

# The balance of planning ideologies in Existing Use Rights cases at the New South Wales Land and Environment Court

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**ABSTRACT:** Planning appeals exist at the apex of the planning process. The impact of decisions of courts and tribunals extends well beyond the individual dispute. Indeed, planning appeal decisions have a profound impact on the day-to-day work of planners and local officials. Unfortunately, planning scholars have largely left examination of planning appeals to legal scholars, essentially divorcing the legal realm from the administrative realm. In this paper, I contribute to narrowing this gap in the literature by drawing on McAuslan's (1980) notion of "planning ideologies" to examine the ideological conflicts inherent in progressing a planning dispute into the legal realm – that is, into an arena where the public interest nature of planning encounters the traditional tendency of courts to protect private property rights. I focus on cases where the New South Wales Land and Environment Court has considered "existing use rights," which protect private property owners when a new planning regulation makes their formally lawful use of their land unlawful. Using a selection of cases, I investigate how the Court balances the traditional tendency to protect private property rights by liberally interpreting existing use rights with the public interest desire of government to limit the conditions under which someone can continue a use that is prohibited. Given the influence that the Land and Environment Court decisions have over development assessment decisions at the local level, knowing this balance adds an essential piece of the puzzle that is the planning process.

## 1.0 INTRODUCTION

Whether through legislation that frames the urban planning process or through appeal bodies such as courts or tribunals, where implementation of that framework is reviewed, the law plays an integral role in the planning process. The law provides the boundaries within which public authorities must act. When there is a disagreement about where those boundaries lie, courts and administrative tribunals provide a forum where the decisions of public authorities may be reviewed. In essence, planning appeals exist at the apex of planning processes and the impact of decisions of courts and tribunals extends well beyond the individual dispute (Willey 2000; Booth 2007; Edgar 2013b; McAuslan 2003; Mualam 2014; Pearson & Williams 2009). For that reason, as McAuslan (1980, p.xii) succinctly puts it, it is important to gain knowledge about "...what our lords and masters are up to and how they say it." Unfortunately, planning scholars have largely left examination of planning appeals – their justification, composition, resolution and impact – to legal scholars and as such, planning appeals remain theoretically underdeveloped (Willey 2007; Mualam 2014; McAuslan 2003). Essentially, planning scholars have divorced the legal realm from the administrative realm, when in reality both are integral parts of the planning process. When it comes to understanding planning from both a procedural and substantive standpoint, a large piece of the puzzle is missing. In this paper, I contribute to narrowing what Willey (2007, p.1675) describes as a "chasm in planning knowledge" by drawing on McAuslan's (1980) notion of "planning ideologies" to examine the ideological conflicts inherent in progressing a planning dispute into the legal realm, where the public interest nature of planning encounters the traditional tendency of courts to protect private property rights. I focus on cases where the New South Wales Land and Environment Court has considered "existing use rights," which protect private property owners when a new planning regulation makes their formally lawful use of their land unlawful. This area of law pits private property interests against the broader public interest considerations of planning regulations. Using a selection of cases, I investigate how the Court balances the traditional tendency to protect private property rights by liberally interpreting existing use rights with the public interest desire of government to limit the conditions under which someone can continue a use which is prohibited by current planning regulations. Given the influence that the Land and Environment Court decisions have over development assessment decisions at the local level, knowing this balance – and how it might conflict with conception of "good planning" of local officials and the general public – adds an essential piece of the puzzle that is the planning process.

## 2.0 PLANNING DISPUTES IN THE COURTS: THE LITERATURE

Law has a profound impact on urban development. As McAuslan (2003, p.139) explains, the law "...defines the system of urban government, it establishes the system of urban planning and regulation of land development, and it delimits the powers of the urban planners and managers." In particular, development

controls represent a significant intrusion into private property rights. Through these controls (for instance, zoning, height controls, floor space ratio, etc...) governments limit what private property owners can do with their land. For property owners, development control is effectively the "...sharp end of the planning system; it stops him doing what he wants with his land..." (McAuslan, 1980, p.147; see also Booth 2002). As a "check" on government intrusion into private property rights, planning legislation in most common law jurisdictions, Australian states included, establishes opportunities for judicial (court) or quasi-judicial (administrative tribunal) oversight of development assessment decisions. In New South Wales, the appellate body for environmental and planning matters is the Land and Environment Court (LEC), a "specialist court" established in 1980 (Ryan, 2002; Stein, 2002).

There are two ways in which the Land and Environment Court may review the development assessment decision of local council: through an application for judicial review or a merit appeal. **Judicial review** involves the Court reviewing *how* an administrative decision was made and declaring invalid decisions that it finds were made arbitrarily or inappropriately (Willey, 2000; 2004). Here, the Court considers such questions as: Was the decision-maker biased? Did they take into account any irrelevant considerations? If the Court overturns a decision in a judicial review, the matter is sent back to the original decision-maker for re-hearing; in other words, the whole process starts again. In the end, the decision might be the same (so long as it is made using proper processes). **Merit appeals** (the focus of this paper) represent a much more attractive avenue for unhappy property-owners (Edgar, 2013b). While in a judicial review, the Court is reviewing the decision-making *process*, in a merit appeal the Court is reviewing the *outcome*. Essentially, the Court is standing in the shoes of the original decision-maker, hearing evidence and exercising its judgment about the merits of the case (England 2014). Ultimately, the Court can substitute its own (often subjective) decision to grant a development application that was refused in the first instance by council.

Importantly, the impact of merit appeal decisions extends well beyond the individual dispute, "trickling down" to local officials who consider development applications and who do not want their decisions to be overturned on appeal (Edgar 2013b; Pearson & Williams 2009). Local officials may be coerced into approving applications they may otherwise have approved (Willey, 2000). As Edgar (2013b, p.77) explains: "The potential for decisions to be appealed to a tribunal puts the primary decision-maker in the position of having the tribunal 'over its shoulder'." Moreover, planning appeal decisions can also impact future policy development (Willey 2000; 2004; Edgar 2013b; Mualam 2014; Pearson & Williams 2009; Booth 2007). For this reason, it is important for planning scholars and planning practitioners to understand what is happening in this parallel planning system. What are the implications of progressing a planning matter from the administrative (and sometimes political) realm into the courtroom? In the administrative realm, a planning matter can involve multiple parties, including council, the developer, other levels of government and objectors. In the legal arena, the same matter is transformed into an adversarial contest between the council and the developer and is presided over by a judge or commissioner who relies heavily on expert evidence to make a decision. In this forum, the "lay" evidence of objectors is given little weight and oftentimes narrow points of law – rather than the planning merits – become the deciding factor of the case (Edgar, 2010; 2011; Stewart 1999; Willey 2004; 2007). As England (2014, p.41) questions: "Merits review requires members of the legal profession to adopt a 'planning hat' so as to adjudicate the planning merits of a particular decision... Should legal professionals, trained in the intricacies of legal interpretation and doctrinal analysis, be required to take on this other disciplinary role? Are they up to the task of adjudicating planning disputes?"

A key question is the focus of this paper: *Are the courts in any way biased towards a particular ideology that might influence how they approach planning disputes?* Indeed, McAuslan identified in 1980 a tendency of the courts in the UK to protect the interests of private property owners in planning matters. According to him, at any one point in time, planning law can be seen as the outcome of the competition between the ideologies of private property, the public interest and public participation. The ideology of private property – originating in the common law and traditionally espoused by courts – views the law as a vehicle through which to protect private property interests. On the other hand, the ideology of the public interest sees law as a vehicle for advancing the public interest (if necessary, against the interests of private property) as determined by the government. In opposition to both of these, the ideology of public participation views the law as a tool for protecting a citizens' rights to have a say in development decisions, not because they are personally affected, but because it is their democratic right to express community concerns. According to McAuslan, the traditional tendency of courts is to ensure that the interests of landowners prevail over broader social, environmental and economic concerns – in other words, over public interest factors – and community concerns. Adshead (2014) recently revisited McAuslan's study and found that the dominance of private property interests in the courts in the UK remains strong. While the public interest is allowed to operate in some areas, it is always "...under the terms of private interest" (Adshead 2014, p.192). Other planning and legal scholars since McAuslan – including Sperling (1997), Edgar (1999; 2011; 2013a), Booth (2002), Edgeworth (2008), England (2014) –

have acknowledged that while throughout history there have been periods where the courts have become more sympathetic towards broader public interest concerns (especially after World War II), the ideology of private property remains deeply entrenched. Is this the case in the NSW Land and Environment Court? If so, how does this ideology manifest itself?

### 3.0 THE CURRENT STUDY: A CASE SURVEY OF EXISTING USE RIGHTS CASES

In order to examine whether the Land and Environment Court has retained the “traditional” tendency of courts to favour private property interests, I am examining cases in one area of planning law wherein the clash between private property rights and the government’s desire to implement public interest plans is prominent – that of Existing Use Rights (EURs). EURs arise when a legal planning instrument (in New South Wales, typically a Local Environmental Plan) makes a previously lawful use of land unlawful. Where a change involves “up-zoning,” or changing to a more valuable zoning (for instance, rural to residential), this is not likely to cause an issue: the landowner has an economic incentive to change in accordance with the new plan. However, where the change involves “down-zoning,” or changing to a less valuable zoning (for instance, high-density residential to low-density residential), there is no economic incentive for the landowner to change in accordance with the new plan and they will likely wish to continue the “existing use” (Whitehouse, 2012). In that situation, Existing Use Rights protect landowners by protecting their right to continue to use their land as they were before that use become prohibited by the new planning regime.

In New South Wales, EURs are enshrined in the *Environmental Planning and Assessment Act, 1979*. Section 107(1) states that “except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.” Furthermore, in recognizing that it would be an unreasonable restriction on private property rights to “freeze” existing uses as they were when the planning regime changed, Part 5 of the *Environmental Planning and Assessment Regulation, 2000* states that council may give development consent to alter, extend, enlarge, expand, intensify or rebuild an existing use. There are some caveats set out in the EPAA and the EPAR, however, restricting when a property owner may make any changes to their existing use and over the years, these restrictions have tightened (Whitehouse, 2012; Hewitt & Gerathy, 2011). For instance, approval can only be given for changes that are minor and do not involve an increase of more than 10% of the floor space. In addition, if an existing use ceases for more than 12 months, it is assumed that the use is abandoned. Perhaps most significantly, any changes **must be for the existing use and for no other use**. Prior to 2006, a landowner could apply to change an existing use to any other prohibited use (making properties with EURs particularly valuable<sup>1</sup> [Cummins, 2006; Hewitt & Gerathy, 2011]), but in 2006 the legislature amended the Regulations to put strict limits on this right and now a property owner with EURs can only change a commercial use to another commercial use and a light industrial use to another light industrial use. So, while EURs are indeed protected by legislation, they have, over time, become more limited in accordance with the government’s desire to ensure planning regimes (which in effect govern the current and future character of an area) are implemented. As Whitehouse’s (2012, pp.1375-1376) observes, the “the law on existing use rights is directed at the appropriate balance between the rights of landowners whose uses of their land are affected (usually adversely) by planning changes and the public expectation that the planning change envisaged by a new plan will actually be achieved.”

In this study, I have employed the case survey methodology, similar to Edgar (2006a; 2010; 2011; 2013a; 2013b) and McAuslan (1980). For instance, Edgar (2013b) recently used this methodology in his study of the precautionary principle in merit appeals at the Land and Environment Court; in this study, he read each case in his sample to ascertain how the precautionary principle was applied. According to Edgar (2013b, p. 64), “this methodology enables the researcher to see how the tribunal analyses the evidence and applies rules, policies and principles to make findings and draw conclusions.” In order to locate EUR cases (which primarily involve a developer appealing council’s refusal or deemed refusal of a development application to somehow change an existing use), I searched Land and Environment Court cases through the New South Wales Caselaw website using the search term “Existing Use Rights.” This produced a list of over 600 cases, spanning the years 1998 to 2015. I further refined my search to cases where EURs was a material and not a tangential issue. In other words, similar to McAuslan’s (1980, p.162) study of the ideology underlying development assessment appeals in the UK, I focused on cases where the court’s consideration of EUR was “sufficiently at the forefront of the decisions that something of the ideology behind them [could] be detected.”

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<sup>1</sup> For instance, as set out in Cummin (2006), up until the changes in 2006, a developer could purchase an industrial site with existing use rights in a low-density residential area with a plan to convert it to another prohibited use such as a shopping centre or apartment building. According to Cummin (2006), “this gave the owner of a site with existing use rights a great commercial advantage.” Indeed, developers purchased sites specifically because they held EURs.

Of the 100 cases that I have reviewed thus far,<sup>2</sup> the issue of EURs has been a material issue in 34. Broadly, these can be grouped into two “types” of EURs cases:

(a) *“Characterization” cases*: In these cases, prior to the consideration of a merit appeal, the Court is asked to define the proponent’s EURs. Because any changes made to a property with EURs must be only for that use and no other use (except in the very narrow circumstances outlined above), how the existing use is defined is often a key issue. As argued by Edgar (1999), Sperling (1999) and Whitehouse (2012), a liberal approach to the characterization of EURs favours the interests of the landowner and their private property rights over the public interest. A narrow approach reduces the scope of the continued use and restricts what landowners can do with their property. According to Edgar (1999, p.49), up until 1999 the approach of the courts fluctuated, but in general, the courts tended to adopt the liberal approach, thereby “tip[ping] the scales decisively in favour of the landowner.” The present study analyses whether the liberal approach has continued since 1999.

(b) *Merit appeals*: In these cases, the existing use has been established and the Court is asked determine, on its merits, whether a development application to rebuild, alter, expand, intensify, etc... an existing use should be approved. Because of section 107(1) of the EPAA and unlike other merit appeals before the Land and Environment Court, any planning control (e.g. zoning, height limits, floor space ratio, landscaping requirements, etc...) that would in effect make the proposed development of the existing use illegal does not apply (Whitehouse, 2012; Hewitt & Gerathy, 2011). However, a line of LEC cases decided since the mid-2000s (in particular *Stromness Pty Limited v Woollahra Municipal Council* [2006] NSWLEC 587 and *Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71) has established that the controls are to be considered (even though they are not determinative), as they are a “guide” to the desired future character of the area. Thus, these merit appeal cases usually involve a Commissioner (or, less often, a Judge) making a determination of whether the change to an existing use will “fit in” with its surroundings, thereby weighing the private property rights of the landowner against council’s desire to achieve conformity through its planning controls.

In all, I examined each of the sample cases to identify whether either the characterization of the use or the determination of the merits of the Development Application favoured the private property owner or Council. I also categorized the cases in terms of the Local Government Area involved and type of use proposed, in order to analyse whether there was any tendency to favour the property owner or the council changed according to area or type of use. Finally, I noted whether there was any form of public participation in the decision and if there was, who participated, why (that is, was it neighbours participating to defend their own private property interests or people participating for more “community” concerns) and what influence that participation had on the outcome.

## 4.0 RESULTS

In terms of geographic distribution, while this is admittedly a small sample that is part of an ongoing study, it appears that EUR cases may be more common in metropolitan Sydney than in non-metropolitan Sydney. More specifically, a majority of the sample cases deal with development applications from the North (including such local councils as Lane Cove, Manly, Mosman, Ku-ring-gai and North Sydney) and Central (including such local councils as City of Sydney, Leichhardt, Strathfield and Woollahra) Sub-Regions of Metropolitan Sydney – both regions that, according to RP Data (as set out by Kusher, 2014), encompass councils with some of the highest median house prices in New South Wales and in fact, Australia:<sup>3</sup>

**Table 1: Geographic distribution of cases**

| <b>Geographic Locations</b>   | <b>Number of cases</b> |
|-------------------------------|------------------------|
| North Sub Region (SYD)        | 12                     |
| Central Sub Region (SYD)      | 9                      |
| West Sub-Region (SYD)         | 2                      |
| South Sub-Region (SYD)        | 1                      |
| South-West Sub-Region (SYD)   | 1                      |
| West-Central Sub-Region (SYD) | 1                      |
| Outside Sydney Metro Area     | 9                      |

<sup>2</sup> This study is ongoing. I am currently adding to my sample of Existing Use Rights cases.

<sup>3</sup> For the purposes of this research, I have adopted the NSW government’s definitions of Sydney’s sub-regions as set out in the recently adopted *A Plan for Growing Sydney* (NSW Planning and Environment, 2014). See Appendix 1 for a map detailing the sub-regions.

Taking the North and Central Sub-Regions together, one case was decided on Consent (that is, the property owner and the Council reached an agreement for the development, which was endorsed by the Court), 5 were decided in favour of the property owner (that is, the development application was approved) and 15 were decided in favour of Council (that is, the development application was rejected). In the small number of cases decided in the rest of the Sydney Metro area (5), all were decided in favour of council. In total for Metro Sydney, 5 cases favoured the property owner and 20 cases favoured the decision of the council to reject the development. Outside of Metro Sydney, the situation appears to be different: one case was decided on consent, 4 favoured the property owner and 4 favoured council.

When the cases are categorized in terms of the use proposed (that is, housing, commercial, industrial, etc...), likely because of the concentration of cases in with councils with high median housing prices, the majority of cases in the sample involved a property owner wanting to somehow increase density in an otherwise low-density residential neighbourhood. The rest of the cases involved the proponent wishing to either rebuild or somehow alter their commercial establishment:

**Table 2: Number of cases by type of use proposed**

| Type of Use Proposed                         | Number of Cases |
|--|-----------------|
| Increasing Housing Density                   | 19              |
| Rebuilding/Adding to a Commercial Enterprise | 15              |

For the housing density cases, 17 of the cases involved the proponent applying to use their EURs to either build or re-build a Residential Flat Building (RFB) in a low-density residential neighbourhood. Where the property owner proposed rebuilding a RFB, that re-building would involve increasing the number of flats in the building. For instance, *Jojeni Investments Pty Ltd v Mosman Municipal Council* [2014] NSWLEC 120 involved a property owner applying to demolish an existing dwelling with 2 flats and build a RFB with 3 flats in a low-density residential zone. The case centred around the characterization of the existing use (“duplex” versus “RFB”) and the Court decided that the proponent could only rebuild 2 flats. As it turns out, in this sample, decisions unfavourable to the applicant are common: of the 17 cases, one was decided on Consent, only two favoured the property owner and 16 favoured Council. For the commercial cases, the Court tended to be relatively more favourable to property owners, with one case decided by Consent, 6 decided in favour of the property owner and 8 decided in favour of Council. For instance, in the case of *Sgro v Greater Taree Council* [2014] NSWLEC 1113, the proponent applied to demolish a caravan park, service station and caravan sales centre with EURs in order to build a “Service Centre,” including a Shell and Hungry Jack’s, which would amount to a total of over 700m2 additional floorspace. The Council argued that a Service Centre is a very different use than what already existed and raised concerns about the impact of the Service Centre on the local village. However, in its decision, the Court seemed to ignore these concerns, finding that in fact, the proponent would be re-building an existing use and it on its merits, the application should be approved.

In terms of the date the cases were decided, there is a relatively even split in the sample between those cases decided prior to the government’s tightening of restrictions to EURs in 2006 and those decided after:

**Table 3: Number of cases by date**

| Date      | Number of cases |
|-----------|-----------------|
| 1999-2005 | 16              |
| 2006-2015 | 18              |

In fact, for the sample cases, it appears that the tightening of restrictions in the mid-2000s may have affected the tendency of the court to decide in favour of property owners. Between 1999 and 2005, 6 cases of the sample cases were decided in favour of the property owner and 10 were decided in favour of Council. For the cases in the sample decided after 2006, two were decided on Consent, 3 were decided in favour of the property owner and 13 were decided in favour of Council. Indeed, in 2005, a very important case in the realm of EURs was decided which has been used since that year as a Planning Principle:<sup>4</sup> *Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71. This case set out a “test” to be used by the Court and

<sup>4</sup> Planning Principles are cases decided by the Land and Environment Court in which the Court sets out “principles” which may be applied by both the Court and Councils in future cases with similar circumstances to promote consistency in decision-making. They are not legally-binding on either the Court or Council, but they are set out by the Court as providing guidance to decision-makers.

development assessment planners in determining development applications based on EURs. In that case, the Court stressed that even though planning controls did not apply to properties with EURs, they still must be taken into account in determining how the proposed development will impact adjoining properties and how the bulk and scale of the proposed development would relate to what is permissible on surrounding sites. In effect, then, the Court appeared to be acknowledging the importance of **compatibility** with neighbouring properties, if not **conformity**.

Again, more cases will be added to this sample in order to make more robust conclusions about any correlations, but preliminary analysis appears to indicate that the LEC is becoming more sympathetic to the desire of local councils to minimize a private property owner's EURs. This is particularly the case where the proposed use involves increasing housing density in a low-density residential environment. The Court appears to be somewhat more sympathetic to the EURs of private property owners in the commercial realm, where the impact on adjoining properties does not appear to be as much of a concern.

## 5.0 DISCUSSION

In his study of EURs cases from in the LEC up to 1999, Edgar (1999) found that while the Court's approach had fluctuated over the years, by 1999 it tended to favour the interests of the landowner/applicant. He found that this was at the expense of broader environmental concerns reflected in local plans. Similarly, in his study of development assessment appeal decisions in the UK, McAuslan (1980) found that the Courts tended to favour protecting private property rights by focusing on narrow physical amenity issues (such as siting, building design, landscaping, overshadowing, views) at the expense of broader social, economic, environmental, financial and general need concerns (which he saw as "public interest" considerations - non-physical concerns that were much harder to prove with evidence). If the courts rejected a development application, it was because it negatively impacted the physical amenity of the property in question or of neighbouring properties, not because it violated wider social, economic and similar public interest concerns.

The cases examined for this paper seem to echo these findings. When one examines the results presented above, it does seem that, particularly since the mid-2000s, the LEC has been making decisions more favourable to local councils at the expense of the freedom of private property owners with EURs. However, when one looks more closely at the cases in which the Court has agreed with Council's rejection of a development application, in almost every case, the application is rejected not based on wider public interest concerns, but on narrow physical amenity (i.e. private property) considerations – for instance, the court does not approve of the internal amenity of the design or the impact of overshadowing on neighbours is too great. And the assessment of the impacts on amenity is often very subjective. For instance, in the case of *Bonim Stanmore v Marrickville Council* [2004] NSWLEC 671, the proponent submitted a DA to demolish an existing club building and rebuild residential townhouses. The proposal was supported by Council planners, but ultimately rejected by Council. Despite both the proponent's experts and the Court-appointed expert supporting the application, the Court decided that the impact of the townhouses on the surrounding residents would be "unacceptable." Where the Court has sided with the landowner, it is because the development proposed is judged as compatible in character of the surrounding properties. For example, in the case of *The Owners of Strata Plan No. 855 v Gosford City Council* [2011] NSWLEC 9, the landowner's proposal to build a larger RFB in a neighbourhood zoned low density was approved because the neighbourhood was already characterized by diversity and "eclectic" development.

It does not appear, from the results obtained thus far, that public participation shifts the focus of the Court from narrow private property concerns to broader public interest concerns; indeed, the vast majority of "public participation" in the cases is by neighbours objecting to a particular development because it somehow negatively impinges on the amenity of their private property (e.g. loss of views, overshadowing, loss of privacy, etc....). Even when neighbours are not present to raise amenity concerns, the potential impact on their amenity is a primary concern of the Court. In the only case where a truly "public interest" objection was put to the Court by Council (that is, the *Srgo* Case detailed above wherein the Council argued that the property owner's proposed service centre would have negative economic impacts on local businesses in the nearby village), the Court did not seem to place much, if any, weight on that argument. In all cases, whether the Court sided with the landowner or with Council, the landowner and properties in the immediate vicinity were the primary concern of the Court. It seems surprising that in the cases where increased residential density is being proposed in an inner-city neighbourhood (which seems to support New South Wales' government strategy to direct at least some future development to already built-up areas of the city), no mention of wider, metropolitan-level strategies were made by either the proponent or the Court in any of the cases. And while Local Environmental Plans were heavily referred to and relied upon by both parties, the focus was largely on

the protection those controls afforded to neighbourhood amenity, not any broader goals (if any) those controls were seeking to accomplish.

So while McAuslan (1980, p.152) concluded in his study that "...the evidence does show that there is an increasing willingness to move from physical amenity considerations towards more economic and social considerations as being considerations which it is proper to take into account in determining a planning application," preliminary results from this research do not, at least in the area of Existing Use Rights, indicate that the strength of this willingness has increased. It appears that Commissioners and Judges of the Land and Environment Court continue to place the private property rights of individual landowners (and the planning controls that protect these rights) at the heart of land-use planning decisions. Since the Land and Environment Court sits at the apex of the planning process in New South Wales, this raises questions about the current and future efficacy of strategic plans where those plans relate to wider, non-physical "public interest" concerns.

## **6.0 CONCLUSIONS**

Given the impact of court decisions on the planning process and on planning policy, it is important that planning scholars begin to examine how decisions are being made in the legal arena and, in particular, whether that arena favours one particular outcome over another. The literature has identified a tendency on the part of the courts to favour the interests of private property owners over more "public interest" concerns such as environmental protection, economic development or social equity. In the area of Existing Use Rights in New South Wales, that assertion seems to hold true. While the Land and Environment Court is, at least in the majority of the sample cases, ruling in favour of Council, it is not usually doing so for broader public interest reasons. Private property rights are still at the forefront – most particularly, the private property rights of landowners in the immediate vicinity. A central concern for the Court is whether a proposal will "fit in" with the surrounding area and whether it will impact negatively on the amenity of neighbouring properties. This is particularly the case where a property owner with EURs is proposing to add density to an established low-density (often high property value) neighbourhood. It is almost as if the key concern has become not the rights of the landowner proposing the development, but the collective private property rights (e.g. views, privacy, etc...) of the neighbouring properties. And the more homogenous that neighbourhood is in terms of the type of residential development, the harder it is for a landowner with EURs to add density. This suggests that the Courts tend to be protective of the status quo, particularly in established residential areas; however, in a fast-growing city like Sydney where the need for infill in those established residential areas has been recognized by the State government in successive metropolitan plans, the Court's tendency to protect the amenity of private property owners in these neighbourhoods is problematic. The fact that the need for infill housing in Sydney was not raised in any of the sample cases dealing with residential intensification suggests that the focus of the Court is on neighbourhood issues, not on wider metropolitan issues. This has broader implications for the implementation of metropolitan-wide strategies going forward.

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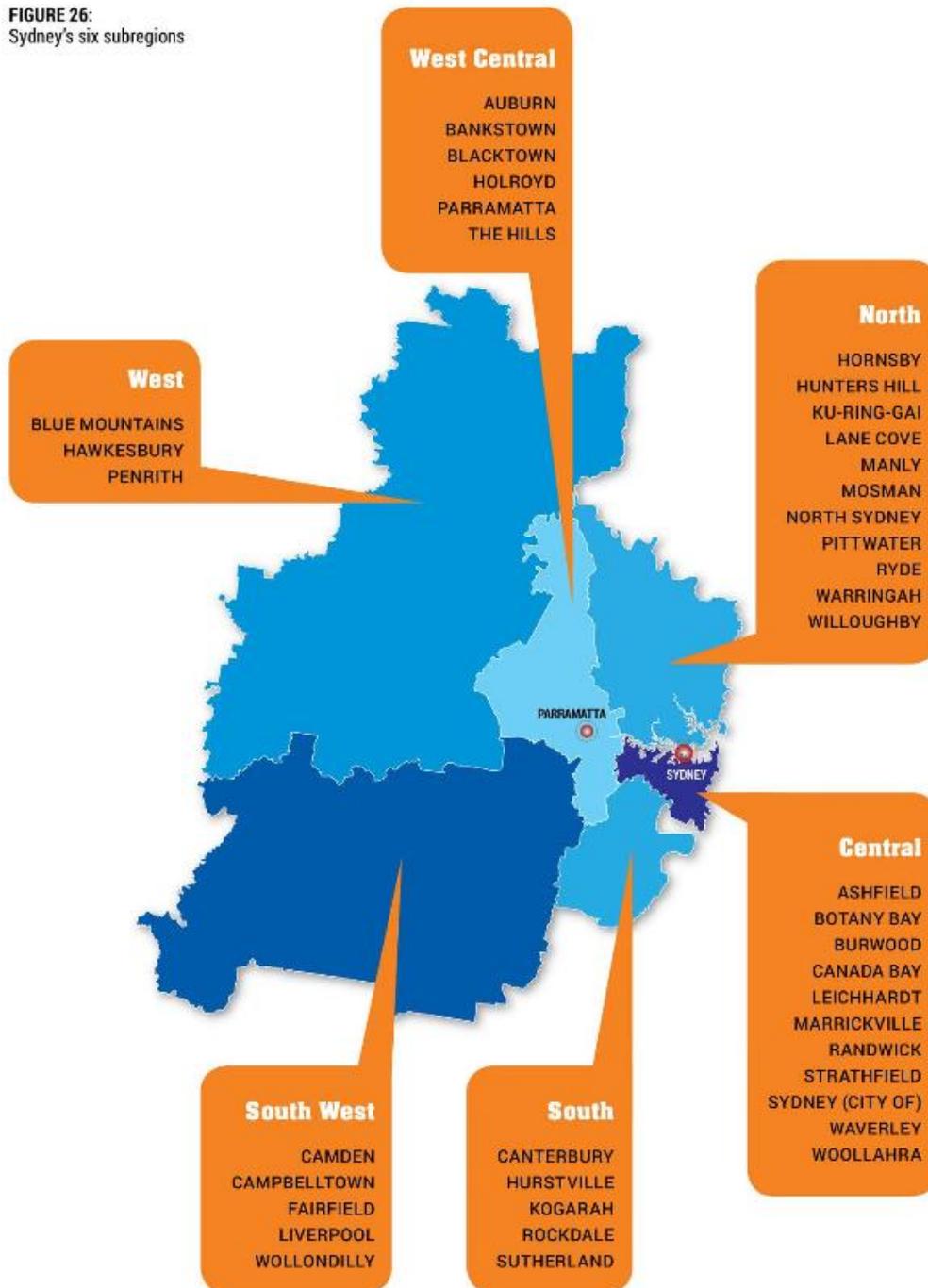
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## APPENDIX

**FIGURE 26:**  
Sydney's six subregions



Source: NSW Planning and Environment (2014, p.107)