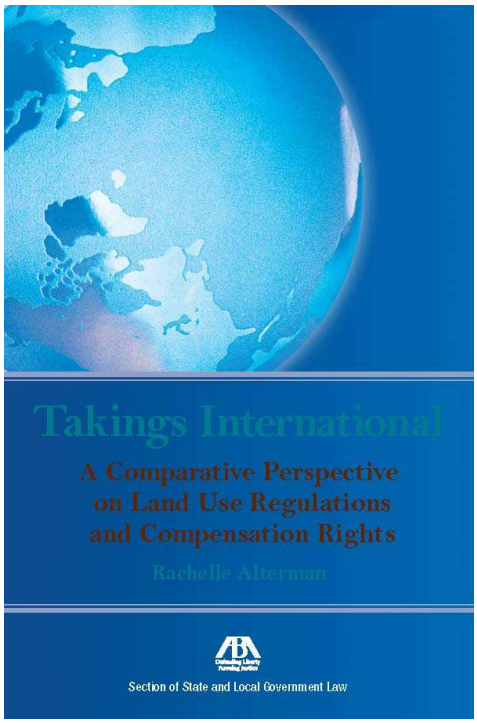

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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Chapter 5
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CHAPTER 5

AUSTRALIA

Although compensation rights for regulatory takings did exist in Australia in the past, under British influence, current Australian planning law, for the most part, no longer recognizes such rights except for extreme situations. The issue does, however, engage some public debate.

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The late 19th century drafters of the Australian *Constitution* revealed a deference towards private property. They ensured that the new Commonwealth Government could not acquire private property rights except on *just terms:*

Section 51(xxxi) of the 1990 Australian *Constitution:* "The Parliament shall subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:…(xxxi) The acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws."[1]

This contrasts with continuing provisions within the six former colonial Australian States that provide only mutable statutory compensation, neither guaranteed as to provision or quantum. Indeed, even the guarantee of private property in the Federal document is a rare constitutional right in a text evidencing:

> *…[a] shortage (as it is now perceived) of explicit statements of ideals and guarantees of rights, and of descriptions of essential human or national attributes.*[2]

However, "regulatory takings" (a US term not used in Australia) do not attract a right to compensation in either Australian federal (Commonwealth) or State jurisdictions except in markedly rare circumstances.

H1 A BRIEF HISTORY

Rights to compensation for reductions in property values arising from planning decisions are rare in Australian legislation. The *Town Planning Act 1932* (UK) was arguably the source of

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[1] An Act to Constitute the Commonwealth of Australia, 1900. Available in : http://www.aph.gov.au/SEnate/general/constitution/par5cha1.htm

[2] HELEN IRVING, TO CONSTITUTE A NATION: A CULTURAL HISTORY OF AUSTRALIAN'S CONSTITUTION 162 (1997).

much Australian planning legislation post World War 2. In the State of New South Wales (NSW) – the State on which this paper focuses - the first significant planning legislation was the *County of Cumberland Planning Scheme Ordinance* [3], passed by Parliament on 27 July 1951. The *Ordinance* introduced town planning along UK lines prevailing in the 1930s, and included compensation provisions for those owners injuriously affected by zoning:

> *[l]egislation providing for planning must ensure that those injuriously affected by a scheme and those from whom land is compulsorily acquired will not be unjustly treated, but the legislation must also ensure so far as possible that the community will not be forced to pay unreasonably. In order to achieve these results, there must be carefully detailed clauses in the Act saying whether compensation is or is not payable in particular circumstances, and just how the assessment of compensation is to be determined.*
>
> *Town and country planning legislation almost invariable provides that owners of property which is injuriously affected and loses value when the scheme comes into effect will be entitled to payment of compensation by the responsible planning authority, usually the local governing authority, or council.*[4]

The *County of Cumberland Planning Scheme Ordinance* also provided for the collection of betterment charges for those owners gaining beneficially from zoning. However, the extraction of betterment from private landowners has never been greatly successful in Australia, except as an offset to compensation arising from expropriation of actual private ownership rights. For example, specific provisions for betterment as an offset arising from public works, notable railways have been provided for in NSW *cf s.18 City and Suburban Electric Railways Act 1915 - 1967* (NSW).

H1 CONSTITUTIONAL ASPECTS

The six Australian States were until 2001 separate British colonies, and they retained responsibility at Federation for land management as this task is not a power specifically vested in the Commonwealth of Australia under the Australian *Constitution*. Management of the water of rivers is also vested firmly in the States[5].

Hence, the right to compensation for expropriation by the States is not a constitutional right but merely a right created by statute, for example in NSW compensation provisions are contained within the *Land Acquisition (Just Terms Compensation) Act 1991*(NSW). Importantly, State legislation does not mirror the provisions of the *Land Acquisition Act 1989* (Cwth.), which sets out at *s55-58* a clear understanding of the Commonwealth basis of assessment of compensation rooted in Constitutional *just terms*, enabling a valid acquisition of private property rights to occur. Arguably, the compensation due to a dispossessed owner from the Commonwealth is at the highest possible level, whilst State compensation can be considerably less[6] because it is an obligation created by mutable statute, not by Constitutional fiat.

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[3] The County of Cumberland Planning Scheme Ordinance was prepared pursuant to the Local Government (Town and Country Planning) Amendment Act 1945 (NSW).

[4] BROWN A.J & SHERRARD H.M, AN INTRODUCTION TO TOWN AND COUNTRY PLANNING, 365-366 (2nd ed.1969).

[5] *s.100* Australian *Constitution.*

[6] Compensation under the City and Suburban Electric Railways Act 1915 - 1967 (NSW) is based on the value of land at 27 February 1967, notwithstanding that property was acquired in some cases many years later.

Paradoxically, the NSW statute uses in its title the words "just terms compensation" notwithstanding there is no requirement in any Australian State to pay compensation at that level, or indeed at all. Given the historic English common law roots from which the States still draw authority, the benchmark 1915 High Court judgement *New South Wales v* Commonwealth[7] revealed that the State Parliaments astonishingly retain:

> *…sovereignty to make laws for the compulsory acquisition for private property without payment for compensation..*[8]

This power was pungently referred to in the 2007 High Court judgement *Shu-Ling Chang & Anor v Laidley Shire Council* [9]:

> *…the States are unfortunately not constitutionally bound to provide just terms on the compulsory acquisition of property…*[10]

Unsurprisingly, there is a continuing reluctance by the States to contemplate extension of the right to compensation, with the NSW Parliamentary *Standing Committee on Law and Justice* stating as recently as 2001 such changes (amongst others) were "not in the public interest for the NSW Government to enact a statutory Bill of Rights"[11]. There remains no right to compensation unless part or whole of an owner's property in NSW is actually compulsorily expropriated or designated for expropriation. Losses in property values for owners subject to rezoning, or abutting substantial new zonings and hence land use changes, are not compensable. This obduracy to expanding compensation contrasts with the early recognition noted above in the pioneering 1951 *County of Cumberland Planning Scheme Ordinance.*

In the sections that follow in this paper, the basic grounds for compensation will be canvassed, the eligibility to claim and liability, the procedures, and finally the abuse of zones or reservations to achieve "regulatory taking by stealth".

H1 BASIC GROUNDS FOR COMPENSATION

Compensation rights for losses derived from planning or development control decisions are tightly restricted to those circumstances where land is zoned or reserved for a public purpose. Such "zoning" or "reservation" decisions are of course not yet appropriation.

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[7] (1915) 20 CLR 54, per Griffith CJ at 66 and per Barton J at 77; known as the Wheat Case, this judgement confirmed that the State constitutions are not constrained in the same manner as the Commonwealth is in *s.51(xxxi).*
[8] Raff, N.J. "Planning Law and Compulsory Acquisition in Australia" in TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 40 (Kotaka, T., & Callies, D. eds., 2002).
[9] [2007] HCA 37.
[10] Callinan J, at [123].
[11] Standing Committee on Law and Justice (2001) *A NSW Bill of Rights,* Report 17 (October), x.

In some States there was debate decades ago about whether compensation for "town planning" losses should be more widely applied, for example in Victoria this occurred in 1978.[12] In 1980 the Commonwealth Law Reform Commission reported that there was no Commonwealth or State law providing for compensation for injurious affection unless land is acquired.[13] Currently, continent-wide Australian legislation remains resolutely drafted against any expansion of compensation.[14]

H2 Types of compensable Injuries

There are extremely rare situations in some States' legislation where direct or indirect injury maybe compensable arising from planning or development control decisions. For example in Queensland, the *Integrated Planning Act 1997* (Qld) provides for an owner to be paid "reasonable compensation" arising from the denial of a favourable development control decision because of new adverse planning controls. The narrow circumstance triggering such a right for compensation requires an application to be made under superseded landuse controls within two years of their cessation, and subject to very specific conditions.[15]

However, the right to such compensation under the Queensland legislation was considered in the previously mentioned 2007 High Court judgement *Shu-Ling Chang & Anor v Laidley Shire Council* [16], but held to be not applicable in the specific circumstances of the case given that:

> *…the relevant statutory language, whether unintentionally, or deliberately and cynically, necessarily does take away the appellant's valuable proprietary and statutory rights, suddenly and without compensation.*[17]

Poignantly, the High Court also observed in respect of planning and development control decisions that:

> *…increasingly descriptive, restrictive, intrusive or even wrong-headed planning and heritage legislation and instruments, which go far beyond what a modern law of nuisance, taking account of denser populations, closer settlements, burgeoning industries, and other contemporary conditions could possibly insist upon, should not, as I fear they oppressively are, be used as a cloak to reduce, or extinguish valuable rights of, or attaching to, property.*[18]

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[12] *Gobbo Report (Report of Committee of Enquiry into Town Planning Compensation)* (1978) Presented to the Premier of Victoria (Melbourne: Government Printer) March.
[13] The Law Reform Commission (1980) *Lands Acquisition and Compensation* Report No. 14 (Canberra: Australian Government Publishing Service) 158.
[14] JACOBS, M.S. THE LAW OF RESUMPTION AND COMPENSATION IN AUSTRALIA 208 (1998).
[15] *s.*5.4.2 Integrated Planning Act 1997 (Qld).
[16] [2007] HCA 37.
[17] *Ibid*, Callinan J at [120].
[18] Callinan J, at [124].

Even where it is clear that land is reserved for a public purpose, there are stumbling blocks before a landowner can make a successful compensation claim. In Western Australia, the *Town Planning and Development Act 1928* (WA) ordinarily provides for compensation to be paid where land is reserved for a public purpose[19], however the *Metropolitan Region Town Planning Scheme Act* 1959 (WA) defers this entitlement to compensation until the sale of the land by the owner after the date of reservation[20]. In addition, a claim for compensation must be made within six months of the sale, or the refusal of a development application or issuing of an unacceptable conditional development approval for the right to compensation to be triggered[21].

In 2004, this narrowing of the right to compensation under the West Australian legislation was considered by the High Court in *Western Australian Planning Commission* v *Temwood Holdings Pty Ltd*[22], in the specific context of a foreshore reservation imposed on private land by way of a condition in a subdivision approval. It was held that no right to compensation existed in the circumstances[23].

Given such situations are uncommon, it remains a truism in Australia that the only broad obligation for compensation arises when planning and development control decisions commute private ownership rights for a "public purpose"[24]. The test for a successful compensation claim is that the zoning or reservation must totally deny private usage, and that the land is reserved "exclusively[25] for the public purpose.[26] The absence of any discernable change in practice since the rare cases cited above lies in the narrow circumstances in which the claims for compensation arose. There remains a historic silence in State and Commonwealth legislation limiting compensation to actual expropriation or designation for expropriation.

The right to compensation for land designated for expropriation has been construed rather broadly under Australian law. The trigger for such compensation remains the zoning of land for a public purpose. The mere identification of land for a public purpose in a statutory planning document provides the landowner with grounds to force the State or its agency to acquire the land according to the relevant compulsory land acquisition legislation[27], even if the State or its agencies may not have an immediate intention to acquire the land.

There has been argument about the difference in terminology in some planning or development control documents between "zone" and "reservation" of land for public purposes. However this issue was definitively resolved in a 1985 NSW judgement *Carson v Department of Environment and Planning*[28] which held that reserving land had the same effect as zoning

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[19] *s*.11Town Planning and Development Act 1928 (WA)
[20] *s.36*(3)Metropolitan Region Town Planning Scheme Act 1959 (WA).
[21] s.36(5) Metropolitan Region Town Planning Scheme Act 1959 (WA).
[22] [2004] HCA 63.
[23] *Ibid,* Gummow and Hayne JJ at [96].
[24] *cf s.27(*1) Environmental Planning and Assessment Act 1979 (NSW).
[25] s.27(1) Environmental Planning and Assessment Act 1979 (NSW).
[26] *cf Brookes vThe Minister for Planning and Environment & Anor* NSW LEC, 16 December 1988, unreported.
[27] cf s.21 Land Acquisition (Just Terms Compensation) Act, 1991 (NSW).
[28] (1985) 3 NSWLR 99. Chief Justice Hemmings of the Land and Environment Court of NSW observed in a 1989 article that the *Carson* decision was supported by two subsequent 1988 judgements Bergman *v Holroyd City Council* (NSW LEC 26 July 1988, unreported) and *Brooks v The Minister for Planning and Environment & anor (*NSW LEC 16 December 1988, unreported). *See also* Hemmings N.A., "Steps in the Resumption Process - Recent

because land was being set apart or "imprinted" by a planning document for a particular purpose[29].

H1 ELIGIBILITY TO CLAIM AND GOVERNMENT LIABILITY

Australian law is clear about which Government authority is liable for paying compensation. The landowner whose property is reserved or zoned for a public purpose is eligible to claim and receive compensation for the loss and makes the claim against the State government agency or local government authority for whose benefit the zoning or reservation exists e.g. roads authority in the case of a reservation for road purposes. The range of property right holders eligible for compensation is quite broad. The critical issue is that not only the landowner is to be compensated, but any other associated holder of an "interest in land" which, in Australian legislation, usually covers not only the basic land property right, but also ancillary property rights such as leases, easements[30]. There have also been attempts to expand the range of compensable interests to include water rights[31], but to date such moves have not been supported by State governments fearful of the cost of compensation in a nation occupying the driest continent on Earth.

H1 PROCEDURES FOR ASSESSMENT OF COMPENSATION CLAIMS

Generally, when land is reserved or zoned for public purposes in a planning or development control document, the obligation to make an inverse compulsory acquisition claim lies with the affected landowner. Many reservations or zonings are imprinted upon planning or development control documents in early anticipation of a future need by the relevant authority, perhaps reserving a route for a proposed new railway or road. However it appears unclear as to whether the planning authority has an obligation to inform the affected landowner of the reservation or zoning for public purposes, beyond that which ordinarily occurs when such documents are published for the inspection of the broader public.

Once a landowner becomes aware of the reservation or zoning, an application for inverse compulsory acquisition can be commenced, requiring the relevant beneficial authority to acquire the subject land or the interest in a particular parcel of land. For example, in NSW the affected landowner can require the relevant authority to acquire the reserved land, and upon publishing in the Government Gazette of the requisite Acquisition Notice all private property rights are extinguished and the land is vested in the relevant State agency.

The procedure for inverse compulsory purchase is similar to claims for expropriation. A dispossessed owner is required to lodge a claim for compensation by the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)[32] once the land has been compulsorily acquired. The

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Decisions", 11 (9 September, 1989) (paper presented to Environmental Law Association Seminar, World Trade Centre).

[29] Carson at 104.

[30] c*f s.*4 Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

[31] cf Water Management Amendment (Water Property Rights Compensation) Bill 2006 (NSW). This proposed amendment to existing legislation was introduced as a *Private Members Bill* but lapsed primarily due to lack of support by the incumbent NSW Government.

[32] *s.39(*1) Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

acquiring authority is required to give written notice to the former landowner within 30 days[33] of the publishing of the Acquisition Notice including a statutory offer of compensation by the State as determined by the Valuer General.[34] Importantly, there is no time constraint upon the dispossessed owner as to when the statutory offer from the State has to be accepted, although if rejected, the dispossessed owner must lodge an objection with the Land and Environment Court of NSW within 90 days of the issue of the statutory offer by the acquiring authority.[35]

In a harsh twist for owners successfully arguing hardship, *s.26 of the Land Acquisition (Just Terms Compensation) Act 1991* (NSW) denies compensation for special value, severance, disturbance or solatium, in return for early acquisition by the authority[36]. In the absence of compensation for these additional losses, arguably the dispossessed landowner could be in a more beneficial position if the property was actually expropriated, rather than invoke the hardship provisions. There have been moves in some States to impose time limits on zones or reservations for public purposes, in an endeavour to ensure that the relevant beneficial authority should act in a timely manner to acquire the private property rights. For example, State agencies and local government in NSW are now required to review zonings and reservations where the land is "no longer needed" [37].

There appears to be reluctance by the statutory planning authorities to review zonings and reservations because State agencies and local government have traditionally benefited from the flexibility provided by the imposition of "public purpose" zones and reserves in the absence of acquisition. Denial of this flexibility can arguably impair long term strategic planning especially by major infrastructure agencies such as railways and water authorities. Such bodies usually have time horizons which anticipate long-term demand growth for their services, but for which they are not yet ready to acquire land.

At the same time, there have also been recent attempts to water down this statutory right of inverse compulsory acquisition. In NSW the law was amended so that since 2006 the landowner must demonstrate hardship as grounds for an inverse acquisition claim[38]. Such moves have occurred to assist the public purse, government fearing that the economic costs of regulating for environmental and other public welfare might spiral out of control.[39]The outcome is that today landowners who cannot show undue hardship are left in possession of property whose value may be grossly diminished. The authorities are thus authorised to earmark land for a public purpose, but the State is free to acquire the land whenever it desires.

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[33] s.42(1).
[34]s.41(1).
[35] s.66(1).
[36]cfs.27Environmental Planning and Assessment Act 1979 (NSW): s.21 Land Acquisition (Just Terms Compensation) Act 1991 (NSW).
[37] cf Hansard 26 March 2006 Environmental Planning and Assessment (Reserved Land Acquisition) Bill – Second Reading, 21576.
[38] In NSW for example since 11 April 2006 the only grounds for forcing inverse compulsory acquisition is hardship as specified in s.24(2) Land Acquisition (Just Terms Compensation) Act 1991 (NSW): cf Environmental Planning & Assessment Amendment (Reserved Acquisition) Act 2006 (NSW).
[39] The doubtful "merit that the economic cost of regulating for environmental welfare does not spiral out of contol" is contrasted with loss of private property rights in Gray, 171.

If a landowner is finally successful in garnering a compensation claim, generally the compensation is assessed strictly on the basis of the highest and best use of the land, and hence its compensable value must be arrived at ignoring steps in the planning process which finally resulted in the zoning or reservation. This principle was set out in a 1978 Commonwealth judgement *Housing Commission of NSW v Sans Sebastian Pty Ltd*[40], stating that planning and other governmental activities associated with the intended State acquisition should be ignored, irrespective of whether beneficial or detrimental to the value[41]. Because 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"[42]. This principle was clearly articulated where land is reserved for parkland, notably in a 1986 Victorian judgement *City of Brighton v Road Construction Authority*[43] where it was stated:

> *[It] is well-established that in valuing the land, it must be valued with all its restrictions. It is also clear that the proper approach in estimating the likelihood of a removal of restrictions is not to assume that the land is free of restrictions…At the same time it is necessary to guard against the view that restrictions, because they restrict the class of potential purchasers, inevitably mean a lower value.*[44]

City of Brighton provides important guidance as to how compensation can be assessed in the context of the reservation of private land for public open space. Prior to the case there has been scant discussion on the topic, and provided a useful authority.

H1 THE ABSENCE OF COMPENSATION RIGHTS FOR INDIRECT INJURY TO ADJOINING LAND

Oddly, there is no provision in Australian law for the assessment of compensation for indirect injury to private lands that adjoin public works notwithstanding that they may be seriously affected and suffer significant economic value loss. Surprisingly, in a complex developed society such as Australia there has been no recognition in any existing Commonwealth or State legislation of the losses incurred by owners adjoining public works. There is simply no compensation for anything less than the expropriation of private property rights, and any claims to offset such injuries clearly lie outside of the existing legislative framework for property compensation. The only avenue available to affected landowners would be outside of this framework, within either the tort of nuisance or some other cause of action which is beyond the scope of this paper. Suffice to say, private nuisance claims are difficult to pursue and landowners rarely pursue them.

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[40] (1978) 140 CLR 196.
[41] For a detailed discussion on the Sans Sebastian principle see Hyam, A "Update – Land Acquisition (Just Terms Compensation) Act 1991" (2002) (unpublished paper presented to Australian Property Institute, NSW Division Seminar).
[42] Hyam, 12.
[43] [1986] VR 255.
[44] *Ibid, at 2*63.

H1 EVALUATION: "TAKING BY STEALTH"

The framework for albeit very limited compensation arising from "regulatory taking" in Australia is sadly a chimera. Former Chief Judge Hemmings of the Land and Environment Court of NSW pointed out in 1989 that arguments were increasingly being advanced by State and local government agencies that certain zones or reservations were not wholly for a public purpose, given that the range of uses in a specific zoning or reservation might include uses which could be undertaken by private parties such as "agriculture" or "recreation"[45]. Recall that the test for a successful compensation claim is that the zoning or reservation must totally deny private usage, and that the land is reserved "exclusively[46] for the public purpose.[47]

To avoid the obligation to pay compensation, State and local government agencies attempt to include in zones or reservations some obscure or unanticipated private use so that "the owner is still left with a residue of reasonable alternative forms of use"[48]. They hope that such steps will arguably negate obligations to acquire land by inverse compulsory acquisition. Alternative forms of such land uses that have appeared over time in various zones or reservations include bee keeping, utilities, forest plantations and electricity generating plants. Even more concerning is the prospect that private property rights could be subsequently acquired at a depreciated market value, because the affected land owner is unable to identify any realistic purchaser other than the relevant State agency. Such misuse of planning controls was criticised in 2007, by the High Court in the previously mentioned *Shu-Ling Chang & Anor v Laidley Shire Council* where increasingly restrictive Queensland land use and heritage development controls were seen as a "cloak" to obscure what is in reality a regulatory taking by stealth:

> *..."Cloak" is an especially apt term here because, instead plainly and openly, of legislatively declaring that the various changes to zoning and uses within the designated area or region, will not attract compensation, that result is achieved by the device, clumsy and obscurantist, of a "properly made application" and the fiction of an application which is not to be treated as an application in fact and in law. If it were at all possible sensibly and properly to read the legislation as conferring a right to compensation upon the appellants I would be glad to do so. I cannot do that, but I can surely at least commend to the legislature the restoration to the appellants, and others similarly affected, of the right to compensation to which historically and morally they are entitled.*[49]

Within NSW the most populous Australian State, the action of some local government authorities on the peri-urban fringe of Sydney is effectively sterilizing significant tracts of natural (or minimally developed) privately owned land, through the imposition of grossly restrictive zonings to protect biodiversity. For example, south of the Sydney conurbation, the semi rural local Government area of Kiama introduced in its 1995 planning document[50], a series

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[45] Hemmings, 13.
[46] s.27(1) Environmental Planning and Assessment Act 1979 (NSW).
[47] *cf Brookes vThe Minister for Planning and Environment & Anor* NSW LEC, 16 December 1988, unreported.
[48] Gray, K, "Can environmental regulation constitute a taking of property at common law?" 24(3) EPLJ 177 (2007).
[49] Chang: Callinan J. at [125].
[50] *Kiama Local Environment Plan 1995.*

of aims and objectives "to minimise the adverse impact of activities within the Council's area on the global environment.[51]

Further, the planning document was said to "assist the sustainability of prime crop and pasture lands"[52] and aimed "to protect biological diversity and maintain essential ecological processes and life support systems"[53]. Whilst the document included the usual raft of zonings, it also introduced a specific zone to address lands in the hinterland of Kiama considered "Areas of High Conservation Value".

These "Areas of High Conservation Value" have been identified using a now traditional matrix-driven technique first proposed by Ian Mcharg in 1969 in his seminal text *Design with Nature*[54], based upon earlier work for the Deleware-Raritan Committee. This technique involves the preparation of a series of map overlays which identify in varying shades of tone the graduations of a particular value, for example intrinsic suitability for conservation[55].

In the Kiama planning document, a similar series of map overlays have been prepared using analogous McHarg techniques, and as a result those areas which are shown as red zoning on the resultant composite maps are identified as having high conservation value. The residual areas not coloured red on the composite maps are thus capable of being used for a range of limited uses such as dwelling houses or agriculture, subject to certain stringent controls.

The land use controls imposed on the Kiama red zones and the residual areas are very restrictive, and when published in 1995, media debate generally over such controls was already occurring:

> *…in the tug between individual and community concerns all sorts of questions are being raised.*[56]

Through careful manipulation of land use controls, local government authorities and State agencies have increasingly taken "steps to avoid the obligation to acquire land"[57] which is zoned so restrictively as to be only capable of realistic use for a public purpose.

As discussed earlier, State agencies and local government have an obligation to acquire land zoned or reserved "for a public purpose" which in effect is a guarantee by the relevant State government that when private land is so grossly diminished in utility that acquisition upon request by the affected owner can occur. The use of highly restrictive zoning such as that in Kiama for "Areas of High Conservation Value" irrespective of the perceived public benefit, is an action which denies the private landowner "a reasonable use of the land".[58] Whether such a

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[51] Kiama Clause 4(2)(p).
[52] Clause 4(2)(r).
[53] Clause 4(2)(t).
[54] MCHARG I.L DESIGN WITH NATURE (1971).
[55] McHarg, 115.
[56] Macken D.,Control thy neighbour, THE SYDNEY MORNING HERALD (26 August, 1995) at 5A.
[57] Hemmings, 15.
[58] The phrase "a reasonable use of the land, is the criterion adopted in *s.21* (3)(b) Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

restriction amounts to a "regulatory taking" is ascertained using the abovementioned test of whether the owner as a result of the restriction is denied such a reasonable use.

Arguably, the continuing use of such restrictive zonings or reservations is "regulatory taking by stealth", and as a defacto taking should trigger the payment of compensation at common law[59]. The central question of what a private owner may regard as constituting a reasonable use of land is in itself somewhat problematic, given that some altruistic owners may voluntarily encumber land to ensure its conservation for their own heirs. Such issues tend to cloud the notion of "a reasonable use of the land".

Nevertheless, sadly there has been only scant public debate regarding the impact of restrictive zones or reservations, and this can perhaps be explained by the large number of State and local government planners populating the Australian planning profession. Increasing restrictions on land usage appears to be justified for the broad public good, and yet this perceived public benefit is increasingly being funded at a private cost as outlined in this paper.

[59] Gray, 167.