

# STATUES AND STATUS: THE LEGAL GEOGRAPHY OF LANDSCAPE VALUES AND BELONGING

BRAD JESSUP\*

*This article concerns a conflict over a statue, built in the Margaret River wine region, in contravention of the Planning and Development Act 2005 (WA). The statue was granted retrospective approval by the state tribunal. However, throughout and following the controversy, the legal geographies of the statue and the landscape became contested. It was framed by disagreement about the appropriateness of the statue, and the values and role of community members in defining the landscape.*

## I INTRODUCTION

This article concerns a conflict over a statue, built in a dam on privately owned land by wealthy landowners, relatively new arrivals to the in the Margaret River wine-making region. The statue was built in contravention of the Western Australian *Planning and Development Act 2005* and it remains on the vineyard where it was erected over a decade ago. Despite community opposition to the statue, which offended many because it could be seen from the road in a valued and protected rural and vegetated landscape, and a refusal of the local council to grant a retrospective development approval, the landowners resisted dismantling it. Instead, the landowners succeeded in obtaining approval from the State Administrative Tribunal of Western Australia in *Pivot Group Pty Ltd v Shire of Busselton*.<sup>1</sup>

Throughout the controversy and the legal process, there was disagreement about the appropriateness of the statue in its place. Specifically, whether the statue, and those who commissioned it, belonged in the place where it stood. Relatedly, the controversy raised debates about the values of the landscape – and whether those values are informed by the local experience of the place or the vision for its future: a binary that was never breached. The neighbouring community's frustration with the planning process was materialised in the building of a ridiculing monument: a statue deliberately designed as a 'tongue in

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\* Senior Lecturer, Melbourne Law School, The University of Melbourne.

<sup>1</sup> [2007] WASAT 268 (*Pivot*).

cheek' nod to the controversial statue, which has since become locally cherished as an object belonging in, and emblematic of, the rural landscape.

Although the controversy was over an obscure development in a small town in an isolated part of the world, lessons can be learnt from looking closely and deeply at a single planning conflict.<sup>2</sup> The lessons that are drawn in this article arise from the limited engagement with landscape values by decision-makers as a result of the community, the holders of landscape values, being excluded from the decision making process. This process of exclusion, enabled by the law, had the effect of ignoring a legal geography that can be traced from property law and crafted by the many policies about the importance of the landscape in the region; but it also gave rise to another legal geography altogether: one created by the statues as material incursions and the claims they make over the landscape, especially about who and what belongs in the landscape. The legal geography in this instance arises by reference to the law rather than because of the law. It makes claims about the law, and especially in this instance about the lack of participatory rights within planning law.

This article is divided into three main parts. Part II begins by introducing its conceptual and methodological underpinnings. I explain the location and subject of the controversy – the statue and its geography. What follows is an attempt to offer a legal geography framework for statues by an analysis of property law cases concerning statues as chattels. This analysis supports a view that a statue belongs in place if it is integral, permanent and accordant with its surroundings – that it coheres with the values of the landscape within which it is put. Part III offers a critique of the *Pivot* case of the Western Australian State Administrative Tribunal. The case retrospectively permitted the controversial statue, considered by the local council to be out of place, to stay in its location. The controversy triggered a process for some in the district to reimagine the landscape and others to reclaim less aggrandising values of the region. I argue that because the planning process excluded the community and supporters and opponents, it could not incorporate the necessary evaluation and consideration of landscape values. This part supports my view that the decision making about the statue overlooked a legal geography of landscape value. Part IV then explores the informal participatory and material processes that the community engaged in – letter writing and the embrace of a counter-statue which highlighted a concerned and attuned community. In this final part of the article, I explore ideas and

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<sup>2</sup> Bent Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2006) 12 *Qualitative Inquiry* 219.

evidence of belonging in and reclaiming of space arising from the empirical parts of the research. This part offers a view that these extra-legal processes offered the foundations for a different, localised and materialised legal geography.

## II THE SCENE

### A *Legal geography and methodology*

This article approaches the legal and community controversy about the statue through a legal geography lens. The purpose of adopting such a lens is to drive an enquiry into the way the law and place – both its physical and material form,<sup>3</sup> and the views, values about and attachment to place<sup>4</sup> – intersect. Legal geography research prioritises a consideration of the geographic conditions in research and brings into question the role and function of the law in influencing, even changing those geographic conditions.<sup>5</sup> Planning law in particular, because of its highly regulatory control of human-place interactions but also its ambiguity in and its proximity to place, is an area of the law that especially lends itself to a legal geography analysis.<sup>6</sup>

In this research, there were layers of legal instruments and legal policy about the place within which the controversial statue was erected. Much of that policy both responded to and sought the response of the community to what it valued about the place. The presence of the statue precipitated an airing of those values – framed either through a desire to accommodate the statue or to have it displaced from the region. The law built on and it depended on a community view about the place and the material belonging in it. It, for instance, included references to viewsheds, values of a landscape and the level of reflectivity of material within it.

Significantly for this article, the legal geographies of the landscape depended on public involvement within the law. It highlights an example of legal geography being crafted by connection to place; just as Indigenous connection with country

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<sup>3</sup> Nicole Graham, *Landscape: Property, Environment, Law* (Routledge, 2011).

<sup>4</sup> Tayanah O'Donnell, 'Legal geography and coastal climate change adaptation: The Vaughan litigation' (2016) 54 *Geographical Research* 301; Robyn Bartel and Nicole Graham, 'Property and Place Attachment: A Legal Geographical Analysis of Biodiversity Law Reform in New South Wales' (2016) 54(3) *Geographical Research* 267.

<sup>5</sup> Robyn Bartel et al, 'Legal Geography: An Australian Perspective' (2013) 51 *Geographical Research* 339, 342.

<sup>6</sup> Phil Hubbard and Jason Prior, 'Law, pliability and the multicultural city: Documenting planning law in action' (2018) 184 *The Geographical Journal* 53.

curates a legal geography.<sup>7</sup> For Western Australia, the Australian state with the most limited public participation regime in planning law, the legal geographies of the landscape were unfulfilled and under deployed.

While this article never intended to pass comment on the global movement to remove confederate and colonial statues – a movement with plural origins and now influencing political discourse in Australia triggered by the Black Lives Matter movement,<sup>8</sup> this article does contribute to a legally geographic informed way to view that movement.<sup>9</sup> Geographies of belonging<sup>10</sup> and of dispossession<sup>11</sup> have been discussed elsewhere, and those ideas are expressed through both desires to preserve and to remove statues. Belonging became the narrative adopted by community members in both support and opposition to the statue, employed in part because of and in opposition to the limitations in the law to accommodate and respond to the community's views about the values of the place. One of the goals of this article is to draw out more clearly the concept of belonging in a localised place within the legal geography scholarship.<sup>12</sup>

Legal geography is celebrated for its openness and willingness to engage with mixed methodology.<sup>13</sup> Case study combined with place-based inquiry is one commonly used legal geography methodology.<sup>14</sup> Yet as O'Donnell et al note,<sup>15</sup> a

<sup>7</sup> Lee Godden, 'Legal geography – Place, time, law and method: the spatial and the archival in "Connection to Country"' in Tayanah O'Donnell, Daniel F Robinson and Josephine Gillespie (eds), *Legal Geography Perspectives and Methods* (Routledge, 2020) 130.

<sup>8</sup> Katie Burgess, "'This is not a licence for people to just go nuts': Scott Morrison condemns statue toppling", *The Canberra Times* (11 June 2020).

<sup>9</sup> Stephen McFarland, Samantha L Bowden and M Matin Bosman, "'Take 'Em Down Hillsborough!': Race, Space and the 2017 Struggle Over Confederate Iconography in Neoliberal Tampa' (2019) 59 *Southeastern Geographer* 172.

<sup>10</sup> Kathleen Mee and Sarah Wright, 'Geographies of belonging: Why belonging? Why geography?' (2009) 41 *Environment and Planning A* 772 introduce an edited collection on 'geographies of belonging'. Sarah Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 *Social & Legal Studies* 423 revisits property as a form of belonging in place. She notes (at 426): 'Property can thus be defined as a relationship of belonging held up by the surrounding space'.

<sup>11</sup> Jeremy Forman and Alexandre Kedar, 'From Arab Land to 'Israel Lands': The Legal Dispossession of the Palestinians Displaced by Israel in the Wake of 1948' (2004) 22 *Environment and Planning D: Society and Space* 809.

<sup>12</sup> Davina Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (Rivers Oram Press, 1998) began this inquiry.

<sup>13</sup> See especially: Tayanah O'Donnell, Daniel F Robinson and Josephine Gillespie (eds), *Legal Geography Perspectives and Methods* (Routledge, 2020).

<sup>14</sup> Ibid. See also: Robyn Bartel, 'Place-thinking: The hidden geography of environmental law' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar, 2017) 159.

<sup>15</sup> Tayanah O'Donnell, Daniel F Robinson and Josephine Gillespie, 'An Australasian and Asia-Pacific approach to legal geography' in Tayanah O'Donnell, Daniel F Robinson and Josephine Gillespie (eds), *Legal Geography Perspectives and Methods* (Routledge, 2020) 3, 7.

range of other socio-legal research approaches typically complement a case study method. That is so for this research.

The research involved extensive reviews, spanning from 2006 to 2010, of local newspapers<sup>16</sup> archived at the State Library of Western Australia in Perth. It also involved targeted searching of national and provincial online publications from 2006 to 2019, and interviews<sup>17</sup> with members of the community. Interviews conducted face-to-face were held during May 2019 with those who commissioned and built the statues, and people closely and geographically connected to the statue and its planning process, as well as interested members of the Cowaramup community. Interviewees were identified from the public record, through snowball sampling, through approaches to local clubs and associations and included individuals who responded to a post to the Cowaramup Community Group Facebook page.<sup>18</sup> Aside from the views from notable individuals who are identified in the article, all interview data was created anonymously and aggregated such that individuals could not be identifiable nor any opinion attributable to any person included in this article.

### B *The Free as a Bird Statue in Wilyabrup, Western Australia*

The controversy centred on the statue ‘Free as a Bird’, erected by Diane and Peter Laurance on their winery in the Margaret River region. The vineyard, formerly Laurance Wines, and now known as Robert Oatley Vineyards, is where the statue remains for the time being.<sup>19</sup> There, it continues to divide opinion as to its artistic merit and the appropriateness of its location within the landscape.

The vineyard is located in the small town of Wilyabrup. It is geographically close to the area where the ‘coastal residential development scandal’, associated

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<sup>16</sup> Newspapers reviewed included: *Busselton Dunsborough Times*, *Augusta Margaret River Times*, *Augusta Margaret River Mail*, *Busselton Dunsborough Mail*, and *The Capes Herald*.

<sup>17</sup> Interviews were conducted consistent with The University of Melbourne Human Ethics Approval 1953874.1: “The Statues of Margaret River: Participation in Planning Law”, active from 1 May 2019 to 20 February 2020. Overwhelmingly interviewees elected to be anonymous and for their opinions to be aggregated such that they cannot be identified.

<sup>18</sup> Facebook, *Cowaramup*, post by Brad Jessup, 15 May 2019.

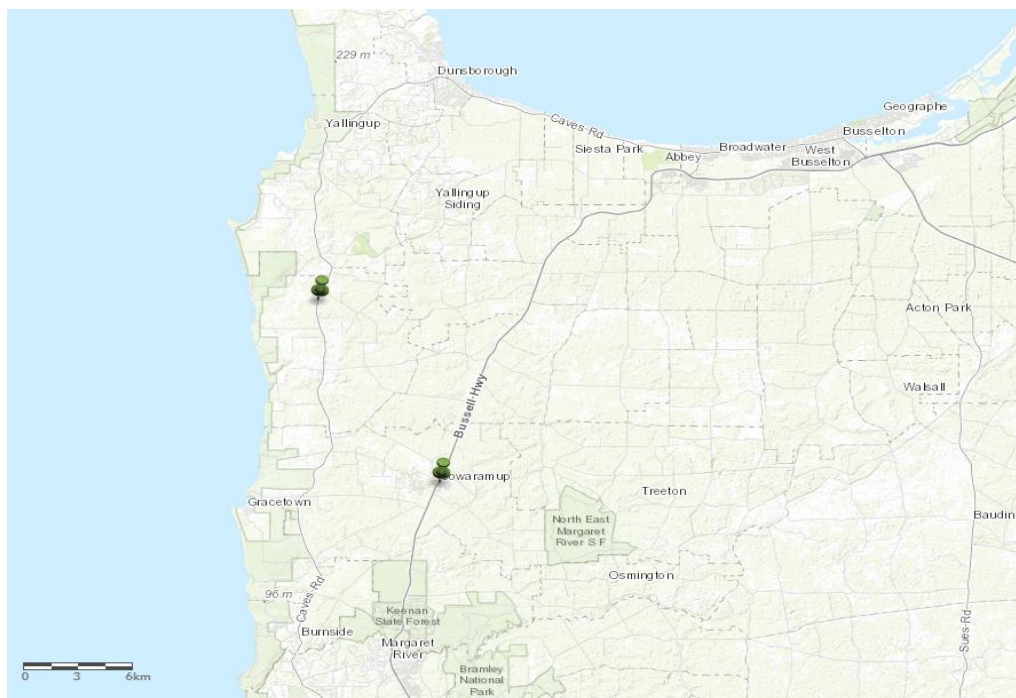
<[https://www.facebook.com/groups/164946653566480/?post\\_id=2295224137205377](https://www.facebook.com/groups/164946653566480/?post_id=2295224137205377)>

<sup>19</sup> Lily Yeang, ‘Dianne Laurance sells Laurance Wines 10 years after opening Laurance Cellar’, *Busselton Dunsborough Mail* (online, 19 October 2016).

<<https://www.busseltonmail.com.au/story/4232387/chick-on-a-stick-bares-all-on-laurance-wines/>>. David Prestipino, “Chick on a Stick” to remain as new wineries open at Laurance site’ *WA Today* (26 May 2017) – the new winery stated that “At this stage she will remain for the foreseeable future ... she’s something of a landmark”. While the inscription plaque has been removed, the statue remains.

with former politician Brian Burke,<sup>20</sup> took place. That scandal involved financial support being given to candidates in the City of Busselton local election of 2005 who were sympathetic to the coastal redevelopment. The financial support, however, was not disclosed as coming from the developer; rather it was directed to candidates through an entity created for the purpose of avoiding the developer disclosure requirements of the law. Despite the illegality of the donations, successful candidates retained their positions on Council. This saga was being ventilated within the public and political discourse at the same time as the debates about the statue. This led some in the Wilyabrup community to draw parallels about the absence of governance frameworks to deal with planning issues locally and created suspicion about behind the scenes lobbying on planning matters.<sup>21</sup>

Figure 1: Locations (Wilyabrup and Cowaramup)



<sup>20</sup> Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (5 October 2007).

<sup>21</sup> Warren Hatley, 'Reid denies being lobbied for winery', *The Capes Herald* (22 May 2007) 1; Margaret Treasure (letter to the editor), 'Council ignore obvious community enrichment', *Busselton Dunsborough Mail* (6 June 2007) 12; Jenny Taylor, 'Shire has gone and lost the plot', *Busselton Dunsborough Mail* (9 May 2007) 13.

Wilyabrup, in the City of Busselton, is approximately 250km south of Perth (see figure 1). It is neighboured to the south by the larger, more agricultural and cohesive community township of Cowaramup, in the Shire of Augusta-Margaret River. This was where much of the opposition to the statue originated. Both of the towns are on Wardandi land, on the Naturaliste peninsula, and they straddle the Leeuwin-Naturaliste Ridge. They are connected by Caves Road, a secondary grade wine tourist road. Wine tourists travelling on Caves Road pass many wineries, including Robert Oatley Vineyards. From the road, the Free as a Bird statue can be seen by passers-by. Its placement was deliberate – as a landmark to both invite visitors into the grounds and cellar door, and through association and recognition to market the winery.

The 'Free as a Bird' sculpture is 16.7 metres of steel which supports a female figure 3 metres high (see figure 2). The beam is painted blue and the figure gilded in 23 carat gold.<sup>22</sup> Above the dam level, within which it is placed and that separates the road from the cellar door, the statue rises approximately 9 metres. The statue was built in 2006, along with another that was ultimately relocated, for the opening of Laurance Wines,<sup>23</sup> and was directed to be dismantled by the City of Busselton Council in 2007.

*Figure 2: Free as a Bird statue*



<sup>22</sup> *Pivot* (n 1) [19].

<sup>23</sup> Full-page advertisement, 'Laurance of Margaret River', *Busselton Dunsborough Mail* (27 September 2006) 31.

The Laurances were a wealthy and commercially astute couple. They had recently arrived in a permanent capacity in Wilyabrup having made money through their tourism business on the Gold Coast and commercial developments in Perth.<sup>24</sup> They were aware of the need for approvals for developments on their property for the purpose of vineyard development. They had sought approval for a number of works on the site, including a stone driveway entry statement. The driveway was twice refused by the Council, but erected regardless by the Laurances without consent.<sup>25</sup> For Diane Laurance, however, who has hinted to the media that she is the model upon whose likeness the statue portrays,<sup>26</sup> the statue was art<sup>27</sup> and expression – an object that ought not to have been subject to appraisal by local planning officialdom.<sup>28</sup> It was a symbol of what it means to be here and now; not a thing that was simply there. In a since removed inscription that accompanied the statue, Diane Laurance wrote about ‘Free as a Bird’:

As you gaze at this beautiful sculpture ready to dive into her own adventure, please take a moment to reflect on the freedom and opportunities that this great country of ours gives us all. Australia – The Lucky Country. Be Proud.<sup>29</sup>

The local council, having received verbal complaints about ‘a structure’ in the dam on the vineyard, reached the view that the statue should not be allowed to remain, because of its adverse landscape impact.<sup>30</sup> However, when directed by the local council to dismantle the statue, the Laurances refused.

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<sup>24</sup> *Pivot Group*, ‘Property Projects’ <<https://www.pivotgroup.com.au/property-projects.html>> Jane Fraser et al, ‘The Top 100 Homes - Australia’s most expensive homes’, *The Australian* (27 April 2002).

<sup>25</sup> Report of Jared Morskate, Council Report ‘Retrospective Application for Extension to Dam; Structure within Dam; Restaurant & Reception Centre & Ancillary Features, Lot 130 Caves Road, Wilyabrup’. A later statue planned for the site was subject to typical planning processes after an application was made by the Laurances: Rob Bennett, ‘A happy female fountain’, *Busselton Dunsborough Mail* (1 August 2012).

<sup>26</sup> Yeang (n 19).

<sup>27</sup> Rob Bennett, ‘Will “chick” stick’, *Busselton Dunsborough Mail* (15 August 2007).

<sup>28</sup> Rob Bennett, ‘Di Laurance attempts to avoid costly statue fight’, *Busselton Dunsborough Mail* (9 May 2007) quotes Dianne Laurance in response to claims that the statue should be altered “That’s like asking Leonard di Vinci to paint the Mona Lisa’s hair blonde. It’s not on”. Jenelle Carter, ‘Winery to appeal planning decision’, *Business News Western Australia* (3 May 2007). Suellen Jerrard, ‘Winery fights for “chick on a stick”’, *The West Australian* (19 April 2007).

<sup>29</sup> The Lazy Aussie, ‘Drizzle on my stick’, *The Worst of Perth* (10 February 2012) <<https://theworstofperth.com/2012/02/10/drizzle-on-my-stick/>>.

<sup>30</sup> Report of Jared Morskate (n 25). A letter dated 7 July explained to the Laurances ‘a number of verbal complaints received from the general public regarding the structure in the dam’.



Instead of pulling down the statue, the Laurances sought, and were ultimately granted, a retrospective development permission by the tribunal. Through that decision, particularly contrasted with the view taken about the statue by the local council and its officers, a new limited legal geography of the Caves Road landscape was constructed through the interpretation of planning policy<sup>31</sup> - a policy directed to the preservation of natural landscape values within the goal of supporting agricultural, particularly vinicultural, industry within the region. The legal geography embraced ideas of change and the more dominant presence of human activity in the viewscape and the place. In so doing, it reshaped the protected values of Caves Road, widening the possibility of newcomers to belong within it. This was despite views within the local district that the statue should or should not be permitted. While some in the community were clear in their view, they are absent entirely from the legal history of the case owing to the lack of participatory rights within the *Planning and Development Act 2005* (WA).<sup>32</sup>

### C Property law and the legal geography of statues

The point made above is that the law and its interpreters can operate to create, curate or modify legal geographies. The process of interpretation of planning policies especially requires an application of law and principle to geographic conditions. In this case the law defines development that requires consent and then directs deliberation about the merits of consent through a place-based and value-informed inquiry. The particular development here, a statue, however, invites consideration of a more particular legal geography emerging from the law that relates specifically to statues. The law and the legal geography of statues, from which I extrapolate lessons for the controversy in Margaret River, can be traced to the 1854 New York case of *Snedeker v Warring*.<sup>33</sup> It was a case concerning a red sandstone sundial. The legal issue was whether the sundial was a part of the land or merely a chattel upon it. This case was cited with approval by Griffith CJ in the High Court of Australia decision in 1905 of *Reid v Smith*,<sup>34</sup> which concerned fixtures and fittings. In *Reid*, it was also decided that the legal

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<sup>31</sup> *Caves Road Visual Management Policy 1999*.

<sup>32</sup> Additionally, the retrospective development application was not advertised, so community members could not formally object or support the development. See the Report of Jared Morskate (n 25).

<sup>33</sup> 12 NY 170 (NY 1854) ('*Snedeker*').

<sup>34</sup> (1905) 3 CLR 656.

quandary over whether an item on land is a fixture or a chattel is not determined simply by inquiring into the annexation of the thing to the land.

In *Snedeker*, Justice Parker made some comments of especial relevance to the contemporary controversy. His Honour said that statues, and their place in property law, depend on whether the statue is integrated to become part of the property and its surroundings. There must be an inquiry into the object, the destination, and the intention of erection of the statue:

Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercise a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether that intent was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands.<sup>35</sup>

Citing the law of France of the time, Parker J said:

Things immovable by destination are said to be those objects movable in their nature, which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement or ornament.<sup>36</sup>

Applying the facts, with the sundial sitting upon a pedestal made for the purpose of carrying the dial, even though the dial was not permanently affixed, Justice Parker decided that:

There is good reason to believe it was designed to be a permanent fixture, because the material of which it was made was the same as that of the house and the statue, and because it was in every respect adapted to the place.<sup>37</sup>

The design and location of the statue were in every respect appropriate, in good taste, and in harmony with the surrounding objects and circumstances.<sup>38</sup>

The case has been explained as giving rise to an inquiry about the actual and intended permanency of an object being part of, or attached to the land, and its adaption into the landscape,<sup>39</sup> which is of relevance to *Free as a Bird*. While the *Free as a Bird* controversy was not concerned with property law, specifically the law of fixtures, the lessons from this case are illustrative. They tell us how the law views objects in place and their belonging – which were matters critical to the

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<sup>35</sup> *Snedeker* (n 33) [7].

<sup>36</sup> *Ibid* [8].

<sup>37</sup> *Ibid* [16].

<sup>38</sup> *Ibid* [10].

<sup>39</sup> Isaac P Smith, *Fixtures in the State of New York where the Annexation is made by Parties Having a Permanent Interest* (1894) Historical Theses and Dissertations Collection. Paper 30.

deliberations made by the City of Busselton, the state tribunal and the views made and expressed by both supporters and detractors of the statue and the Laurances. From *Snedeker*, the law views a statue as belonging in a place not simply because of how, and the degree to which, it is attached to the earth. Rather, whether it fits in or does not disrupt a place; whether there is a harmony between the object the surrounds within which it has been erected.

The 1976 United Kingdom case of *Berkley v Poulet*<sup>40</sup> concerned a white marble statue of a Greek athlete, weighing approximately half a ton and standing on a plinth, and a sundial which rested on a stone baluster. In this case, Lord Scarman explained the law of fixtures as: “If the purpose of the annexation be for the better enjoyment of the object itself, it may remain a chattel” and conversely “an object, resting on the ground by its own weight alone, can be a fixture, if it be so heavy that there is no need to tie it into a foundation, and if it were put in place to improve the realty.”<sup>41</sup>

In applying the law, Lord Scarman focussed on what parts of the statues and their supporting structures are integrated into the place: what exists and belongs for the betterment of the land and, alternatively, what are objects on the land that are replaceable – and that may well be replaced as experiences of the land, its use, its place, its inhabitants all change. This includes when all those objects that are no longer wanted, or no longer considered tasteful, are removed. His Honour explained in full:

The best argument for the statue being a fixture was its careful siting in the West Lawn so as to form an integral part of the architectural design of the west elevation of the house. The design point is a good one so far as it goes: it explains the siting of the plinth, which undoubtedly was a fixture. But what was put upon the plinth was very much a matter for the taste of the occupier of the house for the time being. We know that at one time the object on the plinth had been a sundial. At the time of the sale it was this statue of a Greek athlete. The plinth's position was architecturally important: it ensured that whatever stood on it would be correctly positioned. But the object it carried could be whatever appealed to the occupier for the time being. Sundial or statue - it did not matter to the design, so long as it was in the right place - a result ensured by the plinth which was firmly fixed into the ground. Being, as I think, unattached, the statue was, *prima facie*, not a fixture, but, even if it were attached, the application of the second test would lead to the same conclusion.<sup>42</sup>

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<sup>40</sup> [1976] EWCA Civ 1 (*Poulet*).

<sup>41</sup> *Ibid* [13].

<sup>42</sup> *Ibid* [15].

While the judge's reasoning was directed to the individual site, the principles of integrity and positioning in context could have broader applicability to statues across landscapes. Indeed, the debate about the Free as a Bird statue drew on these very notions – as community members offered conflicting views in the media reports and letters detailed below. First, as to whether the Naturaliste peninsula was a landscape made integral by its so-called 'natural' values and therefore disrupted by the statue. Second, whether the position and context of the place had changed by the proliferation, expansion and commercialisation of the wine industry in the region, such that it could accommodate the Free as a Bird as part of an adapted and commercially material arena.

### III THE PIVOT CASE

#### A *The planning conflict and the disagreement over landscape values*

The Free as a Bird statue was erected without development approval, despite it being a form of development that required consent under the development controls of the *Shire of Busselton District Town Planning Scheme*, promulgated under the *Planning and Development Act 2005* (WA).<sup>43</sup> Having formed the view, after informally receiving complaints about the statue, that the planning policy did not support it, the local council first directed the dismantling of the statue and, subsequently, refused to grant a retrospective development consent for it.<sup>44</sup> The decision as to whether the statue would remain in its place – in the dam of the then Laurance Wines – was sent to the State Administrative Tribunal, upon the application by the landowners for merits review.<sup>45</sup> Because of the absence of third party rights under planning law in Western Australia,<sup>46</sup> the deliberations about the statue excluded those most invested in the values of the landscape that

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<sup>43</sup> Section 162 ('*Planning and Development Act*') and Town Planning Regulations 1967 (WA) (since repealed); Busselton Shire Council District Town Planning Scheme No 20 (since replaced) ('*Busselton Planning Scheme*').

<sup>44</sup> *Pivot* (n 1) [11]–[15]

<sup>45</sup> *Planning and Development Act* (n 43) ss 252 and 255.

<sup>46</sup> Stephen Willey 'Planning Appeal Processes: Reflections on a Comparative Study' (2007) 39 *Environment and Planning A: Economy and Space* 1676, 1676. Judge Christine Trenorden, 'Third-Party Appeal Rights: Past and Future' presented at Town Planning Law – Past, Present and Future Conference 18 November 2009 commented that 'In the years since 1961, the parliaments in each of the states have provided for third-party appeal rights, except in Western Australia. As you will be aware, third-party appeal rights have not been available in Western Australia, except to a very limited extent, under one or two local planning schemes.' There are only limited means by which objectors can be involved in planning appeals. See below n 77ff.

the law sought to preserve: the wider community. The only public forum for the community to express their views about whether the statue belonged or not along Caves Road was in the local print news media. In the case, the legal geography of the statue was not defined by property law. Instead, the legal geography of the statue was animated by planning law.

There were multiple layers of law and legal policy that operated over the Laurance property; many of which applied because the property was accessed and visible from Caves Road. The law and policies that the local council in the first instance and the tribunal member in the appeal addressed, as required under clause 13 of the local planning scheme are listed in table 1.

*Table 1: Laws and Policies*

Clause 13 of the Busselton Planning Scheme	The decision-maker was required to consider the policies in this table, the impact of the development on the environment, the effect of the development on the scenic quality of the locality, the character, design or appearance of the development, the existing and likely future amenity of the neighbourhood, and the public interest.
Table 1 of the Busselton Planning Scheme - Viticulture and Tourism Zone	The purpose of the zone was to support viticulture and associated tourism.
Clause 27 of the Busselton Planning Scheme - Landscape Value Area	The decision-maker was prohibited from consenting to the development unless it had considered whether the development will be compatible with the maintenance and enhancement of the exiting rural and scenic character of the locality, and considered the disturbance of the development including its visual effects and to rural character. The decision maker was prohibited from consenting to development where that development was likely to substantially detract from the visual amenity of the area.

Caves Road Visual Management Policy 1999 - Visual Management Policy Area 2	The policy position was the development: should ensure the public experience and enjoyment of the Caves Road Viewshed was maintained in terms of landscape character, significance, access and views; must not impact the skyline; should reflect local values; and must comply with the Use of Reflective Materials Policy.
Shire of Busselton Rural Strategy - Policy Area 8, Precinct 8C - Western Farmlands	The policy objective was to protect the natural, agricultural and rural values of the area, including by constructing development to blend with the landscape of the area, and to retain the unique character and landscape value of the area; and maintain and protect the unique rural and natural landscapes and land uses and their contribution to the character of the region.
Leeuwin Naturaliste Ridge State Planning Policy	Under this state policy, development was required to be responsive to local values, and be compatible with the natural characteristics and traditional settlement patterns of the area, should protect the rural character and must have regard to the landscape integrity and value of ridge backdrops.
Shire of Busselton Use of Reflective Building Materials Policy	The policy position was to preserve the visual amenity and rural character of areas of Landscape Value and prevent the potential visual distraction from highly reflective materials.

The Laurances' property upon which the statue was erected was in a 'landscape value' area under the Busselton Planning Scheme. That part of the local planning scheme was especially relevant to the deliberations by decision-makers about the statue. That clause of the planning scheme required all development to be evaluated for its compatibility with the goal of maintaining

and enhancing the existing rural and scenic character of the landscape.<sup>47</sup> Moreover, development was not to be permitted in that area if it was 'likely to substantially detract from the visual amenity of the area'. Neighbourhood amenity was a mandatory consideration for decision makers charged with evaluating whether to approve or reject a development generally and specifically with reference to visual amenity in that landscape value area.<sup>48</sup>

The property was also in a significant landscape corridor, which triggered the application of the *Caves Road Visual Management Policy 1999*. This policy did not have mandatory requirements but was directed towards achieving the protection of views from Caves Road and to maintain, enhance and protect 'a natural and rural landscape', while also retaining the rural landscape as the dominant visual experience of the corridor.<sup>49</sup>

The land was also subject to the Western Australian *Leeuwin Naturaliste Ridge Policy*. That policy required development to be 'responsive to local values' and 'compatible with the natural characteristics and traditional settlement patterns of the area'. There was a policy position that 'development and intensification of land use that will affect views from Caves Road ... will not be supported'.

Based primarily on the policy framework detailed above and in Table 1, the City of Busselton Council was insistent that the statue be dismantled. In the local council's summary view, the statue 'was not conducive to the rural surrounds whereby a high rural and natural landscape significance' is present.<sup>50</sup>

When the case came before the tribunal the application of law and policy turned on the distinction between the rural, settled character and viewshed; and the natural, rural and local landscape values of the place. State Administrative Tribunal Member O'Connor rejected the council's expert views that the landscape and rural values of the Caves Road corridor are threatened by the ongoing development of wine infrastructure and facilities, including the Free as a Bird statue. The member preferred the view that these vineyard features comprise and contribute to the already modified rurality of the place. Member O'Connor noted, conflating ideas of landscape value with visual amenity, that: 'the wineries and their entry statements are clearly apparent from Caves Road

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<sup>47</sup> *Busselton Planning Scheme* (n 43) cl 27.

<sup>48</sup> *Ibid* cl 13 and cl 27.

<sup>49</sup> *Caves Road Visual Management Policy 1999*.

<sup>50</sup> Report of Jared Morskate (n 25) 8.

and form a prominent part of the visual matrix of the rural landscape and scenic quality of this section of Caves Road'.<sup>51</sup>

The natural of the place, mused the member, is the background to the vineyard landscape. The natural landscape was described as being 'modified' especially for the purpose of 'tourism'. It was the ridgeline that was described as retaining a natural state; hence the natural landscape was understood as 'the backdrop to the winery and its elements', including the statue.<sup>52</sup>

This reasoning was inconsistent with earlier tribunal decisions that viewed the purpose of the state policy as giving utmost importance to the goal of preserving an uninterrupted ridgeline. In *Rowe v Shire of Augusta-Margaret River*,<sup>53</sup> in rejecting a three storey residential development, the three tribunal members noted about the district around Caves Road: 'this is an area of considerable tourism and recreational development and interest and, as the policy indicates, there is a need to ensure that the natural landscape and character of this area is preserved for the benefit of all'.<sup>54</sup> In *Rowe*, the tribunal was alarmed by the likely effect of the development to achieve a 'skylining against the ridge'.<sup>55</sup> Moreover, those tribunal members noted that previously approved developments that had a visual impact or could be considered a 'blight' were best described as an anomaly to the goal of landscape protection,<sup>56</sup> and they should not inform decisions about what might be acceptable intrusions into the landscape.

For the tribunal in *Pivot*, the determination of the landscape character was essentially a mapping exercise of objects present in the landscape. There was no engagement with the values of the landscape, aside from noting that it was both scenic and rural. The landscape characteristics of the place, according to the tribunal member, were connected with the wineries and their associated infrastructure – like the vines, the grand entrances to the estates and their sometimes-architectural cellar doors. The statue as a marker of presence and entrance was viewed as an object that promotes viticulture and was, therefore, coherent with the place. It belonged.

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<sup>51</sup> *Pivot* (n 1) [69].

<sup>52</sup> *Ibid.*

<sup>53</sup> [2003] WATPAT 2 ('*Rowe*').

<sup>54</sup> *Ibid* [11].

<sup>55</sup> *Ibid* [21].

<sup>56</sup> *Ibid* [22]-[23].



Yet, to Diane Laurance the intent of her statue was to change the place.<sup>57</sup> She wanted to reimagine what a winery on Caves Road was like. She wanted to increase the wine tourism potential of the region. She spoke of a desire to 'showcase' her place and to 'beautify' the landscape. Her view was that the local council wanted to see paddocks and not art along Caves Road. And her legal team argued that the consideration of the planning merits had to include not simply landscape values, but the objectives of the planning scheme that sought to promote viniculture and tourism.<sup>58</sup> It was an argument that appears to have misunderstood what were prohibitions, and what are mandatory and permissive considerations under planning law. Nevertheless, it seemed to have struck a chord with the tribunal member who made the point that along Caves Road there are various land use zones, each encouraging different types of built form with those forms creating subsets of landscape.<sup>59</sup> In compartmentalising the Caves Road district, the tribunal fractured the very thing that made the road important and that supported a policy that traversed municipalities – a cohesive sense of value about it.

What also occurred through this case is what Rydin<sup>60</sup> has recorded elsewhere. Landscape impacts were subject to assessment processes that involved visualisation artefacts and categorisations. There was no space for a narrative about the landscape, its values and what is important about it – by the community. Lee explains that: 'Landscape is not simply physical or visual. Questions of home and belonging, "a passionate attachment to the places of childhood", and spiritual, emotional and social matters, pervade discussion of landscape'.<sup>61</sup> What the community valued about landscape is not addressed in the case. This is despite the planning scheme requiring a consideration of the public interest<sup>62</sup> and the *Caves Road Visual Management Policy* prioritising the public experience of the viewshed and the Leeuwin Naturaliste Ridge State Planning Policy directing development to be responsive to local values. Nor does

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<sup>57</sup> Rob Bennett, 'Winery entry rejected', *Busselton Dunsborough Mail* (21 June 2006) – Dianne Laurance is quoted: 'We can't be left behind because of 10 year old, outdated policies. We need to move forward' in response to the reasons given for rejecting her entry statement. This view was also reiterated in a research interview with Ms Laurance.

<sup>58</sup> Adam Brockman, "'Chick on a Stick" decision reserved', *Busselton Dunsborough Mail* (22 August 2007).

<sup>59</sup> *Pivot* (n 1) [67]-[68].

<sup>60</sup> Yvonne Rydin, 'Silences, categories and black-boxes: Towards an analytics of the relations of power in planning regulation' (2020) 19 *Planning Theory* 214.

<sup>61</sup> Maria Lee, 'Knowledge and landscape in wind energy planning' (2017) 37 *Legal Studies* 3, 9.

<sup>62</sup> Clause 13. See the Report of Jared Morskate (n 25).

the case respond to the views of supporters of the statue: the Laurances presented a petition in support of the statue and its place in the Caves Road viewshed that was signed by 4000 visitors to its cellar door.<sup>63</sup>

There was no presentation of alternative visualisations and local values beyond the local council claiming that community views and values were integrated into the policy documents that directed a consideration of the local and the experienced. As observed by Lee in her work about landscape knowledges,<sup>64</sup> the professional and statutory knowledges were inadequate to capture the values of the landscape relevant to the consideration of the development.

Even as the tribunal member turned to more familiar territory for a planning officer in whose shoes she was standing – amenity – Member O'Connor did not grapple with community values of the landscape in that respect. Whereas the local council in its justification for not providing a retrospective permission identified community interests as warranting protection – especially framed through the notion of 'amenity', 'rural character' and 'local values' – the tribunal did not make any comment at all about the amenity, as opposed to the visual impacts, of the statue.

Amenity is a far less straight-forward and less confined subject than visual impact is.<sup>65</sup> Amenity draws in broader scales and less objectively tested experiences of a place. It is a values-based concept. Yet, the tribunal member's assessment of the impact focused on the thing in a rather scientific way – referring to its 'size, bulk, scale, colour and height';<sup>66</sup> rather than the sense of place that the community has, or – as required to be considered – the public experience of the place. Through her reasoning about amenity, Member O'Connor did not situate the statue within its context and evaluate its effect. Rather, she compared the statue to its context. In so doing, Member O'Connor did not engage with the kinds of reasoning identified above as creating legal geographies of statues, which, in essence, ask whether a statue belongs and is integral to a place. Yet, the planning policy that Member O'Connor confronted required that very contemplation.

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<sup>63</sup> Adam Brockman, "Chick on a Stick" decision reserved', *Busselton Dunsborough Mail* (22 August 2007).

<sup>64</sup> Lee (n 62) 22-24.

<sup>65</sup> *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45.

<sup>66</sup> *Pivot* (n 1) [73].

B *The lack of formal participation and the absence in legal deliberations of community landscape values*

A lack of engagement with community-based or community-informed landscape values is not atypical for planning disputes, despite long held views that planning law processes should allow for the ventilation and understanding of competing values.<sup>67</sup> However, where planning policy directs decision makers to consider landscape values and effects, community impressions ought be primary matters of deliberation. As Lee notes in the context of the wind farm project that she researched, ‘whilst no one who studies environmental decision making will be surprised to see lay knowledge claims (indeed lay contributions generally) being neglected in decision making and reason giving, it is especially striking in respect of landscape’.<sup>68</sup> This is because landscape, as a set of values, is a record of human experiences and impressions of a place. Insofar as landscape becomes a legal matter it facilitates the recreation by community members of local geographies that reflect their imaginary of a place. It is a concept ‘dependent upon past, present and future human relationships and understandings, lived experience partially constitutes the facts about the world that we seek to “know”’.<sup>69</sup>

Amanda Kennedy explores how the idea of ‘place attachment’ is intertwined with landscape values and a sense of belonging and identity: each co-dependent on the other.<sup>70</sup> She also makes another significant point: that an acknowledgment of place attachment provides agency to communities and capabilities to engage in, for instance, legal processes. In this vein, the lessons from the case concerning the Free as a Bird statue are two-fold. First, the approaches adopted by the local council and then the tribunal, respectively to not look beyond planning documents to elicit community values about place and to construct a legal inquiry only into the material and visual composition of the statue was not simply to distance community from their place, but to challenge their identity and sense of belonging to the region. In a formal sense, the community was excised from a legal geography of landscape while the very notion of landscape depends on their inclusion. And second, in the absence of avenues for

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<sup>67</sup> Jenny Steele, ‘Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach’ (2001) 21 *Oxford Journal of Legal Studies* 415.

<sup>68</sup> Lee (n 62) 19.

<sup>69</sup> Ibid.

<sup>70</sup> Amanda Kennedy, *Environmental Justice and Land Use Conflicts: The Governance of Mineral and Gas Resource Development* (Earthscan, 2017).

community involvement in the planning process with respect to the Free as a Bird statue, legal actors are deficient proxies for community values and are prone to denying the fullness of the legal geographic landscape.

It is likely that the community gap<sup>71</sup> highlighted in the formal documentary record about the legal deliberations concerning the statue is at last in part a result of the unconventional pathway the development of the statue took into and through Western Australian planning law; and not exclusively owing to the legal and policy interpretation and the knowledge and objectives-based approach to the merits used by the tribunal. The Laurances did not apply for development consent. There was therefore no opportunity for notification or objection, no scope for the local council to seek out or canvass the views of directly affected neighbours or the wider public about their sense of importance and value in the landscape.

In this case, the local council refused to provide a retrospective permission for the development, with no process specified in planning law to do that,<sup>72</sup> and it not being possible under the City of Busselton Planning Scheme. It was not until the State Administrative Tribunal used its powers to direct the local council to consider a retrospective approval<sup>73</sup> that the matter was deliberated – in a Councillors' meeting, but the community was not involved in those deliberations, with the records showing only one person – a representative of the Cape to Cape Catchments Group – entitled to speak about impacts of the dam on the local waterways as having a demonstrable interest in the matter.<sup>74</sup> Collectively, there was no avenue for orthodox community participation at the

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<sup>71</sup> A borrowing of Carolyn Abbot's 'participatory gap': see: Carolyn Abbot, 'Losing the local? Public participation and legal expertise in planning law' (2020) 40 *Legal Studies* 269, 285.

<sup>72</sup> *Planning and Development Act* (n 43) s 164(1) provides that 'a responsible authority may grant its approval *under a planning scheme* or interim development order for development already commenced or carried out' (emphasised added). However, the City of Busselton Planning Scheme did not enable such grants of approval.

<sup>73</sup> *Pivot* (n 1) [12].

<sup>74</sup> Shire of Busselton, *Minutes of a Meeting of the Busselton Shire Council Held on 26 April 2007*, 3. Bill Gillbard (letter to editor), 'Shire continues to fight common sense', *Busselton Dunsborough Mail* (9 May 2007) 13 records being at the council meeting and reflects on deliberations about the Free as a Bird statue being exclusively between councillors.

local scale about the statue despite the public believing that deliberations, and decisive decisions,<sup>75</sup> should occur locally.<sup>76</sup>

Anomalous throughout the country,<sup>77</sup> third party involvement is almost non-existent in Western Australian planning appeals. Therefore the escalation of the controversy to the tribunal provided no greater capacity for members of the community – the many supporters or opponents of the statue – to articulate their views and values about the district. Only in an exceptional case will a community member with a special interest for the purposes of administrative law be invited to give submissions<sup>78</sup> to the tribunal or to intervene.<sup>79</sup> While objectors may be invited to contribute to mediation processes, that was not available in this case because there was no possibility for objections to have been made.<sup>80</sup>

Having interviewed community members, even if there had been an opportunity to engage in the formal process, they likely would not have. Interviewees explained that they have been conditioned to the fact that they are not invited within planning law; that they do not belong within the decision making landscape; that planning decisions are for local councils and not them.<sup>81</sup> As discussed later, all community members I spoke to in the August-Margaret River Shire erroneously believed that because they did not live within the same municipality as the statue they would have had no right and no voice to oppose the development, notwithstanding them also expressing various landscape values – natural, rural, commercial – about the district that they wanted protected and within which the Laurances' statue was located. There were additional aspects, each critical of the law and governance, to explain their formal disengagement. There were expectations of being ignored, and so a sense of futility in becoming involved. There was a commonly held view that local government was corrupt – especially in light of the Smith's Beach development that embroiled Brian

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<sup>75</sup> See by way of contrast: Hugh Warren (letter to the editor), 'Crass behavior and smug assumptions', *Busselton Dunsborough Mail* (31 October 2007) 13; Ron Burke (letter to the editor), 'Common sense should prevail', *Busselton Dunsborough Mail* (2 May 2007) 12.

<sup>76</sup> For a discussion about scalar disjuncture in planning law, see: Brad Jessup, 'Environmental Justice as Spatial and Scalar Justice: A Regional Waste Facility or a Local Rubbish Dump out of Place' (2013) 9 *McGill International Journal of Sustainable Development Law and Policy* 69.

<sup>77</sup> Trenorden (n 46).

<sup>78</sup> *Planning and Development Act* (n 43) s 242.

<sup>79</sup> State Administrative Tribunal of Western Australia, *Third party participation in planning matters* (pamphlet).

<sup>80</sup> *Planning and Development Act* (n 43) s 243. The State Administrative Tribunal's general power to join a person as a party to a proceeding under section 38 of the *State Administrative Tribunal Act 2004* (WA) is excluded in planning matters.

<sup>81</sup> Perspectives drawn from research interviews.

Burke,<sup>82</sup> that average folk would be overpowered by the more politically savvy and financially equipped, and a concern about legal reprisals grounded in observations about the effect of being an outspoken target in a small part of the world.<sup>83</sup>

#### IV PLACE AND BELONGING

##### A Claims over geography and (un)belonging

The community did express its views about the statue publicly and materially if not formally, and it is within the manifold forms and subjects of expression that a sense of place and belonging and an appreciation of the landscape values of community members can be identified.

Both support and opposition addressed matters of whether the statue was an appropriate object for, and aligned with their vision of, Caves Road and its surrounding landscape, and in doing so they made claims over the landscape and assertions of its different values. By way of illustration, letter writers described the statue as being ‘one of the most eye-catching (in the most attractive way) properties on Caves Road’ and ‘its impact is enormous and its beauty in its surroundings is sublime, and within its setting ‘the water, the landscaping and the attractive buildings that are the backdrop and which can all be seen from the road, giving great pleasure to all who pass that way, whether they be tourists or we who are lucky enough to live work and play in this paradise we call home’.<sup>84</sup> Alternatively, it was viewed as being positioned ‘in-your-face’ in a way ‘that is offensive to the surroundings’, and that it should have been relocated elsewhere on the property out of view from the road and thus restoring ‘natural beauty in

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<sup>82</sup> ‘The Dark Arts’, *Four Corners* (Australian Broadcasting Corporation, 2007)

<<https://www.abc.net.au/4corners/the-dark-arts/8953360>>; Margaret Treasure (letter to the editor), ‘Council ignore obvious community enrichment’, *Busselton Dunsborough Mail* (6 June 2007) 12.

<sup>83</sup> For example Clare Allen, ‘Councillors call on legal advice’, *Busselton Dunsborough Mail* (2 July 2010) reports on threats by Councillors to sue outspoken opponents. ‘Harassment claim’, *Busselton Dunsborough Mail* (4 July 2007) records complaints of poor treatment experienced by Dianne Laurance by local council staff. Rob Bennett, ‘Winery savaged by shire’, *Busselton Dunsborough Mail* (19 April 2007) recounts discrimination claims, and Rob Bennett, ‘Writ issues over “Chick on a stick”’, *Busselton Dunsborough Mail* (1 January 2008) reports on defamation proceedings being brought against a council officer. Earlier, Rob Bennett, ‘“Free as a Bird” stays on perch’, *Busselton Dunsborough Mail* (24 October 2007) quotes Dianne Laurance: ‘who is going to be held accountable for what I think is a senseless court case? I think it is the shire officers’.

<sup>84</sup> David Bell (letter to the editor), ‘Free as a Bird removal just a ludicrous idea’, *Busselton Dunsborough Mail* (9 May 2007) 13.

the humble, low-lying vineyards across rolling hills, the beautiful trees and wildlife'.<sup>85</sup> It was a statue that 'would look even better in the south of France' but not in an area with distinct 'environmental values' characterised by 'remnant vegetation' and 'natural beauty'.<sup>86</sup>

Extracted from the opinions of the community captured in letters to local newspapers was an additional thread of a legal geography. There, a debate centred on whether Dianne Laurance, the person assumed embodied in the figure in the statue, cast alternatively as the protagonist and antagonist in the conflict, belonged. She was characterised as a marketeer, powerful and rich and unlike others within the district capable of doing what she liked without approval.<sup>87</sup> Her statue was described 'the stick is an eyesore and looks simply like a crass monument to wealth, arrogance, marketing and disdain for the rules of society'.<sup>88</sup> Contrastingly, Dianne Laurance was defended as someone attempting to advance the local reputation of the area in the face of a 'no progress' local council,<sup>89</sup> as someone who had contributed to the local economy having 'poured millions into the local businesses'<sup>90</sup> and as someone with vision compelled to expend her own funds battling a belligerent shire intruding into a person's business and freedom.<sup>91</sup> She was both outcast to and the future for the region.

For many community members, both contemporaneously and reflectively, the statue represented change. Lost or found in that change was a vision for landscape and a sense of self and attachment to the place. Within letters published during the height of the controversy there was an awareness of what the statue represented and its symbol. Members of the public explained:

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<sup>85</sup> A Siney, (letter to the editor), 'Rules are rules and should be respected', *Busselton Dunsborough Mail* (9 May 2007) 13.

<sup>86</sup> R Baily (letter to the editor), 'Remember the process folks', *Busselton Margaret River Times* (3 May 2007) 14.

<sup>87</sup> Bill Franssen (letter to the editor), 'Rich can flout the regulations', *Busselton Margaret River Times* (17 May 2007) 11; Amanda Wilson, 'Rules are rules', *Busselton Dunsborough Mail* (2 May 2007) 12; Barbara-Jane Forsyth (letter to the editor), 'No permission', *Augusta Margaret River Mail* (16 May 2007) 6.

<sup>88</sup> Hugh Warren (letter to the editor), 'Chick on a stick', *Augusta Margaret River Mail* (16 May 2007) 6.

<sup>89</sup> Ron Burke (letter to the editor), 'Common sense should prevail', *Busselton Dunsborough Mail* (2 May 2007) 12.

<sup>90</sup> Anon (letter to the editor), 'Give them a break', *Busselton Dunsborough Mail* (2 May 2007) 12.

<sup>91</sup> Jill Bulters (letter to the editor), 'Council has gone too far', *Busselton Dunsborough Mail* (25 April 2007) 13.

Like it or not, Caves Road has become sophisticated, as has our Margaret River region. We are so privileged to have the freedom to wander through this winery, taste the wines and smell the roses. Thank you Dianne Laurance.<sup>92</sup>

It also sets a frightening precedent. A series of large scale, flashy developments dominating Caves Road is not something most of us would like to see.<sup>93</sup>

In 2019, more than a decade later, in research interviews with me one member of the local community reflected that ‘Free as a Bird was a trigger for change to the Caves Road landscape. It is now a commercial tourist destination landscape’ while another insisted that ‘Caves Road should stay as it always was. That statue does not respect the landscape’.

These were positions retraced in a later planning conflict between long-term organic wine makers Cullen and the incoming Cheeky Monkey Brewery. The case arising from that conflict, *Wiseowl Investments Pty Ltd v Shire of Busselton*,<sup>94</sup> focussed on legal issues arising from a concern over the possibility of vagrant brewer’s yeast escaping and contaminating the biodynamic vineyard, but the public narrative of the conflict highlighted a more widespread concern about the change in character of Caves Road as a destination.<sup>95</sup> It was about whether the landscape and its amenity are drawn from the values and experience of small-scale family businesses or more commercial drawcard establishments, and by extension whether and how newcomers belong and ought fit into the region.

The narrative of the statue unbelonging is also illustrated by the names it came to be referred to. Almost universally and quite immediately the statue became known as the ‘chick on a stick’,<sup>96</sup> a nickname that Dianne Laurance has embraced as an example of Australian larrikinism, but as others have noted, it is a name ‘completely demeaning’,<sup>97</sup> and in light of the fact that is also known, offensively,

<sup>92</sup> Alison Philips (letter to editor), ‘Vineyard is freedom’, *Busselton Margaret River Times* (26 April 2007) 14.

<sup>93</sup> Ross Campbell (letter to editor), ‘Defending character of Caves Road’, *Busselton Dunsborough Mail* (25 April 2007) 13.

<sup>94</sup> [2010] WASAT 150 (*‘Wiseowl’*). Of note and relevance to the previous discussion about third-party rights in Western Australian planning law, the neighbouring landowner, Cullen, which had argued that it would have been directed affected by the new development was only able to take part in the tribunal proceedings as a witness.

<sup>95</sup> Clare Allen, ‘Beer and wine battle is on’, *Busselton Dunsborough Times* (19 March 2010) 1; Clare Allen, ‘Wine the winner in brewery battle’, *Busselton Dunsborough Times* (26 March 2010) 5 notes the Council decision to refuse planning approval for the brewery (later overturned by the tribunal in *Wiseowl*).

<sup>96</sup> Suellen Jerrard, ‘Winery fights for “chick on a stick”’, *The West Australian* (19 April 2007).

<sup>97</sup> Alison Phillips (letter to the editor), ‘Winery artwork fracas final straw for Council integrity’, *Busselton Dunsborough Mail* (2 May 2007) preferred to describe the stature as the ‘Golden Lady’.



as ‘mole on a pole’<sup>98</sup> it is a name that suggests misogyny at play in the landscape for the purpose of diminishing, othering and excluding the statue from the landscape.<sup>99</sup> The purpose of such renaming and repeating of the statue’s nickname has been to present the statue as disruptive to the landscape, unexpected, unnatural in contrast to setting in which it is placed. To trigger in the mind of the person hearing reference to the ‘chick on a stick’ the very kind of lack of integrity between object and place that influenced the reasoning of judges about statues as chattels.

### B *The Free as a Cow Statue in Cowaramup, Western Australia*

In speaking to the community about their experience with planning law and how they might have involved themselves in a formal process about the Free as a Bird, community members’ concerns and motivations to be involved were framed by layers of proximity.<sup>100</sup> Those who lived nearest felt that they should have had a stronger say over the values of the place: some sort of control to limit a change in landscape character. Those living outside of the municipality, like the people of Cowaramup erroneously felt that they were not entitled to a say at all. Those living within Shire of Busselton but close to its southern border, distant from its more populous regions to the north around the town of Busselton and Dunsborough, and more socially and connected with the agricultural parts of the peninsula around Margaret River and Cowaramup described themselves as ‘fringe dwellers’ generally ‘unsupported by’ and ‘ignored by’ the City of Busselton Council.

One member of the Cowaramup community believed that the time was now right for the Free as a Bird statue to ‘come down’. It had outlived its utility in promoting the business and personality of Dianne Laurance. With the winery sold to other interests, the statue no longer belonged - it was no longer needed to serve its primary, commercial, purpose. This reiterated another view that the statue is a temporary incursion into a landscape valued for its ‘natural’ and rural aspects.<sup>101</sup>

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<sup>98</sup> Also ‘moll’. Luke Morefesse, ‘No flick for winery’s Chick on a Stick’, *The West Australian* (19 October) 2007. A ‘mole’ being an Australian slang word for a disrespectful woman.

<sup>99</sup> I am grateful to Maria Lee for this insight.

<sup>100</sup> Yvonne Rydin et al, ‘Local voices on renewable energy projects: The performative role of the regulatory process for major offshore infrastructure in England and Wales’ (2018) 23 *Local Environment* 565.

<sup>101</sup> Both perspectives were offered in research interviews.

Removal of statues that offend on the basis of violence, race, and colonial or oppressed histories<sup>102</sup> (while no equivalence of experience is sought to be made) is similarly grounded in a contemporary view about belonging and the values and control over time and especially over public space, a form of landscape.<sup>103</sup> This is seen in the work geographers McFarland and others, who researched the removal of a statue from the Tampa Hillsborough county court house to the land of the private Brandon Family Cemetery.<sup>104</sup> They observed how Confederacy statues especially represent battles of time and the southern contemporary and commercial identity: about whose history constitutes heritage, and what histories should be memorialised – and where that memorialising should occur.<sup>105</sup> Similar critiques have been offered about the John McDouall Stuart statue in Alice Springs in central Australia, a statue of a white man bearing a gun, who was implicated in and that represented Aboriginal killings,<sup>106</sup> and through the transcontinental Rhodes Must Fall Movement,<sup>107</sup> whose arguments were that colonial Rhodes did not belong in contemporary and future South Africa,<sup>108</sup> and his presence in Oxford meant that place excluded the sense of belonging by especially black students.

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<sup>102</sup> L Darnell Weeden, 'A Growing Consensus: State Sponsorship of Confederate Symbols is an Injury-in-Fact as a Result of Dylann Roof's Killing Blacks in Church at a Bible Study' (2017) 32 *Brigham Young University Journal of Public Law* 117; Juanita Solis, A Monumental Undertaking – Tackling Vestiges of the Confederacy in the Florida Landscape (2018) 8 *University of Miami Race & Social Justice Law Review* 109.

<sup>103</sup> Benjamin Forest and Juliet Johnson, 'Confederate monuments and the problem of forgetting' (2019) 26 *Cultural Geographies* 127.

<sup>104</sup> Steve Contorno, 'Can Tampa's Confederate monument rest in peace at Brandon family cemetery?', *Tampa Bay Times* (7 August 2017) <<http://www.tampabay.com/news/humaninterest/can-tampas-confederate-monument-rest-in-peace-at-brandon-family-cemetery/2332728>>.

<sup>105</sup> McFarland et al (n 9).

<sup>106</sup> Judith Lovell and AI Strangeways, 'Monumental - in a small town way: Exploring a 'carnival of characterisations' (Conference paper, Dissents and Dispositions Conference of the Law, Literature and Humanities Association of Australasia, Melbourne, December 2017); Emma Sleath, 'McDouall Stuart freemason statue installed in Alice Springs after four-year controversy', *ABC News* (23 July 2014) <<https://www.abc.net.au/news/2014-07-23/alice-springs-freemason-statue-stuart-mcdouall/5617400>>; *New Matilda*, 'Four Metre Brass Racist Unveiled in Alice Springs Park' (30 July 2014) <<https://newmatilda.com/2014/07/30/four-metre-brass-racist-unveiled-alice-springs-park/>>; Monument Australia, 'John McDouall Stuart' <[momentaustralia.org.au](http://momentaustralia.org.au)>; Pat Anderson AO, 'Our Hope for the Future: Voice. Treaty. Truth.' 17<sup>th</sup> Vincent Lingiari Memorial Lecture, Darwin, (16 August 2017); Megan Davis, 'Moments of Truth – Correspondence' (2018) 70 *Quarterly Essay* 81, 87.

<sup>107</sup> Joanna Ruth Evans, 'Unsettled matters, falling flight: Decolonial protest and the becoming-material of an imperial statue' (2018) 62(3) *The Drama Review* 130; Brita Timm Knudsen and Casper Anderson, 'Affective politics and colonial heritage, Rhodes must fall at UCT and Oxford' (2019) 25 *International Journal of Heritage Studies* 239.

<sup>108</sup> Knudsen and Anderson (n 108).

Most members of the community approached for this research were ambivalent about the ongoing presence of the Free as a Bird statue, offering a view that it remains a peculiarity in a landscape valued for its more humble features now littered by ostentatious landmarks.<sup>109</sup> For the people of neighbouring Cowaramup, there is another component to the narrative. Cowaramup, affectionately and locally referred to as ‘Cow Town’, weirdly known for its model Friesian cows lining its main street, is now the home of the ‘Free as a Cow’ statue (see figure 3). This life-size replica of an upstanding cow, mimicking the pose of the woman in the Free as a Bird statue, stands approximately 5 metres above the ground. It was shown for the first time for the global public art event CowParade, held in region in 2010, and is now located in Pioneer Park, a very typical country town reserve.

*Figure 3: Free as a Cow*



There is a strong narrative about the relevance to place of the Free as a Cow statue to the people of Cowaramup. The cow statue, according to its artist, is

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<sup>109</sup> Perspectives drawn from research interviews.

intended to acknowledge and reference the Laurance statue,<sup>110</sup> and in so doing it passes comment; and also invites others to judgment. While the Free as a Cow statue was a tongue in cheek play on Free as a Bird; it was not intended to become a monument of ‘merciless’ mockery.<sup>111</sup> However, if there is some clear community expression of what was thought about the disruption to landscape values and the sense of belonging of Free as a Bird, it is through the widespread pride and pleasure of the community in the Free as a Cow statue.

The symbolism of a cow being raised in the air and standing on hind legs is that these statues challenge the places in which they are located. Going back to the law of statues, these statues could not be viewed as ‘in the right place’ or ‘integral’ to a landscape<sup>112</sup> – moreover their connection with the land is represented as controlling or acceding to or being adapted to the land; rather it is to disrupt it.<sup>113</sup> But they could also be seen as belonging to their respective, increasingly dissimilar geographies and landscape characters – a neoliberal capitalist one, ‘ostentatious’ as an interviewee described it, and an authentic rural eccentric community one.<sup>114</sup>

The cow statue, the rump on a stump, the steak on a stake, the roast on a post, the shishcowbab, is a material reaffirmation of community control over space. The cow statue helps make Cow Town. That was apparent when speaking to the people of Cowaramup about what they thought of the Free as a Cow statue. There was no common view about what the statue meant to them. However, they did collectively consider their cow statue as being a greater landmark and having a stronger connection with place and community than the statue in the winery. The humour in the statue is understood by most to represent a ridiculing of the neighbouring local council<sup>115</sup> – the law and its custodians, the administrators in another place who ‘ballsed up the planning law’ who proved unable to support its position in a legal arena about the need to take down the Laurances’ statue. It

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<sup>110</sup> Ron Roozen Residences, 9 March 2010 ‘Free as a Cow, Margaret River CowParade; In the description about the statue, the artist, Ron Roozen, references the book *Jonathan Livingston Seagull* (Richard Bach, *Jonathan Livingston Seagull* (1972)): a book about a seagull cast adrift by a flock of birds threatened by the gull’s ambition to be the best flyer amongst them when what all the bird wanted was some respect.

<sup>111</sup> Kerry Faulkner, ‘Try a thrift tour that’s the real deal’, *The West Australian* (1 September 2012).

<sup>112</sup> Poulet (n 40).

<sup>113</sup> Snedeker (n 33).

<sup>114</sup> Sharon Zukin, *Naked City: The Death and Life of Authentic Urban Places* (Oxford University Press, 2010).

<sup>115</sup> One research interviewee shared the rumour that key figures of the Augusta-Margaret River Shire Council were especially keen to fund the statue as a laugh at their neighbouring local council’s expense.

is also a representation of the community making claims over the spaces they value on their terms despite those terms being unheard or irrelevant on the planning decision making process.<sup>116</sup> As Gilbert explains, using ridicule as a device presents and challenges values and rules.<sup>117</sup>

In some respects the expression and the good humour of the Free as a Cow statue is an emotive response that draws a stronger connection with place.<sup>118</sup> As Davidson and Milligan have argued, these ‘emotions are understandable – “sensible” – only in the context of particular places’,<sup>119</sup> while emotional connections to objects or material are considered to help foment a place and a character of that place and the degree to which that place reflected the values or desires one holds or hopes for a place, and with it an attachment to place.<sup>120</sup>

## V CONCLUSION

Based on field and archival research, it was clear that the arguments for and against the Free as a Bird statue were grounded in notions of belonging in landscape – there were divisions between those resident in the larger and less rural towns around Busselton and those nearer the statue, of impressions of a place framed through experiences of how long a person had been in place – long termers were much more strident in their opposition to a change in landscape values than newcomers, and a view about the acceptability of an outsider, wealthy and willing to circumvent the laws, imposing their vision of a place, and converting its character. Notably absent in the sense of place and belonging framed by the local residents were Indigenous perspectives. Cowaramup is a Noongar word referring to a bird that is now less frequently spotted in the area than in the past<sup>121</sup> and Wilyabrup has Noongar language connections. The

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<sup>116</sup> Jane Holder and Donald McGillivray, ‘Recognising an Ecological Ethic of Care in the Law of Everyday Shared Spaces’ (2020) 29 *Social and Legal Studies* 379.

<sup>117</sup> Christopher Gilbert, ‘The ridiculous in rhetorical judgment’ (2014) 14 *Review of Communication* 270.

<sup>118</sup> Martin Zebracki ‘Homomonument as queer micropublic: An emotional geography of sexual citizenship’ (2017) 108 *Tijdschrift voor Economische en Sociale Geografie (Journal of Economic and Social Geography)* 345.

<sup>119</sup> Joyce Davidson and Christine Milligan, ‘Embodying emotion sensing space: Introducing emotional geographies’ (2004) 5 *Social and Cultural Geography* 523.

<sup>120</sup> Yvonne Rydin and Lucy Natarajan, ‘The materiality of public participation: The case of community consultation on spatial planning for north Northamptonshire, England’ (2016) 21 *Local Environment* 1243.

<sup>121</sup> One research interviewee questioned whether Cowaramup is named after the purple-headed lorikeet, as widely understood, partly on the basis that the bird is rarely seen there.

connection with country of the Wardandi people did not inform the articulated values and future vision of the landscape. The limited legal geography constructed by planning officers and the State Administrative Tribunal from documents and visual artefacts and the counter-legal geography established by the people of Cowaramup reclaiming space through its cow statue in many respects both reflected a less than encompassing ideal of belonging and a temporally constrained understanding of connection, and of the 'good ol times'.<sup>122</sup> It is a reminder of the limited temporality of legal geographies, their plurality and transience.

The planning law and its technicians in this case did not engage in a process of thinking about or expressing landscape values of a place. The legal geography centred on the Free as a Bird statue they created was deficient because the planning law process excluded the community. The tribunal's frame of inquiry focussed on objects in rural places, separated from natural places while the local council deployed its policy as proxy for experienced values in place. Yet this article has shown a strong sense of value in place and people within that place that inform the values of a landscape was present. The values were public and known, but they were not formally brought into the planning process because of the limits in law and legal education for participation in planning law. Western Australia is an outlier in this respect, and this case study should reiterate a need to revisit public involvement in all stages of the planning process – from notification through to review. What also makes this case study especially helpful in understanding the importance of involving community members in a consideration of landscape values as understood through a legal geography prism, is that there were an abundance of moments, incidents and material objects that identified community held landscape values. There were transgressions:<sup>123</sup> moments alongside, outside the law. The values were there; they can be there outside the realm of the law but within its regulated space. The values just needed to be distilled and understood. The building of the Free as a Cow statue especially engaged a community's values over a place. It informed us of the views about what is integral and extraneous to their landscape, and therefore I think that statue helps us better understand what a fuller legal geography of the Caves Road area would comprise.

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<sup>122</sup> One research interviewee longed for the return to the 'how things ways things were'.

<sup>123</sup> Tim Cresswell, *"In Place/Out of Place" Geography, Ideology, and Transgression* (University of Minnesota Press, 1996).