Compensation for reserve land under the WA metropolitan Region Town Planning Scheme Act

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WA EDITOR'S NOTE:

The following article discusses the compensation provisions for reserved land under section 36 of the Metropolitan Region Town Planning Scheme Act 1959. The author was Counsel assisting and Solicitor in the recent case of WA Planning Commission v Erujin Pty Ltd [2001] WASCA 139. The outcome of Erujin forms the basis for this article.

The issues raised in the article are currently attracting serious debate in Western Australia as the State Government takes steps to implement "Bush Forever" its main remnant vegetation management policy which aims to maintain a bushland reserve system throughout the Swan Coastal Plain.

The WA Supreme Court recently considered similar issues to Erujin in the case of Temwood Holdings Pty Ltd v WA Planning Commission [2001] WASCA 199. Here it found that, turning on its own facts, the ceding of reserved land to the Crown free of cost was a valid condition of subdivision approval. This case is presently under appeal to the Supreme Court and was heard by the full court on 27 November 2001.

Comments on this article and further discussion on this topic and related law and policy are invited for future additions. Interested commentators should contact the WA NELR Editor at aidan.kelly@freehills.com.au.

Introduction

In layman's terms *WA Planning Commission v Erujin* (Erujin Appeal Case) is all about a farmer's pursuit for compensation. In legal terms it is all about the deficiencies of Section 36 of the *Metropolitan Region Town Planning Scheme Act* 1959 (MRTPS Act).

Section 36 is supposed to provide a mechanism to claim compensation when a regional reservation is placed over land. Certainly, that was what the landowner in this case was told when the reservation was being placed over his land but these words were hollow when the landowner tried to claim compensation.

First the land owner wrote to the WA Planning Commission (WAPC) and was told that the payment of compensation for his land was not on the budget. Then the land owner made an application for development within the reservation that was refused, triggering a right to claim for compensation. The land owner then lodged a claim for compensation, however, the decision in *Bond Corporation Pty Ltd v WA Planning Commission* [1999] WASC 157 (Bond) had already confirmed that only bona fide development applications trigger a right to compensation.

The landowner then decided to subdivide the regional reservation from the balance of the land to put it aside for future acquisition by the WAPC. The subdivision was approved with the condition that the land that was subdivided out be given up free of cost to the Crown. The landowner appealed to the Town Planning Appeals Tribunal (Tribunal). His appeal was upheld. The Crown appealed to the Supreme Court and its appeal was dismissed. This article discusses the legislative provisions and case law relevant to the ceding of reserves under the MRTPS Act.

Background

Arguably, it was never the intention of Perth's original town planners Stephenson and Hepburn that Regional Open Space be given up free of cost. This was because the demand for Regional Open Space as a result of a subdivision was created by regional and not local needs. This was clearly recognised by the Tribunal in early cases such as *Daniels v TPB* (TPATWA Appeal 29 of 1979) (Daniels). More recently the distinction between Regional Open Space and Public Open Space has become less clear than it once was.

A brief restatement of the facts in Daniels is worthwhile as an example of how early cases made the distinction between regional and local requirements. In Daniels the requirement to cede a reserve, which had a regional character as a condition of subdivision, was considered. Here the Tribunal found that

> *"appropriate protective measures could be achieved through regulation of development approvals or by suitable amendments to the Shire of Swan Town Planning Scheme. The proposed subdivision does not of itself give rise to the need for the reserve."*

This reasoning has more recently been applied in the case of *Love v WAPC* (TPATWA Appeal 66 of 1998) (Love). Some further details of this case are set out below and relevantly Love was a decision that the Crown was also seeking to overturn in the Eurjin Appeal Case.

Increasingly it seems that Regional Open Space is required to be ceded at the time of subdivision for the purposes of Public Open Space. While it makes good planning sense if Public Open Space falls within Regional Open Space it is often surprising to note that Public Open Space requirements follow the exact boundaries of Regional Open Space. The issue is that Public Open Space requirements must be justified independently of Regional Open Space and vice versa for only in this way can the compensation mechanisms of the MRTPS operate effectively.

In *Temwood Holdings Pty Ltd v WA Planning Commission Appeal* 29, 40 & 41 of 2000 [2001] WATPAT 4 (Temwood Tribunal Case) the Tribunal Chairman Mr Stein said

> *"The ceding condition does not take away a future right to compensation but requires the giving up of the land free of cost. The reality is that if land is reserved, the owner loses a possible right to compensation but, most importantly, if land is not reserved, the owner loses the value of the land ceded; the same value in each case. There is no difference in the effect of the condition if the land is injuriously affected: in all cases the value of the land is lost."*

Although Regional Open Space can in effect be ceded as Public Open Space, the requirement for Public Open Space needs to be justified according to planning principles. As demonstrated in Erujin, just because land is shown as Regional Open Space it need not be given up free of cost. This is consistent with early cases in the Tribunal that clearly drew a distinction between regional requirements and local requirements. On the face of it, not enabling landowners to claim compensation for land that is the subject of a reservation but requiring Regional Open Space to be given up as Public Open Space free of cost at the time of subdivision seems to ignore the purpose of section 36 of the MRTPS Act.

It is unfortunate that the MRTPS Act makes it so difficult to claim compensation. Landowners with conservation values on their land see this as blight on the land, rather then an asset. In some other countries, such as the Netherlands, resumptions and reservations are not fought but welcomed, landowners do not need to do battle for compensation but receive generous compensation payments. In WA if landowners seek to be paid compensation the process is complex and fraught with difficulty.

Landowners that seek to trigger compensation by lodging a development application often hit a brick wall because the development application needs to be genuine. In the words of the MRTPS Act the application needs to be "Bona Fide". There is a certain unreality in a person lodging a development application over reserved land and it is difficult to make a bona fide application in these circumstances. The Supreme Court's decision in Bond found that compensation could not be claimed where a development application that was refused had been made solely for the purpose of triggering a claim for compensation. This being the case, the reality is that short of selling land there is no mechanism available to landowners to trigger a compensation claim. In the Temwood Tribunal Case the Tribunal Chairman acknowledged this difficulty and said

> *"... Bond, in combination with Love, has significant and unfortunate consequences. If an owner primarily intends to subdivide land, an application to develop will be invariably contrived. If the owner makes contemporaneous applications to develop and subdivide, it is then a matter of luck if the development is refused before the condition is imposed."*

The Erujin Case

In the Erujin Tribunal Case the Tribunal accepted the argument that the condition to give up Regional Open Space as Public Open Space was not reasonable. The law in respect of planning conditions is rather clear insofar as conditions must satisfy the following criteria:

- The condition imposed is for a planning purpose and not for any ulterior purpose.
- The condition fairly and reasonably relates to the development permitted; and
- The condition is not to be so unreasonable that no reasonable planning authority could have imposed it.

Before the Tribunal the WAPC relied on policy and precedent in arguing that the subdivision gives rise to a need for Public Open Space. The WAPC relied on Policy DC 2.3 which relates to Public Open Space in Residential Areas. It should be noted that the zoning for the Erujin land was Rural Living A. Policy DC 2.3 applies only to residential subdivisions as is clearly set out at point 4 in the background notes which provide an introduction to the policy.

The WAPC also relied on Policy DC 2.5 for Special Residential Zones. However, there is no set requirement for Public Open Space in Special Residential Zones. In the background notes of Policy DC 2.5 it states at point 2 (b)

> *"It is made clearer that, while the Commission sets no standard requirement for the provision of Public Open Space in Special Residential zones, a contribution will normally be required."*

Further at 3.2.3 (b) the opening words of the paragraph sets out the reason why a standard open space for Special Residential Zones is not required:

> *"Because of their spacious character and large lot sizes, the WAPC does not specify a standard open space contribution for Special Residential Zones. Land for Public Open Space will be required when the provision of recreational open space is considered desirable or when it can include an important topographical feature such as a creek, lake or group of trees which is to be retained as a recreational amenity for residents of the subdivision and the district as a whole."*

Overall, policy is but one of the considerations to be taken into account in deciding a subdivision. In this context, the decision of the WA Supreme Court in *Falc Pty Ltd v SPC* (1991) 5 WAR at 522 makes it clear that policy must not usurp the discretion or substitute administrative convenience for an individual decision.

Management of the regional open space

In the Erujin Tribunal Case the WAPC argued that Regional Open Space is best managed by it (although in practice invariably the burden of management is placed on the relevant local government authority). In Love the Tribunal acknowledged that public ownership for the purposes of management is not a ground to merit ceding of land for Public Open Space. The Tribunal concluded:

> *"It is not appropriate from the perspective of orderly and proper planning, and it is not reasonable to require the owner to cede the land free of cost to allow the management to be in the hands of authority when the provisions of the Scheme are adequate to accomplish the recognised goals."*

The Tribunal also indicated that access to the land by the public can be ensured by creating an easement in favour of the local authority pursuant to section 136C of the Transfer of Land Act 1893.

In *Biaco Pty Ltd v SPC* TPATWA 15 of 1988 the appellant disputed the need for a 10 metre wide foreshore reserve under section 20A of the Town Planning and Development Act 1928 in a 17 lot subdivision application. The reserve was created to enable the public management of the foreshore. The Tribunal found that the condition creating the foreshore reserve was not justified and that the stated need for future management could be adequately catered for.

The Erujin Tribunal Case is another example of where the argument that land is best vested in the WAPC for the purpose of the management was not accepted by the Tribunal.

Erujin Appeal Case

In his reasons for decision in the Erujin Appeal Case, at paragraph 29, Justice Miller said

> *"It is apparent that there is sufficient Public Open Space provided for in that proposed subdivision. This Public Open Space is provided quite apart from the land reservation associated with the Wungong Brook .... The areas reserved for Public Open Space are substantial and in my view support the argument ... that even had the Tribunal given consideration to the subdivision guide plan it could rightly have been satisfied that Public Open Space was properly provided for without the necessity for ceding the land which is the subject of the presently approved subdivision."*

Justice Miller comes back to this point at paragraph 30 and said;

> *"I am, however, inclined to accept the submission of counsel for the respondent that the amount of Public Open Space provided by the subdivision guide plan clearly exceeds that which was reasonably required by reference to various policies of the appellant..."*

At paragraph 42 Justice Miller agreed that the various WAPC policies were not relevant, he said:

> *"In my view the respondent has correctly pointed out that reference to the three policy documents ... would have indicated that the Public Open Space requirements of the policies were met." At paragraph 44 his Honour said " Insofar as the present plan for subdivision is concerned, it seems to me that the three polices are inapplicable. Nothing in the policies would seem to require that for the subdivision in question the smaller of the two lots should be ceded to the Crown."*

In the concluding paragraph of the decision, paragraph 49, Justice Miller was very clear in respect of what he thought of the imposition of the first condition of the subdivision approval. He said:

> *"... in my view the Tribunal gave sufficient reasons. It reached the view that given the appellant's approval of the subdivision, it was entirely unreasonable to impose condition 1. That is, in the application of proper planning principles, a subdivision creating two lots such as this did, could not justify the imposition of a condition that one of those lots be ceded to the Crown without cost or compensation. The essential reasoning of the Tribunal is clear. It is that proper planning principles could not justify that result. That was a conclusion which, in my view, was clearly open to the Tribunal and indeed it is one with which I agree."*

Conclusion

It is submitted that it is unreasonable to simply require Regional Open Space to be given up as Public Open Space without compensation. Regional Open Space arises from regional requirements, Public Open Space is distinct. Although the outcome in Erujin is good it demonstrates quite clearly that section 36 of the MRTPS Act does not provide landowners with a fair mechanism to obtain compensation for land that is the subject of a reservation.

Many landowners in the Peel region scheme area have objected to their land being reserved. The community expects items of regional significance to have a value, and to be paid for by the regional community. This was recognised by Stephenson and Hepburn when they started the Metropolitan Region Improvement Tax. Land owners who have land that is significant from a regional perspective need to be paid compensation by the regional community. Unless we value our environment and generously compensate land owners for significant land they own, the environment will not be treated seriously by landowners.