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The Properties of Planning: An Evolving Landscape

ALEXANDRA FLYNN & DONALD LEFFERS

Guest Editors

The theme of this special volume is “Challenging Traditional Notions of Property in Land Use Planning.” Property in the common law tradition is conceived as a right to something, whether physical or not, that is disconnected from the object or idea itself. Property interests are almost always hierarchical and exclusionary. An emerging body of property law scholarship is challenging the basic tenets of the discipline. For example, Nicole Graham argues that property law must be rooted in a time and place, and Sarah Keenan suggests that property law is a form of spatial and temporal order that can function as a tool of governance.¹ Representing the “progressive school,” Gregory Alexander disputes that the right to exclude is or should be the core of private ownership, preferring instead a “governance” model of property that sees rights as fragmented, multiple, and regulated through a framework of governance norms.² Interdisciplinary legal geographies projects similarly challenge the hierarchical and exclusionary notions of property law and instead embrace a plurality of legal orders and a messy collection of interests.³

One key application of this scholarship, both empirically and theoretically, concerns land use planning. Land use planning conflicts about how privately-owned land can be used reveal the complexity of contemporary property relations. There is tremendous conflict over urban land use for certain types of land in specific locations. A critical challenge is confronting complex property rights that exist in built environments, triggering responses from multiple actors, such as local and provincial governments, First Nations, developers, neighbourhood associations and the public. At the same time, legal systems acknowledge that persons are entitled to equal treatment within the applicable administrative and political bodies that shape and resolve planning disputes. To effectively resolve conflicts related to spatial development, a deeper understanding of the complex interactions between land use planning, legislative decisions, and resulting property rights is required.

I. SETTING THE STAGE: THE WORKSHOP

The volume is based on a two-day interdisciplinary workshop held in June 2016, aimed at young scholars and senior doctoral students, querying how the planning process can be re-imagined in light of emerging property, environmental, and administrative law scholarship, together with important work taking place in geography, urban studies and other social science disciplines. The

¹ Nicole Graham, *Landscape: Property, Environment, Law* (New York: Routledge, 2011); Sarah Keenan “Property as Governance: Time, Space and Belonging in Australia’s Northern Territory Intervention” (2013) 76:3 Mod L Rev 464.

² Gregory Alexander, “Governance Property” (2012) 160:7 University of Pennsylvania Law Review 1853.

³ Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar, eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford: Stanford University Press, 2014); Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (New York: Routledge, 2015).

event was generously funded by an Osgoode / York @50 grant made possible by Osgoode Hall Law School, which supported collaborative projects between Osgoode and other departments at York University. Significant in-kind support was provided by the City Institute at York University.

The workshop celebrated and built upon important work taking place across York University.⁴ Many of the participants were students and faculty at York. We were grateful to have formidable keynote speakers Nicholas Blomley, Mariana Valverde, and Gerda Wekerle; discussants Stepan Wood, Sue Bunce, Douglas Young, Nick Blomley, Gerda Wekerle, Lorne Sossin, Amar Bhatia, and Stefan Kipfer; former Chief of the Mississaugas of the New Credit, Carolyn King; and over twenty early career scholars. Each contributed greatly over the two days of the workshop. Despite the interdisciplinary nature of the workshop, key themes emerged that illustrated the socio-spatial complexity and dynamic nature of property conceptually and in practice, as well as the work that property does to structure and reinforce relations of power.

A. THE SPACES, TIMES, AND INSTITUTIONS OF PLANNING AND PROPERTY

While land use planning ostensibly is concerned with the control of human activities in particular spaces, planning—in both theory and practice—is normative, rendering judgments about “appropriate” use of land, and thus determining what type of activities and whose interests *should* be permitted in particular spaces. Nicholas Blomley opened the workshop with a genealogy of Canadian land use planning, and values underpinning these early state interventions in land use, namely a preoccupation with productive land use and a fear of wasteful uses. Blomley argued that while contemporary planning, with its focus on spatial organization, often seems to be removed from the messy politics of property and property rights, a closer look at the intellectual starting points for Canadian planning—notably Utilitarianism—was largely a concern for what were seen as the deleterious effects of private property rights to the effective governance of land use. As such, the historical planning institutions that developed were fundamentally shaped by property, which itself has evolved in time and space. Property rights and interests—and some of the processes that result—have been transformed by activism, the courts, politics, and bureaucrats.

The transformation of property rights and land use planning was the topic of Gerda Wekerle’s keynote at the workshop. Wekerle recounted many case studies from cities such as New York and Toronto, describing how institutions and dominant practices of property rights and land use planning are often disrupted by grassroots movements, which themselves derive from a reimagining of property and land emphasizing use rather than exchange value. Wekerle showed how citizen-led initiatives, such as urban agriculture and community gardens, at times are able to trigger institutional change in land use planning and management.

⁴ At the time the workshop took place, such research included Dayna Nadine Scott (the regulation of toxins and pipeline infrastructure, and the implications for First Nations and other communities); Stepan Wood (environmental regulation and non-state actors through local, provincial, national, and transnational practices); Estair van Wagner (non-owner property claims in the context of aggregate extraction in Ontario, one of the most contentious areas of land use planning in recent years); Michael Classens (how property rights and access to land are enlisted as strategies for both advancing and resisting the production of unjust (peri)urban landscapes); and Shubhra Gururani (the “uncommoning” of the commons and the spatial processes of belonging and exclusion).

Also focusing on state institutions, Mariana Valverde, in her keynote, focused on the shifting practices of state-owned entities, such as Infrastructure Ontario. Valverde showed that Infrastructure Ontario engages in public works and deal making purported to imitate the private sector, but that the business framework that it uses, with its rules and procedures, consistently undermines innovation, contributes to bureaucratization, and increasingly operates outside of the public view.

All workshop participants challenged in some way “traditional” notions of property in land use planning. The contributors to this volume benefitted immensely from the workshop, the expertise and thought-provoking insights from the keynotes, and the valuable input provided by discussants and other workshop participants.

II. INTRODUCING THE SPECIAL VOLUME

This volume is a collection of seven academic papers, each based on the overarching theme of the workshop. While the contributions to this special volume are profoundly theoretical, asking questions about the role of property in tackling issues such as homelessness, discrimination, and social justice, they are also practical, dealing with the real world implications of particular enactments of, and challenges to, dominant property and planning institutions. Some theoretical questions include: Is property law as we now conceive it the right tool to tackle issues like housing and homelessness? What are the ethics that should underpin zoning? Papers also question the role of property through examination of case studies that investigate critically the assumptions that emerge through claims that inhere in property law, and the various ways that property law can be both a generator and product of conflict and marginalization.

A. ETHICAL IMPLICATIONS OF PROPERTY AND PLANNING

The first two papers provide theoretical interventions that grapple with the ethical and moral implications of property rights, as well as the normative work that property rights are often claimed to do. The focus of Sarah Hamill’s contribution is the role of property rights in the struggle for human rights. Hamill engages the debate on whether private property rights can be human rights by unpacking Hanoch Dagan and Avihay Dorfman’s recent argument that private property rights are an important mechanism through which human rights can be achieved.⁵ Dagan and Dorfman’s account of private property forms part of their larger project to re-read private law in a way that locates the idea of substantive equality at its heart. Hamill critiques their focus on the horizontal aspects of property, arguing that this focus obscures the ways that property invokes a sense of community. She also argues that Dagan and Dorfman’s account does not solve the problems that it seeks to address, such as addressing those dispossessed by the global land rush.

Building on notions of ethics, Ronit Levine-Schnur sketches out a vision of how to revitalize land use and zoning law. While 2016 marked the centenary of zoning—specifically New York City’s comprehensive zoning plan—in the United States, Levine-Schnur argues that zoning law has always lacked clear and ethics based foundations. Such a vision is called for,

⁵ Hanoch Dagan & Avihay Dorfman, “The Human Right to Private Property” (2017) 18:2 *Theor Inq L* 391 (forthcoming), online: <ssrn.com/abstract=2624428> [perma.cc/D27C-UH83]

especially given the immense impact land use laws have on human lives and their surroundings. As such, Levine-Schnur argues that it is crucial to re-imagine the land use law system, and in particular judicial review of land use law, and to ground it within an ethical foundation. Levine-Schnur further posits that the land use law system should be based on an ethical commitment to fairness and sustainability; it should be guided by principles of democracy and transparency, norms of accessibility, diversity, and density; and it should include a requirement to preserve a fair ratio between the distribution of burdens and the allocation of benefits. This article provides an account of why land use law is currently missing an ethical commitment and offers a broad outline of the form such an ethical commitment could take.

B. CHALLENGING NOTIONS OF “PROPERTY” AND “PROPERTY LAW”

As highlighted earlier, “property” and “property law,” while the terms are often used interchangeably, are not synonymous. How do we, as scholars, unpack property law’s claims of “rights” to “things” and “relationships” among particular parties? Ultimately, these concepts reveal themselves in contemporary tensions that force us to confront the values underpinning property and planning. These tensions include the effects of environment policy on property holders, including developers, and on agriculture. They include the effects of gentrification and new forms of ownership, including the tensions in relationships between Indigenous peoples in municipal planning and pipeline decisions, and the transparency, governance, and management of infrastructure projects and housing through the use of agencies. Pointing more towards the domination, marginalization, and exclusion that certain forms of property regimes produce in both theory and practice, the workshop raised issues of Indigenous rights and colonialism.

Liza Kim Jackson draws on and critiques scholarship that construes gentrification as a form of colonization. Jackson argues that gentrification is but one part of the continuing historical colonization of Indigenous peoples in the Canadian context, but that Marxist geography and gentrification theory do not adequately situate and account for colonial histories as they relate to private property investments and displacement. Jackson argues that *colonial relationalities* persist in an effort to discipline poor and Indigenous bodies, spaces, and lands through the capitalist way of life.

Heather Dorries also confronts Indigenous rights and planning decisions. Dorries draws on Cheryl Harris to argue that racial identity and property claims are co-produced in law. Dorries analyzes by-laws passed by the City of Brantford, Ontario, showing that municipal planning processes, through their regulatory and enforcement powers, can criminalize Indigenous claims to territory even as they legitimize settler colonial property claims. Dorries concludes that municipal planning authority plays a key part in diminishing Indigenous claims to sovereignty while affirming those of the settler state.

C. INSTITUTIONAL TRANSPARENCY

Two of the works in the special volume confront the purported transparency of municipal governments. The institutional structure of municipalities affects who may and may not participate in decision-making. Alexandra Flynn’s paper examines Toronto’s community councils, a post-amalgamation creation meant to buffer the effects of a much larger city. Flynn finds that community councils largely focus on local planning and land use issues despite their potential to do much more under existing law. Flynn argues for a greater role of community

councils to address concerns of Toronto's neighbourhoods, and increased decision-making authority for non-councillor members. Flynn posits that by redesigning community councils in this way, they can be more accessible, participatory, and play a more important role in municipal governance in Toronto.

Sara Ross also asks how city decisions impact meaningful diversity and inclusivity. Focusing on the culture-led regeneration strategies of Toronto's "Music City" initiative and its "Creative City" strategy, Ross critiques the commodification of culture and heritage within redevelopment strategies, showing that these strategies often reveal conflict between exchange value and use value interests. Ross argues that urban planning and governance have an important role to play in culture-led redevelopment, but have often failed to include the interests of precarious individuals and groups that produced the cultural space in the first place.

D. LAND USE PLANNING AND TIME

Planning law is evolutionary, triggering important questions about the ability of government institutions to withstand political and other pressures. In his article, Donald Leffers asks how planning decisions and legislation privilege some actors over others. Adopting third-way institutionalism as a theoretical lens, Leffers focuses on land developers and key governmental decision makers to analyze how they exercise power within existing institutional structures, including legal planning and land use frameworks. Leffers compares the processes driving enactment of two major provincial land use statutes, the *Oak Ridge Moraine Conservation Act* and the *Greenbelt Act*, investigating the relationships between political actors and land developers, as well as the underlying political climate, in shaping the development and outcomes of these statutes. Leffers shows that these two environmental land use statutes, which both had significant implications for the private property rights of land owners, differed in important ways in both their development and enactment.

E. LINKING THEORY AND PRACTICE

The claims and debates within the articles of this special volume are experienced daily. As such, we wished to include pieces that highlighted the lived experiences of those who struggle to have their voices heard. These struggles may be legal and institutional, as the academic pieces reveal, or may appear in other ways, such as through art or parody.

The Voices & Perspectives section helps to understand the lived tensions of planning and property law. Former Chief Carolyn King has spent her career working to create a more inclusive planning system. Sarah Weinberger's interview with former Chief King shows the many ways in which a First Nation government and Indigenous activism have challenged the embedded biases of land use planning and the promise of relationship building. This interview includes images that show the many ways that challenge can reveal itself, from legal claims to literal footsteps. Building on the work of Jackson (2017) and Dorries (2017), this invaluable contribution animates the colonial dynamics of property and planning.

Each of these papers contributes to the burgeoning intersections of planning and property law by querying the uneasy relationships, competing interests, and exercises of power involved in land use planning. We are enormously grateful to the Journal of Law and Social Policy and Osgoode Hall Law School – and especially to Janet Mosher and her formidable student editors—

for housing it. It was an honour to be a part of the workshop and this collection of pieces—we hope you enjoy them!