

Can a Compensation Claim Arise Under a Structure Plan?

By

Pursuant to the Planning and Development Act 2005 (WA) (P&D Act), local governments have the power to preserve land for a public purpose, such as for the provision of public open space. In the instance of the reservation of land under the PDA and subject to certain preconditions, a landowner whose land is partially or totally reserved for a public purpose may have a right to claim compensation from the local government for the loss in the value of the owner's land occasioned by the reservation.

A recent decision of Le Meire J of the Western Australian Supreme Court, on appeal from the WA State Administrative Tribunal (Tribunal), considered the question of whether structure plans could 'reserve' land by identifying it as public open space (POS), thereby giving rise to compensation entitlements on the part of landowners.

THE FACTS

The case concerned lots zoned as 'urban development' under the City of Wanneroo's District Planning Scheme No 2 (DPS2) and identified as POS under Agreed Local Structure Plan East Wanneroo Cell 4 (Hocking and Pearsall): Structure Plan No 6 (ASP6). Following the adoption of ASP6, the owners sought development approval to construct a rural shed on one of the lots. Subsequently, the owners sought development approval for grouped, residential housing on the combined lots. The applications were refused for a number of reasons, one of which was that approval would prejudice future planned use of the site, being for POS, contrary to ASP6. The owners then sought compensation from the respondent for the injurious affection of their land that they alleged was caused by the adoption of ASP6.

THE STATUTORY FRAMEWORK

Under section 173 of the P&D Act, any person whose land is injuriously affected by the making or amendment of planning scheme is entitled to obtain compensation from the responsible authority. Section 174 provides that land is injuriously affected by reason of the making or amendment of a planning scheme if:

- the land is reserved under the planning scheme for a public purpose;
- the scheme permits development on that land for no purpose other than a public purpose; or
- the scheme prohibits wholly or partially the continuation of certain non-conforming uses or the implementation of certain pre-scheme or pre-amendment approvals.

Section 178(1) provides that a claim for compensation may be made within six months of certain trigger events, one of which is the refusal of development on the subject land.

Clauses 9.8.2 and 9.8.3 of DPS2 respectively provided that:

1. where an Agreed Structure Plan imposes a classification on the land included in it by reference to reserves, the provisions of the Agreed Structure Plan shall apply to the land within it as if its provisions were incorporated in this scheme and it shall be binding and enforceable in the same way as corresponding provisions incorporated in the Scheme; and
2. where, under an Agreed Structure Plan, land is classified as a Local Authority Reservation, the rights, provisions and procedures, and the obligations of the Council in regard to compensation shall apply as if the land was correspondingly reserved under the Scheme.

PROCEEDINGS BEFORE THE STATE ADMINISTRATIVE TRIBUNAL

The local government instituted proceedings in the Tribunal seeking a determination under section 176(1) of the P&D Act, that the land was not injuriously affected. The Tribunal determined that the land was not injuriously affected. The owners appealed to the Supreme Court of Western Australia.

THE TRIBUNAL'S DECISION

1. ASP6 was not incorporated into DPS2 and its adoption did not constitute an amendment to DPS2.
2. The provisions of a local structure plan, together with particular clauses of DPS2 were capable of injuriously affecting the owners' land within the meaning of section 174(1)(a) of the P&D Act however the provisions of ASP6, considered together with DPS2, did not have the effect of injuriously affecting the claimants' land within the meaning of the P&D Act.
3. ASP6 did not expressly prohibit non-public purpose development on the land designated as POS.
4. DPS2 did not prohibit, wholly or partially, the continuation of certain non-conforming uses or the implementation of certain pre-scheme or pre-amendment approvals.

THE DECISION OF THE SUPREME COURT

Le Miere J held, dismissing the appeal, that there had been no error by Tribunal. In making this decision, the Court found that:

The owners' land had not been reserved under DPS2 for a public purpose:

The owners submitted that 'reserved' means set apart for a public purpose irrespective of whether the word 'reserve' is used in the planning instrument which imposes the restrictions. The Court rejected that argument. Le Miere J was of the opinion that in the context of this matter, because clause 9.8.2 of DPS2 provided that the provision of the Agreed Structure Plan shall apply to the land when the Agreed Structure Plan 'imposes a classification on the land included in it by reference to reserves, zones...', specific reference to the land being "reserved" was required, and anything short of that was insufficient.

DPS2 did not prohibit the use of the land for any purpose other than a public purpose:

The Court reasoned that DPS2 provided that uses in the Urban Development Zone should be determined in accordance with the Residential Precinct, and ASP6 provided that the permissibility of uses in the Residential Precinct were to be in accordance with the Residential Zone under DPS2. In addition, some rural uses could have been considered. Therefore, the Court determined that DPS2 did not operate on ASP6 so as to amend or have the effect of amending DPS2 to prohibit development on the owners' land except for a public purpose.

The Court also confirmed that the effect of the Planning and Development (Local Planning Schemes) Regulations 2015 (Regulations) is that, in considering an application for development approval in an area that is covered by ASP6, the City is to have due regard to, but is not bound by, the structure plan in deciding the application. As such, the City may, in considering an application, depart from the structure plan if it is consistent with proper and orderly planning to do so.

Further, the Court referred to the decision of the City to refuse the applications for development approval and noted that the reasons for refusal did not explicitly say that no purpose other than a public purpose was permitted, but instead stated that the proposed use was contrary to the future planned use of the site for public open space. The Court also found that the City, having given due regard to the requirements of orderly and proper planning; the provisions of ASP6; the Metropolitan Region Scheme; and a WAPC policy, proffered a number of other reasons for its refusal of the application, such as that the proposed development was inconsistent with the objectives of the 'Primary Regional Road' reservation. As such, the City refused approval in the exercise of its discretion and not because it considered that DPS2 permitted development on the owners' land for no purpose other than a public purpose.

DPS2 did not prohibit, wholly or partially, the continuance of a non-conforming use or the erection, or alteration of any building in connection with that non-conforming use

It was relevant to Le Miere J's reasoning that DPS2 provided that no provision of the scheme prevented, amongst other things:

- the continued use of and land or building for the purpose for which it was being lawfully used at the gazettal date of the scheme; or
- the carrying out of any development thereon for which immediately prior to that time, an approval lawfully required to authorise a development, was duly obtained and is current.

The Court also noted that DPS2 further provided that where a person wishes to alter or extend a non-conforming use or a building used in conjunction with a non-conforming use, approval may be granted for a change of use from an existing non-conforming use to another non-conforming use, if the proposed use is substantially less detrimental to the amenity of the locality than the existing non-conforming use and, in the opinion of Council, is closer to the intended purpose of the zone.

Therefore, DPS2, as operated on or affected by ASP6 did not prohibit wholly or partially the:

- continuance of any non-conforming use of the owners' land; or
- erection, alteration or extension on the land of any building in connection with or in furtherance of the nonconforming use.

KEY POINTS OF RELEVANCE

- The Tribunal and the Court left open the possibility that the provisions of a structure plan, together with the clauses of a planning scheme, might injuriously affect land within the meaning of the P&D Act. However, that will turn on the terminology used in the scheme and whether land is simply identified or specifically 'reserved' in the structure plan for the purposes of the scheme. Therefore, the reasoning used in the Scutti case applied to other facts and provisions could potentially produce a different result and as such, local governments should bear this case in mind when designating private land in a structure plan.
- However, in the circumstances of Scutti, the particular provisions of the local planning scheme required, in order for land to be considered 'reserved', ASP6 needed to use DPS2's language of reserves.
- The prospect of structure plans being deemed to give rise to a right to claim compensation, should be regarded as significantly diminished in light of deemed provisions applying by virtue of the Regulations. This is because the deemed provisions have confirmed that structure plans are not absolutely binding and are only one of a number of considerations to which a decision maker must have 'due regard' in respect of development applications.
- If there is no express prohibition against non-public purpose development on land designated as POS, a nonpublic purpose may be legally capable of approval and therefore the scheme may not be deemed to prohibit development for no purpose other than a public purpose.

For further information in regard to the above, contact Alexandria Bishop on 9383 3133 or abishop@mcleods.com.au. Alexandria Bishop has been a solicitor at McLeods since 2014.

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