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The underlying zoning enigma

John Sheehan[a,b]* and Andrew H. Kelly[c]

[a]*Asia-Pacific Centre for Complex Property Rights, University of Technology, Sydney, Australia;* [b]*Faculty of Society and Design, Bond University, Gold Coast, Australia;* [c]*Faculty of Law, Humanities and the Arts, School of Law, University of Wollongong, Wollongong, Australia*

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Australian property rights exist within a sophisticated body of compensation case law and practice. To facilitate infrastructure, jurisdictions such as New South Wales must compulsorily acquire significant tracts of private land. The key factor for investigation in this paper is the prior reservation (or zoning) of such land where designated for a public purpose, which ultimately prohibits private usage. Enabling legislation for all compulsory acquisitions requires the assessment of compensation for the private land holder. Key judgements in various Australian Courts make clear that the question of an underlying zoning is a "jurisdictional fact" that triggers the agency to assess reasonable compensation.

Keywords: compulsory acquisition; private property rights; underlying zoning; land-use zoning; planning instruments

Introduction

Allocation of specific zones for particular land uses is the central tool of statutory planning. It is supported by the established discipline of town planning, often known as "land-use planning" or, more broadly, "planning". Preparation and implementation of planning instruments that embrace zoning might be regarded as narrow by comprising only one element within the broader planning basket. Yet, the making and implementation of statutory land-use plans can cause difficulties. It can involve a multitude of disciplinary and disparate inputs such as law, architecture, environmental science, landscape design, engineering and property economics, amongst others. The system becomes even more complicated when *private* land is earmarked under a planning instrument for a future *public* purpose, such as parklands, foreshores or widening a roadway (Starke, 1966, pp. 99–100). On this occasion, the planning structures deny the private owner any permanent private use of their property. This phenomena is generally known as "underlying zoning" which is a jurisdictional fact that has to be determined if the compensation assessment process to be triggered. As such, this paper does not address any methodologies of compensation assessment nor the adequacy of compensation so assessed. The terminology and application of underlying zoning comprise the crux of this paper. Put simply, it arises when the land is compulsorily acquired by the relevant authority by means of special zoning mechanisms. As will be seen, it involves *peeling* away the zonal provisions back to when the land was earmarked as a step prior to compulsory acquisition

*Corresponding author. Email: john.sheehan@uts.edu.au

of the property. Working through what comprises the "underlying zoning" leads to assessment of the level of compensation owed to the landholder upon acquisition.

Unsurprisingly, the notion is alien to many planners at the local government and State levels due to its general rarity. Limited financial resources curb public agencies from acquiring private land for new public infrastructure. Mere awareness of the issue fails to reveal its complexity. The principal aim here was to disentangle the concept of underlying zoning with the assistance of historical development, case law and critique. The narrative's central purpose is to assist local government planning officers to appreciate the factors accompanying underlying zoning when circumstances arise. While the emphasis relates to New South Wales (NSW), wider issues and interstate judicial decisions can influence local decisions.

The emergence of land-use zoning

Separation of incompatible land uses by zoning controls over public and private lands has a long history in Australia. Its statutory roots lie in early British town planning legislation which Australian legislatures have followed with gusto (Auster 1985; Colman, 1971; Fogg, 1985). While the UK remodelled its planning system under the *Town and Country Planning Act 1947*, Australian jurisdictions adhered to the traditional regulatory schemes. The allocation of specific zones for particular land uses became the key role in statutory planning.

Planning ideals existed before zoning mechanisms entered into statute. The bones of Australian planning law stem from British post-industrial reform that focused on housing, health and sanitation following cholera epidemics (Cherry, 1972). While this led to the *Public Health Act 1848*, attention was directed to individual technical matters rather than viewing the town or city as an integrated whole (Benevolo, 1967). Other achievements occurred on a sporadic basis, with a handful of wealthy industrialists constructing "model towns" such as Bourneville and Saltaire for their workers (Bell & Bell, 1972; Cherry, 1982; Mumford, 1962; Richards, 1936). Yet it was the Garden City Movement (Freestone, 1989, 2010; Hall, 1982; Stephenson, 1995), derived from Ebenezer Howard's seminal *Garden Cities of Tomorrow* published in 1902 (replacing the previous *A Peaceful Plan to Real Reform* of 1898) which inspired the planning and beautification of cities and towns. Armytage (1961, p. 383) brands it as "a movement without opposition". More importantly, a diluted version was to become translated into statute (Beevers, 1988), namely the *Town Planning, etc Act*, *1909* (Booth & Huxley, 2012). Keeble (1983, p. 71) observes British town planning reached a "final flowering" in the *Town and Country Planning Act 1932*. The early planning principles devised by early plan-makers, especially Howard, however, were reduced to inflexible regulation by zoning of land (Auster, 1985).

In Australia, British architect John Sulman, noted by Wright (2001, p. 18) as possibly the first person to apply the term "town planning" in Australia, wrote in 1919 that the embryonic distinction of uses as "[i]n a town of any size, a special quarter should always be set apart for noxious trades and the disposal of refuse" (Sulman, 1919, p. 19). This separation of incompatible uses also saw the creation of open space, leading to the Green Belt concept derived from Howard's garden city movement. The green belt phenomenon provides an early example of the capture of private land for public purposes. In NSW, it arose during the 1950s via a regional statutory plan, as outlined further below.

As a planning tool, zoning determines which uses are permissible or prohibited on mapped lands. The imposition of such restrictions might be viewed as a contract

between the landholder and the State: should the landholder be restricted in developing their property, they can benefit from constraints imposed on neighbouring lands. For example, they can be assured that a meatworks will not be built next door. This would be the direct result of well-articulated zonal planning. As McAuslan (1980, p. 210) states, the fundamental task is development control, especially zoning over private property, through a document identifying "what public development will take place and where and what private development may take place and where and what principles will govern both" (see also Stein, 1974). McAuslan (1980) notes further that there is an inherent conservatism in land-use planning by reflecting its bias on the prominence of protecting private property. Consideration of the historical roots of zoning in Australia is, therefore, crucial. One can only fully comprehend current law and professional approaches by investigating the past. This is particularly pertinent when the task of determining an underlying zoning is comparable to painting anew on a "clean sheet" (McAllister & McAllister, 1941, p. 143).

Zoning in NSW

In 1951, zoning was introduced in NSW by the *County of Cumberland Planning Scheme Ordinance* (CCPSO) under the *Local Government (Amendment) Act 1951* (NSW), which laid down the permissibility of uses across land throughout the extended Sydney geographical basin in NSW. Other than the rudimentary residential proclamation districts introduced by s 309 under the former *Local Government Act 1919* (NSW), described as a "crude form of zoning" (Freestone, 2010, p. 19; see also Proudfoot, 1992), the CCPSO was the first comprehensive statutory planning instrument on a regional scale (Allport, 1980; see also Winston, 1957). It established 14 zones within which specified categories of buildings could be permissible, together with a raft of developments which were "absolutely prohibited" (Rost & Collins, 1984, p. 585; see CCPSO cl 26). Its adoption of zoning as a pivotal planning tool was based upon prior English models. One special zone related to the "Green Belt Area" (Zone 11, cl 26(c)), providing public open space to encircle suburban Sydney. By December 1959, "substantial areas of the Green Belt" (Rost & Collins, 1984, p. 588) were proposed for release from that zoning which raised the unanticipated spectre of underlying zonings. The Cumberland County Council was dissolved in 1963 and replaced by the advisory State Planning Authority. Parts of the green belt began to be eaten away for expanding residential development. The skeleton of the Green Belt is still visible, with Freestone remarking that it serves as "the classic planning instrument in the garden city tradition" (1989, p. 30; see also Freestone, 1992).

The CCPSO contained clauses on "Reservation and Restrictions on Uses of Certain Land" with a separate table indicating the colours of reserved lands on the CCPSO map. It also indicated the goals for which the specified land was reserved (see cl 10). The purposes for reservation of land comprised "parks and recreation areas", "foreshore reservations and places of natural beauty", "new county roads and widening of existing county roads" and "new railways". The land could be either vacant or built upon. As would be expected, the CCPSO contained provisions for the acquisition of reserved land by the local council or relevant State agency (see cll 17–18). All this exposes a clear difference between (i) reservation of land for public acquisition and (ii) zoning designed to restrict development on private land, although Wilcox describes the division as "rather blurred" (1967, p. 250).

This pattern was adopted in local government's own planning instruments, albeit ultimately approved by the State Government, namely "planning scheme ordinances" (PSOs). These were influenced by both pre-1947 British plans and the CCPSO. An example is the City of Sydney PSO gazetted in 1971, which adopted the separation of tables for reservation and zones (see cll 7–22, especially cl 9). The then State Planning Authority of NSW (1966/1967, p. 32) lists Bowral in the southern highlands as the first PSO outside Sydney, having been gazetted in October 1954. Even though well outside the CCPSO boundary, it contained reservation clauses for parks, recreation and roads (see cll 6–8, especially cl 6). For those councils that were inactive in igniting the PSO, the State Government was able to impose an "interim development order" (IDO) over all or part of a council area to ensure that zoning applied. These have been described as "extremely simple" with "naïve" objectives (Sorensen & Cunningham, 1985, p. 9).

The NSW planning system experienced substantial change in 1980 upon the introduction of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), which broadened the scope of scope of planning instruments beyond development control. The scope and language of s 26 EPA Act leaves no doubt that plans could do far more than was the case under the LGA 1919 Part X11A (see former s 342G). Despite such opportunities, early local instruments closely resembled their unwieldy predecessors (Sproats & Kelly, 1998; Wiggins, 1984). There was no general push for instruments to move beyond unsophisticated land-use regulation or reserving land for public purposes. As Dore discerns, NSW land-use planning focused on "regulating sites rather than making places" (2001, p. 103).

Upon commencement of the EPA Act, new local plans were named "local environmental plans" (LEPs). The NSW Parliament also introduced two other statutory species of plans, namely "state environmental planning policies" (SEPPs) and "regional planning plans" (REPs), which have since been enveloped into SEPPs. While this added some degree of complexity, councils enjoyed an amount of elasticity in devising their own LEPs (George, 1986; Wiggins, 1986). This led to criticism that local plans were "progressing towards vagueness and uncertainty" (Fogg, 1985, p. 273; see also Faludi, 1985). Despite this, the Department of Planning (1986/1987, p. 24) announced that "modern and flexible plans will provide more development opportunities". A handful of councils went as far as having zones with no prohibited uses at all, such as Wagga Wagga LEP 1985 in south-west NSW. This plan contained a reservation clause relating to land "hatched on the map" to be acquired for "open space", "sewerage treatment works", "schools" or "proposed motor way" across the "open space" and "special use" zones (see cl 22(1)). This type of clause of *marked* land over specified zones for public acquisition, regardless of the level of zoning rigidity, became relatively common.

While flexibility in zoning architecture continued, interest in reducing prohibited uses waned. Instead, creative planners in the late 1990s and beyond produced place-based zones rather than relying upon the conventional zoning tabular approach. In particular, the former Warringah LEP 2000, which applied to part of Sydney's northern beaches area, has been recognised as the "peak of LEP making creativity" (Kelly & Smith, 2008, p. 93). It was based on articulated objectives for over 70 "localities", which had to be met before development consent was granted (see Gillen, 2004; Mant, 2000; Untaro, 2002). This was very different from the rigid reservation provisions of "reserved for public open space, regional open space, local roads or arterial roads" (cl 34), separated from the far more innovative zoning clauses.

The malleability in LEP-making was overturned by the introduction of the "Standard Instrument – Principal LEP", commonly known as the "LEP template", in 2006

(see EPA Act, s 33A). At its core, the template contains a set of voluntary or mandatory provisions and 35 fixed zones. The result is a uniform set of definitions to avoid confusion and improve efficiency. A ready example is Warringah LEP 2012, a direct product of the template, which smothered the pioneering Warringah LEP 2000. Of particular interest in the LEP template is mandatory cl 5.1 entitled "Relevant acquisition authority", which delineates the zones for local and regional open space, road infrastructure and National Parks (see Zones RE1, SP2, E1). Essentially, the LEP template embeds reserved lands into the overall zoning table with special names. Clause 5.1 also contains references to "land reserved" and the "reservation acquisition map". It adopts the traditional approach under new clothing.

Conflicts will continue between landholders, stakeholders and acquiring authorities, including compensation challenges concerning underlying zoning. Unlike the period when town planning was an aspirational movement, reservations and zones have now become legally entrenched. Restrictions on the use of land, if not total loss of one's property, became potential areas for local disputation. At the stroke of the planner's pen, landholders can face a financial windfall or disappointment. Reservation of land could axe a landholder's development dreams. Harrison refers to the "unprecedented power" that the planning system has conferred on State and local governments (Harrison, 1988, p. 27). Underlying zone is a prime example, which has led to not only dissatisfaction but also judicial action.

The notion of compensation

The allocation of a specific use for a parcel of land supported by statutory zoning is an activity which occurs at a point in time. It informs current or future land owners as to whether or not a proposed use is permissible. The plan might also identify current "underlying zoning", traditionally known as reservations rather than zones, to identify land to be acquired by the Crown. Yet the plan might be altered when the Crown decides to obtain a piece of land for a public purpose. The issue here is that at the early stage of making a plan, there might be little knowledge of future public purposes. This is because such purposes may then be largely unknown. For example, unexpected urban densification may demand larger open space and/or road widening. This is a dissimilar concept from relying on zoning tables to determine what types of development are permitted. Of course, such provisions can change. A property might be "down-zoned", leading to a reduction of uses that can be carried out on the land. But this is very different from "a complete loss of the value of land arising from a reservation of land for public purposes", leading to compensation (Stein, 2008, p. 14).

When does the requirement to determine an underlying zoning arise? In NSW, the right to compensation is addressed under s 37 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (LAJTC Act). The right to compensation under s 12 can be triggered by a Proposed Acquisition Notice (PAN) and may also arise under s 23 where changes in the zoning, rezoning or reservation of privately-held land for a public purpose causes hardship (s 24). This enables the land owner to require the acquiring authority to acquire the land pursuant generally to Division 3, Part 2 LAJTC Act. When the land is compulsorily acquired, the Valuer-General is required to determine the amount of compensation to be offered by the acquiring State agency (see s 42). What the dispossessed owner receives is assessed by the Valuer-General pursuant to the principle set out at s 54, namely "[that the amount] having regard to all relevant matters

under this Part, will justly compensate the person for the acquisition of the land" (see s 47) as qualified by s 26.

In addition, s 55 LAJTC Act lists various matters to be considered when determining compensation. These items are dealt with in greater detail in subsequent sections of the LAJTC Act regarding "market value" (s 56), "special value" (s 57), "loss attributable to severance" (s 58), "loss attributable to disturbance" (s 59) and "solatium" (s 60) as qualified by s 26. These are the matters which, inter alia, the Valuer-General *must* consider in preparing her or his report.

In assessing the level of compensation, the importance of determining an underlying zoning and the concomitant demonstration of achievable development consent, albeit hypothetical, is critical when private land has been zoned for a public purpose. Brown (1996, p. 49) highlights a number of statutes throughout Australia where the land owner can:

> compel an authority to resume land where the authority has created a situation resulting in the land being unsuitable for its current or planned use. The situation may arise in respect of planning changes. If an area is, for example, zoned for residential development and that zoning is changed to a reservation for parks and recreation, the legislation may permit a landowner to compel the planning authority or council to resume the land as it is no longer possible to carry out his or her intention to develop the land for residences.

All of the above draws attention to the perverse task of ascertaining the likely zoning of the land in the perceived absence of the public purpose zoning that currently applies. The determination of an underlying zoning without a specific zone that sets out what is permissible on private land involves substantial conjecture. It also demands minimising any doubt as far as possible to ensure the dispossessed owner is fairly compensated. The notion of underlying zoning is a relatively rare creature, requiring quantification only when compulsory acquisition of private property occurs. However, since 1980, sporadic discussion on the topic has arisen, spurring growing interest in the enigmatic nature of the concept given the prospect of significant tracts of private property reserved (or zoned) for public purposes for infrastructure needs.

The emergence of underlying zoning as a concept

In 1980, Daines (1980, p. 335) recognised perhaps unwillingly the concept of underlying zoning while observing that both the (then) s 116(1) EPA Act and the Courts had already given credence to the terminology. Daines (1980, p. 333) was also pleased to adopt the term "a remarkable fiction" articulated by Parker in 1965 at a colloquium in London on land valuation. Many years later, Hemmings (1990, p. 153) of the Land and Environmental Court of NSW (LEC) extra-curially canvassed the concept of underlying zoning, observing that "[t]he likely planning control is a question of fact which must be determined in the circumstances of each case". Shortly afterwards, again extra-curially, Cripps (1991, p. 341) of the LEC addressed the issue with further clarity, observing that the legislation:

> does not, in terms, spell out the nature of extent of planning controls, if any, which are deemed to replace those which are to be ignored. A number of interpretations have been advanced. For example, it has been submitted that the court is required to assume that the land is wholly uncontrolled or that it is controlled by such provisions of a planning instrument as are relevant but is unzoned. It has also been submitted that it must be assumed that the planning controls existing prior to the zoning for public purposes ... and, finally, that the subject land is deemed to be the subject of the planning controls which would have applied to the land had there not been an intention to resume.

It seems, therefore, that consensus in statutory interpretation had developed to the stage that the concept of underlying zoning was not only acknowledged but accepted. Cripps further observed (1991, p. 341) that the judiciary had generally moved beyond the "earlier bureaucratic attitude of sparing the public purse" towards a more equitable system.

Again in 1991, but in relation to Victorian law, Barton (1994, p. 241) indicated the concept of underlying zoning had emerged in compensation assessment observing in respect of Part 5 *Planning and Environment Act 1987* (Vic) that:

> [s]ection 104 prescribes a comparison between land value after and before the advent of the reservation or public purpose, the latter generally being based on the zoning the land would have had if the reservation or public purpose did not exist, i.e. the "underlying zoning". The assessment of these values is tied by section 104 to the date on which liability to pay compensation first arose: the land being considered with its existing and potential attributes at that date, not as if it possess an earlier but since lost attribute, such as the ability to subdivide the land more intensely than the current underlying zoning allows.

Accordingly, the underlying zoning had to be a genuine zoning unaffected by the subsequent allocation of land for a public purpose. Barton (1994, p. 241) added that:

> [a]lthough the "before" value generally will be based on the underlying zoning, it is possible that this zoning may be ignored where it is found to be a de facto form of reservation imposed by abuse of power, or where it is a step in the scheme or process of acquisition.

An unpublished seminar paper by Hyam (2002) presented to the Australian Property Institute NSW Division, cited by Sheehan (2010, p. 113), noted that:

> [b]ecause the affected land may have been zoned or reserved for public purpose for many years, determining the highest and best use must be undertaken ignoring the zoning or reservation, and is ordinarily "deemed to have the same zoning as that of adjoining land".

The concept of underlying zoning was considered further by Raff (2002, p. 43), noting that:

> [t]he compensation is calculated on what the market value of the interest would be if the land had not been reserved for a public purpose. The difficulty of assessing this is relieved to some extent, if formalistically, by specification of the "underlying zone". There is a widely held view that the correct basis of calculation is the market value of the land when being put to the highest and best use that could be made of it, although that use was not being pursued at the time of acquisition.

More recently, Hyam (2014, p. 332) listed the determination of underlying zoning as part of a compendium of general principles for the assessment of compensation arising from compulsory acquisition, outlining the principle as the "[a]pplication in determining zoning absent the scheme of acquisition" (see also Brunton, 2012). In summary, since 1980, the concept of underlying zoning has slowly emerged in professional and academic literature. Contemporaneously, case law has been steadily developing as will be outlined below.

Relevant case law

Arguably, the first paramount case to address the concept of underlying zoning to any significant extent was *Housing Commission of New South Wales v San Sebastian Pty Limited* (1978) 140 CLR196; 37 LGRA 214 where the High Court of Australia (HCA) held (at LGRA, p. 223):

> [i]f the zoning was done with the intent or in anticipation that the land should be resumed for a purpose such as a public reserve or if the zoning was proposed or dictated by the resuming authority then s. 124 requires that the zoning be ignored.

Twelve years later, in *R v Murphy* (1990) 95 ALR 493, the HCA considered the likelihood of particular zonings that would exist in the absence of any resumption of the relevant private land. The purpose of the land acquisition was to establish an environmental park to protect the sea turtle breeding ground at Mon Repos Beach near Bundaberg, Queensland. The land had been zoned "Rural" under the local planning instrument and, subsequent to its resumption, the HCA considered that (at p. 449):

> [a]ny use of the resumed land which, directly or indirectly, reduced the number of turtles using the adjoining coastal strip as a rookery or the number of surviving hatchlings would effect an alteration of a feature of that coastal strip and, hence, an alteration of the environment of the resumed land.

The compensation for the land, excluding the impact of the resumption for the public purpose of an environmental park, raised the question of whether the underlying zoning would have been "Rural" immediately prior to the resumption or "a notional rezoning as Residential A and subdivision into 40 allotments" (see p. 495). The sensitivity of the coastal environment of the turtle rookery was considered to restrict the underlying zoning to that of the immediately prior zoning of "Rural".

Subsequently, Hemmings J. of the LEC held in *Pamalco Pty Ltd v Minister Administering the National Parks and Wildlife Act 1974 (No. 3)* (1991) 71 LGRA 441 that (at p. 449):

> if the restrictive zoning had not been imposed, the subject land would have been zoned non-urban similar to adjoining land, but with a strong potential for some tourist oriented development, and re-zoning to include associated residential accommodation. Whilst Council's attitude was favourable, the timing, nature and extent of such urban development could not be clearly defined at resumption date.

One year later, Pearlman CJ of the LEC succinctly described the process of determining an underlying zoning in *Russellan Pty Ltd v Roads and Traffic Authority of New South Wales* (1992) 75 LGRA 263 as follows (at p. 267):

> [i]t is not relevant to inquire what the zoning of the land would be if an application were made at the date of resumption to re-zone the land for a business or industrial use. Rather, it is necessary to go back in history and try to predict what would have been the zoning over the course of the years from 1951 until the date of resumption if there had never been any proposal for a county road affecting the subject land and the lands to the south. It seems likely in my opinion that commercial and retail development would have flourished along Willoughby Road had it not been for the adverse effect over the last forty years of the proposal for a county road ... [A]though the matter is obviously open to a degree of conjecture.

Then in 2012, Emerton J of the Supreme Court of Victoria helpfully described in great detail the process of determining of underlying zoning in *Rigby v Department of Sustainability and Environment* [2012] VSC 3427 ("*Rigby*"), introducing the task as follows (at para 3):

> [t]he Court is asked to determine how the subject land would have been zoned as at the relevant date had there been no proposal to compulsorily acquire it for the purposes of the Parkland. This is not an easy question, as the subject land has been reserved for parkland purposes since 1978, having been earmarked for acquisition as early as 1973. Given the longevity of the Parklands proposal and the physical development of the Parklands over

> 40 years, it is difficult to conceive of how the subject land and its surrounds might have been developed in the absence of the Parklands proposal.

Emerton J usefully set out the "proper approach" by accepting the claimants' submission that (at para 28):

> as the circumstances of the case require over 30 years of planning history to be *peeled back* to determine the zoning of the subject land, to the extent that doubt arises or matters remain obscure, the doubt or obscurity should be resolved in their favour of the claimants. (emphasis added)

In accentuating the concept of "peeling back", Emerton J also canvassed the "signposts" which could indicate the hypothetical zoning of the land at a time in the past, stating two salient matters: (i) physical limitations, especially flooding and defending natural heritage, and (ii) systematic planning. While the physical constraints of the land were aired in the Court, the development potential of the land over a period of 30 years was considered in great detail. There was a focus on the overall objectives of Victorian planning viewed through planning policy and implementation. Importantly, discussion arose on whether a need existed at the time for industrial or business zonings in the locality. Emerton J considered the later discussion on land sterility, attributing far more importance to strategic planning issues described as (at para 165):

> [those] broad trends expressed in Government policy statements more useful than local planning policy to assess the likely use and development of the subject land in the absence of the Parklands proposal. Although in the usual course no great weight would be given to policy statements of a general nature that are not referred to or incorporated in the planning scheme, this is not the usual course. The court is required to consider planning policy since 1978 and how it might have applied to land that has to be imagined in the absence of the Parklands proposal and therefore placed [in] a different physical context. In this circumstance, high level planning strategy documents such as those relied on by the claimants, become relevant.

Finally, Emerton J provided the following conclusions regarding the process of ascertaining an underlying zoning in compensation assessment, laying down that (at paras 192–193):

> ultimately, [it] is a matter for the Court to determine the underlying zoning of the land on the basis of the evidence, and in particular the expert planning evidence before it. The exercise that the Court has been asked to undertake is a hypothetical one that involves peeling back 30 years of planning history and re-imagining the physical development of the subject land and its surrounds. The task is both radical and uncertain. Doing the best that l can having regard to the characteristics of the land and its surrounds, along with applicable planning policies and Government policy statements, l find that, in the absence of the Parklands proposal, it is likely that Lot 2 would have been zone Business 3 as at the relevant date on the basis that its highest and best use was the same as or similar to the land on the other side of Eastlink.

Subsequent judgements in NSW by the LEC have also adopted the concept of underlying zoning by literally "peeling back" the statutory zoning over certain land, as will be demonstrated by three examples. All reveal the vital role that planning plays in determining compensation upon compulsory acquisition. Firstly, *Davies v Sydney Water Catchment* [2012] NSWLEC 130 involved land in Kellyville within the NW corridor for Sydney's urban expansion that was compulsorily acquired for trunk drainage purposes. More specifically, it related to the Balmoral Road Release Area within the broader Rouse Hill Development Area (RHDA). The site in question was Lot 57, which included the new Lot 1 that was compulsorily acquired. The judgement related

to a plethora of planning instruments, statutes, policies and reports. In relation to the history of the area, Craig J went as far back to the 1989 Sydney REP 19 – Rouse Hill Development Area. After various studies, Baulkham Hills LEP 1991 was gazetted, which zoned the RHDA as 1(a) Rural. This was precursor to Baulkham Hills LEP 2005, which was amended various times including Amendment No 5 in 2006, relating to the Balmoral Road Release Area. This led to the zoning of Lot 1 as Special Uses 5 (a), marked on the LEP map as "Trunk Drainage" (para 12), while the remainder of Lot 57 was divided into three other zones, namely Public Open Space 6(a), Residential 2(b1) and Residential 2(a2) relating to medium density housing (paras 13–14). All this was part of planning for Sydney's residential expansion. The two parties through their planning experts agreed on the compensation value of one part of Lot 1 (para 112). In peeling away the "rubric" of underlying zoning on the remainder (para 95), Craig J ascertained that the valuation should be based on residential zoning taking into account, inter alia, the surrounding zones. The nub was Amendment 5 to the LEP 2005 without application of the former rural zoning. Substantial attention was paid to drainage controls in the LEP (para 128). Accordingly, the underlying zone was recognised as Residential 2(a2) subject to the special provisions relating to drainage (see paras 105–109), thereby facilitating potential flood damage to be incorporated into the market value (para 129).

Secondly, in *Capocchiano v Shellharbour City Council* [2015] NSWLEC 28, Craig J considered the compulsory acquisition of land in the Illawarra region south of Sydney. This required "peeling" back the "templatised" Shellharbour LEP 2013 to not only Shellharbour LEP 2000 but even further to the Shellharbour LEP No 18 of 1983, which altered the ancient Illawarra PSO gazetted in 1968. Under the PSO, the land was zoned Non-Urban 1(b) but reallocated to 9(d) Open Space Reservation in 1983. The zoning name remained in the municipal-wide LEP in 2000 until rescheduled to RE 1 Public Recreation under the modernised LEP of 2013. The Council advocated "a statutory zoning of the land that would have prohibited the erection of any dwelling on the land" while the applicant contended that the site was subject to a "dwelling entitlement" (para 5). Unfortunately, the applicants lodged "no expert town planning or valuation evidence" for the LEC to consider (para 25). Yet Craig J decided that there was a "real possibility" that the land "could be zoned for residential purposes" (para 81). In peeling away the zoning layers, taking into account the "zoning history" and "zoning of land in the vicinity" (para 86), in addition to planning constraints such as potential flooding, the LEC decided that the property "would be confined to an entitlement to erect a single dwelling" as limited by amendments to the LEP.

The third judgement is *Hoy v Coffs Harbour City Council* [2014] NSWLEC 1217 ("*Hoy*"), situated in the growing beachside village of Moonee on the NSW north coast. Whilst the "underlying zoning" terminology is not used, the case nevertheless revealed the "peeling away" of the relevant planning instruments back to before the site was earmarked for compulsory acquisition. Originally, a PSO was prescribed in 1959 applying to the Coffs Harbour township area only while an IDO covering the entire then Shire was introduced in 1967 imposing the traditional 40 hectare minimum subdivision size under a non-urban zone (State Planning Authority of NSW, 1970/1971, p. 34; *Hoy*, para 188). The zone was changed to Land 2(a) Residential under Coffs Harbour LEP 1988. A similar zoning was placed within draft LEP 1998, which was placed on public exhibition. The consequent LEP 2000, however, zoned the land as 6A Open Space Recreation for public acquisition. This froze the development potential of the site. Eventually, LEP 2000 was supplanted by Coffs Harbour LEP 2013, which followed the

LEP template's standard provisions by altering the zoning to RE1 Public Recreation. While the LEC explored a surfeit of reports, documents, studies, environmental planning instruments, non-statutory development control plans and draft instruments, its compensation calculation stopped short before the "blight on the land" imposed by LEP 2000 (see para 194). The core of the decision rested on the *draft* LEP of 1998. In turn, the LEC decided that "106 lots is the appropriate lot yield" was a moderate basis for compensation valuation (para 51).

In summary, the key question is whether the determination of an underlying zoning has proved to be so conjectural as to be too enigmatic and possibly unhelpful in assessing compensation for dispossessed land owners. Is Emerton J's test in the *Rigby* case of peeling back several decades of planning history too arduous in determining the fair and reasonable costs to the landholder whose property is being acquired for a public use? Is underlying zoning becoming too difficult for those who design and/or implement planning instruments in the first place? Or have judicial decisions exhibited an ability to decipher the intricacies of reaching the preferred underlying zoning on a case-by-case basis? It appears that the concept of underlying zoning should no longer provide a conundrum for valuation experts and planners. It represents a jurisdictional fact which, once reached through professional investigative analysis, triggers the ability of the valuer, with the support of the planner, to calculate the amount of compensation owed to the private land holder. The central issue is the process, rather than the outcome, of paring away swathes of plans, draft plans and countless other documents.

Conclusion: Is the task of determining the underlying zoning too enigmatic?

The foregoing discussion indicates remarkable complexity in the task of ascertaining the likelihood of a zoning at a date in the past. The site might even be surrounded by more than one disparate zone. But as Emerton J indicates in *Rigby*, the task of ascertaining underlying zoning is crucial if the dispossessed land owner is to be compensated adequately and correctly. Key judgements from various Australian Courts indicate that resolving the question of the underlying zoning of a particular parcel of land compulsorily acquired is necessary if the dispossessed owner is to achieve an outcome with fair compensation.

In the absence of an underlying zoning in prevailing statutory planning documents, the professional must turn attention to the planning policies of government at the appropriate time in the past. The arduous task of peeling back an array of planning mechanisms may demand fossicking over decades, but this task is needed to ensure fair compensation. While determining the underlying zoning can be reasonably described as enigmatic, it nevertheless must be undertaken, with planners, valuers and other professional experts working together.

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References

Allport, C. (1980). The unrealised promise: Plans for Sydney housing in the forties. In J. Roe (Ed.), *Twentieth century Sydney: Studies in urban and social history* (pp. 48–68). Sydney: Hale and Ironmonger.

Armytage, W. H. G. (1961). *Heavens below*. London: Routledge & Kegan Paul.

Auster, M. (1985). Co-operating in the country: The forgotten place of rural communitarian thought in the history of town planning. *Australian Planner, 23*, 5–7.

Barton, P. H. (1994). Compensation for loss due to town planning restriction under Part 5 of the Planning and Environment Act 1987 (Victoria). *The Valuer and Land Economist, 33*, 239–242.

Beevers, R. (1988). *The garden city of Utopia*. London: Macmillan Press.

Bell, C., & Bell, R. (1972). *City fathers: The early history of town planning in Britain*. Harmondsworth: Penguin Books.

Benevolo, L. (1967). *The origins of modern town planning*. London: Routledge & Kegan Paul.

Booth, P., & Huxley, M. (2012). 1909 and all that: Reflections on the Housing, Town Planning, Etc. Act. *Planning Perspectives, 17*, 123–128.

Brown, D. (1996). *Land acquisition: An examination of the principles of law governing the compulsory acquisition or resumption of land in Australia and New Zealand* (4th ed.). Sydney: Butterworths.

Brunton, N. (2012). Out of land and out of pocket: An analysis of compensation for disturbance following the compulsory acquisition of land in NSW. *Local Government Law Journal, 17*, 148–182.

Cherry, G. E. (1972). *Urban change and planning*. Henley-on-Thames: G. T. Foulis & Co.

Cherry, G. E. (1982). *The politics of town planning*. London: Longman.

Colman, J. (1971). *Planning and people: An introduction to urban planning in Australia*. Sydney: Angus & Robertson.

Cripps, J. S. (1991). Acquisitions – Principles and recent court cases. *The Valuer, 31*, 338–341, 367.

Daines, D. R. (1980). Underlying zoning – A remarkable fiction. *The Valuer, 26*, 333–336.

Department of Planning (NSW). (1986/1987). *Annual report*. Sydney: Department of Planning.

Dore, J. (2001). The planning jigsaw – Too many pieces? *Australian Planner, 38*, 102–104.

Faludi, A. (1985). Flexibility in zoning: The Australian case. *Australian Planner, 23*, 19–24.

Fogg, A. (1985). Patterns in the use of development control in Australia. *Western Australian Law Review, 16*, 258–275.

Freestone, R. (1989). *Model communities: The garden city movement in Australia*. Melbourne: Nelson.

Freestone, R. (1992). Sydney's green belt 1945–1960. *Australian Planner, 30*, 70–77.

Freestone, R. (2010). *Urban nation: Australia's planning heritage*. Collingwood: CSIRO.

Gillen, M. (2004). Promoting place: Evaluating place-based discourses and new approaches in local governances in New South Wales. *Urban Policy and Research, 22*, 207–220.

George, M. (1986). Alternative approaches to local environmental plans. *Planner (Sydney), 2*, 37–41.

Hall, P. (1982, November 11). Ebenezer Howard. *New Society*, 252–254.

Harrison, P. (1988). Urban planning and urban issues: 1951–72. *Australian Planner, 26*, 26–27.

Hemmings, N. (1990). Steps in the resumption process – Recent decisions. *The Valuer, 31*, 150–154.

Hyam, A. (2002). *Update – Land acquisition (Just Terms Compensation Act) 1991*. Unpublished paper. Sydney: Australian Property Institute, NSW Divisional Seminar.

Hyam, A. (2014). *The law affecting valuation of land in Australia*. Sydney: The Federation Press.

Keeble, L. (1983). *Town planning made plain*. London: Construction Press.

Kelly, A. H., & Smith, C. (2008). The capriciousness of Australian planning law: Zoning objectives in NSW as a case study. *Urban Policy and Research, 26*, 83–100.

Mant, J. (2000). Putting place outcomes at the centre of planning law and administration. *Australian Planner, 27*, 59–64.

McAllister, G., & McAllister, E. (1941). *Town and country planning – A study of physical environment: The prelude to post-war reconstruction*. London: Faber and Faber.

McAuslan, P. (1980). *The ideologies of planning law*. Oxford: Pergamon Press.

Mumford, L. (1962). *The story of utopias*. New York, NY: Viking Press.
Proudfoot, H. (1992). Milestones in planning history – Residential proclamations in Ku-ring-gai. *Australian Planner, 30*, 25–28.
Raff, M. (2002). Planning law and compulsory acquisition in Australia. In T. Kotaka & D. L. Callies (Eds.), *Taking land: Compulsory purchase and regulation in Asian-Pacific countries* (pp. 27–74). Honolulu: University of Hawai'i Press.
Richards, J. M. (1936). Sir Titus Salt. *The Architectural Review, 80*, 213–218.
Rost, R. O., & Collins, H. G. (1984). *Land valuation and compensation in Australia* (3rd ed.). Sydney: Australian Institute of Valuers.
Sheehan, J. (2010). Australia. In R. Alterman (Ed.), *Takings international: A comparative perspective on land use regulations and compensation rights* (pp. 107–118). Chicago, IL: The American Bar Association.
Sorensen, A. D., & Cunningham, C. (1985). Rural community planning. *Australian Planner, 23*, 8–12.
Sproats, K., & Kelly, A. (1998). *The role of local government in natural resource management*. Sydney: Local Government and Shires Associations of NSW.
Starke, J. G. (1966). *The law of town and country planning in NSW*. Sydney: Butterworths.
State Planning Authority of NSW. (1966/1967). *Annual report 1966/1967*. Sydney: Author.
State Planning Authority of NSW. (1970/1971). *Annual report 1970/1971*. Sydney: Author.
Stein, L. A. (1974). *Urban legal problems*. Sydney: The Law Book Company Limited.
Stein, L. A. (2008). *Principles of planning law*. South Melbourne: Oxford University Press.
Stephenson, G. (1995). *Compassionate town planning*. Liverpool: Liverpool University Press.
Sulman, J. (1919). *Town planning – A sketch in outline*. Sydney: NSW Government Printer.
Untaro, S. (2002). Regulatory frameworks for place-based zoning. *Urban Policy and Research, 20*, 169–186.
Wiggins, D. (1984). The relationship between LEPs and DCPs: Implications for legislative amendment. *Planner (Sydney), 1*, 10–14.
Wiggins, D. (1986). Flexible land use zoning. *The Valuer, 29*, 38–41.
Wilcox, M. R. (1967). *The law of land development in New South Wales*. Sydney: The Law Book Company.
Winston, D. (1957). *Sydney's great experiment: The progress of the Cumberland County Plan*. Sydney: Angus & Robertson.
Wright, B. (2001). *Expectations of a better world: Planning Australian communities*. Canberra: Royal Australian Planning Institute.