High Court finds in favour of WA Planning Commission in compensation claim for injurious affection

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Decision

On 8 February 2017, the High Court allowed two appeals by the Western Australian Planning Commission (**WAPC**) from WA Court of Appeal decisions regarding the right to compensation to subsequent owners of land reserved for a public purpose. In *Western Australian Planning Commission v Southregal Pty Ltd & Wee; Western Australian Planning Commission v Leith* [2017] HCA 7 [1], the High Court ruled 4:1 against both the first instance decision and the Court of Appeal decision [2] and ordered costs payable by the landowners in all 3 matters.

Background

Southregal and Leith claimed compensation for injurious affection after both applications for development approval were rejected by the WAPC. Their respective parcels of land were subject to the Peel Region Scheme (PRS), which came into effect in March 2003 and reserved land for regional open space. Southregal and Leith purchased the respective land in October 2003 for $2.6 million and June 2003 for $1.28 million respectively. The WAPC rejected claims for compensation under section 177 of the *Planning and Development Act 2005* (WA) (PDA) for $51.6 million by Southregal and $20 million by Leith, on the grounds that compensation was only payable to the owners of the land at the time of reservation under the PRS.

The Majority Findings - Kiefel and Bell JJ & Gagelar and Nettle JJ

The two joint judgements forming the majority decision found that the provisions of section 173(1) PDA read together with section 177(1) PDA and section 177(2) PDA produces a harmonious result supporting the construction of the compensable right provisions for injurious affection to apply to only the owners of land at the time of reservation. Any subsequent owner was not entitled to claim.

Agreeing with *Gummow and Hayne JJ in WAPC v Temwood Holdings Pty Ltd* [3], the Court found that while compensation is postponed until one of the events outlined in section 177(1) is triggered [4], the eventual enlivening of one of those events provides the first and only right to compensation [5]. A subsequent occurrence of one of the two remaining events cannot trigger a further valid claim for compensation [6].

Even if the owner at the time of reservation did not claim compensation subsequent to selling the land, a subsequent owner of that land whose development application was rejected or was subject to unacceptable conditions cannot make a claim given the construction of section 173(1), as compensation can only be claimed by a landowner “affected by the making” of a reservation, as opposed to a reservation already made.[7]

Section 177(2)(b) PDA is not concerned with who can claim, but rather, identifies the person to whom payment is made after a claim is made.[8] Subsection (2)(b) is simply concerned with ensuring that, irrespective of who the applicant for development approval is, the payment must be made to the owner of the land at the date of reservation. In considering the parliamentary debates of 1969 and 1986 and the historical development of the section from its origins in sections 11 and 12 of the *Town Planning and Development Act* 1928, the majority retained the view that there was no intention to

extend compensation to somehow run with the land and pass to subsequent owners, thereby creating a right to compensation when the owner applying had suffered no damage insofar, as subsequent owners do not suffer in the same way as the owners at the time of reservation for two reasons.

Firstly, subsequent owners purchase the land at a reduced market price brought on by the reservation [9], and secondly “subsequent purchasers are aware of the scheme provisions at the time of purchase… and would not be at the same disadvantage as the original owner" [10]. Owners of land who have a reservation imposed on them do not have the same liberties [11].

The Minority Finding: Keane J

Justice Keane agreed with the first instance decision and the decision of the Court of Appeal applying an alternative statutory interpretation of the relevant Part of the PDA, coupled with other interpretations of extrinsic material. His Honour found that the PDA allowed for subsequent purchasers to claim compensation for injurious affection, especially given the 1986 amendments [12]. His further view was that a loss suffered from having a reservation imposed is the same as entering into a contract for sale at a lower price, therefore entitling a subsequent purchaser to the same compensation [13] because the full extent of the loss may not be realised until development approval is sought [14].

Implications

The majority judgement places purchasers of land subject to reservation on constructive notice that they will not have any compensation rights unless a scheme amendment occurs imposing another reservation on the land or altering the existing reservation, post purchase. If a reservation is in place at the time of purchase, the reduced market price of the land is a satisfactory remedy.

For more information or discussion, please contact HopgoodGanim Lawyers’ Planning team.

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[1] Western Australian Planning Commission v Southregal; Western Australian Planning Commission v Leith [2017] HCA 7 (‘Southregal; Leith’).

[2] See Leith v Western Australian Planning Commission [2014] WASC 499; Western Australian Planning Commission v Southregal Pty Ltd (2016) 49 WAR 487.

[3] (2004) 221 CLR 30.

[4] Southregal; Leith [2017] HCA 7 [16], [72].

[5] Ibid [17, 33].

[6] Ibid.

[7] Ibid [31], [35]-[36].

[8] Ibid [42]-[44].

[9] Ibid [50].

[10] Ibid [46], [72]-[77], [82].

[11] Southregal; Leith [2017] HCA 7 [31]; Citing Gummow and Hayne JJ in Temwood, who quote Ipp J in Bond Corporation Pty Ltd v Western Australian Planning Commission (20000 110 LGERA 179, 187-188 [34].

[12] Southregal; Leith [2017] HCA 7 [156]-[160].

[13] Ibid [167]-[168].

[14] Ibid [169]-[170].

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