Supreme Court decision highlights the importance of careful preparation of Proposed Acquisition Notices

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The Supreme Court of NSW has handed down a decision that highlights the importance for public authorities including Councils to be thorough and have express regard to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**Just Terms Act**) when preparing Proposed Acquisition Notices (**PAN**).

The decision of Justice Hammerschlag in *Desane Properties Pty Limited v State of New South Wales* [2018] NSWSC 553 found that a PAN issued by the RMS was invalid as it failed to meet the formal requirements under the *Just Terms Act*. Specifically, the PAN did not comply with the approved form prescribed by the Minister, it failed to state the public purpose of the acquisition and it was issued for an improper purpose.

Background

On 26 May 2017, the RMS served a PAN on the plaintiff, Desane to compulsorily acquire its commercial property, as part of the NSW Government's WestConnex project. Under s 171(1) of the *Roads Act 1993* (**Roads Act**), the RMS has the authority to compulsorily acquire land for any purposes of that Act.

The plaintiff argued that the PAN did not comply with the requirements of the Just Terms Act as it was not accompanied by a compensation claim form, the RMS had not provided a sufficiently formed proposal and it had issued the PAN for an improper purpose. The Court held that the proposed acquisition was invalid as it did not comply with statutory requirements and was issued for an improper purpose.

PAN not in approved form

The Court held that a PAN must be in the form required by the Just Terms Act or be in a form approved by the Minister and be accompanied by a claim for compensation form under section 39.

The Court noted that the PAN deviated from the Approved Form in the following aspects:

1. Para 1 did not contain the State name;
2. The PAN substituted **The** for **This** where it appears in para 3 of the Approved Form;
3. Para 3(e) of the PAN **reads the disadvantage resulting from relocation** whilst the Approved Form refers in para 3(e) to **solatium**;
4. The Approved Form referred to **30** days for notice requirements. Instead para 6 of the PAN refers to **45** days;
5. Para 9 of the Approved Form provides for the address of the Office of Authority. Instead Para 9 of the PAN provides the contact as an Officer at Roads and Maritime Services'

Parramatta office;

6. There was no address in the PAN which makes provision for the address of the Land as is done so in the claim of compensation Form 2 (para 1(a))

The Court concluded that the above divergences from the approved form as being significant enough to find that the PAN had no statutory effect.

PAN failed to state Public Purpose

Desane also argued that the *Just Terms Act* requires by implication that a PAN identify a public purpose for the acquirement of the land. The PAN issued by the RMS broadly stated that it was issued for a public purpose but did not actually identify the exact nature of that public purpose.

The *Just Terms Act* seeks to ensure that the owners of land that has been acquired by an authority of the State receive compensation on just terms. Hence, the failure to identify essential information like the public purpose for acquiring the land, places the owners in an unfavourable position during sale negotiations or compensation contest. Therefore, the Court held that there is a statutory requirement that the public purpose for the acquirement of the land is identified when issuing a PAN.

PAN was issued for an improper purpose

In this instance, the PAN was issued by the RMS in accordance with its authority under the *Roads Act.* Therefore, the RMS was required to ensure that it was issued for a purpose permissible under the *Roads Act*. It was held that the PAN did not do so and that it had been issued for an ulterior purpose not permissible under the *Roads Act*.

The Court held that that if RMS' purpose in issuing the PAN was an ulterior one, "it will be an abuse of RMS' powers if the ulterior purpose is a substantial purpose in the sense that no attempt would have been made to acquire the land if it had not been desired to achieve the unauthorised purpose." Thus, the attempted exercise of power will be invalid despite the ulterior purpose not being the sole purpose of the acquisition.

Consequently, the Court found that although one of the purposes of acquiring the property to use it as a construction site in relation to the WestConnex project was a valid purpose under the Roads Act, the other substantial purpose of acquiring the property to create green parkland and open space was not. Therefore, it was held that the PAN was issued for an improper purpose and was invalid.

The case of Desane highlights the importance for Local Councils to ensure that any PAN it issues complies with the correct form, clearly states the public purpose for which it is for and ensures that it is only issued in compliance with the purposes of the Act from which it derives its authority.

Visit: https://www.caselaw.nsw.gov.au/decision/5ae69650e4b074a7c6e1eb04 for the full judgment