

Structure Plans: injurious affection and compensation

By Peter Wittkuhn

Introduction

A recent decision of the Western Australian State Administrative Tribunal considered the question of whether structure plans could injuriously affect land and thereby give rise to compensation entitlements on the part of landowners.

However the decision in question, *City of Wanneroo and Scutti* [2016] WASAT 102, concerned alleged compensation rights which, if they existed at all, would have accrued prior to the Planning and Development (Local Planning Schemes) Regulations 2015 coming into force, which include 'deemed provisions' in Schedule 2 (Deemed Provisions) that are now read into every local planning scheme.

It is suggested that a key provision of the Deemed Provisions would have probably played a decisive role in the case if the deemed provisions had been in force when the critical refusal of development occurred.

Facts of City of Wanneroo and Scutti

The applicant in the case was the local government, which sought a determination from the Tribunal that certain land was not injuriously affected. That procedure was available by virtue of section 176(1) of the Planning and Development Act 2005 (PD Act). The respondents were the owners of the land.

The relevant land (comprising 2 lots) was zoned 'Urban Development' under the local planning scheme. Provisions of the local planning scheme required an Agreed Structure Plan to be adopted under the scheme prior to any subdivision or development in the Urban Development zone. An Agreed Structure Plan had been adopted.

The structure plan incorporated text and two maps. One of the maps was entitled 'East Wanneroo Structure Plan Cell 4', on which the two lots owned by the landowners were designated 'Public Open Space'. The second map was entitled 'East Wanneroo Cell 4 Zoning Plan'. On that map, the landowners' land was designated 'Residential Precinct'. The landowners

applied for a grouped housing development across the two lots.

The application was determined by a Joint Development Assessment Panel (JDAP). The JDAP refused the application, and one reason given was that the proposed development was 'inconsistent with and contrary to clause 6 and Schedule 3 of ASP 6, as the ability for the provision of public open space would be compromised'. The landowners lodged a claim for compensation from the City on the basis that their land had been injuriously affected upon the adoption of the Agreed Structure Plan which as mentioned, incorporated a map which identified the land as 'Public Open Space'.

Legislation

Under the PD Act, land is injuriously affected by the making or amendment of a planning scheme in three categories of situation:

- a) Where the land is reserved for public purpose;
- b) Where the scheme prohibits development of the land for no purpose other than a public purpose;
- c) Where 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 174(1).

In referring the matter to the Tribunal, the City sought a determination that none of those circumstances applied, whilst the landowners argued for the application of each category in the alternative. This article will address only points (a) and (b), as the application of (c) is likely to be particularly fact-specific.

Was the land 'reserved under the scheme for a public purpose' by virtue of the Agreed Structure Plan?

If this question was answered in the positive, then injurious affection would necessarily arise: PD Act, section 174(1)(a). The Tribunal considered the provisions of the local planning scheme which were in effect as at the date of the refusal of development approval, and which gave effect to structure plans. As to those provisions governing structure plans which were in force at the time of the refusal, the Tribunal held that they were capable of resulting in the reservation of land if the structure plan or its mapping treated land in a way that sufficiently matched the concept of a 'local authority reserve' under

the local planning scheme:

'... the adoption of ASP was... a circumstance that caused relevant provisions of TPS 2, that had been in existence since the making of the Scheme, to potentially have the effect of causing injurious affection to the land...': [31].

Clauses 9.8.2 and 9.8.3 of the applicable local planning scheme made the following provision in relation to the effect of an Agreed Structure Plan: '9.8.2 Where an Agreed Structure Plan imposes a classification on the land included in it by reference to reserves, zones... :

(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:

...

(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.'

Whilst the above clauses provided for the classification and zoning of land under an Agreed Structure Plan to have effect as if incorporated in the scheme, the Tribunal ultimately found that that the provisions of the local planning scheme did not, in so far as they gave effect to the Agreed Structure Plan, operate to 'reserve' the land for a public purpose as the 'Public Open Space' designation in the Agreed Structure Plan did not match with any specific category of Local Reserve recognised under the Scheme text or Scheme maps: [42].

Did the Scheme prohibit the use of the land for any purpose other than a public purpose?

The Tribunal referred to both maps mentioned earlier, that is, one which identified the land for 'Public Open Space' and the other which identified the land as being within a 'Residential Precinct' and noted that there was not an express prohibition in the Agreed Structure Plan against non-public-purpose development on land designated 'Public Open Space': [57].

It was determined that the effect of designation as 'Public Open Space' was to require 'due regard' to that designation. That meant that non-public-purpose development was legally capable of being approved, and therefore it could not be said that the scheme prohibited development for no purpose other than a public purpose.

Discussion

The result in *City of Wanneroo and Scutti* was that the land was not injuriously affected, and no compensation rights accrued to the landowners. The Tribunal's decision is under appeal to the Supreme Court. The Tribunal's conclusion did not depend upon the operation of the deemed provisions, which only came into effect after the JDAP had refused the development application.

The *City of Wanneroo and Scutti* decision has some elements of specificity to its particular facts. Under the statutory environment that applied prior to the deemed provisions coming into operation, it would be dangerous to assume that *City of Wanneroo and Scutti* establishes that land could never be considered injuriously affected by virtue of the interaction of a structure plan and provisions of the local planning scheme which give effect to that structure plan.

It was of significance in *City of Wanneroo and Scutti* that there were two maps, one which designated the land 'Public Open Space' and the other, which designated in 'Residential Precinct'. Further, the designation of 'Public Open Space' did not match with a category of reserve specifically recognised by the local planning scheme. If the *City of Wanneroo and Scutti* reasoning were applied to other situations, then the specific text and maps comprising any given structure plan, and the text of scheme provisions which give effect to structure plans, would have needed to be considered carefully to ascertain whether any different result might have flowed in a particular case.

Deemed provisions

Importantly, the JDAP's decision in *City of Wanneroo and Scutti* was made well before the Deemed Provisions in Schedule 2 of the Planning and Development (Local Planning Schemes) Regulations 2015 came into operation on 19 October 2015. By force of those Regulations and section 257B of the PD Act, a deemed provision prevails over any inconsistent local planning scheme provision.

The Deemed Provisions, now include clause 27(1), which provides that a decision maker for an application for development approval in an area that is covered by an approved structure plan is to have regard to, but is not bound by, the structure plan when determining the application. It is suggested that clause 27(1) probably prevails over clauses such as 9.8.2 and 9.8.3 of the local planning scheme in the *City of Wanneroo and Scutti* case, in so far as those clauses have the effect of treating land as if zoned or reserved directly under the Scheme.

One probable legal effect of cl. 27(1) is that refusals of development applications are no longer likely to trigger valid

compensation claims, as a structure plan is only a discretionary consideration to which regard must be had by a decision maker. This issue was touched on by the Tribunal but not determined. The way in which the issue was framed by Member Eddy was whether clause 27(1) reverses any injurious affection upon the land by virtue of the interaction of a structure plan and the scheme provisions which (at least prior to the Deemed Provisions) gave effect to the structure plan. The way in which the Member contemplated the reversal could operate would presumably be as follows: prior to the Deemed Provisions, land might be treated as equivalent to being reserved and therefore injuriously affected; but upon the commencement of the Deemed Provisions, the structure plan would be 'merely' something to which 'due regard' must be given, rather than as imposing a reservation. Because the Tribunal found the particular structure plan in issue in City of Wanneroo and Scutti did not purport to give the subject land a status equivalent to a reserve, it was unnecessary for the Tribunal to determine whether the 'reversal of injurious affection' analysis was correct.

Conclusion

City of Wanneroo and Scutti contributes to Western Australia's case law concerning structure plans. Specifically, it represents a determination, on particular facts, that land was not injuriously affected through the interaction of structure plan and scheme provisions. However, the equivalent reasoning, applied to other facts and provisions, could have potentially produced a different result. The Deemed Provisions which, since 19 October 2015, are to be read into local planning schemes, probably have the effect that structure plans no longer 'injuriously affect' land, if they ever did. However, it should be noted that that proposition was left open by the Tribunal, and landowners may yet attempt to pursue a contrary argument. Local governments should therefore continue to take care when designating private land in a structure plan for a purpose that has an apparently public flavour, as compensation obligations cannot be categorically ruled out. Additionally, it is noted that the landowners in City of Wanneroo and Scutti are pursuing an appeal, and this development should be monitored by local governments.

If you would like any further information in relation to the issues discussed in this article, please do not hesitate to contact Peter Wittkuhn by email at pwittkuhn@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.