SUPREME COURT OF QUEENSLAND

CITATION:	*Mahoney & Ors v Chief Executive, Department of Transport and Main Roads* [2014] QCA 356
PARTIES:	**JOHN MAHONEY** **KATHRYN MAHONEY** **AUSTIN MAHONEY** (applicants) **v** **CHIEF EXECUTIVE, DEPARTMENT OF TRANSPORT AND MAIN ROADS** (respondent)
FILE NO/S:	Appeal No 4125 of 2014 Land Appeal No 4 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from the Land Appeal Court
ORIGINATING COURT:	Land Appeal Court
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2014
JUDGES:	Margaret McMurdo P and Gotterson JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal refused.** **2. Applicants to pay the respondent's costs of the application on the standard basis.**
CATCHWORDS:	REAL PROPERTY – COMPULSORY ACQUISITION OF LAND – COMPENSATION – ASSESSMENT – OTHER CONSIDERATIONS – where the applicants purchased the land in 1982 when it was zoned Future Urban – where in 1999 the land was rezoned Rural – where the land was resumed in 2005 – where compensation was valued at $275,000 – where it was agreed that if zoned Future Urban, the compensation would have been $1,707,500 – where the respondent contended that there was no causal connection between the rezoning and the acquisition – where the Land Court found that the rezoning was related to the acquisition and applied the principle from *Housing Commission (NSW) v San Sebastian Pty Ltd* to value the land as Future Urban – where the Land Appeal Court reversed the decision – whether the Land Appeal Court erred in accepting the evidence of a town planner involved with the rezoning – whether leave should be granted to appeal

Abalos v Australian Postal Commission (1990) 171 CLR 167; [1990] HCA 47, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited
Housing Commission (NSW) v San Sebastian Pty Ltd (1978) 140 CLR 196; [1978] HCA 28, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited

COUNSEL: M T Labone for the applicants
D R Gore QC, with T Trotter, for the respondent

SOLICITORS: BCCS Law for the applicants
Clayton Utz for the respondent

[1] **MARGARET McMURDO P:** I agree with Gotterson JA's reasons for concluding that the applicants have not demonstrated any error or mistake in law on the part of the Land Appeal Court warranting the grant of leave to appeal to this Court under s 74 *Land Court Act* 2000 (Qld). I agree with the orders proposed by Gotterson JA.

[2] **GOTTERSON JA:** In 1982, the applicants, John Mahoney, Kathryn Mahoney and Austin Mahoney, jointly acquired a fee simple interest in the land described as Lot 229 on RP 202963 in the County of Churchill, Parish of Purga situated at 16-22 Ipswich-Boonah Road, Yamanto ("the land"). The land had an area of approximately 16 hectares.

[3] On 24 March 2006, some 8.593 hectares of the land ("the resumed land") was resumed by the respondent, Chief Executive, Department of Transport and Main Roads, pursuant to the provisions of the *Acquisition of Land Act* 1967 (Qld) ("the Act"). The notice of intention to resume[1] dated 13 October 2005 and served on the applicants stated that the resumed land was to be taken "for future transport purposes including the facilitation of transport infrastructure (namely road and busway, rail or light rail) for the South-West Transport Corridor" ("SWTC").

[4] The SWTC is a transport corridor that connects Springfield with the Cunningham Highway. Construction of the corridor infrastructure was a project undertaken by the Department of Main Roads ("DMR"). In early 2000, DMR appointed external consultants to investigate implementation of the corridor project. A final impact assessment study identifying the preferred route for the corridors was completed in June 2005. The preferred route envisaged resumption of the resumed land for the corridor.

[5] On 20 March 2013 and after a hearing over three days in the Land Court of Queensland, compensation for the acquisition of the resumed land was ordered in an amount of $1,707,500 with interest payable from the date of acquisition at differing rates for the intervening years between resumption and award.[2] On 21 March 2014, the Land Appeal Court allowed an appeal and set aside the orders made on 20 March 2013. It further ordered that the matter be remitted to the Land Court for determination of the compensation to be awarded to the applicants and any interest payable to them.[3]

[6] Section 74(1) of the *Land Court Act* 2000 (Qld) permits a party to a proceeding in the Land Appeal Court to appeal to this Court on specified grounds. One of those grounds is

---

1 AB1681-1682.
2 AB1962; Reasons AB1942-1961.
3 AB1992; Reasons AB1963-1984.

error or mistake of law on the part of the Land Appeal Court. Section 74(2) thereof requires a party who wishes to appeal such a decision to obtain the leave of this Court to do so. By an application filed on 2 May 2014, the applicants seek leave to appeal to this Court against the decision given by the Land Appeal Court on 21 March 2014.

The zoning of the land

[7] The land is at the intersection of the Ipswich-Boonah Road and the Cunningham Highway, to the east of the former and the south of the latter. In 1982 it was located within the Moreton Shire. At the time, it was zoned Future Urban under the Moreton Shire Planning Scheme. In 1995, the Ipswich City Council ("ICC") and the Moreton Shire Council ("MSC") amalgamated with the consequence that the land became located within the area administered by the ICC.

[8] On 18 February 1999, the Ipswich City Council Planning Scheme ("the 1999 Planning Scheme") was approved. Under the 1999 Planning Scheme, the land was rezoned as Rural. It had retained that zoning by the date of the resumption.

The issue in the Land Court

[9] In the Land Court, the parties were agreed that, based on its zoning as Rural, the value of the resumed land at the date of resumption was $275,000 but that, if zoned Future Urban at that date, the value of the resumed land would then have been $1,707,500. The point of difference between the parties was as to which of these two bases of valuation was applicable in the circumstances.

[10] In support of the latter basis, the applicants contended that the relationship test embodied in the *San Sebastian* principle was satisfied with the consequence that the resumed land should be valued as if zoned Future Urban. To the contrary, the respondent contended that the relationship test was not satisfied and that the appropriate basis of valuation was as land zoned Rural. Thus, the difference between the parties refined itself to one of whether this test was satisfied on the facts of the matter. That became the central issue for determination by the Land Court.

[11] The *San Sebastian* principle owes its name to the decision of the High Court in *Housing Commission (NSW) v San Sebastian Pty Ltd*.[4] That case posed the question whether, and in what circumstances, ought a rezoning of land be ignored for the purpose of assessment of compensation upon a compulsory acquisition of the land. In considering that question, Jacobs J, with whom Gibbs ACJ, Stephen, Murphy and Aickin JJ agreed, observed at 206:

> "A greater difficulty in applying the principle of assessment which is enacted in s 124 of the *Public Works Act* arises as a result of planning and land use legislation and the processes whereby statutory restrictions on land use are imposed. Restrictions on land use, so that, explicitly or practically, use is restricted to a use for a public purpose for which the land might be resumed, are commonly imposed as a result of consultation with or direction by the public authority concerned with the carrying out of the particular public purpose. In such a case where there is a direct relationship between the restriction on land use and the proposed establishment of the public works the effect on value of the zoning or restriction ought to be ignored. That was the position in *Chapman v The Minister*[5] …"

---

4 (1978) 140 CLR 196; [1978] HCA 28.

5 (1966) 13 LGRA 1.

[12] These observations are directed towards the circumstance where there is a direct relationship between a zoning restriction imposed on land and the fulfilment of the purpose for which the land is then compulsorily acquired. Of circumstances where the relationship is less direct, his Honour further observed:

> "There are, however, many situations where the relation between the zoning and the proposed public works is not as clear-cut as it was in *Chapman v. The Minister*. One can take an example away from the present case. Assume an area of land on the outskirts of existing settlement, and assume a planning authority concerned to designate land uses in a planning scheme. The land is designated open space. Thereafter it is resumed for the purpose of a public reserve. The fact that the land was zoned as open space may have depreciated its value. Does the resuming authority pay compensation at the depreciated value of open space or at some other value? The question cannot be correctly answered without knowing whether there was any connexion between the zoning as open space and the subsequent resumption. If 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. It is only a step in the process of subsequent resumption. But in other circumstances the resumption may be unconnected with the act of zoning. It may be that the resuming authority selects the land for resumption as a public reserve because it is zoned open space; if it does so it is doing no more than ensuring that it, as well as others, conforms to the planning scheme. In those circumstances there is no relevant relationship between the zoning and the public purpose. No public purpose, existing or anticipated, intended, or urged by the zoning authority, leads to the zoning; rather, the zoning leads to the public purpose and consequent resumption."[6]

[13] Referring to these passages, the High Court in *The Crown v Murphy & Anor*[7] affirmed that:

> "[t]he principle applies in cases where there is a direct relationship between the planning restriction and the scheme of which resumption is a feature and extends to cases where there is merely an indirect relationship, provided that the planning restriction can properly be regarded as a step in the process of resumption."

[14] Jacobs J identified the issue of whether there was any connection between a rezoning and the subsequent compulsory acquisition as a necessary subject of enquiry. His Honour put the test in terms of whether the rezoning was "a step within the process of subsequent resumption".

[15] For guidance in carrying out such an enquiry, the learned member of the Land Court referred to the decision of the New South Wales Court of Appeal in *Sydney Harbour Foreshore Authority v Walker Corporation Pty Ltd*.[8] In that case, Basten JA (Beazley JA and Stein AJA agreeing), in speaking of the test put by Jacobs J,[9] said that "no narrow view should be taken of steps which may affect the value of land". His Honour then

---

6 At 206-7.

7 (1990) 64 ALJR 593 per Mason CJ, Brennan, Deane, Gaudron and McHugh JJ at 595; [1990] HCA 42.

8 [2005] NSWCA 251; (2005) 63 NSWLR 407.

9 At [85], quoted in *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2007] WASCA 226 at [20].

drew attention to the necessity to distinguish "between conduct which constitutes a proper exercise of planning powers irrespective of the ultimate resumption and a use of planning powers in pursuit of a proposed resumption".[10]

[16] The learned member also regarded as instructive the description of the task involved in undertaking the enquiry given by the Land Appeal Court. In *Bowers and Crane v Pine Rivers Shire Council*[11], that court described the task as one that involves examination of relevant planning documents. Consistently with that approach, he had regard to a number of planning documents in order to ascertain whether the rezoning of the land in 1999 as Rural was a step in an overall process which concluded with the compulsory acquisition of the resumed land in 2006 for the purpose stated in the notice of intention to resume.

[17] No contemporary documentary evidence recording the reasons of the ICC for the rezoning of the land in 1999 was adduced. Evidence led for the respondent included the testimony of Mr J S Adams, the ICC City Planner since 2008. He had worked as a town planner for the ICC since 1981. The learned member declined to accept reasons advanced by Mr Adams for the rezoning as being the actual reasons of the ICC for the rezoning. Mr D W Perkins, a town planner, also called in the respondent's case, gave evidence to the effect that it would not be "suitable" to make zoning changes until there was "absolute certainty", in a metes and bounds sense, with respect to where a transport corridor would be located. The learned member regarded that evidence as not ruling out the possibility that the applicant's land had been dealt with differently, but "still as a step in the scheme".[12]

[18] In absence of evidence of the actual reasons for the rezoning, the learned member considered that the task that he had to undertake was one of determining whether relevant facts and circumstances gave rise to an inference of a relationship between the rezoning and the compulsory acquisition such as would characterise the former as a step in the latter.

[19] As a basis for such an inference, the applicants placed very great reliance before him on high level planning documents which, it was submitted to him, reflected decisions made at this level prior to the rezoning, about land use affecting the land. He summarised aspects of those documents as follows:

> "[36] … Pursuant to an approach to managing the population growth in South-East Queensland which the State Government adopted in 1990 a Western subregion of Councils (WESROC) group provided recommendations to inform the planning policy known as the Regional Framework for Growth Management (RFGM). The April 1995 Report of the Steering Committee included an indicative map titled 'Proposed Development of WESROC 2011' which shows the applicants' land tentatively outside of the area marked for urban development. The RFGM listed "Relevant Priority Actions" including:
>
> > '13.14 Ensure that identified major existing and future transport corridors are protected through planning schemes'
>
> The final WESROC structure planning report, completed in September 1995 included Recommendation 32, that there be

---

10 *Ibid*.

11 (2007) 28 QLCR 196 at [23].

12 Reasons [44].

> a major transport corridor to link the Cunningham Highway, Logan Motorway, Ipswich Motorway and Centenary Highway via Ripley and Springfield. Recommendation 44 was that Commonwealth, State and Local Government adopt as the basis for transport planning in the WESROC subregion the development of a full transport corridor 'linking the Cunningham Highway, via Ripley, Redbank Plains and Springfield, to the Logan Motorway'.
>
> [37] The Integrated Regional Transport Plan in 1997 refers, at page 68 under the heading 'South-west of Ipswich' to a transport corridor which 'in the longer term' could be extended from the Ipswich-Boonah Road to the Cunningham Highway.
>
> [38] The 1998 Regional Framework for Growth Management contained a principle that early provision should be made to protect the routes of high capacity corridors such as the Springfield-Ripley-Ipswich corridor. Local governments had a lead agency role for integrated transport and land use planning in their geographic areas." (Footnotes omitted.)

[20] The learned member concluded that the test in *San Sebastian* was satisfied and that therefore the resumed land was to be valued as if it was zoned Future Urban.[13] His reasoning to that conclusion was expressed in the following two paragraphs:

> "[46] Any reduction in value of the land resumed which is due to the resumption scheme will be disregarded in assessing the value of what has been taken. It is not necessary that the step in the process be undertaken or connived in by the present respondent. I accept the evidence that the respondent did not do anything to seek to bring about the down-zoning by the ICC of the land subsequently resumed. The ICC is suggested to have taken the step as the circumstances, particularly the aircraft noise affecting the land, would have made it a proper exercise of planning authority to do so. If that were the case then the project has not been an influence in the down-zoning and the compensation would be the $275,000 agreed on where it is proper to assess it on the basis of the land being zoned for rural use. The actual reason or reasons for the down-zoning were not recorded and are sought to be inferred, as has been considered. The use of planning power was argued to be unsuitable until the detailed course of the transport corridor was known. Against this, the applicants point to the high-level planning documents, the mapping of which is rather vague, showing at best a potential for the corridor to go in a westerly direction with an indicated course to the south of this land. The ICC was itself favouring extending the study area for the corridor to the south of a previous draft, taking it further from the applicants' land. This, it argued, weighs heavily against the conclusion that the ICC would have down-zoned the land in preparation for it to be part of the corridor. This must be considered in the context of all of

---

13 Reasons [48].

> the studies that were done to refine the planning of the route for the transport corridor. I am not satisfied on the evidence that the progressive planning regime was constrained by an already-chosen end point. It is however unnecessary for the applicants to show that the route or any part of it had been pre-determined. They would succeed if they show that the rezoning was entirely due to the underlying scheme. In this they point to the instruction that could only be interpreted as from the strategic planners to the local authorities to protect the corridor. To say, as the respondent does, that this in effect means that this is only 'one of the inputs' into planning does not give any real significance to the authoritative instruction, which was issued years before the route was precisely defined by 'metes and bounds'. The ICC was required to preserve the corridor and at a time after that direction it down-zoned this land which reduced its development potential, an action that could well be understood as directed to preserving the corridor. It is clear that the route and end-point of the corridor were not known until years after this action but the nature of the action is consistent with the required goal and it was possible that the land would be required even though the ICC favoured a more southerly potential route. The applicants would be able to succeed if they can show that it is more likely than not that the down-zoning was intended to preserve the possible route of the corridor.
>
> [47] When the down-zoning is viewed in the light of the existence of the instruction to preserve the corridor, and accepting that to interpret this instruction as incapable of being acted upon until the actual details of the corridor were finally settled is to interpret it as lacking the effect it clearly directs, it is more likely than not that the down-zoning was done in pursuit of the scheme. This is notwithstanding that the scheme still had to mature to the 'metes and bounds' stage. This conclusion is easier to reach in view of the fact that there is no evidence of why the decision was actually made."

[21] The references in the first of these paragraphs to a requirement and a direction that the ICC preserve the corridor were not otherwise elaborated at that point. Presumably, they were references to the learned member's perception of the operative effect of the documents which he had summarised. The further reference to the ICC having favoured a more southerly route was supported by a communication in September 2000 from the Works Manager of the ICC to a senior officer at the DMR which suggested that the proposed study area for the SWTC "does not appear to extend far enough south". The communication included a map which proposed the addition of land well to the south of the land.[14]

[22] As the second of these paragraphs indicates, the learned member was satisfied on the balance of probability that, as a matter of inference, the rezoning was related to the compulsory acquisition such as to characterise it as a step in the acquisition process. He therefore applied the *San Sebastian* principle and adopted the valuation based on a zoning as Future Urban, for assessment of compensation.

---

[14] Reasons [20].

The appeal to the Land Appeal Court

[23] In exercise of the right of appeal conferred by s 64 of the *Land Court Act* 2000 (Qld), the respondent Chief Executive appealed to the Land Appeal Court from the decision of the Land Court. An appeal in the Land Appeal Court must be decided on the evidence in the record of the proceeding the decision in which is under appeal, subject to a discretion to admit new evidence if certain conditions are met: ss 56(1), (2). In exercise of its jurisdiction the Land Appeal Court is not bound by the rules of evidence; it may inform itself as it considers appropriate; and it must act according to equity, good conscience and the substantial merits of the case without regard to legal technicalities and forms or the practice of other courts: s 55.

[24] In *De Tournouer v Chief Executive, Department of Environment and Resource Management*,[15] this Court held that although, under this statutory framework, an Appeal to the Land Appeal Court is by way of re-hearing rather than by way of strict appeal as in *House v The King*,[16] an appellant may succeed only by establishing that the decision of the member of the Land Court under appeal resulted from factual, legal or discretionary error.[17] The Land Appeal Court approached the appeal on this basis.[18] There is no challenge in the proposed appeal to this Court in its having done so.

[25] The Land Appeal Court rejected a submission for the respondent Chief Executive that the *San Sebastian* principle ought operate only where the planning restriction is a step in a resumption scheme being pursued by the resuming authority.[19] In accepting that the principle may apply where the planning restriction is imposed otherwise than by the resuming authority, the Land Appeal Court observed:

> "[46] Questions of fact and degree will necessarily be involved in determining the sufficiency of the connexion between the depreciating factor, in this case the rezoning of the subject land, and the scheme of resumption.[20] Where, as here, there is an unchallenged finding that the resuming authority was not involved in the decision to rezone the land, the question to be answered remains the same, was the decision to rezone nevertheless a step in the scheme of resumption[21], or was that decision made with the intent or in anticipation that the land should be resumed for the SWTC...[22]"

These observations, too, are not challenged in the appeal to this Court.

[26] In reasons published on 21 March 2014,[23] the Land Appeal Court disagreed with the learned member of the Land Court in two fundamental respects. After surveying the evidence before the Land Court, it concluded, first, that there was within the testimony of Mr Adams, evidence of the actual reasons for the decision to rezone the land as Rural and, secondly, that an inference was not available that the decision to rezone the land as Rural was a step in a resumption scheme.

[27] The Land Appeal Court reasoned to its conclusion with respect to the testimony of Mr Adams by the following process:

---

15 [2009] QCA 395; [2011] 1 Qd R 200.
16 (1936) 55 CLR 499; [1936] HCA 40.
17 Per Fraser JA at [22] (McMurdo P and McMeekin J agreeing).
18 Reasons [26].
19 Reasons [37], [46].
20 *Doolan Properties Pty Ltd v Pine Rivers Shire Council* [2001] 1 Qd R 585 at 594 [25].
21 *The Crown v Murphy* (1990) 64 ALJR 593 at 595.
22 *Housing Commission (NSW) v San Sebastian Pty Ltd* (1978) 140 CLR 196 at 207.
23 AB1963-1984.

"[47] The learned Member found that there was no evidence of the 'actual reasons' for the rezoning given. He thought that the evidence was limited to opinion evidence which justified the rezoning after the fact. The Member referred to Mr Adams' letter to Ms Mahoney dated 21 September 2006 in which Mr Adams said that 'It would appear that the *Rural* designation was based around the fact that the land' was subject to overhead aircraft noise and difficult to service with urban infrastructure. And it is true that this letter reads as though Mr Adams did not know why the land was downzoned.

[48] Counsel for the appellant submitted that the Member had overlooked the fact that Mr Adams was, in that letter, dealing with the 1992 review by the Moreton Shire of its Strategic Plan which lead to the 1993 Draft Strategic Plan. That is, he was not dealing with the rezoning in question. Mr Adams had not been employed by the Moreton Shire, having been employed by the Ipswich City Council since 1981. We accept that submission.

[49] The learned Member also referred to Mr Adams' statement, and his evidence more generally, but concluded that this evidence was also rationalisation or reconstruction after the fact, rather than direct evidence of the reasons for rezoning. Counsel for the appellant submitted that the Member had wrongly emphasized the generalized language in that material and overlooked Mr Adams' direct oral evidence about the reasons for the downzoning. We accept that submission. During the course of cross-examination by Mr Favell, then Counsel for the Mahoneys, Mr Adams' evidence was:

> 'And can you explain briefly why - what were the planning reasons in your recollection and understanding for the land being zoned rural rather than perhaps having a more intensive urban designation?-- A number of factors came to play and I was involved in the zoning with the 1999 scheme. Essentially there was a block to the west a - an industrial zone block that really took our attention that was completely unserviced in a very difficult location. That drew our attention to try and look at that - the southwest corner of the urban footprint and in terms of how that came together, the future urban zone that was on the subject site is predominantly a residential zone and the ANEF situation meant that that could not be developed for residential purposes. In terms of commercial and industrial options, really we've got and we still have and we had then, enough surplus land for commercial industrial purposes to the north of the Cunningham Highway and Warwick Road so looking at the constraints on the - on the land, the difficulty of getting urban services to it being on the southern side of the highway, providing a logical urban edge to the urban footprint it really meant that -

> that - a couple of blocks there should have been rezoned back to a more appropriate rural zone and that's what was done.'

[50] Subsequently, Mr Adams said:

> 'Now, at the time of the 1999 rezoning of the subject land, did you or anyone else to your knowledge, have foreknowledge that the subject site or part of it was going to be required for a future road resumption in 2006?-- No. No. Our expectations were that it was probably heading towards Champions Way-----
>
> And-----?-- -----further to the south.
>
> And can you explain also - when you say our expectations, are you referring to the council planning officers or the council generally or who are you referring to? -- Probably the council staff more so would be engineers and planners.
>
> Right. And are engineers and planners the ones that advise the council as to future directions?-- Certainly are.
>
> Now, you also indicate in your affidavit or your statement that at no stage were you aware of any approach or any - anything of that nature from the DTMR to the council or any council officers in any communicating in 1998 or 1999 the future road requirement; is that correct? -- That's correct.
>
> Are you aware as the planner for Ipswich City Council, of any possible connection between the zoning of the land in 1999 and it's ultimate presumption in 2006? -- No.

[51] The effect of that evidence is, in our opinion, that Mr Adams stated the reasons for the change in zoning of the subject land effected by the 1999 Planning Scheme. He also said that he was involved in the 1999 zoning, the clear implication being that he was able to and did state, from his own knowledge, the reasons for the rezoning. This evidence was not referred to by the learned Member in his reasons for judgment.

[52] It was not put to Mr Adams that the reasons he gave for the downzoning in his statement were not the actual reasons. Nor was there any effective challenge, in cross examination, to Mr Adams' oral evidence as to the reasons for the rezoning of the subject land. Indeed the learned Member said that, from his observations of the witnesses who gave evidence, he was satisfied that they were being truthful and endeavouring to be of assistance to the Court. The learned Member correctly noted that there were no contemporary written reasons for the rezoning. The lack of a written record as to the reasons does not lead to the conclusion that Mr Adams' reasons in his oral evidence were incorrect.

[53] Further, the evidence given by the town planner Mr Perkins, supported the reasons for the downzoning given by Mr Adams in as much as Mr Perkins' evidence was that in his opinion the subject land was rezoned for planning reasons and that the rezoning was not connected with the resumption. It would not be a sensible approach to change the zoning until a specific alignment for the corridor had been determined, he said. Further, the designation of the subject land as Rural was not an appropriate mechanism for preserving the corridor for future transport purposes. A zoning such as special purpose, community purpose, or special purpose road would be more appropriate.

[54] Civil engineer, Mr McAnany also said that there were sound reasons, relating to sewerage reticulation and maintenance of water quality in the land waterways, which would have been relevant considerations in the change in designation.

[55] We consider therefore that the learned Member erred in his understanding of the evidence. Mr Adams did give evidence of actual reasons for rezoning and they were independent of the scheme of resumption. There was no reason not to accept that evidence, and it was consistent with Mr Perkins' and Mr McAnany's evidence. It was also consistent with the contemporary documents discussed below.

[56] Given our conclusions in this regard, it is unnecessary to consider the respondents' submissions that the development constraints over the subject land identified by Mr Adams - aircraft noise and provision of services - similarly impacted other nearby land that was designated Urban in the planning instruments. Whether the rural zoning was appropriate for the subject land and consistent with other zonings in the vicinity is not an issue in these proceedings, once it is accepted that Mr Adams' evidence established the actual reasons for the rezoning."[24] (Footnotes omitted.)

[28] As to the issue of inference, the Land Appeal Court's reasons for reaching the conclusion that it did are these:

"[57] Having found that there was no evidence as to the actual reasons for the downzoning, the Member held that there was evidence from which he could infer that the reason for the decision to downzone was a step in the resumption scheme. The learned Member found that the effect of various high level planning instruments was that local authorities were directed to protect transport corridors. In particular, the Ipswich City Council was required to preserve the SWTC. Thereafter the Council rezoned the subject land. The learned Member concluded, in the light of this evidence, that it was more likely than not that the downzoning was done in pursuit of the scheme.

[58] Counsel for the appellant submitted that the learned Member erred in concluding that it was more likely than not that the

---

[24] AB1977-1980.

downzoning was done in pursuit of the scheme and relied on the following evidence, in support of those submissions -

- in the period from 1990 to the downzoning in 1999, planning documents produced by the Moreton Shire Council and the Ipswich City Council identified the respondents' land as unsuitable for development for urban purposes;
- in the period between 1996 and the downzoning in 1999, both the State Government and the Ipswich City Council conducted themselves on the basis that any future transport corridor would be south of the respondents' land;
- even after the downzoning, in 2000, the Ipswich City Council showed a preference for any corridor to be south of the respondents' land;
- it was not until 2000 that planning for the future SWTC commenced;
- it was not until 2005 that the planning for the SWTC affirmatively identified a requirement for part of the respondents' land.

[59] Leaving aside Mr Adams' evidence as to the reasons for the downzoning, we do not consider that it was open to the learned Member to infer on the evidence before him that the downzoning was done in pursuit of the resumption scheme.

[60] There were no documents dated before the rezoning which showed the SWTC impinging on the respondents' land. To the contrary, the following documents identified the SWTC as follows -

- The May 1996 discussion draft IRTP for South East Queensland produced by the Department of Transport and Main Roads showed the SWTC well south of the subject land. Although there is a spur link to the Cunningham Highway shown, that link is to the east of the subject land.
- The 1997 IRTP showed the Springfield-Ripley-Ipswich Corridor well south of the subject land;
- The Veitch Lister Consulting Report 1997 showed potential significant roads including the South-West Arterial (Camira Bypass), (an earlier name for the SWTC) which was well south of the subject land;
- On 26 May 1998 the Ipswich City Council advised the Department of Transport and Main Roads of the indicative location of the SWTC in the Swanbank-Ripley area. The attached sketch shows the SWTC heading in a direction well south of the subject land.
- Mr Michel, a Regional Director of the Department of Transport and Main Roads, said that the 1998 SWTC route location draft brief stated that the South West Corridor extends from Springfield to Willowbank and showed the SWTC as commencing in the vicinity of the planned Springfield Town Centre; the corridor is then broadly defined as the area between the Cunningham Highway and

> the future Ripley Town Centre, and then continues further west to the Cunningham Highway in the vicinity of Willowbank. No map showing the location of the corridor was included in the Record.

[61] It is also noted that in September 2000, the Ipswich City Council wrote to the Department of Main Roads saying that the proposed study area did not appear far enough south along the Cunningham Highway and pointing out that the Veitch Lister Consulting Study 1997 showed the South West Arterial joining the Cunningham Highway in the vicinity of Champions Way, near the Willowbank Raceway. The appended maps show the expanded study area as suggested by the Council. The subject land is shown within the study area for the corridor in that map. Similarly, the project brief dated October, 2000 shows the subject land in the study area for the Corridor. However both those documents were created after the rezoning.

[62] There was no specific finding by the Land Court as to when the resumption scheme commenced. It may be that the policy underlying the scheme was reflected in the documents set out at [60] above. However, given the generality of those documents, even that is speculative. Even if there were sufficient evidence to establish the existence of the resumption scheme before the rezoning, such evidence as there was pointed to a route well south of the subject land.

[63] The respondents referred to the Southern Corridor Planning Study prepared by Humphreys Reynolds Perkins at the request of the Ipswich City Council. The Planning Study reported in April 1999, some three months after the rezoning of the subject land. Under the heading Ripley Road Corridor the report says:

> 'Alternative access to the City Centre is possible from the western side of the Ripley Valley via the Ipswich Boonah Road and Warwick Road.'

Figure 11.4/1 in the Study shows a major inter-suburban link travelling north west from what appears to be the SWTC through the respondents' land to provide a connection to the Cunningham Highway at the Yamanto interchange. Mr Perkins, who was involved in the preparation of this document, gave evidence that the document could not possibly have informed the 1999 Ipswich Planning Scheme because work on the study commenced in March 1998 and in January 1998 the Ipswich City Council had produced a new Planning Scheme Report in which it was proposed that the subject land be located in the Rural zone which was the zoning adopted in the 1999 Planning Scheme.

[64] There was no evidence that the Council was aware of the content of the Southern Corridor Planning Study at the time of the rezoning. Rather Mr Perkins evidence is to the contrary. We do not consider that this document assists the respondent' case.

> [65] As to the planning instruments, the uncontradicted evidence before the Land Court was that in 1993 the previous local authority for the area where the subject land is located, the Moreton Shire Council, published a draft Strategic Plan which identified the land as predominantly within a Rural area, and partly within an Urban Development area. Mr Perkins' evidence was that the land appeared to be predominantly within the Amberley Air Base noise affected area and that Council would not approve development within that area.
>
> [66] We also note that the following Ipswich City Council planning documents leading up to the introduction of the 1999 Planning Scheme showed the subject land in the Rural zone and within the frame area of the Amberley Air Base Buffer Area -
>
> - the Ipswich 1998 Planning Scheme Report
> - the draft Planning Scheme which was placed on public display in April 1998.
>
> [67] There is nothing in the evidence that points to an inference that the Ipswich City Council was responding to a directive from the higher planning authorities to protect the proposed SWTC in downzoning the subject land. Further there appear to have been sound planning reasons for the decision, although we accept that those reasons were criticized by the respondents. It follows that there was not sufficient evidence to support a conclusion that the downzoning decision was a step in the scheme of resumption or was made with the intention that or in anticipation that the subject land would be resumed for the SWTC."[25] (Footnotes omitted.)

[29] Having regard to these conclusions, the Land Appeal Court determined that the appeal to it should be allowed and that compensation should be assessed on the basis that the land was zoned Rural and that that zoning was independent of any resumption scheme.[26] As noted, the Land Appeal Court made orders to that effect on 21 March 2014.

The application for leave to appeal and the ground of appeal

[30] The application for leave to appeal to this Court is supported by an affidavit of the applicant, Kathryn Mahoney, sworn on 2 May 2014 to which is exhibited a draft notice of appeal.[27] That document contains a single ground of appeal as follows:

> "The Land Appeal Court erred in law in that:
>
> (a) The Land Appeal Court did not give due weight to the conclusions (and, in particular, the factual conclusions) of the Land Court at first instance;
>
> (b) The Land Appeal Court substituted its own conclusions for the conclusions of the Land Court as to the effect of the oral evidence of a key witness in circumstances where:

---

25 AB1980-1983.

26 Reasons [68].

27 Exhibit KMM-4; AB1986-1989.

(i) The conclusions of the Land Court as to the evidence of the witness were open to the Land Court on all of the evidence;

(ii) The Appeal Court placed too much weight on a particular part of the oral evidence of the witness;

(iii) The Land Appeal Court's conclusion as to the effect of the oral evidence of the relevant witness was fundamental to the different decisions reached by the Land Court and the Land Appeal Court; and

(iv) The Land Appeal Court erroneously understood the oral evidence of the witness to have been given in cross-examination, whereas the relevant evidence was given in examination in chief and was subject to cross examination."

[31] The applicants submit that the proposed appeal raises an important question of law of public importance concerning circumstances in which an intermediate Court of Appeal may, on a re-hearing, disturb the conclusions reached at first instance. That together with the significant monetary sum involved warrant a grant of leave to appeal.

[32] The respondent argues against a grant of leave to appeal on the footing that the proposed appeal does not identify any error of law on the part of the Land Appeal Court and that, in any event, its decision is correct. In these circumstances, a critical consideration for the grant or refusal of leave to appeal is whether or not the applicants have advanced a viable argument which demonstrates that the Land Appeal Court did err in law.

[33] In written and oral submissions, counsel for the applicants elaborated upon the ground of appeal. He identified the principal questions to be resolved by this Court as being:

(a) whether the Land Appeal Court erred "in substituting its own conclusions as to the effect of" Mr Adams' testimony for those of the Land Court; and

(b) if so, whether the error was "about a fact vital to the resolution of the case or of a nature such as to have a cascading effect upon the Land Appeal Court's resolution of the larger issues in the case".[28]

[34] It is convenient to consider these questions in that order. I turn first to the errors which the applicants contend that the Land Appeal Court made in concluding that what Mr Adams said in his oral testimony was evidence of the actual reasons of the ICC in rezoning the land as Rural in February 1999.

Mr Adams' testimony

[35] **Applicants' submissions:** The applicants' submissions on this topic range over a number of matters. Specific criticisms are made that the Land Appeal Court:

(a) mistook evidence-in-chief as having been given in cross-examination by Mr Adams;

(b) appeared to proceed on an illogical footing that because Mr Adams, like all other witnesses, was truthful and tried to assist the court that, therefore, his testimony as to reasons for the rezoning had to be taken as the actual reasons for it; and

---

[28] Applicant's submissions paragraph 2; Tr1-5 LL11-21.

(c) overlooked what is submitted to have been confusion on Mr Adams part between a designation of the land as Rural under the 1993 Draft Strategic Plan of the Moreton Shire Council and the 1999 Rezoning.

[36] It is further submitted by the applicants that a number of matters, namely Mr Adams lack of personal knowledge concerning the 1993 designation of the land in the Draft Study Plan considered with his acknowledgement that that document formed part of the 1999 Scheme; the "heavily qualified" nature of his testimony as to reasons for the 1999 rezoning; and alleged inconsistencies in that testimony with certain documentary evidence, taken together, have impaired the reliability of Mr Adams' testimony as a satisfactory evidentiary basis for making factual findings as to the actual reasons for the rezoning.

[37] In acknowledgement that an appeal to this Court is for error of law only, the applicants draw upon these criticisms and submissions for the purpose of contending that the Land Appeal Court erred in law by failing to observe aspects of the approach which appellate courts are to take towards findings of fact as enunciated in the High Court in *Warren v Coombes*,[29] *Fox v Percy*[30] and, particularly, *Abalos v Australian Postal Commission*.[31]

[38] **Respondent's submissions:** The respondent submits that the specific criticisms made by the applicants are not valid and that Mr Adams' testimony was reliable evidence on which the Land Appeal Court could base a finding as to the actual reasons for the rezoning. It is further submitted by the respondent that the particular aspects of approach to fact finding which the applicants cite by reference to passages in the judgments in the High Court, were not relevant to the exercise undertaken by the Land Appeal Court. The respondent therefore disputes that the applicants have demonstrated an error of law in that regard.

[39] For completeness, I note that in written submissions the respondent took issue with paragraph (a) of the stated ground of appeal. The complaint made by the applicants in that paragraph is that due weight was not given by the Land Appeal Court to conclusions, particularly factual conclusions, of the Land Court. The respondent pointed out that as the complaint is to weight given to a relevant consideration only, then, consistently with the principle stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[32] it does not raise an error of law. The point is a valid one, in my view. It has, however, been overtaken by the applicants' elaboration of the ground of appeal, formulation of the principal questions for consideration and submissions on legal error to which I have referred.

[40] **Discussion:** An appraisal of the respective submissions must begin with a brief summary of the process of reasoning adopted by the Land Appeal Court in coming to its conclusion that the evidence given by Mr Adams of the reasons for the 1999 rezoning were the actual reasons for the rezoning. Paragraphs [47] to [56] of the reasons of the Land Appeal Court are relevant for this purpose. They are set out above. They reveal a process by which the Land Appeal Court:

(a) noted[33] that the learned member had had regard to a letter written by Mr Adams to Ms Mahoney dated the 21st of September 2006;[34]

---

29 (1979) 142 CLR 531; [1979] HCA 9.
30 (2003) 214 CLR 118; [2003] HCA 22.
31 (1990) 171 CLR 167; [1990] HCA 47.
32 (1986) 162 CLR 24, per Mason J at pp 41-42; [1986] HCA 40.
33 At [47].
34 AB 418.

(b) considered[35] that the learned member had misconstrued that letter as one that set out factors on which the 1999 rezoning might have been based when, according to its terms, it set out factors on which the designation of the land as Rural in 1993 Draft Strategic Plan for the Moreton Shire Council might have been based;

(c) noted[36] that the wording of that letter "read as though Mr Adams did not know why the land was downzoned";

(d) set out[37] passages from the evidence of Mr Adams which were not referred to by the learned member;

(e) observed[38] that, in the court's opinion, the effect of that evidence was that, by it, Mr Adams stated the reasons for the 1999 rezoning;

(f) noted[39] that there was "no effective challenge in cross-examination" to that evidence;

(g) referred[40] to Mr Adams' evidence that he was involved in rezoning under the 1999 Planning Scheme, observing that that evidence implied that Mr Adams knew of the reasons for the rezoning;

(h) noted[41] that the learned member did not refer to that aspect of Mr Adams' evidence;

(i) referred[42] to reasons why the land and the surrounding area was suitable for zoning as Rural under the 1999 Planning Scheme given by Mr Adams in his statement[43] which correspond with those given in his oral evidence;

(j) noted[44] that it was not put to Mr Adams in cross-examination that the reasons given in the statement were not the actual reasons for the rezoning; and

(k) stated[45] that the fact that there was no written record of reasons did not lead to a conclusion that the reasons given by Mr Adams in his oral evidence were incorrect.

[41] Reduced to its essentials, the process was one in which the Land Appeal Court ascertained the meaning and effect of documentary material before it, namely, the letter written by Mr Adams dated the 21st of September 2006 and the transcript of Mr Adams' oral evidence as to reasons for the 1999 rezoning which found support in his statement. The Land Appeal Court was of the view that the learned member had misconstrued the letter and had overlooked the oral evidence which, on its plain meaning, was evidence of the actual reasons for the 1999 rezoning.

[42] I now turn to those aspects of approach towards fact finding to which the applicants refer in their submissions in order to demonstrate error of law. First, the applicants cite the well-known observations in the joint judgment of Gibbs ACJ, Jacobs and

---

35 At [48].
36 At [47].
37 At [49] and [50].
38 At [51].
39 At [52].
40 At [51].
41 *Ibid*.
42 At [52].
43 Exhibit 13; AB 1253-1357 at paragraph 31.
44 *Ibid*.
45 *Ibid*.

Murphy JJ in *Warren v Coombes*,[46] to the effect that, in general, an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or established by findings of the trial judge.[47]

[43] Next, the applicants cite the equally well-known caution in the joint judgment of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*[48] that an appellate court need observe the "natural limitations" that exist for any appellate court which is proceeding wholly or substantially on the record, including disadvantage when compared with the trial judge in respect of the evaluation of witness credibility and of the "feeling" for the case, and be mindful of the fact that it might not necessarily be taken to, or read, all of the evidence at trial.[49] Having sounded this caution, their Honours in *Fox v Percy* then referred to the decision in *Warren v Coombes* and cited the observations in the joint judgment to which I have referred.[50]

[44] The observations cited are concerned with inferences that are drawn from facts. The caution cited refers to natural limitations which bear upon evaluation of witness credibility, the "feeling" for the case, and scope of evidence read by the appellate court. Both the observation and the caution are, of course, to be heeded by an appellate court, as the Land Appeal Court so acknowledged.[51]

[45] The observations and caution were not, however, applicable in any significant degree to the process which I have described. The ascertainment of the meaning and effect of the letter and of Mr Adams' oral evidence and supporting statement was not a process in which inference was drawn from facts. The conclusion that the letter was misconstrued was not reached by a process of inference from evidential facts; nor was the conclusion that the learned member had failed to advert to the oral evidence and supporting statement, so reached. Likewise, for the observations that neither the oral evidence nor the statement had been the subject of effective challenge in cross-examination and that that factor, too had been overlooked. These matters were gleaned from a perusal of the transcript of the proceedings in the Land Court and the reasons of the learned member.

[46] Of critical importance in the process undertaken by the Land Appeal Court was the overlooked oral evidence. Whether it was evidence of the actual reasons for the 1999 rezoning or not fell to be determined by reading the transcript of Mr Adams; testimony and thereby ascertaining its meaning. It did not depend upon an evaluation of Mr Adams' credibility or a "feeling" for the case. The process was not one in which natural limitations, as understood, had a significant role to play.

[47] The applicants also placed particular reliance upon the following passage from the judgment of McHugh J in *Abalos v Australian Postal Commission*:[52]

> "Consequently, where a trial judge has made a finding of fact contrary to the evidence of a witness but has made no reference to that evidence, an appellate court cannot act on that evidence to reverse the finding unless it is satisfied 'that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion': *Watt or Thomas v. Thomas*."[53]

---

46 *Supra*, n29.
47 At 557.
48 *Supra*, n30.
49 At [23].
50 At [25].
51 Reasons [26].
52 At p 178.
53 [1947] AC 484 at p. 488.

[48] Both the context in which this passage appears and his Honour's subsequent comments on the case in *Fox v Percy*[54] indicate that he was addressing intervention in a decision of a trial judge who has made findings based on the credibility or demeanour of a witness. In *Abalos*, the trial judge had not referred to evidence of an ergonomics professor on an issue of supervision at a workplace although she did refer to contrary evidence of a work supervisor on the issue which she accepted.

[49] The passage in *Abalos* relied on by the applicants has no application to the process undertaken by the Land Appeal Court in relevant respects, in my view. It did not involve an assessment of the credibility or demeanour of Mr Adams. As noted, his evidence on the subject was not effectively challenged in cross-examination. No other witness having personal knowledge of the reasons for the rezoning gave evidence which contradicted his evidence on it. What the process undertaken did involve was the ascertainment of the meaning and effect of unchallenged evidence to which the learned member had not referred. It was plainly open to the Land Appeal Court in its appellate jurisdiction to have regard to that evidence, to ascertain its meaning and effect, and then to make a finding based on the meaning and effect which it ascertained that that evidence had.

[50] For these reasons, I conclude that the applicants have not demonstrated error of approach on the part of the Land Appeal Court amounting to legal error in making the finding that the reasons for the 1999 rezoning of the land as Rural as stated by Mr Adams in his oral evidence and statement were the actual reasons for the rezoning. Whilst this conclusion is sufficient to answer the first question posed by the applicants, I would add the additional observations with respect to a number of the specific criticisms raised by them.

[51] First, it is true that the Land Appeal Court described[55] the extracts from Mr Adams' oral evidence set out at [49] and [50] of the reasons as having been giving in cross-examination. That is an error. That evidence was given in chief. The error is of no significance. What is significant to the process undertaken by the Land Appeal Court is that that evidence was given, not when it was given.

[52] Secondly, the Land Appeal Court did not reason that because Mr Adams was truthful and tried to assist the court that his testimony as to reasons for the rezoning had to be taken as the actual reasons for it. Insofar as the Land Appeal Court mentioned the truthfulness and the endeavours to assist the court of Mr Adams and other witnesses, it was in the context of noting that the learned member himself had been satisfied of those matters.[56]

[53] Thirdly, I do not accept that Mr Adams was confusing the designation of the land as Rural under the 1993 Draft Strategic Plan with the 1999 rezoning as Rural when he gave the oral evidence which the Land Appeal Court set out at [49] of its reasons. Immediately before that passage of evidence are two questions, the substance of which were to ask Mr Adams whether he was aware that the land was designated Rural under the 1993 Draft Strategic Plan. His answer was that he was aware of that.[57] He was then asked why the land was zoned rural. That question turned the subject of inquiry to the actual rezoning. Mr Adams understood it as such and referred to his participation in the zonings in the 1999 Planning Scheme. Immediately after Mr Adams had completed his response, counsel for the respondent again mentioned the Draft Strategic Plan. Mr Adams responded with the observation that he thought that counsel had been

---

54 At [65].
55 At [49].
56 At [52].
57 AB204; Tr2-41 LL39-43.

referring earlier to the 1999 rezoning.[58] That observation confirms that Mr Adams understood that the reasons that he had given were the reasons for the 1999 rezoning.[59]

Cascading effect of error

[54] The second principal question posed by counsel for the applicants is premised upon the footing that this Court's answer to the first principal question is in the affirmative. That is to say, that this Court determines that the Land Appeal Court erred in law in making the findings it did as to the reasons for the 1999 rezoning based upon Mr Adams' testimony. For the reasons given, I consider that the first question should be answered in the negative. Thus the premise underlying the second question is unfulfilled; the question thereby loses any relevance it may have potentially had; and it is unnecessary to answer it.

[55] Significantly, there is no independent ground of appeal alleging legal error on the part of the Land Appeal Court in its appraisal of contemporaneous planning documents relating to the SWTC set out at paragraphs [60]–[67] of its reasons. Nor is there an allegation of legal error in the conclusion which it drew of insufficiency of evidence in them to support a finding that the 1999 rezoning decision was a step in a scheme of resumption, or was made with the intention, or in anticipation, that the land, or part of it, would be resumed for the SWTC.[60]

[56] Notwithstanding the absence of a challenge in this respect, I note that the appraisal identifies relevant facts which point to unlikelihood of a relationship between the 1999 rezoning and the resumption. They include the fact that as late as September 2000, the Ipswich City Council was continuing to urge the Department of Main Roads that the latter's proposed study area be extended well to the south of the land to allow for a connection to the Cunningham Highway in the vicinity of Champions Way. Further, the planning documents produced in the period 1993 to 1995 concerning a South West Arterial, which the applicants suggest were overlooked by the Land Appeal Court, referred to a connection with the Cunningham Highway within an area known as M2. Although the land was within that area, M2 was relatively large. Yet, the planning documents did not show the location of any proposed point of connection with the highway.

[57] As well, extensive evidence was given in the Land Court as to the unsuitability of the land for residential purposes having regard to ANEF contouring which affected the land and topographical factors including a ridge line and dual watercourses which would have complicated the provision of sewerage connections for the land. This evidence amplified the cogency of those considerations to a decision to rezone the land from Future Urban to Rural in 1999.

Disposition and order

[58] The applicants have failed to present a viable argument that the Land Appeal Court erred in law. Leave to appeal ought therefore be refused. I would propose the following orders:

1. Application for leave to appeal refused.
2. Applicants to pay the respondent's costs of the application on the standard basis.

[59] **APPLEGARTH J:** I agree with the reasons of Gotterson JA and with the orders proposed by his Honour.

---

58 AB205; Tr2-42 LL10-17.

59 See also *ibid* at LL 19-41.

60 At [67].