

WALKER CORPORATION PTY LIMITED v SYDNEY HARBOUR FORESHORE AUTHORITY (S307/2007 & S308/2007)

Court appealed from: New South Wales Court of Appeal

Dates of judgment: 27 July 2005 & 21 December 2006

Date of grant of special leave: 25 May 2007

On 26 September 2002 the Sydney Harbour Foreshore Authority ("the Authority") compulsorily acquired land at Ballast Point ("the land") on Sydney Harbour from the Walker Corporation Pty Ltd ("Walker Corporation"). This was done for the purpose of creating a harbourside park. At the time of its acquisition, the land was zoned "Industrial" under the Leichhardt Local Environment Plan 2000 ("LEP"). Its value would have been higher however had it been zoned "Residential".

Proceedings for the assessment of compensation under the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) ("the Acquisition Act") were commenced by Walker Corporation in the Land and Environment Court ("LEC"). On 9 July 2004 Justice Talbot held that the land's market value was \$60 million. This was on the basis that the Council would have rezoned the land as "Residential" if it was not otherwise going to be used for "Open Space". On 27 July 2005 the Court of Appeal set aside the LEC's judgment and remitted the matter for redetermination according to law.

An appeal was later brought under section 57(1) of the *Land and Environment Court Act* 1979 (NSW) against the second LEC judgment delivered on 4 April 2006. On that date Justice Talbot attributed a 100% prospect of the land being rezoned "Residential" and thus confirmed his previous valuation. Upon appeal the critical question was whether his Honour was correct to assume that the land should be treated as zoned "Residential".

On 21 December 2006 the Court of Appeal (Handley, Beazley & Basten JJA) unanimously allowed the Authority's appeal. Their Honours held that s 56(1) of the Acquisition Act encapsulates the principle that the market value of land is the amount that a willing but not anxious buyer would pay to a willing but not anxious seller. In this case the critical characteristic was the land's zoning. This is because it imposed a legal constraint on its possible development and hence its market value. At issue therefore is whether that zoning was part of the "public purpose" for which the land was required. Their Honours held that any precondition for notionally setting aside the land's zoning had not been established. The Court below therefore erred in law in doing just that.

The Court of Appeal also held that the value of land may reflect potentialities which have not yet been realised. A proposal to carry out the "public purpose" for which the land is later acquired may be seen as preventing that realisation, and hence diminishing its value. That decrease must therefore be disregarded. Their Honours found that Justice Talbot had erred in disregarding the Leichhardt Council's inaction in considering a draft LEP which would have led to the land's rezoning (to Residential). What his Honour should have done was to identify the diminution in its value caused

by that inaction.

In matter number S307/2007 (relating to the Court of Appeal's judgment of 21 December 2006) the grounds of appeal include:

- The Court of Appeal took an unduly narrow view of the words "the proposal to carry out the public purpose for which the land was resumed" in section 56(1)(a) of the Acquisition Act.
- The Court of Appeal erred in holding that it was not possible, as a matter of law, to characterise the conduct of the Leichhardt Council as part of "the proposal to carry out the public purpose" for which the Appellant's land was acquired.

In matter number S308/2007 (relating to the Court of Appeal's judgment of 27 July 2005) the grounds of appeal include:

- The Court of Appeal erred in taking the view that it was "far from clear" that s 56(1)(a) operated so as to require that a failure to act be disregarded.
- The Court of Appeal erred in holding that relevant factual findings had not been made, or issues considered, by the LEC. Such a view was not consistent with the reasons of Talbot J, especially at paragraphs 110-114.