

Level 9
89 York Street
Sydney NSW 2000
Email: edonsw@edo.org.au
Webpage: www.edo.org.au

Fran Kelly
Total Environment Centre
Level 2, 360 Kent Street
Sydney NSW 2000

Tel: (61 2) 9262 6989
Fax: (61 2) 9262 6998

21 November 2005

Dear Fran,

Compensation and Rezoning in NSW

We refer to your request for advice from the Environmental Defender's Office Limited (**EDO**) on the issue of compensation in relation to rezoning. The following advice sets out the current legal position in relation to when compensation is required, and the options available to Councils.¹

When is compensation required?

The NSW Constitution does not contain any provisions requiring compensation for acquisition of property or any lesser modification of any property right. Therefore, State legislation may (theoretically) acquire property without requiring the payment of compensation. Indeed, unless they have legislation in place to the contrary, States can acquire on any terms they choose, even though the terms are unjust: *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, 397-8, 412; *Commonwealth v NSW* (1915) 20 CLR 54, 77. See also *Durham Holdings Pty Ltd v NSW* (2001) 177 ALR 436.

NSW has enacted legislation that provides the primary framework for when compensation will be payable in circumstances where the State or its agencies acquires private property. The *Land Acquisition (Just Terms Compensation) Act 1991* deals with the mechanics of compensation in NSW and is not dealt with further here.² There are also two circumstances under the *Environmental Planning and Assessment Act 1979 (EP&A Act)* where compensation may be required. The first is where a development consent is revoked or modified; the second is where land is reserved for certain purposes.

a) Revocation or modification of a development consent

¹ Notwithstanding the following advice, we note the current planning reform process, specifically the "LEP Template" may change environmental protection zoning and include a standard mandatory provision detailing when compensation is required.

² The *Land Acquisition (Just Terms Compensation) Act 1991* defines land under section 4 as 'including any interest in land'. Interest in land is, in turn, defined as: (a) a legal or equitable estate or interest in the land, or (b) an easement, right, charge, power or privilege over, or in connection with, the land. Acquisition is defined as an acquisition of land or of any interest in land (section 4). The Act provides two mechanisms for land acquisition – that is, land is acquired either compulsorily or by agreement.



Under the *EP&A Act*, the Director-General and councils have the power to revoke or modify the granting of a development consent in limited circumstances. Revocation or modification must be in writing. The terms under which a revocation or modification can be made are quite narrow; a revocation or modification may be done ‘at any time it appears...having regard to *draft* [relevant planning instruments]...that the development...should not be carried out or completed’ (section 96A(1)). In other words, if a council is seeking to amend the planning controls that apply to an area of land, for example by rezoning the land, and a development which has the benefit of development consent, but which has not been commenced or completed is inconsistent with the proposed new zoning, the council can revoke the consent, but will be required to compensate the holder of the development consent for its loss of the development rights associated with the consent.

Before revoking or modifying the consent, the Director-General or council must give affected parties the opportunity to show cause why the change should not be effected (section 96A(3)).

An ‘aggrieved person’ is entitled to recover compensation (from either the Government or council) in a limited context. Such compensation are only for “sunk costs” and do not extend to future losses. Specifically, compensation is only for expenses incurred pursuant to the consent during the period between the date on which the consent becomes effective and the date of service of the “show cause” notice under section 96A(3) and which have been rendered abortive by the change (section 96A(7)). Consents granted by the Minister or by the Land and Environment Court are not subject to compensation provisions (section 96A(9)).

b) Reservation of land

Part 3 of the *EP&A Act* sets out the process for the making, amending and repealing of environmental planning instruments, including local environmental plans. Draft local environmental plans are prepared either by a local council on its own initiative or pursuant to a direction from the Minister.

Section 24 of the *EP&A Act* states that:

Without affecting the generality of any other provisions of this Act, an environmental planning instrument may be made in accordance with this Part for the purposes of achieving any of the objects of this Act.

The objects of the *EP&A Act* are found at section 5 and include:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

...

(iv) the provision of land for public purposes,

...



(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and

(vii) ecologically sustainable development, and

...

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

In addition, section 26 of the *EP&A Act* explicitly provides that:

(1) Without affecting the generality of section 24 or any other provision of this Act, an environmental planning instrument may make provision for or with respect to any of the following:

(a) protecting, improving or utilising, to the best advantage, the environment,

(b) controlling (whether by the imposing of development standards or otherwise) development,

(c) reserving land for use for the purposes of open space, a public place or public reserve within the meaning of the [Local Government Act 1993](#), a national park or other land reserved or dedicated under the [National Parks and Wildlife Act 1974](#), a public cemetery, a public hospital, a public railway, a public school or any other purpose that is prescribed as a public purpose for the purposes of this section,

...

(e) protecting or preserving trees or vegetation,

(e1) protecting and conserving native animals and plants, including threatened species, populations and ecological communities, and their habitats,

....

(2) If land declared to be critical habitat is land to which an environmental planning instrument described in subsection (3) applies, the instrument must be amended as soon as practicable after the declaration to identify the land that is critical habitat.

....

If an environmental planning instrument reserves land for use exclusively for a purpose referred to in section 26(1)(c) being for a public reserve, national park or other public purpose, section 27 of the *EP&A Act* provides that that environmental planning instrument shall make provision for or with respect to the acquisition of that land by the Council.

Options available to Councils

For the reasons set out above, compensation will only be payable by a local council in two very limited circumstances; if it revokes or modifies a development consent in association with amendments to an environmental planning instrument; and if it acquires land for a public purpose.




It is often assumed that if council rezones land for environmental protection purposes, then compensation will be payable. This is not correct. In circumstances where land that is, for example, zoned 2(c), and council wishes to rezone the land for a purposes other than a public purpose (usually the zone 6 categories) then no compensation will be payable. Therefore, if council has a zoning scheme in place in its primary environmental planning instrument which has environmental protection zones that apply to private land (usually zone 7) then it can, subject to complying with the requirements of Part 3 of the *EP&A Act*, rezone the land without paying compensation.

The primary reason why compensation is not available in these circumstances is that the *EP&A Act* provides a "safety net" for the continuation of lawfully commenced uses of land through what are known as existing use rights. That is, if land zoned 2(c) is lawfully being used for the purposes of a retirement village prior to a rezoning of the land that makes the use prohibited, that use may continue, or be intensified (subject to development consent being obtained). However, if the land is used for the purpose of a dwelling house prior to the rezoning, that use (which is likely to remain permissible) can continue, but the owner/developer could not, after the rezoning occurs, seek to develop the land for a residential flat building. In other words, the legislative scheme enables the continuation of development rights that had been exercised before the rezoning, but not those that were "potential development rights".

Should you have any queries, please do not hesitate to contact me on 9262 6989.

Yours faithfully

Environmental Defender's Office Ltd



Jeff Smith,
Director

