The sale was stopped on the basis the building was historically significant." Other alternatives? Verification? A pattern or just a random example? No, just a recitation in the Report.

But perhaps the best example of argument by vignette of Mr. John Boyd who claimed in his submission that listing his property would reduce its value from $720,000 to $600,000, for a "loss" of $120,000, a claim cited by the authors. Mr. Boyd apparently submitted an addendum to evidence his claim; the addendum was not included in the publicly available submissions so that the accuracy and the appropriateness of that conclusion could be independently examined.

So in an example of inductive reasoning on an absurdist scale, the authors of the report have apparently concluded that heritage listing equals diminished value. But if proof by vignette is an acceptable approach, then Mr. Boyd's story "proves" that the system, in fact, works. Three times his property was proposed for heritage listings; three times he opposed the listing; three times the property was not listed.

More about Mr. Boyd's "loss of value" is discussed below.

2 Sloppy use of terms

A few examples will suffice.

Denial of a redevelopment opportunity is "imposing unwarranted costs." No, the denial of a redevelopment opportunity is limiting a speculative, hypothetical value, not imposing an additional cost on the owner.

The authors use the phrase "…not commercially viable…" meaning not able to be developed to the most profitable imaginable. This ignores the great likelihood that there is an entire range of "commercially viable" *and* profitable uses to which the property could be placed, short of the "40 story building" that seems to be the ideal.

The language used by the authors implies that reduced development potential is the same as creating a loss for the owner. It is not. Here is the parallel. "Toyota Motors suffers a loss because of the additional cost of complying with environmental regulations." Might it be true that Toyota's profits are less because of the regulations? Of course. Does that translate into a "loss" for Toyota? Of course not. ***Simply because profit is not "maximized" does not mean that a "loss" has been incurred***. But every work chosen by the authors implies that is the case.

The appraisal term “Highest and Best Use” is tossed around in the report is if its definition were “most profitable use imaginable”. That is *not* the definition. *Highest and best use* is “the most profitable likely use to which a property may be placed.” But the first constraint on “likelihood” is “what is legally permitted.” To say that one is being denied his/her “highest and best use” because one is constrained by land use or other regulations, is to intentionally distort the meaning of a well-established concept in real estate economics.

Dr. Armitage obviously understood the distinction as she wrote in her submission, “…somewhat inappropriately termed highest and best use in property parlance…” But in citing that very paragraph of Dr. Armitage’s submission in the body of the report, the authors consciously choose to omit that caveat. Clearly their case was better made by making the reader believe that “highest and best use” was the same as “the most money I can possibly make.”

3 Failure to undertake research.

While the authors considered it appropriate to cite unsupported claims in submissions as if they were fact, and denigrate the research of others, they did not undertake any research of their own (except the survey of local government) or even recommend such research be undertaken.

A very reasonable suggestion from the Australian Council of National Trusts stated, “…this Commission would fail in its duty if it did not undertake an evaluation of the value Australians place on the preservation of their heritage (or at least recommend that such an evaluation be undertaken),” to which the authors respond,

> “Aside from the question marks over the accuracy of such data in representing community valuations, there are also very serious concerns about the relevance of such a construct for policy making.”

Wait a minute! The entire document is premised on the unsupported claim that heritage listing diminishes property values, and yet, research to demonstrate the contrary is not relevant to policy making? This is illogical in the extreme.

4 Apparent Ideological Bias

It is evident to me through reading the submissions that the heritage process in Australia is not working ideally, and that corrections are appropriate. It seems clear that there should be a better balance between the regulatory framework and the incentives provided to private owners of historic buildings. It was very clear, in fact, that the entire spectrum of submissions – from both the strongest heritage advocates to the most vociferous opponents of regulation – suggest changes need to be made.

But this Draft Report is not written to make appropriate adjustments to a system that is not working optimally. Rather it appears to be based on a Libertarian perspective far out of the mainstream of political thought in the rest of the developed (and certainly *all* of the later developing) world.

Who is the ideological champion that the authors have chosen to model their approach on? The American law professor Richard Epstein. Epstein is certainly a brilliant thinker and posits interesting positions. But what the authors of the Draft Report fail to mention is that Epstein is at the very far end of the ideological spectrum in the United States.

Even in a country that holds property rights nearly as important as free speech, the Epstein position on property rights has been consistently rejected, by courts, by legislatures, and by the executive branch at both the federal and state levels. The only places where Epstein is wholeheartedly espoused is in “no role for government except national defense and printing of money” libertarian circles, and right-wing anti-government fanatics, particularly in the USA.

Epstein is an original thinker and a cogent debater (as are many Marxist economists on the far left extreme of the spectrum) but he remains, as do the Marxists, at the far end of the ideological scale.

It is interesting to note that in the Draft Report the phrase “property rights” occurs 30 times; the phrase “property responsibilities” not once. The authors argue for “balance”, but the fundamental purpose of land use regulations is to try to assure that there is balance between rights and responsibilities.

It might be helpful to think about the alternatives through two questions.

Question #1 – Are property rights absolute? If yes, then there is no justification for ANY land use controls. If no, than regulations should not be arbitrary or capricious. Is there any evidence given whatsoever that heritage designation of either landmarks or districts is capricious or arbitrary? Absolutely none.

Question #2 – Are “property rights” and “property values” the same thing? If yes, (although what a sad commentary on where the evolution of the Magna Carta has led us) wouldn’t that mean that *every* limitation on rights reduced property values? If that’s the case why is there abundant evidence internationally (albeit very reluctantly and skeptically acknowledged by the authors) that heritage districts (which impose some restrictions on “rights”) have greater rates of property appreciation than do similar non-designated neighbourhoods?

If “property rights” and “property values” aren’t the same thing, why is virtually every argument made for abandoning the current heritage protection system based on imagined diminution of value? It is a rhetorical scam on the part of the authors to imply “property rights” and “property values” are synonyms. It only proves how right the father of capitalism, Adam Smith, was when he wrote, “As soon as the land of any country has all become private property, the landlords, like all other men, love to reap where they never sowed.”

The authors’ ideological bent also emerges in their clever but intentionally misleading choice of words. For example, they write, “By limiting owners’ property rights, coercive regulation can undermine longer-term conservation incentives for owners.” Is there such a thing as “non-coercive” regulation? Of course not. By definition, a regulation requires an action (or precludes an action). We could as easily write, “Those coercive laws against murder”. By incorporating “coercive” into their descriptions they aren’t attempting to get rid of the coercive nature of regulations, they’re attempting to get rid of the regulations themselves.

Elsewhere in the report they write, “Inappropriately and unnecessarily evade property rights and values” Have they defined “inappropriately”? No. Have they defined “unnecessarily”? No. Have they defined “property rights”? No. Definition of property rights? The only logical way that the arguments and resulting conclusions and “solutions” of the Draft Report can be accepted is if “property rights” is defined as “do anything I damn well please.”

5 Extension of conclusions

The Draft report is focused primarily on individually listed properties rather than heritage zones or historic districts. The authors write, “The above discussion has focused on the treatment of *individual* properties included in conservation agreements or on existing statutory lists. Heritage areas, precincts or zones, where restrictions apply equally to properties within a wider area, would remain under the planning system for decision and enforcement by local authorities.”

But consider the “problems” that have been alleged that individual heritage listing causes:

- Loss in value from not being able to develop a property more intensively
- Demolition of properties in anticipation of being subject to regulations
- Extra costs associated with maintaining heritage properties
- Loss in value because of use limitations
- Individual owners without the financial means to maintain the properties
- “Over designation” of properties

If these are valid arguments against individually listing properties, why are they not equally valid for prohibiting the listing of properties as part of a heritage district?

The favorite submitter of the authors (favorite because they accept both his spurious arguments and his suggested solutions almost verbatim, and regularly quote him in the Draft Report) Mr. Alan Anderson writes this: “Is it correct for owners to have their property rights expropriated without compensation, through an arbitrary and capricious system” Now has Mr. Anderson demonstrated evidence of arbitrariness? Of capriciousness? Of course not.

But clearly, Anderson was referring not just to individually listed buildings, but districts as well. If he has all the right answers, why not also abolish heritage districts? There is not a single argument that either Mr. Anderson or the authors of the Draft Report have made that is not equally applicable to heritage districts as they are to individual landmarking.

As an aside, should the authors of the Draft Report suggest that their recommendations are within the mainstream of political thought, even Mr. Anderson, their key witness, refers to his recommendations as a “radical overhaul” of the system.

Once again, inconsistent reasoning emerges from the authors. At one point they write, “Heritage areas are not significantly different, in principle, from the zoning of other areas that require development to be compatible with general amenity, appearance, or streetscape of an area.” But when the Chairman of the Australian Council of National Trusts made that exactly the same argument, the authors write:

> *While regulations are commonly used to prevent or reduce negative externalities, they are seldom, if ever, used to require the provision of positive externalities because of the high monitoring costs and the difficulties of enforcing positive behaviour.*

Either “general amenity, appearance or streetscape” regulations are in place to reduce negative externalities or regulations for “general amenity, appearance or streetscape” are used to require the provision of positive externalities. It’s one or the other.

The authors are greatly concerned that individual property owners are having to pay for benefits while others parasite on their investment. It’s a shame the authors don’t consider the most fundamental reality of real estate economics: **the primary source of value in real estate is largely external to the property lines.**

If that doesn’t immediately make sense, think about that old real estate cliché “The three most important things in real estate are location, location, location.” Notice it doesn’t say, “The three most important things are roof, walls, and floor.” It is a property’s location which provides most of its economic value – that is the context within which the property exists – and it is the protection of that context that virtually all land use ordinances are about whether they are zoning laws, historic districts, or ordinances to maintain viewsheds.

Most of the value of an individual parcel of real estate comes from beyond the property lines from the investments others – usually taxpayers – have made. And land use controls are an appropriate recompense for having publicly created that value.

Do land use decisions (and other governmental actions) ever affect the economic value of real estate? Certainly, everyday, in both directions. But when was the last time you heard an owner say, “Because of rezoning my land went from being worth $10,000 to being worth $100,000. But since it was the action of the Planning Commission and not some investment I made that increased the value, I’m writing a check to the city for $90,000.”? No “property rights” advocate ever said that, nor should they have. Public decisions affect the value of real estate in both directions – it is one of the risks and potential rewards of ownership.

Every day hundreds of decisions are made by public bodies at every level that impacts someone’s property value. In virtually no instance is the property owner entitled to be compensated for that action. But the authors want to compensate property owners for any imagined diminution of property value. If that is to be the public policy, here’s a suggested funding mechanism: have a 100% tax on all of the value enhancement of properties as a result of governmental actions.

6 Principle of Subsidiarity

The authors are strong proponents of the Principle of Subsidiarity and cite it positively on numerous occasions throughout the report. But many of the situations they cite as “problems” are, in fact, direct and natural and probably appropriate outcomes of subsidiarity. Furthermore, many of these “problems” would not change under their “pay for agreements” scheme. Here are just a few examples:

- “The commitment to identify, conserve and manage publicly-owned historic heritage places varies considerably between States and Territories.

- “The level of assistance provided to non-government owners of historic heritage places varies considerably between States and Territories.”

- “There is a high level of discretion for decision-making on heritage matters at the local government level…and this has resulted in inconsistent outcomes within many local governments”.

Of course if you espouse and operate under the principle of subsidiarity which is described as "…responsibility for a function should be assigned to the lowest level of government that is able to exercise it effectively, and thus as close as possible to consumers to allow them choice as to the services they receive" you will get different responses in different communities. That's the point! To simultaneously advocate subsidiarity and identify the natural outcomes of subsidiarity as a problem is the height of intellectual inconsistency.

Further, it was not the National government that has designated local places and created local heritage districts. That was the elected local governments who, in their best judgments were providing their citizens services they chose to receive.

7 Establish "equation" as an unequal hurdle

The authors of the draft report have laid a trap for heritage conservation that is exactly akin to the lawyer's question, "Have you stopped beating your wife yet." By definition, an "equation" means an equality on both sides of the equals mark. Therefore, at first blush it seems "equitable" that the authors say that compensation is paid when the "costs" outweigh the "benefits".

The problem is this: as the authors acknowledge, **the "costs" are relatively easy to calculate; the "benefits" are not.** In fact, the authors suggest that it may be impossible to quantify the benefits. And yet it is only the immediately (and short term, by the way) measurable benefits that can be counted to offset the costs.

This is a kind of intellectual fraud. Heritage conservation is being penalized by an "equation" that is in no sense "equal." Just as the witness loses whether he answers "yes" or "no" to the wife beating question, so heritage conservation loses if its advocates accept this unwinnable proposition.

8 What the authors don't mention

What is at least as interesting as what the authors of the Draft Report chose to include was what was never mentioned, particularly since they work for an institution called the *Productivity Commission.*

- The job creation impact of rehabilitating heritage buildings for which there is abundant international evidence. Number of times mentioned? Zero.
- The labor intensity of construction rehabilitation, for which there is no doubt Australian data. Number of times mentioned? Zero.
- The fact that for practical purposes rehabilitation construction activities cannot be outsourced to foreign markets. Number of times mentioned? Zero.
- The fact the jobs in building rehabilitation are generally well paid jobs, particularly for those without advanced formal education. Number of times mentioned? Zero.
- Evidence from every part of the world that successful center city revitalization nearly always includes the reuse of heritage buildings. Number of times mentioned? Zero.

- One would think that a “productivity commission” would consider small business since it employs around 40% of the Australian workforce and generates 25% of the Australian GDP. So how many times was the role of heritage buildings serving the role of natural incubator of small business? Zero.

- The name of the organization is “Productivity Commission” which might be expected to look at what makes cities competitive. Highly competitive cities like Singapore, Hong Kong, and Dubai are now trying to salvage what little of their heritage resources they’ve destroyed in the last few decades in order to maintain their competitiveness. Cities like Barcelona, Vancouver, and San Francisco build their competitiveness, in part, around their historic resources. Number of times mentioned? Zero.

- In culturally, ethnically, and racially diverse countries, a policy of economic integration is usually seen as desirable. Throughout the world, it is heritage districts that tend to be the most economically integrated. Number of times mentioned? Zero.

- Even in the Less Developed World, business, government, and environmental leaders are recognizing the preservation of historic structures as an irreplaceable component of an overall sustainable development strategy. Number of times heritage as part of sustainable development was mentioned? Zero.

- Many cities in Australia, Asia, and North and South America are struggling to contain the seemingly unending, automobile-oriented sprawl surrounding metropolitan regions. Historic preservation as emerged as an important element in these *Smart Growth* strategies. Number of times mentioned? Zero.

Why weren’t these things mentioned? There are two possible reasons:

1) the authors didn’t know this (in which case they certainly didn’t do some very basic homework on the subject); or

2) citing the role of heritage conservation in these areas didn’t fit their identified “problems” or their predetermined “solution”.

9 “Economic Hardship” and “Reasonable Return”

Throughout this document, I have tried to avoid U.S. based examples. Australia and the United States, although coming from the same English legal tradition, do have different political, cultural, and social contexts. To say “this is how we do it in America” is not a valid argument.

However, this issue of potential diminished value as a result of heritage listing, and what constitutes an economic loss is one that has been debated for decades here. Fortunately, we have a Supreme Court decision of nearly 30 years standing (**Penn Central** Transportation Co. v. New York City, 438 **US** 104, 1978) that laid the groundwork for addressing these complex issues.

Without meaning to provide legal commentary, here in simplified terms is what the Court said, and which subsequent historic preservation legislation has incorporated.

1. A “forgone opportunity” is *not* equivalent to loss nor is it a “taking” (i.e. diminishing property value without paying compensation) under the U.S. Constitution.

2. A property owner is entitled to a “reasonable return” on his/her investment.

3. A valid historic preservation ordinance (applying to properties either within historic districts or as an individually landmarked structure) must contain a provision for “economic hardship” allowing the property to be exempted from the provisions.

4. But “economic hardship” goes not to “maximum return” but “reasonable return”.

5. When an owner applies for demolition (or other exception from the preservation regulations) under grounds of “economic hardship” he/she has to demonstrate that a “reasonable return” cannot be achieved and that alternatives other than the one being proposed have been investigated.

Recall the submission of Mr. Boyd. He claimed that having his property subject to landmarking would diminish the (hypothetical, speculative) value of his property from $720,000 to $600,000. The questions not asked include:

- Are there not viable alternatives which would provide a “reasonable return”

- What did Mr. Boyd acquire the property for? And what is that compared to the $600,000 of its current value?

- Is Mr. Boyd suffering an “economic hardship” from being denied his development plan?

Now, if Mr. Boyd demonstrated that no other alternatives are available, that no reasonable return can be achieved, that listing substantially removes *all* the value from the property, then he would be entitled to an exclusion from the provisions of the ordinance based on economic hardship. That’s a far cry from saying, “I’m losing $120,000 because that damn heritage commission won’t let me do whatever I want.”

10 Sole Reliance on the Conservation Agreement concept

The *idée fixe* of the authors of the Draft Report is to establish a system where owners would be paid to voluntarily submit their property to a *conservation agreement* substantially similar to what elsewhere is called a preservation easement. And so the protection would be limited to those places which had negotiated such agreements between property owners and government.

While there is, apparently, a system for preservation easements in Australia, according to the authors, its use has been extremely limited. Perhaps that’s why the authors appear to have gotten so much of the basic concept wrong.

Because it is in the United States where the tool of a preservation easement is used most frequently, it might be useful to understand how it works here:

1. A preservation easement is usually used in one or more of four circumstances:

    a. When there are no local regulations that would protect the property.

    b. Where the owner feels that the local protections are inadequate to appropriately protect the property under subsequent owners.

c. Where the owner feels more of the property should be protected than what is covered in the local ordinance (e.g. an interior space, a non-public façade, etc.)

d. Where the owner wants a deduction on his/her federal income tax in exchange for the donation of the preservation easement to a level of government or a non-profit organization.

2. Preservation easements are nearly always *in perpetuity* and that is a requirement for a donor to receive the tax deduction.

3. Preservation easements are NOT seen as a replacement for a regulatory structure, but rather a complimentary tool for heritage conservation.

4. Preservation easements are very VERY rarely paid for. On the contrary, most non-profit organizations require the donation of cash to fund an endowment to monitor compliance with the easement in addition to the conveyance of the easement itself. In other words, the property owner often *pays* rather than being paid for the right to protect the property.

5. When a formal valuation of the easement is required (as it is to be eligible for tax deduction) the methodology is: Value of the property unencumbered by the easement less: value of the property subject to the easement equals diminution of the value as a result of the easement equals value of the donation.

6. Because the donation of an easement is a *deduction* for income tax purposes (rather than a tax credit or a direct payment) the net benefit to the donor is at most 35% (the maximum marginal tax rate) of the amount of the "diminished value".

7. Even so, over the last year preservation easements in the U.S. have come under harsh scrutiny by the U.S. Congress because of abuses in valuations, and significant overstatement of loss in value. **And this is when the benefit to the owner is no where near the total amount of the valuation. Who knows how much more serious the abuse would be if the owner received – not in tax benefits but in cash – the entire amount of the "value diminution."**

In summary, the use of preservation easements in the United States (by far the most extensive in the world), bear almost no relationship with what is being proposed by the authors of the Draft Report.

There's the old saying that for a man with a hammer every problem looks like a nail. Now a hammer is useful, but not for everything. For the authors of the Draft Report, the hammer is a bizarre use of what is otherwise a useful tool…and they propose using it on every real or imagined problem, whether it is appropriate or not.

Finally, there is a very serious problem in the issue of length of the easement and of the compensation proposed to be paid to property owners.

- First, the length of time for the agreement would be, at maximum, the period of ownership by the owner who entered into the agreement. Subsequent owners would not be subject to the agreement. That system would fail to meet any of the first three reasons listed above why properties are placed under easements to begin with.

- Second, there is a call for a negotiated agreement with the owners in exchange for the restrictions. But if there is going to be prudence and accountability with the use of public funds, there would need to be some valuation as to how much the "diminished value" was. How would that be done? The most basic definition of "value" in real estate economics is the "present worth of future benefits." But "future benefits" requires an assumption of time. The reason why there is an established procedure for the valuation of preservation easements in the US (even if it is periodically abused) is that the use limitations (and typically the affirmative maintenance obligations) are in *perpetuity*.

This concept of the time/value of money is central to such a valuation. When the period for which the conservation agreement exists is both unknown and finite, how does a public entity appropriately estimate the payment?

This is a system just begging for abuse by property owners to negotiate high levels of "compensation" under the conservation easement and then sell the next day to a new owner who is not obligated under the agreement.

And keep in mind the higher the development pressure on the property the higher the compensation would be…and the more motivation for the present owner to sell the property as soon as possible to maximize profits. Both heritage properties and the public coffers will be sacrificed in this system.