

Compensation claims against local governments under Structure Plans

By Denis McLeod

The decision on 12 October 2018 by the WA Court of Appeal in **Scutti v City of Wanneroo** [2018] WASCA 175 has set alarm bells ringing for local governments and others about the potential for claims for compensation for injurious affection arising out of the provisions of a local structure plan (**LSP**). The purpose of this update is to suggest that the scope and effect of the Court of Appeal's **Scutti** decision may be very limited. It is suggested in this update that the Court of Appeal decision may not apply where the local government's decision on a development proposal or, where a sale giving rise to the claim for compensation for injurious affection, was made after 19 October 2015. In that case there may be no significant present risk for most local governments.

Planning and Development (Local Planning Schemes) Regulations

The *Planning and Development (Local Planning Schemes) Regulations 2015* (**LPS Regulations**) came into operation on 19 October 2015. The LPS Regulations included Schedule 2 which contained deemed provisions, deemed to be included in every local planning scheme (**LPS**). Section 257B of the *Planning and Development Act 2005* (WA) (**P & D Act**) provides in subsections (2) and (3) as follows –

'(2) Deemed provisions ... have effect and may be enforced as part of each local planning scheme to which they apply, whether they are prescribed before or after the scheme comes into force.

(3) If a deemed provision that has effect as part of a local planning scheme is inconsistent with another provision of the scheme, the deemed provision prevails and the other provision is to the extent of the inconsistency of no effect.'

Clause 27(1) in Schedule 2 of the LPS Regulations provides –

'(1) A decision-maker for an application for development approval or subdivision approval in an area that is covered by a structure plan that has been approved by the Commission is to have due regard to, but is not bound by, the structure plan when deciding the application.'

I suggest that a provision in a LPS that purports to give the provisions of Structure Plans (eg. zoning and reservation of land) the same effect as if they were provisions of the parent LPS (as was the case in **Scutti**) may be considered inconsistent with deemed cl.27(1) and ineffective pursuant to s.257B(3) of the P & D Act. Note in that regard the terms of cl.9.8.2(a) and 9.8.3(e) from the City of Wanneroo LPS considered in the **Scutti** case discussed below.

Scutti v City of Wanneroo

The Court of Appeal in the **Scutti** case gave special attention to cl.9.8.2 and 9.8.3 of the City of Wanneroo's LPS. Those

provisions came from the draft model text provisions for Structure Plans in Schedule 1 of the WAPC's Planning Bulletin No. 37 of February 2000. They are or were before 19 October 2015, common to many local planning schemes. In the City of Wanneroo's Scheme, those clauses were in the following terms –

'9.8.2 Where an Agreed Structure Plan imposes a classification on the land included in it by reference to reserves, zones (including Special Use Zones) or Residential Density Codes, until it is replaced by an amendment to the Scheme imposing such classifications:

(a) 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

(b) provisions in the Scheme applicable to land in those classifications under the Scheme shall apply with the necessary changes or alterations to the Agreed Structure Plan area.

9.8.3 Without limiting the generality of the preceding subclause, under an Agreed Structure Plan:

(a) in the areas designated as zones, the permissibility of uses shall be the same as set out in Table 1 as if those areas were zones under the Scheme, having the same designation;

(b) ...

(c) the development control procedures including (without limitation) the procedures for approval of uses and developments under the Scheme shall apply as if the land was correspondingly zoned or reserved under the Scheme;

(d) ...

(e) where land is classified as a Local Authority Reservation, the rights, provisions and procedures, and the obligation of the Council in regard to compensation shall apply as if the land was correspondingly reserved under the Scheme;

(f) ...

(g) an Agreed Structure Plan may distinguish between provisions, requirements or standards which are intended to have effect as if included in the Scheme, and provisions, requirements or standards not so intended, and it is only the provisions so intended which have that effect. Any other provisions are for guidance or information only, or such other purpose as stipulated in the Agreed Structure Plan documents.'

It is important to note that the Court of Appeal in the **Scutti** case referred to the fact that the planning refusal which gave rise to the claim for compensation for injurious affection was made on 13 March 2014. That was more than eighteen months before the coming into operation of the LPS Regulations, and consequently before the coming into operation of deemed provision cl.27(1).

The Court of Appeal noted at [16] that the parties had agreed before the SAT that the relevant provisions of the City of Wanneroo LPS were those applicable as at 13 March 2014 upon the refusal of the grouped housing development

application. The Court of Appeal went on to say at [22] –

‘In these reasons, consistently with the parties’ approach in the Tribunal and before the judge [at first instance], and in this court, the statutory position referred to is that as at the date of the refusal of the Grouped Housing Development Application, ie, 13 March 2014.’

As at 13 March 2014, deemed provision cl.27(1) was not in operation. It is at least arguable, and probably is the case, that if the **Scutti** decision had been made on the basis of the law as it exists since 19 October 2015, upon the coming into operation of the LPS Regulations, and upon the coming into effect of deemed cl.27(1), then the outcome may well have been different.

Recommendation

The purpose of this update is to suggest to local governments that they take care in applying the Scutti decision. At least in the case of claims for compensation for injurious affection arising out of a refusal of development approval, or the imposition of conditions on a development approval, where the claim for compensation is made on the basis of provisions in a Structure Plan which purport to reserve the subject land for a public purpose, they should argue against the application of the Scutti decision and the acceptance of the claim for compensation unless the development refusal or approval subject to unacceptable conditions, was made prior to the coming into operation of the LPS Regulations on 19 October 2015.

There is also the potential for claims for compensation for injurious affection arising not upon the refusal of a development application, but upon the first sale of the land after the imposition of a reservation. It may be that in such a case, the first sale giving rise to the alleged injurious affection would need to have occurred prior to 19 October 2015, and given that a claim for compensation for injurious affection must be made within six months of the first sale, there will, as from the date of the **Scutti** decision on 12 October 2018, be few if any compensation claims arising from the first sale of reserved land that could avoid the argument as to the effect of deemed cl.27(1). It must be acknowledged however that the situation in regard to a compensation claim arising from a first sale of land may be considered to be different from a determination on a development application as in **Scutti**, considering that deemed cl.27(1) specifically addresses the position of a decision-maker for an application for development approval or subdivision approval in an area that is covered by a Structure Plan.

Conclusion

The simple message of this update for local governments is, that if you receive a claim for compensation for injurious affection arising out of the provisions of a Structure Plan, the local government should not take any step to admit or even process the claim until competent legal advice has been obtained. It seems likely that valid claims covered by the Scutti decision will be rare, at this time, three years after the coming into operation of the LPS Regulations.

For further information please contact Denis McLeod by email to dmcleod@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.