

Structure plans and injurious affection claims: Otago Pty Ltd and City of Cockburn

By Peter Wittkuhn

In common with the legal situation in most Australian jurisdictions, Western Australian planning law makes provision for landowners to obtain compensation in some circumstances when their land is subjected to a town planning classification for a public purpose. A compensable impact of this kind is referred to in WA as 'injurious affection'. The main category of injurious affection recognised under WA planning law applies where land is reserved under a planning scheme for a public purpose. WA planning practice also makes extensive use of structure plans. There has been ongoing legal debate as to whether the designation of land for a public purpose under a structure plan, is the equivalent of a reservation under a planning scheme, such as to give rise to a right to claim compensation.

An additional feature of the WA legal landscape is the advent of the so-called 'Deemed Provisions', being a set of standard provisions which, since October 2015, have been deemed to form part of every WA local planning scheme.

The WA State Administrative Tribunal's decision **Otago Pty Ltd and City of Cockburn** [2021] WASAT 27 is the next significant case precedent following the **Scutti** litigation (overviewed below), to explore whether land can be considered injuriously affected by virtue of having a designation for a public purpose under a structure plan.

The Tribunal determined that the Deemed Provisions, which now merely require a decision-maker to have 'due regard' to a structure plan, had the effect in the **Otago** case that the land was not 'injuriously affected', and thereby did not give rise to a claim for compensation under the *Planning and Development Act 2005* (**PD Act**) Part 11.

Facts of Otago

During the period of the applicant's ownership of the subject land, three key things happened. The first key thing that occurred was that the subject land was included within an area that was rezoned under the local planning scheme from 'Rural' to 'Development'. The main consequence of a 'Development' zoning was that a structure plan was required to guide development and subdivision.

The second key thing was that a local structure plan was adopted for the area including the subject land. Under the structure plan, a portion of the subject land was designated as 'Public Open Space'.

The third key thing that happened was that the Deemed Provisions came into effect – that is, Schedule 2 to the *Planning and*

Development (Local Planning Schemes) Regulations 2015. The Deemed Provisions are deemed to have effect as part of every WA local planning scheme, and prevail over any inconsistent provision of a planning scheme, to the extent of the inconsistency: PD Act section 257B.

A key Deemed Provision in this context is clause 27(1) which 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.’

The Deemed Provisions came into operation on 19 October 2015.

The applicant sold the land in 2017. The applicant then claimed compensation for injurious affection against the local government pursuant to Part 11 of the PD Act. The basis of the claim was that the price obtained was alleged to be depressed by reason of the Public Open Space designation, compared with the price that the land would have obtained if not for the public purpose designation.

The local government argued that the land was not injuriously affected within the meaning of that concept under section 174(1) of the PD Act. The relevant category of ‘injurious affection’ under section 174(1) which arose for consideration in **Otago**, was whether the POS-designated portion of land was ‘reserved ... under the planning scheme for a public purpose’. In light of the local government’s rejection of the claim for compensation, the applicant commenced proceedings under section 176(1) for determination by the Tribunal as to whether the land was injuriously affected

Comparison with *Scutti*

In the earlier, unrelated **Scutti** litigation, an applicant had ultimately succeeding in establishing injurious affection by virtue of a designation under a structure plan. In that litigation, the local planning scheme had contained a provision that where a structure plan imposed a classification on land by reference to reserves, then the provisions of the structure plan would apply to the land as if its provisions were incorporated in the local planning scheme and were binding and enforceable in the same way. That was a key provision which led the Court of Appeal division of the Supreme Court of WA to conclude that a designation for a public purpose was effectively equivalent to a local planning scheme reservation: see **Scutti v City of Wanneroo** [2018] WASCA 175 at [125(6)]. Hence, the applicant’s land in **Scutti** was found to be injuriously affected, giving rise to a claim for compensation against the local government.

At the time when the structure plan affecting the subject land in **Otago** was first adopted, the relevant local planning scheme had contained a provision similar to that in **Scutti**: see Tribunal’s reasons at [23]. The Tribunal in **Otago** held that the subject land *would have been regarded as* ‘injuriously affected’ by reason of those provisions *whilst they were in operation*: see [155], [157] and [165].

The impact of the Deemed Provisions

It is important to point out that the entitlements of the applicants in the **Scutti** litigation were determined by reference to the law as it stood prior to the Deemed Provisions coming into operation.

As previously noted, the Deemed Provisions, operative from 19 October 2015, merely required the decision-maker on an application for development, to have 'due regard to', but not be bound by, the structure plan. Additionally, the local government in **Otago** later incorporated into its local planning scheme an express provision to the same effect as Deemed Provision clause 27(1).

The applicants sold its land in 2017. The date of the registration of the transfer, rather than the date of the contract, was held by the Tribunal at [53] to be the relevant date for determining whether the subject land was injuriously affected, although the legal framework would have been the same as at both dates on the particular facts of **Otago**.

The Tribunal determined that the effect of a local planning scheme provision which merely required 'due regard' to the structure plan, was such that the land could no longer be regarded as 'reserved' for a public purpose under a local planning scheme: see particularly [175].

The applicant in **Otago** nevertheless argued that the *historical status* of its land as having been 'reserved' *before* the coming into operation of the Deemed Provisions, meant that the applicant was still entitled to pursue compensation. The Tribunal rejected that argument. The critical date for the assessment of whether the land was 'injuriously affected' was held to be the date of the 'trigger' which gave rise to the right to claim: see especially [84]. Section 177(1) provides the trigger in cases where land is reserved. The possible 'triggers' are the sale of land; the refusal of development approval; or the imposition on a development approval of a condition unacceptable to the applicant.

The Tribunal rejected the argument that the applicant had a deferred right to claim compensation by virtue of the structure plan *having historically had*, for some period, the equivalent status as a reserve: [258] – [262]. The applicant's argument was that the deferral operated until the applicant sold the land – albeit by the time the applicant sold the land, the structure plan designation had ceased to have the equivalent effect as a reserve under a planning scheme. The Tribunal held that the applicant did not hold a deferred (but preserved) right to claim compensation.

Conclusion

The coming into operation of the Deemed Provisions on 19 October 2015, would appear in light of the **Otago** decision, to have the effect that designations on structure plans for a public purpose, would no longer be regarded in WA as having the equivalent status of a reserve under a local planning scheme. Accordingly, claims of compensation for injurious affection within the meaning of section 174(1)(a) of the PD Act would no longer appear to be capable of arising by virtue of structure plan designations.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information on matters discussed in this Update please contact Peter Wittkuhn by email to pwittkuhn@mcleods.com.au.

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