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High Court rejects excessive use of WAPC powers

In the recent decision of *Mandurah Enterprises Pty Ltd & Ors v Western Australian Planning Commission* [2010] HCA 2 (**Decision**), the High Court unanimously held that a compulsory taking order issued by the Western Australian Planning Commission (**WAPC**) did not validly apply to land in Mandurah zoned for private uses under the Peel Region Scheme (**PRS**).

Facts

The appeal related to four properties and the taking order purported to compulsorily take the whole of each of the properties for the express purpose of Railways and Primary Regional Roads. One of the properties however was partly zoned for Industrial uses under the PRS and parts of two other properties were zoned for Urban land uses. The appellants argued that the WAPC could not exercise powers to take the whole of the properties for the purpose of constructing a railway when some parts would not be required for a railway and were only included for the purposes of avoiding a statutory duty to construct a crossing to provide access.

The appellants were unsuccessful at trial before a single Judge of the Supreme Court, and on appeal to the Court of Appeal in the Supreme Court the appellants were again unsuccessful, save that the Court of Appeal held that the portion zoned Industrial could not have been used for the purposes of the taking order. The Industrial zoned portion was accordingly returned to the owners and the appellants brought the rest of the issues to the High Court to argue that the taking order was wholly invalid.

The decision

The High Court found that whilst the areas reserved for public purposes under the PRS had been validly acquired, the areas zoned under the PRS had not been validly acquired. The Court noted that the WAPC had acted on advice to take the severed (zoned) portions which would avoid the statutory requirement to provide access through level crossings. The Court said:

> *'Acquiring land for the purpose of avoiding the construction of a level crossing is patently not acquiring land for the purpose of a railway or for purposes incidental to the undertaking, construction or provision of a railway.'*

The Court held that the taking of the severed zoned areas in order to avoid a statutory obligation to provide access to that land did not constitute a purpose required to undertake, construct or provide a public work i.e. the railway. The Court found that much of the taking order which purported to take the zoned areas were invalid.

The issue of severance, i.e. whether part of a lot or the whole of a lot invalidly taken could be severed from a taking order so as not to invalidate the taking order itself, appears to have been sidestepped by the High Court, in that it did not strike out the whole of the taking order, but rather sought to limit the effect of the taking order to apply to only the reserved portions of land. As a result, the High Court provides no clear direction on the issue of severance and effectively remitted the issue to the Supreme Court for final determination and orders. We will of course be keeping an eye on the position with interest.

Impact for property owners

The High Court's decision emphasises a long established principle that the extent of a resuming authority's powers are circumscribed by the purposes and terms of the legislation under which the resuming authority acts. The decision reinforces the Court's prescription against the use of powers for purposes that are not authorised or contemplated by the relevant legislation. Property owners whose rights are being affected by actions of government such as compulsory taking, should carefully consider the powers that are being relied upon by government and whether those actions are properly authorised by the legislation.

For further information on compulsory taking orders and this case, please contact Brian McMurdo, Consultant, on (08) 9288 6893 or brian.mcmurdo@lavanlegal.com.au.

About Lavan Legal:

Lavan Legal is the largest independently owned law firm in Western Australia. Lavan Legal has more than 200 staff, including 20 partners.

Our planning, environment and land compensation team offers advice on environmental enforcement and licence conditions, legislation and its impacts on proposed developments, advising government on amendments to planning legislation and sensitive developments which include rail freight facilities and claypit redevelopments. Injurious affection caused by the reservation of land is a frequent issue facing our clients and we represent them in the State Administrative Tribunal for compensation for their land.

We understand the intricate web of environmental laws encompassing all levels of regulation from Commonwealth to Local Government. We service an established client base which includes leading town planners, engineers and environmental consultants, as well as large public and private developers, local councils and State Government authorities.

Our vast experience in land compensation, planning and environmental law allows us to meet all our clients' needs with integrated and highly efficient services.

The Graceful Sun Moth

A recent article in the Financial Review, entitled *'Golden Sun Moth hinders Melbourne's growth'* (02 March 2010), highlighted the concern shared by developers that the presence of the Golden Sun Moth *(Synemon plana)* is halting the release of land in Melbourne's key urban growth areas. The cause for the concern arises from the release of Department of the Environment, Water, Heritage and the Arts' (**DEWHA**) significant impact guidelines in December 2009 which states that the mere identification of suitable habitat for the moth necessitate further survey, possible referral and a restriction on the clearing of the affected habitat.

The manner in which DEWHA have approached the issue has highlighted potential for similar treatment of WA's own Graceful Sun Moth *(Synemon gratiosa)*, which is afforded similar protections under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

Background

The Graceful Sun Moth was classified as an endangered species under federal environmental legislation in 2009 and occurs on Perth's Swan Coastal Plain between Wanneroo and Mandurah (and possibly as far as Wilbinga to the north and Yalgorup to the south) in areas of Banksia woodland or in areas close to the coast comprising *Lomandra maritima or L. hermaphrodite*.

Department of Environment and Conservation (**DEC**) guidance currently indentifies Graceful Sun Moth populations at the following nine bushland reserves:

- Warwick Conservation Reserve, Warwick (2 populations);
- Koondoola Bushland, Koondoola;
- Errina Road Bushland, Alexander Heights;
- Marangaroo Bushland, Marangaroo;
- Landsdale Road Bushland, Landsdale;
- Gumblossom Reserve, Quinns Park;
- Shenton Bushland, Shenton Park; and
- Whiteman Park, Whiteman.

However, in the absence of a recent survey, development proposals that may include removal of or degradation to bushland, including herbland, heathland and shrubland, risk impacting populations that are yet to be identified. To that end the DEC have undertaken to conduct a new survey of the moths' populations and habitats in the next 1-3 years.

Currently, developers are referred to the DEC publication 'Graceful Sun Moth Information Kit and Survey Methods' which provides guidance on how to conduct surveys of bushland to determine if the moth is present.

Implications for Development Proposals - lessons from the eastern states' experience

Like Western Australia's Graceful Sun Moth, the Golden Sun Moth is listed as a threatened species under federal legislation, meaning that whilst a development proposal may have all the necessary authorities from the local and state government, the proposal may additionally require assessment and approval from the Commonwealth government.

What does the EPBC Act term 'significant impact' mean?

Under the EPBC Act a person must not commence a project/proposal that *'has, will… or is likely to have a significant impact on listed threatened species in the endangered category'*.

As alluded to above, DEWHA have recently prepared 'Significant Impact Guidelines' for the eastern states Golden Sun Moth and these guidelines should only be loosely applied to Western Australia's Graceful Sun Moth, as the Golden Sun Moth habitat requirements differ to the Graceful Sun Moth and the former moth is classified as 'critically endangered' rather than 'endangered'.

Relevantly however, the Golden Sun Moth guidelines suggest that development proposals that involve the following actions may significantly impact the Golden Sun Moth:

- vegetation clearing including soil cultivation;
- modification of habitat such as changes to shading, hydrology, wind patterns, species composition;
- management practices such as changes to fire regime, slashing, mowing, increases or decreases in the intensity of a grazing regime;
- weed introduction; and
- chemical application such as pesticides, herbicides or fertilisers.

The way forward

What this means is that if a development proposal involves removal of or degradation to bushland on the Swan Coastal Plain (and particularly Banksia Woodland or *Llomandra*) a survey of the site should be undertaken to determine whether it may be a Graceful Sun Moth habitat or contain a population. If the survey reveals that it is, and the development proposal is likely to have a significant impact on the moth, then the proposal should be referred to DEWHA prior to commencing any works. Careful consideration should be given to significant impact because it is clear from DEWHA guidance that translocation of the Golden Sun Moth is not possible, and neither are offsets suitable, with the result that land containing habitat can be used for no other purpose than conservation (ie. reservation).

For further information or advice on requirements under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) including timeframes on referral decisions, rights of appeal against conditions imposed on an approval and advice on other environmental legislation, please contact Paul McQueen or Craig Wallace on (08) 9288 6828 or craig.wallace@lavanlegal.com.au.

State Planning Policy – 'not the be all and end all'

Background

It is the long held legal position that the existence of planning policies is not intended to replace the discretion of the Western Australian Planning Commission (**WAPC**) in the sense that planning policies are not to be inflexibly applied regardless of the merits of the particular case (*Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522). This requirement is also embodied in section 241(1)(a) of the *Planning and Development Act 2005 (WA)* (**PD Act**), which requires the Tribunal (on appeal) to have 'due regard' to any state planning policy.

Developers have however experienced a growing trend on the part of the WAPC and the State Administrative Tribunal (**Tribunal**) for strict adherence to policy, and in particular State Planning Policies, as the yardstick by which approval should or should not be granted, and in turn failing to adequately consider the merits of the application itself.

Change on the horizon

The decision of the Supreme Court in *Tah Land Pty Ltd v Western Australian Planning Commission* [2009] WASC 196 (**Tah Land**) confirmed the longstanding position with regard to policy and quashed a decision of the Tribunal on the basis that it had inflexibly applied planning policy in refusing a structure plan.

The Tah Land case concerned the issue of a structure plan which proposed, amongst other things, to increase the retail floor space of an existing shopping centre and to introduce a second supermarket, a second discount store and a department store. The applicant sought a review of the Commission's decision with the Tribunal refusing the structure plan. The Tribunal refused the proposal, determining that the proposal was materially inconsistent with the strategic and statutory planning framework, namely *State Planning Policy No 9 – Metropolitan Centres Policy Statement for the Perth Metropolitan Region* (**SPP4.2**). The applicant appealed the decision of the Tribunal to the Supreme Court (**Court**).

The Court reviewed the Tribunal's reason for refusal and in particular the rationale that the proposed increase in the size of the retail floorspace and functions at the centre showed that the proposed centre would be upgraded from a district centre to a regional centre and was inconsistent with the hierarchy set out in SPP4.2.

In finding that this reasoning represented an inflexible application of policy, Justice Simmons stated that 'the Tribunal had not regarded itself as free to exercise its discretion contrary to that policy'. The Court also found that the Tribunal had failed to take into account other relevant planning considerations, including the undersupply of retail floorspace in the City of Wanneroo, the public interest in the provision of shopping facilities and the unanticipated and substantial population growth in the locality.

Impact for developers

Despite the decision in Tah Land, the *modus operandi* of the decision makers has been slow to change. That position must change and the fact that the Tah Land decision has now recently been favourably applied by the Tribunal in *Jones v Town of Vincent* [2009] WASAT 180, sends a warning to decision makers that a genuine proposal for development cannot simply be dismissed out of hand if it is not in strict conformity with the relevant State Planning Policies. Developers should be reassured that this shift in the Tribunal's thinking will require decision makers to take into account all material planning considerations rather than slavishly adhering to planning policy, resulting in the flexibility to make innovative development applications based on planning merits rather than the specific content of planning policy.

If you would like further information on the Tah Land case and the implications of the decision on your development proposal, please contact Paul McQueen or Rebecca Somerford on (08) 9288 6820 or rebecca.somerford@lavanlegal.com.au.

Rebecca Somerford, Solicitor

LLB, BSc

Rebecca Somerford is a solicitor in the planning, environment and land compensation team within the property services group.

Rebecca has practised law in New South Wales and Western Australia and has been involved in a wide range of matters for developer and resource clients including appeals to the State Administrative Tribunal, New South Wales Land and Environment Court and the Office of the Appeals Convenor.

She has advised on liability for land contamination under the contaminated sites legislation, environmental impact assessment at Federal and State levels, clearing of native vegetation, native title, general advice on development, building licences and environmental approvals and compliance with environmental licences.

Rebecca has a specialist interest in water resource management which is currently the subject of legislative reform.

Areas of expertise

- Planning law
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