

Effect of the High Court's Decision in the Southregal Case. Special Consideration of the Effect on Local Governments

By

Effect of the High Court's decision in the Southregal case on claims for compensation for injurious affection due to the reservation of land in WA planning schemes. Special consideration of the effect on local governments.

INJURIOUS AFFECTION CLAIMS MAY BE SIGNIFICANT FOR LOCAL GOVERNMENTS

Local governments (LGs) in WA which have a local planning scheme (LPS), as most have, face a potential liability for compensation for injurious affection if they reserve land for a public purpose under their LPS.

The liability could be substantial. For instance in the Avon Capital Estates case³, the City of Canning was held liable in an arbitration to pay a claimant owner in excess of \$17M compensation and interest for injurious affection arising from a reservation imposed to reflect the Water Corporation interest in major water supply mains passing through the claimant's land. An appeal to the Supreme Court by the City was successful⁴, but the case stands as an example of the scale of liability a LG may face in a claim for compensation for injurious affection arising out of the reservation of land under an LPS.

This article considers the legal framework for injurious affection claims against local governments, and how it has been affected by the recent decision of the High Court in *WAPC v Southregal Pty Ltd & Anor*.

INJURIOUS AFFECTION CLAIMS UNDER A LPS PRE-PLANNING AND DEVELOPMENT ACT 2005

The potential for a LG to face a claim for compensation for injurious affection arising out of a reservation of land under a scheme has been in the WA planning legislation since the coming into operation of the Town Planning and Development Act 1928 (WA) (TP & D Act)⁶. But until April 2006 when the Planning and Development Act 2005 (WA) (P & D Act) came into operation, the claim was as a general rule required to be made within a period of six months after the date of gazettal of the notice of the Minister's approval of the scheme.⁷ Probably because of the time limit, but perhaps also because of the further requirement in s.12(2a)(b)(i) of the TP & D Act, even for reserved land, that the scheme permitted development on the affected land for no purpose other than a public purpose, claims for compensation for injurious affection against LGs were seldom made.

INJURIOUS AFFECTION CLAIMS UNDER REGION PLANNING SCHEMES PRE-PLANNING AND DEVELOPMENT

ACT 2005

Under the Metropolitan Region Town Planning Scheme Act 1959 (WA) (MRTPS Act)⁹, a significantly different provision was made for claims for compensation arising from the reservation of land under the Metropolitan Region Scheme (MRS)¹⁰.

Under the combined provisions of ss.11 and 12(2a)(b) of the TP & D Act, and s.36(3) of the MRTPS Act, claims for compensation for injurious affection to land alleged to be due to or arising out of an MRS reservation could not be made until –

- the land was first sold following the date of the reservation; or
- the responsible authority under the MRS refused an application for permission to carry out development on the land, or granted permission to carry out development subject to conditions unacceptable to the applicant.

The Western Australian Planning Commission Act 1985 (WA) (WAPC Act)¹² contemplated the possibility of a region planning scheme (RPS) being made for any of the other nine regions of WA, besides the Perth metropolitan region. The provisions in s.36 of the MRTPS Act relating to claims for compensation for injurious affection under the MRS were made applicable by similar provisions, to any other RPS.

DIFFERENCE BETWEEN INJURIOUS AFFECTION CLAIMS UNDER A LPS AND UNDER A RPS PRE-PLANNING AND DEVELOPMENT ACT 2005

The above analysis highlights the difference between the entitlements to claim compensation for injurious affection arising from the reservation of land under a LPS on the one hand, and under a RPS on the other hand, immediately prior to the coming into operation of the P & D Act on 9 April 2006. The difference can be roughly summarised as follows:

Claims for compensation for injurious affection under an LPS were generally subject to a time limit of six months after the making (coming into operation) of the scheme which gave rise to the injurious affection. A practical consequence of the six month time limit was that generally it would only be the owner of land at the time the reservation was imposed who would be in a position to make a claim for compensation for injurious affection. The six month provision was therefore a serious limitation on claims.

For a RPS, the right to claim compensation arising from the making of the RPS was deferred to the time when the impact of the reservation would be felt by the owner. That would be:

1. The date of the first sale of the land after the imposition of the reservation (presumably on the assumption that the first sale would reflect the affected value); or
2. On an application for approval to carry out development on the land being refused, or granted subject to conditions unacceptable to the applicant.

INJURIOUS AFFECTION CLAIMS UNDER THE P & D ACT

The P & D Act was intended as a consolidation of the previous law.¹⁴ One of the exceptions to that broad general principle was that claims for compensation for injurious affection against LGs and the WAPC were covered under the new Act by the same set of provisions. The restriction on the circumstances in which claims could be made for injurious affection previously contained in s.36(3) of the MRTPS Act, now under the P & D Act were, in effect, made to apply to the LPS of a LG, as well as to the MRS. However the six month limitation on claims which previously applied generally under a LPS, no longer applied under the P & D Act.

S.173(1) of the P & D Act effectively repeated the opening provisions of s.11(1) of the TP & D Act by providing –

1. Subject to this Part any person whose land is injuriously affected by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority.’

That provision was significant for the purpose of future analysis of the injurious affection provisions by the High Court in that it conferred the right to claim compensation on ‘any person whose land is injuriously affected by the making or amendment of a planning scheme’.

S.174(1) of the P & D Act provides in its relevant part –

1. ... land is injuriously affected by reason of the making or amendment of a planning scheme if, and only if —
 - that land is reserved (whether before or after the coming into operation of this section) under the planning scheme for a public purpose; or
 - the scheme permits development on that land for no purpose other than a public purpose; ...’

Then, reflecting s.36(3) of the MRTPS Act, s.177(1) of the P & D Act provides in its relevant part –

1. ... when under a planning scheme any land has been reserved for a public purpose, no compensation is payable by the responsible authority for injurious affection to that land alleged to be due to or arising out of such reservation until —
 - the land is first sold following the date of the reservation; or
 - the responsible authority —

- refuses an application made under the planning scheme for approval of development on the land; or
- grants approval of development on the land subject to conditions that are unacceptable to the applicant.'

The legislative regime for injurious affection claims under a RPS have effectively been preserved in the P & D Act provisions, but the regime for LGs has been changed as to the previously existing six month limitation on claims, and has been brought into line with the RPS regime.