

**WESTERN AUSTRALIAN PLANNING COMMISSION v SOUTHREGAL PTY LTD & ANOR (P47/2016);**  
**WESTERN AUSTRALIAN PLANNING COMMISSION v LEITH (P48/2016)**

Court appealed from: Supreme Court of Western Australia Court of Appeal [2016] WASCA 53

Date of judgment: 24 March 2016

Date special leave granted: 1 September 2016

The respondents are each the registered proprietors of a piece of land, part of which has been reserved for a public purpose under the provisions of the Peel Region Scheme (the PRS), which is a planning scheme made pursuant to the provisions of the Planning and Development Act 2005 (WA) (the PD Act). Neither of them were the registered proprietor of the relevant land at the time it was reserved for that public purpose. The respondents' applications for approval to develop the land were refused because the land had been reserved for regional open space. Their claims for compensation pursuant to the provisions of the PD Act were rejected by the appellant ('the Commissioner') on the basis that compensation under the PD Act was only available to the owners at the time of the reservation.

The respondents each commenced proceedings in the Supreme Court of Western Australia asserting their entitlement. In each case the court directed the preparation of a Special Case presenting a question of law to the court for its determination. The question of law formulated and determined by Beech J was:

*Whether a person to whom s 177(2)(b) of the PD Act would otherwise apply can be entitled to compensation pursuant to ss 173 and 177(1)(b) of the PD Act, in circumstances where the land has been sold following the date of the reservation, and where no compensation has previously been paid under s 177(1) of the PD Act.*

Beech J answered the question in the affirmative, on the basis of the breadth and generality of the language of s 177(2)(b), the legislative history of the introduction of the predecessor provision, and the principles of statutory construction for compensatory legislation. His Honour construed Part 11 of the PD Act as giving rise to two independent alternative rights to compensation. The owner of the land at the date of reservation has a right to claim compensation when the land is first sold, or, alternatively, the owner of the land at the date a development application is made and refused (or granted on unacceptable conditions) has a right to compensation. However, once compensation has been paid, no further claim can be made by any party.

In his appeals to the Court of Appeal (Martin CJ, Newnes and Murphy JJA), the Commissioner contended that the only person entitled to compensation was the owner of land at the time that the planning scheme was made or amended.

The Court noted that the terminology of s 173(1) of the PD Act is capable of supporting the construction for which the Commissioner contended, by its

reference to a person whose land is injuriously affected 'by the making or amendment of a planning scheme'. However, that view of s 173(1) is directly contrary to the plain and ordinary meaning of s 177(1) and (2) of the PD Act, which explicitly provide that compensation is payable to the person who was the owner of the land at the date of an application for development approval which was refused or granted subject to unacceptable conditions. Further, the plain and ordinary meaning of s 177(1) and (2) could only be reconciled with the construction of s 173(1) for which the Commissioner contended if: (a) s 177(1) is read as deferring the entitlement to compensation only until the time at which the first of either of the two events to which it refers occurs, and should therefore be read as if the words 'whichever shall first occur' are to be found at the end of the subsection; and (b) if the reference in subsection (2) to the person who was the owner of the land at the date of the application for development approval is read as if it is restricted to a very limited and special class of owners - namely, owners at the date of reservation; or alternatively, to owners who were not the owner at the time of reservation but became an owner by some means other than purchase after the date of reservation.

The Court noted that s 177(2) of the PD Act, which is specifically directed to the question of the identification of the person entitled to claim compensation, expressly refers to the entitlement of two classes of persons - namely, the owner at the date of reservation, and the owner at the date of an application for development approval which is refused or granted subject to unacceptable conditions. The Commissioner's construction of the section could only be accepted if the entitlement conferred by the plain and ordinary meaning of the words used in s 177(1) and (2) was significantly constrained by implied limitations not found in the express words of the statute. The Court found that approach to the construction of statutes providing for compensation to landowners for the injurious affection of their land was contrary to well established principle and should not be accepted. Each appeal was dismissed.

The ground of appeal in each matter is:

- The Court of Appeal erred in law by ruling that a person to whom s 177(2)(B) of the *Planning and Development Act 2005 (WA)* would otherwise apply can be entitled to compensation pursuant to ss 173 and 177(1)(b) of the PD Act, in circumstances where the land has been sold following the date of the reservation, and where no compensation has previously been paid under s 177(1) of the PD Act.