HIGH COURT OF AUSTRALIA

Manager, Public Information

3 February 2010

MANDURAH ENTERPRISES PTY LTD & ORS

v

WESTERN AUSTRALIAN PLANNING COMMISSION [2010] HCA 2

The High Court today held that a taking order purporting to compulsorily acquire privately owned land was partly invalid. Those portions of the land reserved to construct the Perth to Mandurah railway were validly acquired. However, the remainder of the land was not validly acquired, as the reason for its acquisition was to avoid a statutory obligation to construct crossings to the land, to which public access had been cut off by the construction of the railway.

In August 2003 Mandurah Enterprises Pty Ltd was the registered proprietor of lots 7 and 49 of the local government area of the City of Mandurah, south of Perth. Mr and Mrs Graham were the registered proprietors of lots 8 and 30 in the City of Mandurah. Each of the lots fell within the Peel Region Scheme (PRS). Following the gazettal of the PRS in October 2002 part of each of lots 7, 8 and 30 and all of lot 49 were reserved for Primary Regional Roads. The balance of lots 7 and 8 were zoned "urban" and the balance of lot 30 was zoned "industrial". On 5 August 2003 a taking order was issued under s 177 of the *Land Administration Act* 1997 (WA) (Land Act) declaring that all of the lots had been compulsorily taken under the Land Act. The four lots comprised land on and adjacent to which the Perth to Mandurah railway was subsequently constructed.

At the time of the acquisition the appellants sought declarations that the orders for acquisition were invalid. They were unsuccessful before the primary judge. A majority of the Court of Appeal of the Supreme Court of Western Australia upheld the primary judge's decision, except in relation to that part of lot 30 which had been zoned "industrial" under the PRS. The High Court granted leave to the appellants to appeal the decision of the Court of Appeal.

Under the *Town Planning and Development Act* 1928 (WA) (Planning Act) land may be compulsorily acquired "for the purpose of a town planning scheme". Under the Land Act, when a particular entity has been authorised to "undertake, construct or provide [a] public work" (the definition of which included an authorised railway), then land "required for the purposes of the work" may be taken. The legislation which authorised the construction of the Perth to Mandurah railway also authorised the construction of "all necessary, proper and usual works and facilities in connection with the railway". Under s 102 of the *Public Works Act* 1902 (WA) (Public Works Act) the Public Transport Authority is required to make such crossings as may be necessary to provide access to private land to which access has been cut off by the making of a railway line.

The railway was built over the western parts of lots 7 and 8, the eastern part of lot 30 and the whole of lot 49. All parties agreed the whole of lots 7 and 8 had been taken because, following construction of the railway, the parts of lots 7 and 8 not required for the railway would be inaccessible via public roads, and that lot 30 was taken as it was mistakenly believed that part of the lot would be rendered inaccessible via public road. The High Court unanimously determined that the PRS, which answered the description of a "town planning scheme", authorised the taking of the whole of lot 49 and those parts of lots 7, 8 and 30 which had been reserved for the purpose of a town planning scheme. However the taking of the zoned parts of lots 7, 8 and 30 in order to avoid an obligation to provide access to otherwise inaccessible land did not constitute an acquisition of

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land in order to undertake, construct or provide a railway or for purposes incidental to that construction. Thus the Land Act did not authorise the taking of the parts of the lots which had been zoned "urban" (lots 7 and 8) or "industrial" (lot 30).

The Court unanimously allowed the appeal. A majority of the members of the Court made declarations to the effect that the taking order was invalid insofar as it purported to apply to those parts of lots 7 and 8 which were zoned "urban" under the PRS and that part of lot 30 zoned "industrial" under the PRS; and that the interests of the registered proprietors in those parts of lots 7, 8 and 30 had not been extinguished by the registration of the taking order validly made in relation to the reserved portions of lots 7, 8 and 30 and the whole of lot 49. Justice Hayne would have declared that the Commission had no power to take any of the land which was not reserved under the PRS and that the taking order of 5 August 2003, which applied to all of the lots, was beyond the power of the Commission to make.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*