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Land Release in Western Australia:
An Overview and Analysis of the System and its
Effectiveness

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I INTRODUCTION

Land, a rudimentary productive economic asset, has a critical bearing on many sectors of an economy. Accordingly, its efficient release is an issue necessitating further consideration. Despite the wide-ranging importance of this component, the processes used to develop, and the mechanism that then releases, new land may lack sufficient certainty and capacity to support an efficient and effective supply of land for the Western Australian market. The result is an inadequate release of land by the system to service rising demand, especially for serviced residential lots.¹ This is particularly problematic when the State faces a growing population and strained construction industry. The impact of the land supply shortage is evidenced in housing affordability, which has declined since 2001 and resulted in a 290% increase in the median house price in Perth – land costs account for 80% of this.²

The inefficiencies of the present planning and development system and consequent methods of land release that emerge in adapting to this tight market generate costs, both legal and economic, that appear to jeopardise property rights and question the value of rationing land in certain ways. The resulting cost burden faced by owner-occupiers, the intended targets of rationing residential lots, disproportionately negates any benefit accruing under the processes designed to provide assistance to them in such an environment. These problems appear to augment Friedman's rationalisation that 'the

¹ Western Australia, Land Release Coordinator, *The Coordination of Land Release for Perth and Peel* (2007) 1.

² Mike Nahan, 'Red Tape, Strategy Dog Supply of Ready Land', *The West Australian* (Perth), 12 March 2008, 64.

government solution to a problem is usually as bad as the problem'.³ Consequently, the outcomes of the present system suggest that streamlining the development and approvals system to expedite land releases, and considering alternative methods of sale, is desirable to deal with supply issues.

This paper will begin with an objective overview of the planning and subdivision approvals system in Western Australia, exploring how land is prepared and developed into ready to be released lots. This will involve an analysis of the effectiveness of the system and highlight where inefficiencies exist and improvement can be initiated, particularly in reducing time delays and meeting conditional approvals requirements since the conversion of conditionally approved lots to final approvals and title has not been occurring fast enough.⁴ Having established that the system results in an inadequate release of land to service market demand, the paper will identify the methods employed to ration the resulting supply. It will be shown that the method of fixed-price rationing used by the State causes legal and economic costs to be suffered by the class of recipients otherwise intended to be assisted in shortages of supply. The paper will conclude by providing support for an alternative method of rationing by auction, allowing the market clearing mechanism to allocate an inadequate land supply using prices. This Friedman-Stigler approach justifies auctioning as a more efficient and equitable compromise for land release rather than the current government command mechanism.

³ *Milton Friedman Quotes* (2008) BrainyQuote
<http://www.brainyquote.com/quotes/authors/m/milton_friedman.html> at 16 May 2008.

⁴ Land Release Coordinator, above n 1, 1.

The scope of this paper is confined to land release in Western Australia. The paper will also focus principally on the issues attached to residential land releases since there has been an extraordinary level of demand exceeding supply for serviced residential lots over recent years in the context of a booming State economy and population growth.⁵ The matters that arise provide a clear illustration of the need for a more market-driven land release policy.

⁵ Land Release Coordinator, above n 1, 1.

II EFFICIENCY OF LAND RELEASE IN WA

A Layers of Government Interference

Land regulation and development is subject to processes and legislation existing at Local, State and Commonwealth levels of government. It is the interrelatedness of this system within and between the levels that imposes constraints on land release in Western Australia since authorities at each tier, despite each having varying levels of influence on the process, have different responsibilities and objectives. A driving factor limiting effective release is the lack of communication, and doubling up of regulations, between the layers of government. This has imposed unnecessary restrictions and prevented streamlined processes developing. These problems have, in turn, been magnified by the Federal Government promoting population growth, yet leaving land supply issues up to the states.⁶ This paper will focus on the constraints existing at the State level since the release of land in Western Australia is predominantly regulated by planning and land development authorities in Western Australia.

B The Mechanism Developing and Releasing Land

The release of land in Western Australia is coordinated by a system of processes that flow through multiple government bodies. The prima facie problem with such a system is the greater scope for inefficiencies to be introduced at various stages of the chain which block land supply. However, the problem is most pronounced with the underlying release of raw land onto the market. The release of land is managed by the State Government,

⁶ ABC Television, 'A closer look at Federal Budget infrastructure spending', *Lateline Business*, <<http://www.abc.net.au/lateline/business/items/200805/s2243827.htm>> at 13 May 2008.

which also exacerbates the problem by its presence as the largest owner and developer of land in the State.⁷ The availability of ready land able to be released does not set back supply, since it has been identified that an additional 18 year stock of residentially zoned land exists even at peak metropolitan demand rates.⁸ Further evidence that the problem lies with the State's development strategy and subdivision process is the number of proposed lots currently held up with conditional approvals. For the December 2007 quarter, a total of 53,423 lots in the Perth metropolitan and Peel sectors, and 83,747 lots State wide were held up in this manner.⁹ The efficiency of the mechanism releasing land, plagued with delays and serving an overarching planning strategy for the State, has largely contributed to the pace of land approval and release.

1 *The Western Australian Planning System*

The Western Australian planning system is a three tiered model, regulated by the Minister for Planning and Infrastructure (currently the Hon Alannah MacTiernan), the Western Australian Planning Commission (WAPC) in association with the Department for Planning and Infrastructure (DPI), and local government. The planning system has a fundamental purpose to ensure adequate supply of land, particularly residential.¹⁰ However, the absence of a steady and sufficient supply of land can be seen to have impeded the State's broader economic, social and environmental sustainability objectives.¹¹

⁷ Nahan, above n 2, 64.

⁸ That is, even at peak consumption rates in 2006 of 800 to 900 hectares per annum; Land Release Coordinator, above n 1, 9.

⁹ Of the 53,423 lots in the Perth metropolitan and Peel sector, 49,103 of the proposed lots were for residential purposes, and 4320 for non-residential subdivision; Western Australia, Western Australian Planning Commission, *State Lot Activity December Quarter 2007* (2008) 13.

¹⁰ Land Release Coordinator, above n 1, 2.

¹¹ Land Release Coordinator, above n 1, 18.

The WAPC is a statutory authority established and operating under the *Planning and Development Act 2005* (WA).¹² It is central to ensuring that an adequate ‘quantity’ of land is released to the public. This is the result of the Commission’s responsibility for land use planning and development in Western Australia,¹³ which also involves integrating and administering regional planning schemes and strategy as part of its role as an agency of the DPI.¹⁴

(a) Schemes and Strategies

An important scheme administered by the WAPC is the Metropolitan Region Scheme (MRS). This scheme is the statutory basis controlling land use and property development in Perth.¹⁵ The WAPC is responsible for reviewing the MRS and updating it to reflect land planning needs and supply, especially since the scheme strategically reserves land for later use, zones non-reserved land and controls development on reserved or zoned land.¹⁶ This beneficially identifies where land supply is needed where land use patterns emerge. However, the MRS is effectively a lagging indicator to supply needs since land is released at a much later time post-identification of it being insufficient. This is due to the mandated process under the Scheme, where it has to be amended to reflect the supply need, followed by the WAPC having to hand down a development decision to formally release the land. Further, having to comply with the requirements of the MRS, which regulates development action on reserved land and what is permitted in zones, again

¹² *Planning and Development Act 2005* (WA) ss 7, 14, 15.

¹³ Western Australia, Western Australian Planning Commission, *An Introduction to the Western Australian Planning System* (2007) 2.

¹⁴ The DPI provides professional planning and administrative support to achieve the desired outcomes of the Government and/or the WAPC.

¹⁵ *Planning and Development Act* (WA) s 33(1).

¹⁶ Western Australia, Western Australian Planning Commission, *Annual Report 2006-2007* (2007), 13.

hinders supply and release of land to service these areas after the demand has been identified.

The WAPC prepares the Metropolitan Development Program (MDP) as a source of data to advise government on these land use planning and development intentions as well as on the coordination and priority of infrastructure and essential services.¹⁷ However, presenting this inherently lagging information means it is also a lagging indicator, affecting meaningful forward action being taken by its users. The value of the MDP's data would improve with streamlining the amendment process and requirements of the MRS.

The MDP is also assessed by the WAPC to align it with the 25 year Network City metropolitan strategy adopted for the Perth metropolitan and Peel region.¹⁸ The Strategy is designed to limit further consumption of land, in effect recognising the supply shortage, but creates an alternative solution instead of focusing on, and fixing, its cause which results from an untimely and delayed land release system. Rather than improving land release it concentrates residential developments in a limited number of already developed areas located on transport junctions.¹⁹ This is intended to minimise urban sprawl. However, this inevitably enhances the possibility for environmental and community backlash and delays in releases since it intensifies density levels.

¹⁷ *Planning and Development Act 2005* (WA) s 14(a), (c), (e), (f); Western Australia, Western Australian Planning Commission, *Metropolitan Development Program 2005/2006 to 2009/2010*, (2006) 3.

¹⁸ Western Australia, Western Australian Planning Commission, *Statement of Planning Policy: Network City* (2006) 3.

¹⁹ Nahan, above n 2, 64.

Only permitting residential development in the selected areas that the Strategy identifies is perhaps the greatest structural flaw of Network City. This means that only a few developments can occur (which by their nature would have to be large scale projects, consequently facing further delays and backlash), reducing the total supply of residential land.²⁰ It excludes the possibility of residential development in non-earmarked areas. The outcome of Network City is therefore a detrimental strategy to an efficient release of residential land, significantly contributing to prevailing land shortages and affordability.²¹ This is especially the case since Network City shapes the interpretation of existing planning policies, programs and instruments and informs how the WAPC now makes policy and carries out planning.²² Despite it having some broader merit in controlling urban sprawl, it affirms relevant past State planning decisions going forward.

Another problem with the Network City Strategy is that it depends on all authorities in the planning system acting towards the same outcomes and adhering to time lines,²³ which is not occurring in the present planning system. For example, environmental holdups have been highly problematic. This is evidenced in the major Keralup residential development with a proposed 90,000 dwelling capacity. This development achieved Environmental Protection Authority (EPA) clearance in 1998. However, the time required to redesign it to fit Network City has meant its delayed plan has had to be reconsidered by the EPA and now does not meet newer and more strict EPA

²⁰ Nahan, above n 2, 64.

²¹ Nahan, above n 2, 64.

²² WAPC, above n 18, 3.

²³ Nahan, above n 2, 64.

requirements, which are impediments to timely and efficient releases (such as requiring land developments to have zero net emissions of phosphate into adjoining waterways).²⁴

(b) Subdivision Process

In addition to the flaws in the strategies of residential land release is the actual subdivision and clearance process undertaken by the WAPC when considering development applications for releases. The WAPC has the function of determining all land subdivision applications made to the DPI and also granting approvals.²⁵ In this capacity, the development industry is a major driver of land supply, as it is the source of applications and effectively controls when they are lodged.²⁶ However, it is the approvals process itself, centralised in the WAPC rather than being administered by local governments,²⁷ that exemplifies the inefficiencies in the planning system and is the major cause preventing a substantial release of the present stock of available and ready land already, or potentially able to be, lodged for approval.

The major problem is the time taken to satisfy the requirements of the process and achieve approvals at its various steps, with unreasonable delays existing prior to and during the formal WAPC subdivision and development mechanism. Such delays have caused the process, from an initial zoning application to final subdivision approval, to have taken five years in some cases.²⁸

²⁴ Nahan, above n 2, 64..

²⁵ *Planning and Development Act 2005* (WA) s 135.

²⁶ Land Release Coordinator, above n 1, 51.

²⁷ Land Release Coordinator, above n 1, 13.

²⁸ Land Release Coordinator, above n 1, 17.

i. Structure Plans

The process begins with the potential applicant, under their own initiation, assessing the planning context of their landholding, which must be done before a subdivision application can be made. This involves preparation of ‘structure plans’ or ‘outline development plans’ which detail a proposed site layout and type of land uses for the applicant’s landholding and surrounding areas.²⁹ These structure plans are an integral part of the planning process and essentially form the basis of orderly planning of a whole area on a long term basis. Their preparation is usually the responsibility of the landowner, who appoints consultants such as surveyors and planners to formally develop a plan. However, since the structure plan affects a whole area, it is generally prepared in association with other surrounding landowners who also contribute to the one plan. In some circumstances, such as where land ownership is disjointed or where complex development constraints exist that necessitate government intervention, the WAPC and local governments may also prepare structure plans.³⁰

Structure plans operate on two broad levels.³¹ District level structure plans (usually WAPC prepared) represent macroeconomic planning, coordinating the needs of a larger area or region, outlining required retail/commercial areas, streets, public open space, infrastructure provision and community facilities. More detailed structure plans exist at the local level, configuring microeconomic necessities for a more specific area of

²⁹ Land Release Coordinator, above n 1, 13.

³⁰ Land Release Coordinator, above n 1, 13.

³¹ Interview with Steve Allering, Director – Allering & Associates: town planners, advocates and subdivision designers (Personal interview, 2 July 2008).

proposed development, such as density levels, road layouts and land views of proposed lots. These micro-level plans are effectively pre-subdivision level plans.

However, the development of structure plans is a major hurdle that restricts any semblance of a speedy entrance to even begin the subdivision and clearance process. They involve an assessment of the relevant zoning provisions of a planning scheme (to determine minimum and average lot sizes, and if a new use is being proposed), as well as preliminary consultation with affected government related authorities (non-mandatory) and a feasibility study being carried out.³² Since this is the applicants responsibility, it is both a costly and time consuming exercise for land which may be denied structure plan or later subdivision approval. It is also generally initiated at the choice of the land holder, which may delay the development of privately held land banks.

Structure plans also require support of the relevant shire and the WAPC to approve the proposed land uses and densities. The result is that the WAPC can request changes to, and impose conditions on, a structure plan before its acceptance, and can revise a structure plan themselves which may exclude potential subdivision applicants who contributed to the plan's preparation in the first place.³³ A prime example of the delays in constructing an acceptable structure plan, even when initiated by the WAPC, is the Amarillo development. Over 10 years ago, the 1997 Inner Peel Region Structure Plan was developed to analyse the area for future development, identifying government owned land at Amarillo as a major development area. This land has been held by the State since

³² Western Australia, City of Belmont Planning Department, *Summary of the Subdivision Process* (2005) 1.

³³ Interview with Steve Allering, above n 31.

1991, and it was not until 2008 that a more finalised Masterplan was made, with 2011 identified as the time when an application for subdivision will be lodged.³⁴ Once accepted by the WAPC, the structure plan must then be advertised for public comment to gain community and stakeholder support, which further extends the time before subdivision application can begin.

Once a structure plan has gained support of the WAPC, it is then necessary for regional (such as the MRS) and other relevant local planning schemes for the area to be amended if the proposed land use under the plan (for the potential subdivision to be applied for) requires a different zoning to that presently under the relevant schemes. This amendment introduces further time delays since the WAPC regulates the process to verify that the change accords to the Network City strategy.

Overall, achieving acceptance of the structure plan and any necessary rezoning appears to be too long a process to initially overcome before proposed developments even begin the formal subdivision and clearance process. There would be value in simplifying this process and mandating (rather than leaving it as a choice) that applicants consult with referral authorities and the WAPC at this early stage. Doing so would enhance the efficiency of the formal subdivision application process, preventing later holdups by these authorities after an official development application has been made, speeding up assessment and improving the prospect of the applicant achieving approvals.³⁵ Even when it is the State initiating greenfield development, it is more efficient for land to be

³⁴ Western Australia, Taylor Burrell Barnett for the Department of Housing and Works, *Amarillo Masterplan* (2007) Foreword I, 67.

³⁵ Western Australia, City of Swan, *Guidelines for Development and Subdivision of Land* (1998) 7.

selected that is suitable and compatible with its intended use in the first place, rather than focusing on prospective development areas, despite the existence of development problems, based on transport hubs (Network City), such as Amarillo (located on the Kwinana Freeway and the Perth to Mandurah rail line). This is the result of the unique land characteristics in Perth increasing the likelihood of environmental problems, necessitating careful selection initially rather than hampering the process with inappropriate land.

ii. Subdivision Clearance Process

Once the structure plan is accepted and any necessary zoning is amended, an applicant can make a formal application for subdivision to the DPI to be decided by the WAPC. The time taken for the WAPC to make a determination on subdivision applications is fairly reasonable. Generally, it has 90 days to determine an application,³⁶ and it is also within this time that the relevant local government and other state government authorities must have 42 days to consider an application referred to them for consideration and to attach conditions, and should they not respond to the WAPC by the end of this time they are deemed not to object or have conditions.³⁷ However, there is the potential for these time limits to be halted when planning officers require further information from the applicant to properly assess an application (with the applicant's consent).³⁸ Since no statutory timeframe exists on how long an authority can take to assess information once the time limits are stopped, the application could be delayed significantly, slowing the final release of land.

³⁶ *Planning and Development Act 2005* (WA) s 143.

³⁷ *Planning and Development Act 2005* (WA) s 142(1), (2), (3).

³⁸ *Planning and Development Act 2005* (WA) ss 143(2), 142(2).

The application must be referred to the relevant local government, the Water Corporation and Western Power, and may further be referred to several other authorities depending on the issues involved with the subdivision application.³⁹ As noted earlier, consultation with these authorities is also generally done at the earlier structure plan stage. The requirement to again correspond with these authorities is an unnecessary delay that could be resolved in one mandated step as suggested above. Even if this second round of referral is maintained, mandating reference to these authorities at the early structure plan stage can identify and resolve any major issues with a development, or recommend that the development not be applied for.⁴⁰ This would prevent the development being halted and obstructing the following subdivision process and later clearance stages if it is continued.

After receiving back referral advice, the WAPC decides whether to grant approval on the subdivision application, which if granted is generally 'conditional' since these authorities almost always impose conditions on applications. These are a major source of delay in the approvals process since there may be up to 45 conditions for a large subdivision,⁴¹ and they may be highly onerous. This delays final approval further since applicants may appeal conditions to the State Administrative Tribunal, introducing the time constraints of action in the legal system. Onerous conditions are also detrimental in the context of the Perth construction industry being stretched to its limit in the midst of the property boom,

³⁹ Other referral authorities include the Dept of Environment & Conservation, Dept of Water, Main Roads WA, the Swan River Trust, FES, Dept of Health, Dept of Agriculture, Dept of Education; Land Release Coordinator, above n 1, 13.

⁴⁰ Western Australia, text version of Debra Goostrey's (CEO, UDIA WA) presentation to the Environmental Protection Authority, *EIA review: The Environmental Approvals Process* (2008) 2.

⁴¹ Land Release Coordinator, above n 1, 14; Interview with Gordon Roberts, Senior Project Manager – Developments, Department of Housing and Works (Personal interview, 19 May 2008) 1.

which means conditions may not be satisfied for a significant time. Consequently, the four year validity period of conditional approvals for subdivisions of five or more lots⁴² is less effective for developers than envisaged,⁴³ hampered by the inefficiency caused by onerous conditions and a strained construction industry. Scrutiny of conditions,⁴⁴ so that only meaningful and necessary ones exist, would be a better solution to improving the ability of developers to satisfy them instead of relying on the increased validity period from three to four years. Further, if developers fail to satisfy all of the required condition clearances within this period, then they face submitting a new subdivision application and potentially new or more conditions.⁴⁵

Further issues arise in the context of strained resources, where the State lacks sufficient capacity and funds to provide infrastructure which is necessary to fulfill referral authority conditions. One such example is land in East Baldivis, where the Water Corporation is opposing development (which could amount to 3,800 lots) on the grounds that existing sewage infrastructure is unable to cope with the additional demand if the entire proposed development was completed to provide for housing.⁴⁶ Further, lack of power supply was identified as the main reason for the delay of 12% of approved subdivisions from which titled lots had been produced for the year ending 30 June 2006.⁴⁷

⁴² *Planning and Development Act 2005* (WA) s 145(2).

⁴³ Nada Raphael, 'New Planning System for WA' (2006) 4(7) *L Gov R* 97, 99.

⁴⁴ Land Release Coordinator, above n 1, 20.

⁴⁵ City of Swan, above n 35, 9.

⁴⁶ Emily Piesse, 'Baldivis Waste Water Threat', *WA Business News* (Perth), 7 May 2008.

⁴⁷ Western Australia, Department for Planning and Infrastructure, *Residential Developers Survey: Lot Supply, Sales Outlook and Development Delays, June 2006, Perth Metropolitan Region and Peel Sector* (2007) 16-18.

Reforms are needed to assist the development industry to have a sufficient capacity to satisfy imposed conditions since it is development applicants who determine when the ‘clearing’ of conditions commences in that four year period, and because it is once conditional approvals are satisfied that final approval is reached.⁴⁸ Consequently, the cause of inactive approvals is as much market driven as the result of delays in obtaining infrastructure and environmental approvals for the proposed development.⁴⁹ The result is that it has historically taken an average of 10 months to convert a conditional approval to a final approval with title (2000 to 2005). However, this approvals process has taken longer in the presently constrained market conditions, with the potential to take up to the four year validity limit.⁵⁰ This has meant an opportunity cost exists with additional planning resources being diverted to meet approvals for land which may take up to four years to be released and satisfy present demand.

Improving the approvals process would permit land release to become more efficient and avoid significant delays in lot production and clearance. Several possibilities exist to accelerate clearances. Firstly, resolving the general lack of clarity and certainty in the approvals process would reduce the time developments are delayed in the conditionally approved stage.⁵¹ Planners have identified that environmental clearance and services availability are major hurdles to overcome.⁵² This is predominantly due to the present planning system model placing strategic powers in the WAPC, the EPA and the services authorities, since they are each established under separate legislation. This is most

⁴⁸ DPI, above n 48, 1.

⁴⁹ Land Release Coordinator, above n 1, 11.

⁵⁰ Land Release Coordinator, above n 1, 5, 15.

⁵¹ Land Release Coordinator, above n 1, 17.

⁵² Interview with Steve Allarding, above n 31.

pronounced with environmental assessment since the EPA enjoys a power of veto to hold up land that otherwise satisfies WAPC conditions, especially with new legislation such as the *Contaminated Sites Act 2003* (WA) expanding EPA powers.⁵³ The EPA does this at a microeconomic level, assessing impacts, for example, on flora, fauna and waterways.

An alternative model would be to place the WAPC as the source of all strategic and determinative powers, with subsidiary advisers or committees in social, economic and environmental areas providing recommendatory advice to the WAPC. Whilst this decreases the independence of authorities such as the EPA, it reduces the complexity of the process by centralising decision making in the WAPC and also maintains the scrutiny and fairness such advisers would promote in the approvals system. Removing assessment by multiple bodies will consequently reduce time delays, improving the cost to the end purchaser of subdivided land.⁵⁴

Secondly, whilst it has been suggested that the DPI should assist the development industry in expediting clearances,⁵⁵ an alternative solution would be to create the ability to have conditions certified by the private sector (for example by engineers, planners, surveyors etc). This could be achieved since most conditions are standard or merely technical in nature (for example, can the development connect to power or not).⁵⁶ Private certification would avoid the red-tape and delays inherent in government assessed approvals (removing a layer of government decision making), permitting speedier

⁵³ Interview with Steve Allarding, above n 31.

⁵⁴ Debra Goostrey, above n 40, 3.

⁵⁵ Land Release Coordinator, above n 1, 18.

⁵⁶ Interview with Steve Allarding, above n 31.

resolution of development issues by the more efficient market services sector. Consequently, it is arguable that once land is assessed as suitable for residential development, the role of the government approval should cease.

iii. Final Approval

Upon application and lodgment of a deposited plan of the site's configurations, statutory approval may be granted by the WAPC confirming the subdivision's clearance conditions have been met according to the initial approval that was granted (it has 30 days to determine this).⁵⁷ The developer may then apply for Landgate to issue titles for the subdivided lots, provided they conform with the deposited plan.⁵⁸ It is at this point that lots are ready to be released for sale. However, leaving it to developers to decide when to seek titles may again introduce market driven delays to the release of the new lots.

Overall, short-term demand for land releases has outstripped the long run supply that exists due to the inefficiencies in the conversion of zoned land to approved residential lots.⁵⁹ The result is an accumulation of proposed lots in the planning system with conditional approvals, despite conditional approvals for residential lots being granted at levels exceeding 17,000 p.a. for the five years up to 2007.⁶⁰ Even in the December 2007 quarter 8790 residential lots were conditionally approved. However, only 4742 (3374 in the metropolitan and Peel areas) achieved final approval and were ready for release.⁶¹ This is a flow rate of just over 53%. Improving the efficiency of the approvals and

⁵⁷ *Planning and Development Act 2005* (WA) ss 145(5), 253(b).

⁵⁸ Land Release Coordinator, above n 1, 15.

⁵⁹ Land Release Coordinator, above n 1, 9.

⁶⁰ Land Release Coordinator, above n 1, 18.

⁶¹ WAPC, above n 9, 14.

clearance system would reduce the impediments that are holding up the large volume of ready land with conditional approvals, permitting land release to be increased in the short-term. The consequence of the present situation is that only small quantities of land are released at a time.

2 Land Development Agencies

As seen above, the WA planning and approvals process impacts on land development and release. It causes only small tracts of land to be released due to the inefficiencies in the system. Consequently, this has impacted upon the methods of release utilised by land developers who have achieved final approval.

Private developers are affected by the system but overall to a lesser extent since they rationally sell lots at market prices to maximise profit. The opportunity cost private developers face in diverting and tying up their resources in the planning system is recoverable as they can pass on costs to end purchasers in a market influenced by the system itself, where demand outweighs short-term supply. This has assisted the going-concern of broadacre land developers in Perth, including the Satterley Property Group, Peet and Co., Stockland and Mirvac.⁶²

The State Government is also a participant in land subdivision and housing development,⁶³ more greatly affected by the planning system and land shortages. The

⁶² Land Release Coordinator, above n 1, 51.

⁶³ Land Release Coordinator, above n 1, 17.

public sector accounts for about one-quarter of total residential lot production.⁶⁴ The subdivision and development of land by the State occurs predominantly through the Department of Housing and Works (DHW) – providing the majority of residential land supply by the State Government,⁶⁵ and LandCorp – providing about 5% of the State’s total residential land supply.⁶⁶ Smaller supply is also provided by the four state metropolitan redevelopment authorities (East Perth, Subiaco, Midland and Armadale),⁶⁷ which either subdivide land into lots for sale to private individuals or on-sell larger land parcels to the private sector to undertake housing developments.⁶⁸

(a) LandCorp

LandCorp is an independent WA State Government Authority. It has an underlying economic objective to maximise the return on Government land assets through its role in property development, producing major land and associated infrastructure projects statewide.⁶⁹ It makes strategic land subdivisions and releases, dealing with industrial land, commercial property, and urban development and renewal⁷⁰ in the inner, middle and now outer suburbs of Perth as well as in regional towns.

⁶⁴ Letter from Rob Giles (Chief of Staff, Office of the Minister for Planning and Infrastructure) to Jason Pasqua, 7 July 2008, 1.

⁶⁵ Rob Giles, above n 68, 1.

⁶⁶ Rob Giles, above n 68, 1.

⁶⁷ Land Release Coordinator, above n 1, 51.

⁶⁸ Rob Giles, above n 68, 2.

⁶⁹ *Land and Housing Development – Government Sites* (2007) Department of Housing and Works <http://www.dhw.wa.gov.au/landsales/site_files/corporate/links.htm> at 20 March 2008.

⁷⁰ *About LandCorp* (2008) LandCorp <http://www.landcorp.com.au/portal/page?_pageid=33,35643&_dad=portal&_schema=PORTAL> at 21 March 2008.

LandCorp also has an equitable goal of securing social prosperity for all Western Australians.⁷¹ This entails the development and provision of land as a public good – a justifiable reason for State intervention. Consequently, LandCorp delivers projects which would not otherwise be pursued by the private sector due to financial viability.⁷² Such projects include large industrial or town-scale developments, those with large up-front capital requirements, and those with long lead times. The result is beneficial to supply and stimulus of industry and employment in the economy, beyond the delivery of just financial returns.⁷³

LandCorp may subdivide and sell lots to private individuals in its own right, but it also enters many partnerships with the private sector to develop land. These partnerships enable the private sector access to government owned sites,⁷⁴ resulting in improved standards and efficiency in the land supply produced.

(b) Department of Housing and Works (DHW)

The DHW focuses on releasing residential land or housing in Western Australia, and engages in some redevelopment of public housing. It carries out this more equitable function through its Land and Housing Development agency, assisting low and middle income earners and first home owners.⁷⁵ Its objective is to encourage owner-occupiers by

⁷¹ LandCorp, above n 74.

⁷² Western Australia, LandCorp, *Creating Land for Tomorrow* (2006) 2.

⁷³ LandCorp, above n 76, 2.

⁷⁴ *Partnering with LandCorp* (2008) LandCorp

<http://www.landcorp.com.au/portal/page?_pageid=33,1778211,33_1778222&_dad=portal&_schema=PORTAL> at 21 March 2008.

⁷⁵ *About the Department of Housing and Works* (2007) Department of Housing and Works
<http://www.dhw.wa.gov.au/585_410.asp> at 21 March 2008.

constantly acquiring⁷⁶ and releasing vacant urban land and housing for sale to these targeted groups, as dictated by demand, at affordable prices.⁷⁷ It is this function of the DHW which predominantly determines the amount of land it releases onto the market. The DHW Redevelopment Program also adds to its supply of land, since this Program involves clearing or constructing on existing public housing land which is later placed for sale on the market.⁷⁸ The DHW undertakes the subdivision of some government land holdings and selling the resulting lots to private individuals in its own right, as well as delivering residential land in the outer suburbs of Perth (such as Ellenbrook and Brighton) and regional areas in joint ventures with private developers.⁷⁹

(c) Methods Employed to Release Land

The methods of land release utilised by these developers is affected by the small tracts of land being released due to the inefficiencies in the WA planning and approvals process. The resulting excess in demand for lots has meant that inefficient rationing and allocation strategies have become favoured methods of release especially by these government agencies. The intention of these methods is aimed at prioritising owner-occupiers in pursuit of ensuring genuine purchasers end up with land rather than speculators seeking re-sale profits or monopolising procurers who acquire land to hold (which delays the development of necessary housing in the medium to longer term⁸⁰). At June 2007, some 55% of total lots surveyed (private and government approval releases) employed the use

⁷⁶ Interview with Gordon Roberts, Senior Project Manager – Developments, Department of Housing and Works (Personal interview, 19 May 2008).

⁷⁷ *Land and Housing Development – About Us* (2007) Department of Housing and Works <http://www.dhw.wa.gov.au/landsales/site_files/corporate/ABOUT.HTM> at 21 March 2008.

⁷⁸ *Land and Housing Development – Initiatives* (2007) Department of Housing and Works <http://www.dhw.wa.gov.au/landsales/site_files/corporate/initiatives3.htm> at 21 March 2008.

⁷⁹ Rob Giles, above n 68, 2.

⁸⁰ Land Release Coordinator, above n 1, 52.

of strategies for this purpose.⁸¹ The intention of government is also to contain land prices using these methods in its releases,⁸² selling at lower prices and only to this targeted consumer.

However, the use of rationing and strategies in lot sales might be less advantageous than first envisaged. Market segmentation indicates that owner-occupiers already broadly purchase two thirds (66%) of all lots sold.⁸³ Even 22% of the 28% of investors who acquire land intend to build houses for sale or rent,⁸⁴ supporting supply of available accommodation or even owner-occupancy, albeit their profit motive. This may also mean land is used more effectively since investors will have an impetus to convert vacant land into housing faster.

Nevertheless, the response to demand for lots outstripping supply has maintained the objective of promoting owner-occupiers in land releases. This has been done by tactics such as applying restrictions to releases, including:

- i. limiting the number of lots sold to each purchaser: this prevents the use of a nominee or company to contract for purchases, or requires that the individual, nominee or company sign a statutory declaration that the lot will be used for owner-occupation;⁸⁵ and
- ii. contract of sale conditions: these may require a purchaser to build within a designated time or provide for buybacks by the seller in the event that the

⁸¹ DPI, above n 48, 25.

⁸² Julie-anne Sprague, 'Lot release to salve shortfall', *WA Business News* (Perth), 31 October 2007.

⁸³ DPI, above n 48, 23.

⁸⁴ DPI, above n 48, 23.

⁸⁵ DPI, above n 48, 24-25.

purchaser is unable to build.⁸⁶ More influential is the imposition of caveats by sellers, entrenching their right to lots until the purchaser has satisfied sale conditions by providing evidence such as practical completion of building.

Importantly, the actual methods of land release, which may usually vary depending on land type and location, have had to modify in response to the insufficient lot supply. Traditional methods of release include auction (with land going to the most willing purchaser subject to any reserve price), private treaty or tender.⁸⁷ However, in the interests of fairness and equity to prioritise owner-occupiers in tight market conditions, increased use of balloting to ration land has occurred. Balloting sets a fixed price for lots, with prospective purchasers entering a public draw with equal chances of being chosen.⁸⁸ They are also structured to favour owner-occupiers by generally excluding investors from the database of interested purchasers.

As mentioned earlier, private developers, with no obligation to pursue equitable objectives, will logically sell to maximise their profit. This intrinsically involves auctioning methods to allow the most willing purchaser to buy at a price reflecting their assessment of the value of the land, subject to the seller's minimum reserve price. However, contrary to rational practice, in the peak of the land shortage, a method of balloting was adopted by private developer Satterley Property Group because of the

⁸⁶ DPI, above n 48, 24-25.

⁸⁷ Western Australia, LandCorp, *Buying LandCorp Land: Your Guide to Our Development Conditions* (2008), 3.

⁸⁸ LandCorp, above n 91, 3.

considerable excess in demand for vacant land which the Group wanted to direct to families rather than investors.⁸⁹ This is a direct result of the problems inherent in the planning and approvals system delaying supply in the property market, forcing a transfer of social objectives onto some private developers which are the responsibility of the State. This is despite the government land development agencies also having adopted balloting as a means to carry out their social functions when this market condition exists, rationing and selectively distributing land.

The costs generated by the inefficiencies of the planning and subdivision system and rationing via fixed-price ballots is the subject of the next chapter of this paper.

⁸⁹ James Moses, 'MacTiernan Summit on Land Shortages', *WA Business News* (Perth), 1 June 2006.

III COSTS OF SYSTEM INEFFICIENCIES AND RELEASE METHODS

The consequence of the inefficiencies of the planning and subdivision system, combined with the rationing methods and other strategic restrictions, generates costs on developers and prospective purchasers. The costs have substantial effect on the nature of land and how it will be developed, the quantity of land released, who can obtain that land, and how purchasers must act once they have acquired it. Indirect costs to economic growth also flow on from diminished revenue being earned by rationing releases and stifling competition, as well as from the insufficient land supply causing land use to be diverted away from alternate productive ends (provided adequate infrastructure and construction services existed to support the use of land as a basic factor of production).

A Legal Costs

The legal costs resulting from the rationing of land releases and allocation strategies mentioned above have existed since Nineteenth Century colonial Australia. Seeking to unlock large tracts of land from the hold of the wealthy and powerful squattocracy (as a result of pastoral expansion) meant colonial parliaments passed Selection Acts between 1858 and 1872.⁹⁰ The idea was to convert illegitimate squatter occupation on land (resulting from long term leases) into smaller freehold titles, enabling other free selection of this Crown land to the working class and expanding new generation to meet their demand for land and promote small-scale independent freehold landholdings and

⁹⁰ *Objects Through Time: 1840 – 1900* (2006) NSW Migration Heritage Centre
<<http://www.migrationheritage.nsw.gov.au/exhibitions/objectsthroughtime/timeline/1840.shtml>> at 22 June 2008.

agriculture. Free selectors being the intended recipients of the newly released and rationed land is analogous to the targeting of owner-occupiers for present purposes. Even similar allocation strategies existed to ensure the selection process supported the acquisition of land by free selectors. Specifically, conditions were imposed requiring purchasers of the land (rationed cheaply at auction) to occupy the land for one year and make improvements.⁹¹ It seems that some 150 years on this same tactic is being used to ensure owner-occupiers and not speculators acquire land releases in WA by requiring purchasers to build. Consequently, the result that the intended recipient could be prevented from receiving rationed land, just as the squatters did by placing dummy claims on the best land using friends and employees,⁹² is possible under a rationing mechanism. The ineffectiveness of rationing land in ensuring the intended recipient actually secures title is therefore a lesson learned from Australia's colonial past. Even with effective rationing, an economic problem still arises since the poorer classes lack the capital to exploit the land that they gain via the rationing mechanism (such as the ability to build or develop), therefore causing a less effective use of the land than otherwise possible had open market acquisition occurred.

The strategic use of caveats and memorials to control land use and direct land to owner-occupiers is also a major bulwark to effective legal property rights in rationed as opposed to un-rationed land. The fundamental tenant of private property is the owner's rights to exclusive possession, use, enjoyment and alienation of that property.⁹³ It is the ability to

⁹¹ NSW Migration Heritage Centre, above n 95.

⁹² NSW Migration Heritage Centre, above n 95.

⁹³ *Milirrpum & Ors v Nabalco Pty Ltd & The Commonwealth* (1971) 17 FLR 141, 268, 272 (Blackburn J, during argument).

enforce these rights which permits private property to exist. The imposition of contract of sale conditions to encourage particular land uses is permissible as rational agents are free to contract on terms and abandon rights as they so choose, such as LandCorp's standard condition to require its permission be sought before a purchaser may resell their LandCorp land.⁹⁴ However, placement of caveats and memorials on land *titles* to restrict use is arguably tantamount to an erosion of private property rights. Despite encouraging perhaps the best use of land (to service owner-occupiers in an excess demand market) and preventing speculation and land banking, the placement of caveats and memorials on the titles to government rationed land⁹⁵ substantially interferes with a purchaser's rights to use, enjoy and deal on their land prior to building being completed and therefore put land to its most effective use. This is especially the case since caveats are only withdrawn when a purchaser can provide evidence of practical completion of building – by way of a Certificate of Occupancy from the Local Government Authority or a letter from the contracted builder.⁹⁶ This restricted use also represents an opportunity cost of foregone exploitation of the productive capacity of the land outside owner-occupier building.

A purchaser's security of title is also affected despite becoming a registered proprietor. This is because the indefeasible interest they acquire in the land is subject to the government authority's prior caveated interest registered on the certificate of title.⁹⁷ Combined with the use of standard contractual clauses that the government authority may 'buyback' land should building or development by the purchaser not occur within agreed

⁹⁴ Western Australia, LandCorp, *Selling LandCorp Land: Your Guide to Our Development Conditions* (2008) 5.

⁹⁵ LandCorp, above n 99, 5, 8.

⁹⁶ LandCorp, above n 99, 5.

⁹⁷ *Transfer of Land Act 1893* (WA) s 68(1), (2).

time frames,⁹⁸ this erodes a land owner's rights to its exclusive possession and alienation. Whilst this is a valid retraction since the Authority has priority of interest in the Torrens Title system, releasing land with such restrictions is counter-intuitive to encouraging private ownership and independence. It prevents the rights of possession, use and alienation from assuming their required characteristics of permanence or stability.⁹⁹

Overall, the legal costs resulting from restricting people's freedom to use and take security in their property, especially when it is private property, does not create a fairer and more harmonious society, but quite the opposite.¹⁰⁰ This is because economic growth and prosperity depend crucially on a system of institutions that define and protect property rights, treat all citizens equally and impartially, and allow the free market to flourish,¹⁰¹ rather than rationing, exclusion of market participants and providing property that affords less than adequate protections in ownership. The 'spontaneous order' of the market, as expounded by Hayek, settles its own controls, limits and promotes purchasers to use their own knowledge without unjustifiable political power otherwise imposing constraints.¹⁰² Consequently, endorsing free-market capitalism will facilitate the most advanced degree of individual freedom in the market, acting as a rule system which assigns most assets to specific owners and which fosters the autonomous, self-responsible

⁹⁸ LandCorp, above n 99, 5.

⁹⁹ *R v Toohey & Anor; ex parte Meneling Station Pty Ltd & Ors* (1982) 158 CLR 327, 342 (Mason J, quoting and approving Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* (1965) AC 1175, 1247).

¹⁰⁰ Warby, Michael, *Land Rationing and Regressive Politics* (2006) Australian Adam Smith Club, Melbourne <<http://www.economic-justice.org/LF78.pdf>> at 1 July 2008, 3.

¹⁰¹ Wolfgang Kasper, *Property Rights and Competition: An Essay on the Constitution of Capitalism* (Sydney: The Centre for Independent Studies, 1998) back cover.

¹⁰² Hashimoto Tsutomu, *A Theoretical Reconstruction of Hayek's Spontaneous Ordering* (2006) History of Economic Thought Society of Australia <<http://www.ballarat.edu.au/ard/business/hetsa06/tsutomu.pdf>> at 1 July 2008, 1-2.

use of private property.¹⁰³ It functions well only without discrimination, that is, when it is based on the rule of law¹⁰⁴ and the discipline of the market.

B *Economic Costs*

The inefficiencies of the planning and subdivision system in conjunction with use of rationing and other strategic restrictions have the potential to generate economic disadvantage on developers and prospective purchasers who are both intended and non-intended recipients of releases.

These costs largely stem from opportunity costs, some of which have been alluded to earlier in this paper. Developers face the opportunity costs associated with idle resources whilst they suffer delays in the planning process in satisfying conditional approvals. Investments in meeting approvals for land may take up to the four year validity period of subdivision approval before any land can be released and return realised. Consequently, the long lead times and reduced return (since rationing diminishes profits) provide less incentive for developers to exercise entrepreneurial skill and undertake land ventures. Government land authorities releasing land, as explored earlier, have equitable and social objectives to do so. However, private developers can maintain motivation by their ability to use non-rationing methods of release, albeit with small tracts of land at a time due to the inefficiencies of the planning system.

¹⁰³ Wolfgang Kasper, above n 106, 63.

¹⁰⁴ Wolfgang Kasper, above n 106, 63.

Another opportunity cost in the context of the land released is the opportunity foregone in directing land to owner-occupiers and the benefits that could otherwise be received from the opportunity of putting that land to alternate use.¹⁰⁵ This cost merits a distinction be drawn between the ‘best’ use of land and the most ‘effective’ use of land. Prospective purchasers, as a result of the balloting and other strategic restrictions used (such as imposition of caveats), are largely directed to use vacant land they acquire for owner-occupancy, providing a net social benefit. Whilst this may be the best use of land in a market where there is an expanding population and demand for land outstrips its supply, it is failing to realise the opportunity in that land being used most effectively by its purchaser – either for arbitrage or alternate development or income producing potential – a net economic benefit. It prevents active use of the productive property with internalised benefits and costs to its owner.¹⁰⁶ Non-owner-occupier purchasers face even higher levels of this opportunity cost due to their restricted access to this rationed land.

The result is inefficiency in the market tackling the economic problem (indefinite wants in the face of scarce land) dynamically.¹⁰⁷ Placing restrictions in the land market that prevent entrepreneurial exploration (‘discovery’, according to Hayek) frustrates the most willing and innovation seeking buyers obtaining and using that land – putting this scarce resource to its most efficient use¹⁰⁸ – and obstructs the spread of useful knowledge. Consequently, economic growth is impaired.¹⁰⁹

¹⁰⁵ Joshua Gans, Stephen King and N. Gregory Mankiw, *Principles of Microeconomics* (2nd ed, Victoria: Thompson) 6, 53.

¹⁰⁶ Wolfgang Kasper, above n 106, 66-67.

¹⁰⁷ Wolfgang Kasper, above n 106, 77.

¹⁰⁸ Gans, King and Mankiw, above n 111, 5.

¹⁰⁹ Wolfgang Kasper, above n 106, 77.

1 Predictable Theoretical Impacts

The use of balloting land (predominantly government released land) at fixed prices in the midst of excessive demand generates a series of predicted economic impacts. In a war or natural disaster, rationing is a reasoned response to a real or anticipated shortage of supply; in an otherwise normal market it just distorts prices.¹¹⁰ This is because any form of rationing will necessarily involve an increase in the effective price of the product. This provides windfall gains to existing land owners, benefiting from the supply shortage increasing their asking prices, but at the expense of purchasers of secondary market land. Consequently, the only purchasers who win from supply shortages are the intended recipients (or rather, actual recipients) of newly released lots that are balloted with fixed lower-than-market prices.

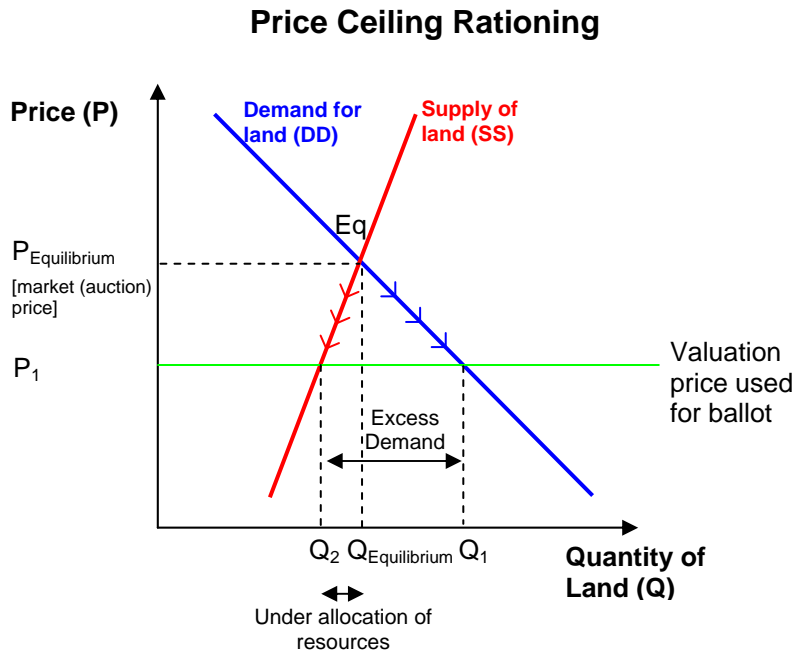
This results in a misallocation of resources and land not being used in its most effective capacity. Fixed-price balloting imposes a binding ‘price ceiling’ in the land market, necessitating the rationing of the shortage of land supply. The price ceiling is a form of price control that prevents the shortage of land supply raising sale prices by a substantial amount. Here, the economic model assumes significant inelasticities in short run supply (a more vertical supply curve) since the inefficiencies of the planning and subdivision system release small quantities of land.¹¹¹ Also, the fixed prices are held at their value derived from the Valuer General’s Office and independent valuers.¹¹² However, rationing under lower fixed-price ceilings is rarely desirable as compared to rationing in a free and competitive market which uses the market price of the good to efficiently and

¹¹⁰ Mark Pownall, ‘Finger Pointing No Solution’, *WA Business News* (Perth), 8 August 2007.

¹¹¹ Land Release Coordinator, above n 1, 11.

¹¹² LandCorp, above n 76, 3.

impersonally allocate the scarce resource to those who value it the most (who are willing to pay the most for it).¹¹³ Consequently, releasing land in a way that prevents the market settling on an equilibrium price is inefficient, causing an excess demand for the available stock of released land, rather than the market clearing at an equilibrium auction price.



Equilibrium Price is at P_0 . If a price ceiling is set at P_1 , the quantity demanded will rise to Q_1 and quantity supplied will fall to Q_2 . The quantity actually exchanged will be Q_2 .

The rationing under a binding, fixed-price ceiling produces the following unfavorable theoretical results which actually end up burdening the intended recipients of rationed land that the mechanism was designed to assist.

¹¹³ Gans, King and Mankiw, above n 111, 113.

(a) Search costs

Prospective owner-occupiers will incur shoe-leather (search) costs in attempting to secure available land or a ballot position. This is the result of the rationing mechanism not excluding market participants (in fact creating an excess demand for it) by providing the rationed land at a lower than market price. Consequently, intended recipients will incur searching costs equal to the price the owner-occupier is willing to pay minus the price they actually pay. These costs are founded in the pursuit of finding available land to their liking and, more importantly, in their time which becomes wasted. Long, inefficient lines¹¹⁴ may form as purchasers queue to receive insufficient releases of land. This was most evident in what some consider was the peak of the supply shortage in the mid to end of 2003. Strong demand saw prospective purchasers camp out at the sales office for more than a week to secure releases by Peet and Co. at Carramar Golf Course Estate, north of Perth.¹¹⁵ An even more extraordinary example was the government releases at Harvest Lakes estate in Atwell by LandCorp, where purchasers queued for up to two weeks to acquire lots.¹¹⁶ Following this dilemma, LandCorp did introduce a process of registrations of interest and balloting to prevent actual queuing.¹¹⁷ However, this is still a process of lining to obtain released land. These are just a couple of numerous other instances of land queuing that has occurred in WA. Queuing also causes indirect costs which prospective owner-occupiers might have to bear, such as renting, whilst they wait to secure a lot. The inadequate land supply has prompted the State Government to

¹¹⁴ Gans, King and Mankiw, above n 111, 113.

¹¹⁵ Peet & Company Ltd, 'Happy campers at Carramar', *Prosper* (Perth: Peet & Company Ltd, 2003).

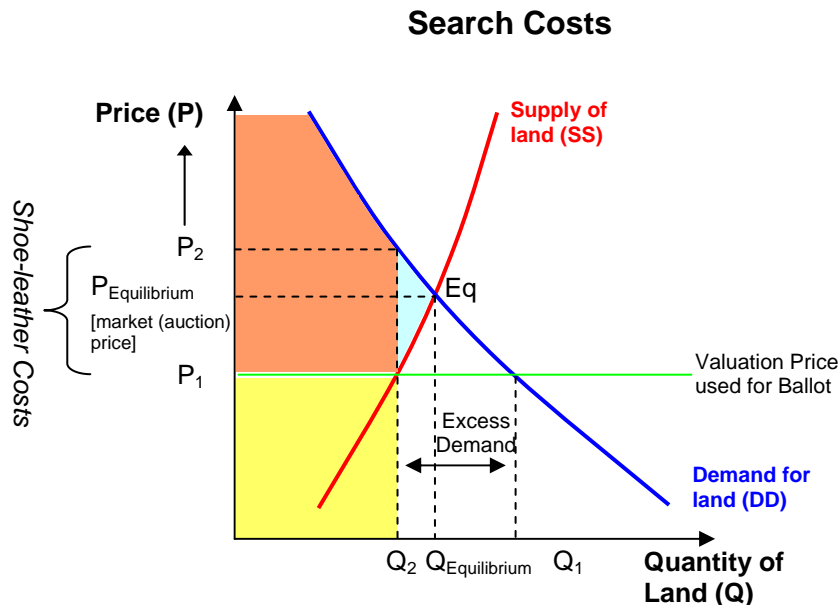
¹¹⁶ LandCorp, 'Strong sales continue at Harvest Lakes' (Press Release, 14 June 2003)

<<http://www.landcorp.com.au/pls/portal/docs/PAGE/ATSTH/MEDIA/HARVEST%2BLAKES-STAGE2A%2BRESULT-1406.PDF>> at 29 June 2008, 1.

¹¹⁷ LandCorp, 'New Sales Process Results in Happier Campers' (Press Release, 6 November 2003)

<http://www.landcorp.com.au/pls/portal/docs/PAGE/LC_WEB_ROOT/LC_PG_7_0/LC_PG_7_1/NOV03/MR_HL%2BSTAGE3%2BSALES%2B0511.PDF> at 29 June 2008, 1.

propose a ‘rental model’ to increase rental housing supply in the inner city as one alternative to alleviate the shortage.¹¹⁸



Shoe leather costs equal willingness to pay, P_2 , minus the (ceiling) price purchasers actually pay, P_1 . These are additional costs to acquisition born by intended recipients. The blue area is the dead weight loss of prevented release.

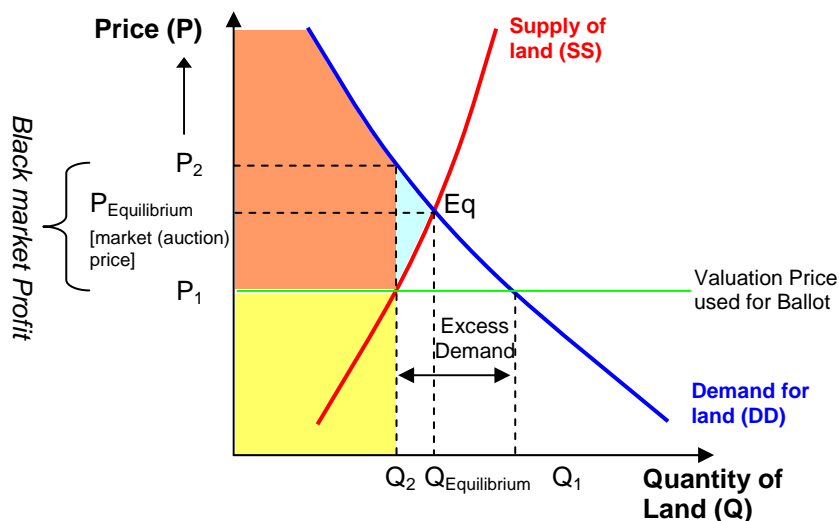
(b) Parallel / Alternate Markets

As with any form of rationing, there is the potential for alternate or illegitimate markets to develop, attempting to secure the good and exploit those who genuinely need it. In the case of land rationing, this may arise when investors, speculators or land bankers manage to secure released land or a ballot position. They may achieve this by bending the rules of the government strategies of caveating and imposing contractual conditions, just as the squatters managed to use dummy claims to secure land. For example, they may not buy in a company name or actually intend to, and do, build but later re-sell the lots. Even

¹¹⁸ Office of the Minister for Planning and Infrastructure, ‘Private Sector Support for State Government’s Innovative Rental Model’ (Press Release, 10 May 2008) <<http://www.mediastatements.wa.gov.au/Pages/Results.aspx?ItemId=130170>> at 20 May 2008, 1.

genuine owner-occupiers who obtain lots may be tempted to build and re-sell (once sale conditions no longer apply) to other owner-occupiers who miss out on a ballot. The supply shortage resulting from the inefficiencies of the planning and subdivision system ensures the market for these re-sales. Consequently, the rationing method of release ultimately hurts its intended recipients – if a prospective owner-occupier is successful in a ballot, he or she may be motivated by potential profits to sell and therefore lose the land they genuinely need. Conversely, if a prospective owner-occupier is unsuccessful in the ballot, their motivation to obtain a lot means he or she face higher prices on the secondary land market as those who re-sell balloted land have the capacity to demand large entrance fees which purchasers are willing to pay in a supply shortage, that is, a premium equal to the difference in value between the rationed price and their actual payment for a lot.¹¹⁹

Parallel / Alternate Markets



If all available supply of Q_2 was sold on alternate markets, the price to purchasers would rise to P_2 . Because black marketeers buy at the ceiling price of P_1 and sell at black market prices of P_2 , profits of the black marketeers is the red area. The blue area is the dead weight loss of prevented release.

¹¹⁹ Douglas McTaggart, Christopher Findlay and Michael Parkin, *Economics* (4th ed, Sydney: Pearson Education Australia, 2003) 125.

(c) Discrimination

Systems of fixed-price rationing, such as employment of balloting, also generate the potential for discrimination. Despite any popular acceptance of egalitarian rationing, discrimination can exist in the parallel secondary market created by the remaining excess demand of genuine owner-occupiers who miss out on a balloted lot. Re-sale driven owner-occupiers, investors or speculators who obtain released land may freely choose to whom and how they will on-sell. Whilst they will generally sell in pursuit of highest profitability, there is scope for seller bias to be inefficient (if land is not sold to the purchaser who values it most highly) as a seller can unfairly choose and favour particular purchasers.¹²⁰ This can mean rationing has burdened owner-occupiers (particularly those with lower incomes) intended to be assisted who miss out on ballots and are discriminated in re-sales. Private development releases have even greater potential for discrimination directly in sales where no rationing is employed – the shortage of supply caused by the inefficiencies of the planning and subdivision system mean private developers will also generally discriminate to favour those who can pay the most with the least risk.

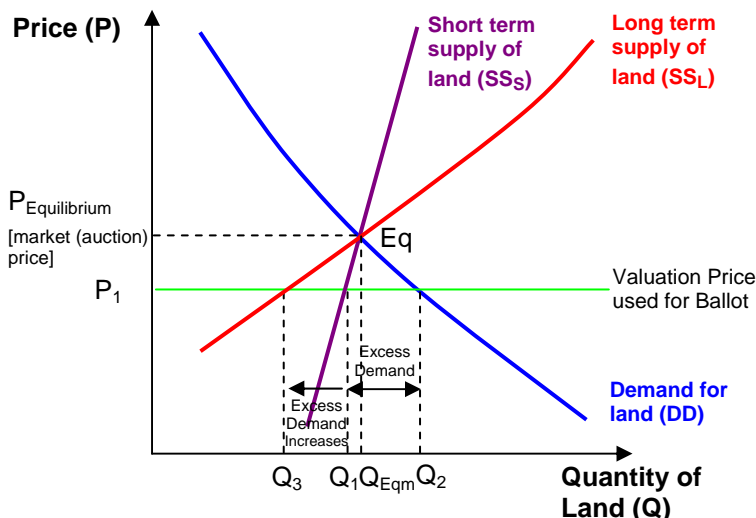
(d) Long Run Impacts of Using Balloting Into the Future

The price ceilings imposed on balloted lots have a unique feature as they are applied to a highly durable good (land) that provides use for a long period of time. Since the inefficiencies of the planning and subdivision system cause small tracts of land to be released, the short run supply response does not change a great deal. This limited response affirms that short run supply is inelastic and has a low responsiveness to price

¹²⁰ Gans, King and Mankiw, above n 111, 113.

change – that is, administrative incapacity to release a greater volume of land means there is less incentive for developers to increase the quantity of land supplied in the short term despite the ability to substantially increase the price of the available supply (where no rationing is employed). In the long term, the supply response to price-ceiling rationing can be dramatic. As supply improves and becomes more elastic, continuing to use balloting at fixed lower-than-market prices causes even greater excess demand for available land and an inefficient market clearing system. Consequently, since housing shortages would worsen as time passes and supply improves¹²¹ there is no justification for rationing or balloting in otherwise normal competitive markets.

Long Run Impacts



- The short term supply of land is shown by the highly inelastic curve SS_s . Thus Quantity supplied remains at Q_{Eq} in the short term, and the land shortage is $Q_2 \rightarrow Q_1$.
- Over time, quantity supplied decreases, shown by the long run curve SS_l . Here there is only Q_3 of land. The land shortage has increased to $Q_2 \rightarrow Q_3$.

¹²¹ Marvel, H, *Supply and Demand* (2002) Department of Economics, Ohio State University <<http://economics.sbs.ohio-state.edu/hmarvel/econ200/archive/lect6r4.ppt>> at 23 September 2005.

2 *Other Economic Costs*

In addition to the opportunity costs and predicted economic costs of administering a fixed-price rationing ballot system considered above, several other costs flow from the general system of land release, including:

- (a) lost market value of land. When land is released by a rationing mechanism it does not achieve the sales revenue otherwise attainable in a free market system. This increases the burden on the State's financial position as government land releases become equitable rather than profitable.
- (b) administrative costs. Developers, both government and private, face unnecessary additional costs in proceeding through a delayed and complex planning and subdivision system (opportunity cost of developers resources).
- (c) housing affordability and expectations. The rising property prices in the secondary land market will have macroeconomic effect upon the community's propensity to spend.¹²² Prospective owner-occupiers who miss out on ballots, investors and other persons seeking land or housing in the secondary market will face higher prices due to the supply shortage of new land and rationing mechanism, and consequently will factor these prices into their thinking,¹²³ potentially leading to reduced aggregate expenditure and an economic slowdown.

¹²² Greg Parry and Steven Kemp, *Exploring Macroeconomics* (6th ed, Perth: Tactic Publications, 2002) 26.

¹²³ Pownall, above n 116.

More generally, it has been suggested that the situation in Australia is so severe that on an affordability index (by comparing median housing price as a multiple of median household income), all mainland Australian cities feature in the list of seriously unaffordable places in the world to live. Consequently, housing continuing at its current level of un-affordability is likely to cause a decline in the levels of home ownership among future generations.¹²⁴

3 Market Failure

Market failure occurs when a market does not allocate resources efficiently.¹²⁵ It is a justification for government intervention in the market to modify the market outcome. If a purely competitive market existed for land release, lots would simply go to the most willing purchaser. However, the allocation of resources in such a model would generate the potential for speculators and monopolising land owners at the expense of buyers who genuinely need to obtain land. These investors act to enforce scarcity by taking up available supply and push up land prices.¹²⁶ Consequently, the market would fail if monopolies were permitted to form due to the market for land producing an insufficient supply of releases.¹²⁷ Merit therefore exists for some intervention to assist some market participants to acquire land (such as the equitable objectives of LandCorp and the Department of Housing and Works), perhaps through non-market arrangements (such as

¹²⁴ Day, Bob, *The Tyranny of Urban Planning: Home Truths About Home Affordability* (2008) Australian Adam Smith Club, Melbourne <http://www.economic-justice.org/tyranny_of_planning.pdf> at 1 July 2008, 6.

¹²⁵ McTaggart, Findlay and Parkin, above n 125, 308.

¹²⁶ Prosper Australia, 'Speculative Land Rationing Our Opportunity' (Press Release, 21 January 2008) <<http://www.prosper.org.au/2008/01/21/speculative-land-rationing-our-opportunity/>> at 22 June 2008.

¹²⁷ McTaggart, Findlay and Parkin, above n 125, 308.

the first homebuyers grant), but not through a rationing mechanism which, as has been established above, burdens the intended class of purchaser it seeks to assist.

IV AN ALTERNATIVE APPROACH TO LAND RELEASE?

The costs resulting from the inefficiencies of the planning and subdivision system and the use of rationing present the opportunity to explore an alternate approach to land release. Under the present system, it is evident that these costs of land release ultimately burden the intended recipient of rationed land in a tight market and prevent an efficient allocation of land that allows it to be put to its most effective use.

A *The Friedman-Stigler Approach*

Following the conclusion of World War II, a prevailing housing shortage in America laid the foundations for Milton Friedman and George Stigler to propose an economic solution to the insufficient supply by asking whether Americans wanted roofs over their heads or ceilings on rents.¹²⁸ Their argument was an attack on rationing via rent controls (a price ceiling) as an inefficient means of allocating resources, rather favouring the free market clearing mechanism to remedy the situation. Their classic Chicago approach concludes that government intervention fails – the direct government regulation of the price of housing led to a number of outcomes which were far worse than those which the regulation was designed to fix.¹²⁹

Friedman and Stigler's approach can be transposed to land rationing. Just as it has been established that the imposition of a fixed-price ceiling ballot system to ration land causes

¹²⁸ In their essay, *Roofs or Ceilings? The Current Housing Problem* (2008) Foundation for Economic Education <http://www.fee.org/library/books/Roofs_or_Ceilings.asp> at 11 February 2008.

¹²⁹ Emmett, Ross, *Roofs or Ceilings? Stigler and Friedman on Price Controls* (2006) The Skeptical Liberal <<http://skepticalliberal.blogspot.com/2006/03/roofs-or-ceilings-stigler-and-friedman.html>> at 23 June 2008.

unfavourable outcomes, following Friedman and Stigler's approach and replacing this price control with free market clearing will produce more beneficial results. It will overcome the problem of balloting restricting the opportunity for the most willing purchaser to obtain land and therefore put it to its most effective use – a problem of government control identified by Friedman and Stigler.¹³⁰ Their approach even explains that government intervention and regulating laws that protect the intended class (owner-occupiers for present purposes) involve partial expropriation of property rights and limit the owner's right to use and to profit from the use of his property.¹³¹ As established in chapter III of this paper, this has occurred by the imposition of caveats and contract of sale conditions by government land authorities, which restrict the freedom to contract.

Consequently, as proposed by Friedman and Stigler, the better solution for rationing land is the free market method of auctioning.¹³² The justifications presented for this method dismiss the key objection that auctioning permits only more willing purchasers to obtain land. Friedman and Stigler provide that:

- i. in a free market, there will always be some land immediately available for all prospective purchasers;¹³³
- ii. bidding up prices (cost) of land to market levels forces people to economise in existing space, therefore making the existing stock of used and available land become distributed more equally. Auctioning also permits all people to become

¹³⁰ In the Foreword of their essay, Leonard E Read notes that rent control restricts the opportunity of everyone else who would like to bid for the use of the properties thus controlled by government; Milton Friedman and George Stigler, *Roofs or Ceilings? The Current Housing Problem* (2008) Foundation for Economic Education <http://www.fee.org/library/books/Roofs_or_Ceilings.asp> at 11 February 2008, 1.

¹³¹ Friedman and Stigler, above n 136, 1.

¹³² Friedman and Stigler, above n 136, 3.

¹³³ Friedman and Stigler, above n 136, 4.

- prospective new land purchasers and potentially release their existing land, balancing out supply;¹³⁴
- iii. the higher market price of land will become a stimulus for new development and subdivision of land, which may be used to service future supply shortages if the inefficiencies of the planning and subdivision system are improved;¹³⁵
 - iv. it is better to directly attack existing inequalities in income and wealth than to allow unequal incomes and then take measures to prevent people using their higher wealth and obtain land by auction – this is the ‘height of folly’.¹³⁶

A free auctioning mechanism benefits from its simplicity and ability to impersonally ration through the price system.¹³⁷ The removal of cheaply available land under price-ceiling rationing also means the likelihood of investors and speculators bidding for released land is reduced because their opportunity for arbitrage is minimised by having to purchase land at higher auction prices. Arguably, this may produce a natural allocation of released land to genuine owner-occupiers as these investors and speculators leave the market, making redundant the need for caveating and contractual sale conditions.

Friedman and Stigler also recognise that in any rationing system, even by auction, some people will gain and some must be hurt.¹³⁸ Under fixed-price ceiling balloting, intended recipient owner-occupiers are hurt, as well as purchasers who miss out on, or are excluded from, ballots who will put land to its best use. Auctioning harms lower income

¹³⁴ Friedman and Stigler, above n 136, 4.

¹³⁵ Friedman and Stigler, above n 136, 4.

¹³⁶ Friedman and Stigler, above n 136, 4.

¹³⁷ Friedman and Stigler, above n 136, 4.

¹³⁸ Friedman and Stigler, above n 136, 12.

earners immediately the most – as they are unable to compete at higher market prices in a shortage of supply – but overall the burden is spread more evenly and each person is hurt less severely as all purchasers must face higher prices which eventually normalise as supply improves and balances with falling demand (exclusion of market participants by price).

Consequently, there is merit in the Friedman-Stigler approach to remove price controls such as the fixed-price ceiling ballot and adopting auctioning as a more efficient compromise. As told by Friedman and Stigler, any other solution involves worse evils.¹³⁹ Regulation by the state selectively helps and hurts an industry for the benefit of some large public subclass,¹⁴⁰ but the restriction of economic freedom proves to be inefficient and inequitable.

¹³⁹ Friedman and Stigler, above n 136, 12.

¹⁴⁰ George Stigler, 'The Theory of Economic Regulation' in George Stigler (ed), *Chicago Studies in Political Economy* (Chicago: The University of Chicago Press, 1988) 209, 209.

V CONCLUSION

The provision of land is an essential feature to the effective working of an economy. The Government's overall role is to help ensure that sufficient serviceable land is available for urban development and to approve subdivisions in accordance with WAPC policies.¹⁴¹ However, the inefficiencies of the planning and approvals system have meant an inadequate release of land to meet demand, resulting in the need for rationing. The arguments presented in this paper have shown that the legal and economic costs flowing from the method of rationing utilised by the State ultimately burden the targeted beneficiary, eroding their property rights and ability to secure lots, as well as having broader economic impacts such as increased prices. This is because restricted access to a basic resource has predictable results.¹⁴² It appears that the problems of government imposed methods of rationing have existed since their defeat by the squatters in the 19th Century, leading one to conclude that 'governments never learn.'¹⁴³ Consequently, there is scope to propose an alternate approach to rationing land in times of excess demand or insufficient supply. The removal of government imposed price controls and allowing the market to self-regulate allocation via prices in auctions, as advocated by Friedman and Stigler, appears to be a more efficient compromise to avoid the government initiated costs that otherwise exist from its market arrangements. However, to prevent market failure and encourage some allocation to those who genuinely need and will make the best use of released land (as opposed to most effective use), some government regulation is merited,

¹⁴¹ Rob Giles, above n 68, 2.

¹⁴² Warby, above n 105, 3.

¹⁴³ *Milton Friedman Quotes* (2008) BrainyQuote
<http://www.brainyquote.com/quotes/authors/m/milton_friedman.html> at 16 May 2008.

which should be encouraged to exist, more beneficially, through policy that is more reflective of free-market mechanisms, as well as through greater use of non-market arrangements.

The reforms and areas for improvement identified and noted throughout the paper may assist the requirement for better government policy, fair systems of approvals process, reasonable cost structures¹⁴⁴ and a method of release that will enable the fast, efficient release of land. This will mitigate the supply shortage, lowering competition, speculation, and prices, improving affordability in Western Australia. There may also be some value in mandating targets of release to correlate with population growth.

The land regime in Western Australia should have the competency and capacity to adapt to varying market conditions such as rising demand, whilst maintaining process and allocative efficiency. Anything less than an efficient release unduly burdens market participants. It is up to the State to initiate the impetus for streamlining and enhancing the release of land to be sensitive to diverse scenarios.

¹⁴⁴ *Ex-RAAF Land Earmarked for Affordable Housing* (2007) ABC News
<<http://www.abc.net.au/news/stories/2007/04/22/1903519.htm>> at 11 March 2008 (Rob Druitt, REIWA).

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