

PROPERTY, REAL ESTATE & CONSTRUCTION

counsel

05 AUGUST 2008

Offer-back under the Public Works Act - a re-appraisal?

The owners of land held under the Public Works Act 1981 (PWA) may have greater security of investment and discretion over land use as a result of a recent High Court decision in relation to Auckland International Airport.

The decision suggests an interpretation of the section 40 offer back provisions which is more favourable to these "Public Landowners" and will significantly enhance their ability to undertake large-scale, long-term capital works by reducing the risk that the land will have to be offered back to the former owners before the work is underway.

The circumstances in the case were exceptional in terms of the significance of the public work and the profit that would accrue to the former owner if the land had to be offered-back. Many of the comments in the judgement, however, point to a rebalancing of the rights of the general public, as represented by the Public Landowner, against those of the former owner.

In this edition of *Counsel*, we review the significant points in the decision and discuss how it affects the s 40 regime. The media has reported that the decision will be appealed. We will comment on the outcome of the appeal once it becomes available.

The *Craigie* decision suggests a subtle shift in the approach to the operation of s 40 PWA, which is more favourable to Public Landowners. The new approach significantly enhances their ability to undertake large-scale, long-term public works with reduced risk of land being unintentionally found to be surplus, and therefore having to be offered back to former owners before the public work is underway.

Background

Craigie Trust v Auckland International Airport Ltd concerned land that had been compulsorily acquired from the Lambie family in the 1970s for “aerodrome” purposes and was subsequently incorporated into what is now Auckland International Airport. The decision refers to the land as the “Craigie Trust Land”.

The land in question lies between the two runways and is largely undeveloped. Only a small portion is being used for what might be regarded as core airport activities, although some is being used for infrastructure related to the wider airport, such as roads, utilities and drainage. Other parts have been leased by the airport company to third parties for commercial uses as diverse as the Butterfly Creek leisure attraction and a McDonald’s restaurant.

The Craigie Trust, as descendants of the original Lambie family, argued that the lack of airport development meant that the Craigie Trust Land was surplus to airport purposes and must therefore be offered back to them at 1982 values, this being when s 40 of the PWA came into force.

Section 40 requires, subject to some exemptions, that the owner of land that is held for a public work offer it back to its former owners or their descendants if the land is “no longer required” or is surplus for that or any other public work.

The process has become increasingly onerous on the Crown and Public Landowners over the years, as successive court decisions have broadened the circumstances under which land will be regarded as no longer required, such that:

- Land can be found to be surplus to the public work for which it is held,

not just by a decision to that effect but also if a reasonable person would have made that inference based on all the circumstances;

- Such a conclusion is irreversible even if the Public Landowner never intended to create the impression that the land was surplus and does in fact still require it; and
- Land must be offered back as at the date on which it was found to be surplus (plus a short processing period). This date is often a considerable distance in the past, particularly where the land is found to be surplus by implication. The former owner can therefore derive a significant profit from rising land values; a consideration which is often part of the motivation behind claims by former owners.

Significance

The *Craigie* decision is significant for four main points, all of which provide greater certainty for Public Landowners:

1. The range of facilities properly included in a public work can change over time, but includes those used “in connection with”, or “required directly or indirectly” for, that public work.
2. Land can be “required” for a public work, even if the land is not actually being used for that work at present, or is being held for future expansion or development or for future-proofing.
3. Land can be retained for another public work of the same Public Landowner, which can be assessed at the time of the litigation or when the land becomes surplus.
4. The exemption from having to

offer land back on the grounds of unfairness or unreasonableness includes such considerations as whether the former owner was fully compensated at the time, the financial windfall that would arise if the land was offered back at historical prices, any delay by the former owner in enforcing their s 40 rights, the strategic importance of the public work, and the impact on the public work of the land being offered back.

Still required?

The key question in the decision was whether the land was still required for a public work. Much of the evidence and submissions centered on expert definitions of “aerodrome” and “airport”, and what facilities were properly part of each definition.

Airport facilities

The Court found that “airport” had replaced the older term “aerodrome”, and that most people would have described the kind of facilities found at Auckland Airport when asked to describe an “aerodrome”.

The Court held that airports now include a wide range of facilities, not necessarily related to what might be regarded as core airport activities, but including:

facilities connected with ... meeting the expectations of airport users – travellers, staff, security and border agents, travellers’ services, “meeters and greeters” and general airport users ... Examples include the provision of banking facilities for the millions of travellers and thousands of staff at Auckland Airport and the rental car and campervan parking and the supermarket servicing airport users and inbound tourists. Food outlets can be similarly regarded. Even

The Court expressly acknowledged the importance of an airport operator being able to hold land to future-proof expansion, and the consequences of failing to plan ahead and have sufficient land for expansion. Land could still be required for forecast future activities.

Section 40 of the Public Works Act 1981

- (1) Where any land held under this or any other Act or in any other manner for any public work—
- (a) Is no longer required for that public work; and
 - (b) Is not required for any other public work; and
 - (c) Is not required for any exchange under section 105 of this Act—
- the chief executive ... or local authority, as the case may be, shall endeavour to sell the land in accordance with subsection (2) of this section, if that subsection is applicable to that land.
- (2) Except as provided in subsection (4) of this section, the chief executive ... or local authority, unless—
- (a) He or it considers that it would be impracticable, unreasonable, or unfair to do so; or
 - (b) There has been a significant change in the character of the land for the purposes of, or in connection with, the public work for which it was acquired or is held—
- shall offer to sell the land by private contract to the person from whom it was acquired or to the successor of that person ...

Butterfly Creek, though primarily recreational, offers convention facilities, now an important facility at airports.

These findings are significant for airports, because they confirm the modern style of large airports with a wide range of facilities. The decision acknowledged that airports are commercial ventures, generating revenue from developments within the airport. The decision confirmed that land can legitimately be held for any of these activities and still be required for an airport.

The decision is also helpful for other public works which might change over time or include a range of incidental activities. The words “*anything required directly or indirectly for any such ... work*” in the PWA are similar to “*facilities ... used in connection with the airport or its administration*” in the Airport Authorities Act 1966, which were key to the *Craigie* decision.

Future Projects

The next question was whether the *Craigie* Trust Land was still required for the wider range of airport facilities, given that it was mostly undeveloped.

The Court confirmed the previous case-law that:

land can continue to be “required” for a public work even if it is not actually being used for such ... land may continue to be “required” for the purposes of s 40 even if only held for future expansion.

The Court expressly acknowledged the importance of an airport operator being able to hold land to future-proof expansion, and the consequences of failing to plan ahead and have sufficient land for expansion. Land

The alternative conclusion appears to suggest that another public work requirement could be raised at the time of litigation and, if established, allow the land to be held for that other public work, without being offered back. That interpretation would be of considerable benefit to Public Landowners, and prevent the loss of land which is in fact still required for a public work, and waste of public monies. It seems to accord more with the intention of s 40 and address some of the unfairness in past interpretations.

could still be required for forecast future activities.

That confirmation of previous case-law is particularly important for large-scale, long-term public works. Such projects can often take decades, and there is always a risk that the passing of time could see land being found to be surplus against the Public Landowner's wishes and offered back to former owners before the public work is completed. *Craigie* reduces that risk.

Other Public Works

The Court's final decision included the alternative finding that, if the land "was no longer required for the public work of 'aerodrome', it is required for another public work, namely an 'airport'."

That alternative finding suggests a departure from previous case-law in two important respects, which address some of the potential unfairness for Public Landowners in how s 40 had previously been interpreted and applied.

Section 40(1)(b) provides that, even if land is surplus to the public work for which it is held, it need not be offered back if it is required for *another* public work. There had been doubt whether the other public work could be undertaken by the *same* Public Landowner or only by *another* Public Landowner. *Craigie* suggests that other public works by the same Public Landowner are sufficient, which is consistent with the intent and wording of the PWA.

Previous case-law held that another public work requirement could only be raised when the land became surplus to the public work for which it is held, and not later such as when a claim

was made. In many cases that date occurred some time ago and without the Public Landowner's knowledge, and therefore without ever giving an opportunity to raise a valid other public work requirement. That could result in the farcical situation where land must be offered back even though another legitimate requirement exists. The Court observed that this could oblige the Public Landowner to re-acquire the land at current market prices, achieving nothing except a windfall for the former owner and unnecessary cost for the taxpayer.

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Unfair or Unreasonable Exemption

Having found that the Craigie Trust Land was still required for a public work, the Court did not need to consider whether any of the exemptions from offer back applied. However, the Court thought it "appropriate to give relatively brief consideration" to these issues.

That consideration includes some of the most significant developments in the decision. If the comments in *Craigie* are applied, they would substantially protect the position of Public Landowners (and therefore the general public) and address the apparent preference given to former

owners under s 40 case-law in the past.

Section 40(2) exempts a Public Landowner from having to offer land back where it would be "unreasonable, or unfair to do so". In the past this exemption has applied in situations such as:

- land was acquired voluntarily, only after the former owner advertised it for sale, or at the former owner's insistence
- land was so worthless that the cost of offering the land back is likely to exceed its value
- the former owner had disclaimed any interest in an offer back.

However, the Court's comments in *Craigie* indicated a significant expansion of this case-law. If the question had needed to be answered, the Court would have found that an offer back would be unreasonable or unfair, because:

- The airport was "an infrastructural asset of critical importance to the New Zealand economy" and offering the land back would "imperil the development and usage of so important a facility as the airport"
- The former owner had been fully compensated when the land was acquired
- The former owner would receive a substantial profit from rising land values
- The former owner had delayed enforcing its s 40 rights.

Previous case-law had given strong preference to the former owner's rights, subject only to a rather narrow exemption. *Craigie* suggests a genuine balancing exercise, and an expansion of the exemption. The Court ultimately

Many of the comments reflect the fact that s 40 can, in vindicating the private individual citizen's rights, create a far greater injustice to the Public Landowner and therefore the general public. In those circumstances, a balancing act is required, and sometimes the greater public good must prevail. *Craigie* suggests that this may happen more often than previously.

decided that:

AIAL's continuing ability to use all the land it currently owns, including the Craigie Trust land, in the way which best conduces to the interests of all the airport's users, was sufficient to outweigh what have been held to be the Craigie Trust's rights and was such as to make it "unreasonable or unfair" to direct the claimed land be offered back to the plaintiffs.

the airport company, which paid full value for the whole of its land on acquisition following vesting, may have felt the need to negotiate with the Trust to re-purchase the claimed land from it at present value, a value significantly enhanced by the airport and, latterly, the airport company's capital expenditure. That possibility, too, might yield the Trust a windfall and is a further factor affecting unreasonableness or unfairness.

The Court made significant expansions in the interpretation of "unreasonable or unfair", by examining the conduct of the former owner and noting that:

the Craigie Trust cannot have been unaware of developments at the airport since before it was opened and similarly cannot have been unaware of developments in and on its former land since it was acquired from them. Yet it has taken no step – other than planning objections – to oppose those developments. It is of note that the Craigie Trust has allowed over quarter of a century to pass without seeking to invoke its rights under the 1981 Act.

This approach is not inconsistent with the general intent and purpose of the PWA, which does not provide any direction as to *how* unreasonableness should be examined. *Craigie* could be seen as consistent with the basis behind some of the existing grounds for unreasonableness or unfairness, which do relate to the former owner's conduct and intentions.

Media reports estimated the current market value of the Craigie Trust Land at well over \$100 million. The Court was much influenced by the windfall that the Craigie Trust would receive if the land was offered back at 1982 values, commenting:

Conclusion

The Court's comments in *Craigie* are a significant and sensible addition to the interpretation of s 40, which better reflect the intent of s 40, and restore some of the balance which previous cases had given to the former owner.

The comments undoubtedly reflect the fact that *Craigie* is at an extreme in terms of the significance of the public work and the profit that would accrue to the former owner. However, many of the comments reflect the fact that s 40 can, in vindicating the private individual citizen's rights, create a far greater injustice to the Public Landowner and therefore the general public. In those circumstances, a balancing act is required, and sometimes the greater public good must prevail. *Craigie* suggests that this may happen more often than previously.

The media has reported that Craigie Trust intends to appeal the decision, and it will be very interesting to see how the Court of Appeal approaches the case and whether it upholds the High Court's decision. We will report on the appeal once the decision is released.

Our thanks to
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