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Planning Law Update

A review of Planning and Environmental Law in Western Australia

Valuation of Cash-in-lieu of Public Open Space where Conditional Approval of Subdivision is given before 9 April 2006

The commencement of the Planning and Development Act 2005 ("2005 Planning Act") on 9 April 2006 resulted in some significant changes to the requirement for and the calculation of cash-in-lieu of public open space ("POS"), in particular, the date of valuation of the land required for POS.

Prior to the 2005 Planning Act

Section 20C of the Town Planning and Development Act 1928 ("1928 Planning Act") recognized the possibility of a subdivider paying cash-in-lieu to satisfy a condition of subdivision approval requiring POS to be given up free of cost. Under the s 20C provisions it was necessary for the subdivider to wish to pay cash-in-lieu of POS and the WAPC and the relevant local government to approve cash-in-lieu.

Where all three were in favour of a cash payment in lieu of POS, then the value of the land required for POS was assessed under s 20C as at the date of conditional approval of subdivision. Where the subdivider and the local government were not in agreement as to the cash-in-lieu value as at the date of conditional approval, the value would be set by a valuer agreed upon by the subdivider and the local government, and if they could not agree on a valuer, the local government would appoint the valuer.

The changes

The 2005 Planning Act introduced provisions for payment of cash-in-lieu of POS which were similar in some respects, but in some other respects significantly different to the provisions contained in s 20C. The most significant differences are:

1. Cash-in-lieu of POS will be payable by the subdivider if the WAPC so requires after consultation with the local government, or if the WAPC, the local government, and the owner of the land so agree. The difference here is that cash-in-lieu may be payable if the WAPC so requires even if the local government or the owner do not agree. That does not apply, however, in the case of subdivisions creating less than 3 lots.
2. The cash-in-lieu value of the POS land is to be determined as at the date on which the valuation is made. The date on which the valuation is made could be any date up to, or even after the date of endorsement of approval on a deposited plan, but in any event will necessarily be a date after the date of conditional approval, which was the date of valuation under s 20C in the 1928 Planning Act.

The date of valuation

Under the 2005 Planning Act, like the 1928 Planning Act, the landowner and the local government can agree on value, in which case presumably the date of agreement would be the date of valuation. If they do not agree on value, they may agree on a valuer, and if they do not agree on a valuer, then the local government appoints the valuer. The relevant date of valuation is then the date on which the valuer makes his/her valuation rather than the date of conditional approval. This change in valuation date has at least 2 benefits namely:

- (a) it simplifies the valuation process because the valuer must necessarily be carrying out a current valuation, and not a historical valuation; and
- (b) the date on which the cash-in-lieu value of the POS is paid is likely to be close to the date of actual subdivision (WAPC endorsement of the Deposited Plan), and therefore close to the date on which the POS land would have been vested had land been given instead of cash-in-lieu.

Old subdivision approvals

A difficulty arose for a number of local governments where conditional approval of subdivision was given before the commencement of the 2005 Planning Act on 9 April 2006 but where no valuation of the POS had been undertaken by that date. There has been a difference of opinion as to the date of valuation of the POS in those circumstances.

One view was that the provisions in s 20C of the 1928 Planning Act continued to apply where the conditional approval was given before 9 April 2006. That is, that the valuation should be as at the date of conditional approval. The other view was that if the local government had not approved the payment of cash-in-lieu, or the subdivider had not agreed to pay cash-in-lieu prior to that date, then there was no accrued right for payment of cash-in-lieu and the valuation provisions in the 2005 Planning Act would apply. In those circumstances, the valuation of the POS would be at the date of the valuation rather than the date of conditional approval.

The issue arose for decision recently by the Supreme Court in ***Shire of Peppermint Grove v Owston Nominees No 2 Pty Ltd*** [2008] WASC 38. In that decision, Templeman J made determinations the effect of which was that where conditional approval of subdivision was given before 9 April 2006, the cash-in-lieu value of the POS land would be calculated pursuant to the provisions of s 20C of the 1928 Planning Act whether or not the LG had approved of and the landowner had agreed to the payment of cash-in-lieu prior to 9 April 2006.

The effect of the decision in ***Owston Nominees*** is it can now be accepted that in the case of conditional approval of subdivision given before the commencement of the Planning and Development Act on 9 April 2005, the cash-in-lieu value of the POS should be assessed under the provisions of s 20C of the 1928 Planning Act.

Please contact Denis McLeod on 9383 3133 if you have any queries regarding the issues raised in this update.

The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstance of each case

