



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 39

Compensation for New Street Alignments

REPORT

MARCH 1977

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

Mr. E.G. Freeman, Chairman

Mr. N.H. Crago

Mr. D.K. Malcolm.

The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Telephone: 256022).

PREFACE

In March 1974 proposals were made by the then Minister for Local Government for the revision of s.364 of the *Local Government Act 1960*. These proposals were conveyed to the Law Reform Commission by the then Attorney General, the Hon. T.D. Evans, M.L.A., under a covering letter asking the Commission for its comments on them. The Commission had earlier been given a project by the Hon. T.D. Evans dealing with one of the matters covered by the Minister's proposals, namely as to the adequacy of the compensation provisions in s.364 (7) of the *Local Government Act*. In his letter of March 1974 the Hon. T.D. Evans indicated that, since the Minister for Local Government had already given his approval to the amendments, it would be inappropriate to deal with the matter as a project.

The Government changed shortly afterwards, and the Commission raised with the then Minister for Justice, the Hon. N. McNeill, M.L.C., the question whether the incoming Government required the Commission's comments on the proposals of the former Minister for Local Government. The Minister confirmed that it did. In the circumstances it was not considered appropriate to issue a working paper on the subject. Accordingly the Commission reported to the Attorney General, the Hon. I.G. Medcalf, Q.C., M.L.C., by letter dated 16 March 1977. The text of the report is set out below.

TO: THE HON. I.G. Medcalf, M.L.C.
ATTORNEY GENERAL

Project No. 39 (compensation for new street alignment)

Further to your letter of 11 June 1976, the Commission offers the following comments on the amendments to s.364 of the *Local Government Act 1960*, proposed by the then Minister for Local Government on March 1974 and set out in the attached appendix.

Operation of s.364

From discussions with Mr. Paust, the Secretary for Local Government, it would appear that the section operates in practice as follows:

Non-specified streets

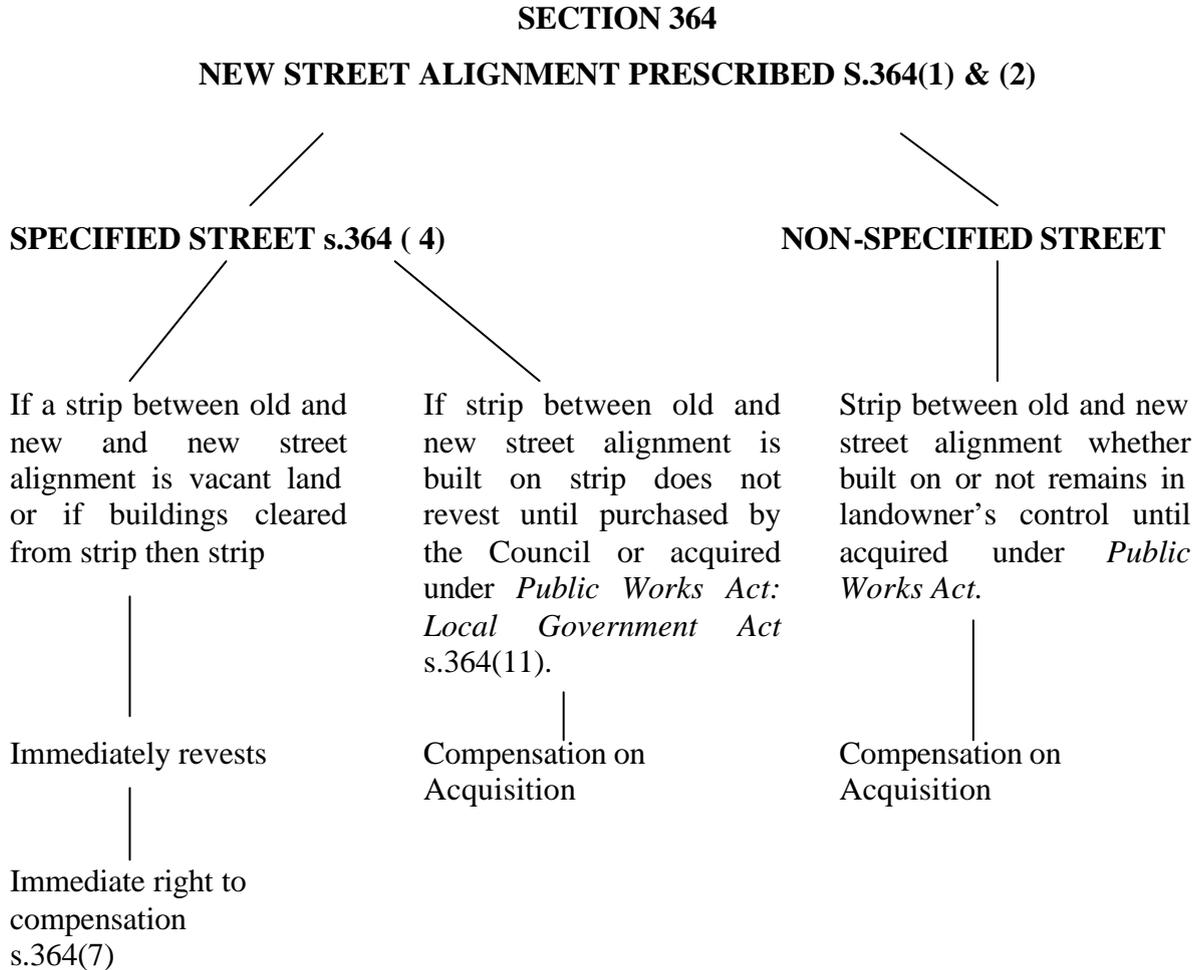
A Council may, if it wishes, prescribe a new street alignment under s.364(1) & (2). This has the effect of preventing any further building taking place in the strip of land between the old and new street alignments (referred to as “the strip”).

An indefinite period of time may then lapse before the Council is actually ready to proceed with the widening of the road. When it is ready it can simply proceed to acquire the strip under the provisions of the *Public Works Act* without specifying the street.

Specified streets

Alternatively, it can request the Governor to specify the street under s.364(4) in which case two different procedures may be followed depending on whether the strip is vacant land (or becomes vacant by the buildings on it being subsequently demolished) or whether it continues to have buildings on it until it is required by the Council. If the strip is vacant land or if the buildings are subsequently cleared from the land then the strip immediately reverts in the Crown and an immediate right to compensation arises. Such compensation will be determined in accordance with s.364(7).

If the strip is built on, it does not revert in the Crown until the Council acquires it under the provisions of the *Public Works Act*: see *Local Government Act* s.364(11), in which case compensation will be determined in accordance with the *Public Works Act* and paid on acquisition. The position may be shown:-



While there are different practices amongst Councils the Commission understands that the provisions of s.364 are little used. Councils simply negotiate with landowners or resume under the *Public Works Act*.

The Commission has been advised that the reason for this is that some Councils do not consider that the operation of s.364(7) results in fair compensation. Under s.364(7) there is no compensation payable for the actual strip taken. Compensation payable by the Council is limited to the amount by which the remainder of the land is depreciated in value by the strip being so dedicated and reverted.

It might also be queried whether some form of prior public notice, for example, in a newspaper and the Government Gazette should be given to any proposed variation in order that members of the public have the opportunity of objecting (compare Uniform Building By-laws 1974 by-law 11.14). Further it would seem necessary to relate the definitions of "coverage" and "plot ratio" to the definitions in the *Uniform Building By-laws 1974*, as these terms are not defined in the *Local Government Act 1960*.

Amendment 2 The insertion of paragraphs (b) (c) and (d) in subsection (3) in lieu of the existing paragraphs (b) and (c).

The proposed new subparagraph (b) (iii) introduces a new concept. The object is to permit an owner of land abutting the strip, within ten years of the new alignment coming into force (subject to certain limitations) to carry out improvements of more than a minor nature on existing buildings situated on the strip. For the purposes of calculating the compensation payable when the land is revested in the Crown, the value of the improvements is to be taken as depreciating by 10% per annum with no compensation payable for improvements after twenty years. Thus an owner affected by a street alignment would be able to make improvements to his land in the knowledge that he would ultimately receive some compensation if the land were revested within ten years. Under the present law he would not be able to make any major improvements although he would have to wait until the land were revested to obtain compensation, there being no immediate right to compensation when a new street alignment comes into force unless the Governor has specified the street under s.364(4) and the land is vacant (or the buildings on it are subsequently demolished).

In assessing this proposal the following should be taken into account:-

- (1) It is a familiar concept in leases of commercial properties to build on leased land and to amortize the value of the building over the term of the lease. However in the case of a residential property, different considerations may well apply. After ten years the structure might be significantly more valuable than when first put up and the compensation would not be adequate at all.
- (2) Also, to adjust the plot ratio on the remainder of the land might provide little compensation if there were a valuable residence on it which the owner wished to

retain. Again, the value of the residence might be too great so that it would not be economic to demolish the residence to take advantage of the improved plot ratio.

- (3) The proposal appears to ignore the effect of inflation. This in itself may well render any compensation provision incorporating depreciation of a fixed sum unfair.
- (4) The proposed new paragraph (b) is an attempt to achieve a balance between the interests of the owner whose land use has been restricted without immediate compensation, and the interests of the public as represented by the Council, which may wish to plan for future road widening without incurring any additional costs that might otherwise be avoided by imposing restrictions on future works within the new street alignment. Whatever view is adopted towards the concept, it is suggested that the manner in which the proposed new paragraph has been drafted would give rise to problems in itself. These problems include:
 - (a) Proposed paragraph (b) (iii) (V) provides that if the owner removes the modified building of his own volition so that the land reverts in the Crown, no compensation is payable in respect of the building.

The only other way in which the land can revert is if the Council negotiates with the owner to acquire it or if it is compulsorily acquired under the *Public Works Act 1902*. There is at present no power for Councils to order that buildings on the strip must be removed except in limited cases, for example, where they are dangerous, neglected, or have been erected in contravention of the Act, and there may be objections to giving Councils a general power to order their removal. In so far as it is implied in the proposed paragraph (b) (iii) (IV) that Councils should have such a general power, the Commission is of the view that it would be better if Councils used the resumption provisions of the *Public Works Act*, otherwise it would appear at least arguable that the owner would be liable for the costs of demolition and removal. Apart from this, the Commission considers that if Councils are to be given such a power, it should be strictly limited to situations where the demolition and removal gives rise to an immediate right to compensation.

- (b) It is proposed that as a condition of being able to carry out any modifications to a building, the owner must enter into an agreement with the Council limiting the compensation payable, and purporting to bind his heirs successor and assigns. It would seem necessary to ensure that such heirs successors and assigns are bound by the agreement notwithstanding the absence of privity of contract between them and the Council.

Alternatively it would be possible to provide that the provisions of Parts (I), (II), (III), (IV) and (V) of the proposed new paragraph (b) (iii) automatically apply without the existence of any agreement whenever a Council give its approval under the paragraph and regardless of who may be the owner at the time the right to claim compensation arises.

Perhaps the safest way of overcoming this point might be to simply provide that the Council must register a notice of such agreement as an encumbrance on the owner's title.

- (c) (i) Under paragraph (b) (iii) of the proposals, it appears that if the land reverts within one year after the new street alignment comes into effect, the full value added to the building by any permitted modifications made within that year will be compensable. If a modification is carried out at any time within ten years after the new street alignment comes into effect and if the land reverts within one year after the modification, then it appears that compensation based on the full value added to the building by any permitted modifications would still be payable. Thereafter for the purposes of compensation the value is reduced by one-tenth for each year after the modification.
- (ii) It is not clear from the proposals whether the "value" for the purpose of compensation is the value of the modifications at the time the work is done (in which case it seems desirable to have some mechanism for determining the value at that time) or the value at the time the right to claim compensation arises.

- (iii) Nor is it clear whether only the value of the modifications are affected by the depreciation, or whether it is the value of the whole building. Parts (I) and (III) refer to the value added to the building by the modification, but Pa (II) refers to the value of the building.
- (iv) The proposal does not specify the point of time from which the depreciation is calculated. It could be either the commencement or the completion of the modification. Presumably the latter is intended.
- (v) Difficulties could arise where the Council approves a proposed modification within 10 years after the new street alignment comes into effect and the modification is not completed until after that 10 year period. Under subparagraph (iii) of paragraph (b) of the proposals, it is not clear whether the modification must merely be commenced within the 10 year period, or whether it must be completed within that period, although the latter appears to be intended.
- (vi) Difficulties could also arise if there were a series of modifications on the one building, particularly in valuing each modification separately and then calculating the depreciation on it.
- (vii) It is also not clear whether there is an appeal against the refusal of a Council to allow a modification to a building under the proposal. Paragraph (c) gives a Council what appears to be absolute discretion to refuse an application. It could be argued that an appeal lies to the Minister from such a refusal, under section 374 of the *Local Government Act* (and note 421A). However a Council could presumably refuse to enter into an agreement with the owner in the terms of paragraph (b) of the proposal. Also it is proposed that no modification can be carried out without the consents specified in paragraph (d) and there is no provision for appeal from a refusal to give such consents.

Amendment 3 The present subsection (4) to become subsection 4(a) and a new subsection 4(b) to be added.

In addition to the existing requirement that the Governor must make an order specifying a street to which the provisions of s. 364 (5) apply, the new paragraph provides that the order is made by the Governor on the recommendation of the Minister who acts either at the request of the Council or if the Council has not consented, at the request of some other person after first consulting with the Council.

In this way it might be thought that the Minister could prevent a Council using delaying tactics and postponing indefinitely the payment of compensation to the owner. However, the solution would only apply where the land was vacant or where the owner demolished his building and would have no application where the strip was built on: s.364(11). This could well be an anomaly.

Amendment 4 To delete subsection (7) and insert a new subsection (7).

This proposal incorporates into s.364(7) the provisions of the *Public Works Act* and would be in substitution for the existing provision whereby compensation is limited to the amount by which the remainder of the land is depreciated in value by the strip being so dedicated and revested.

It has been suggested that the amendment might further detract from the use of s.364 by Councils. The proposal has however the merit of providing for uniform compensation provisions.

Amendment 5

The amendment proposes the deletion of subsection (8) of s.364 and is a consequential change as a result of amendment 4 (this subsection provides that questions as to the amount of compensation or as to the day on which buildings have been cleared from land are determinable only on reference to arbitration).

Amendment 6 To amend subsection (11) of s.364.

This proposal is consequential to Amendment 2.

Amendment 7 To add a new subsection (12)

At present there is no power given to the Commissioner of Main Roads, the Metropolitan Region Planning Authority or other body (other than a Council) to prescribe new street alignments in a similar manner to that provided for in s.364. However on occasions Councils have prescribed new street alignments at the request of these other bodies, and the proposed new subsection would have the effect of indemnifying the Council against any costs and compensation thereby resulting. Consideration would need to be given to consequential amendments to other Acts.

Amendment 8 To amend subsection (2) of s.364.

The purpose of this proposal is to have details of any new street alignment inserted on all certificates of title held at the Titles Office, thereby giving notice of the street alignment to anyone who searches the title.

It is desirable that this should be done, as the existence of a street alignment can have a considerable bearing on the value of land.

Amendment 9 To amend subsection (1) of s.694.

The purpose of this proposal is to enable the recording in the Council's "register of orders" of any agreement entered into between an owner and the Council under the proposed new section 364 (3) (b). The Register is open to public inspection.

Other matters

The *Municipality of Fremantle Act 1925*, s.5, and the *City of Perth Act 1925* s.5, gives those Councils power to prescribe new building lines for any street, thereby resulting in a right to compensation in similar terms to that contained in s.364 of the *Local Government Act*.

Consequently if s.364 of the latter Act is amended, it would be desirable either to repeal s.5 in the above two Acts with appropriate saving provisions, or to amend s.5 in each of them to bring them into line with the amendments to s.364.

The Commission appreciates that the drafting of the proposals is in embryo form and has not yet been considered by Parliamentary Counsel. It has therefore not commenced on the detailed drafting.

(signed) C.W. Ogi1vie
Executive Officer

16 March 1977

APPENDIX
AMENDMENTS PROPOSED BY LOCAL GOVERNMENT COMMITTEE

The proposed amendments to s.364 are -

1. The addition of a new subsection (2A) as follows -

"Any such by-law may declare that, notwithstanding the provisions of any Town Planning Scheme, Zoning By-laws or Building By-laws, which prescribe certain building lines or building setbacks, coverages or plot ratios for land and buildings, the Council with the consent of the Minister for Town Planning, may permit a lesser building line or setback, or a greater coverage or plot ratio in respect of land abutting on the street or portion thereof which is affected by the new street alignment. "

2. The insertion of paragraphs (b), (c) and (d) in subsection (3) in lieu of the existing paragraphs (b) and (c) as follows -

(b) "A person shall not carry out any building operation on that land which is between the old street alignment and the new, as prescribed by the by-law, except in accordance with the following provisions:

(i) The building surveyor, subject to directions which the Council may give, or the Council, may approve the execution of minor but not substantial repairs, in order to permit of the reasonable preservation of an existing building or work;

(ii) a person may complete a building which has been commenced at the time of the publication of the by-law in the Gazette, provided it is completed in accordance with the by-laws of the Council and in accordance with plans and specifications approved by the Council;

(iii) a person may, subject to the provisions of paragraph (d) of this subsection, modify an existing building within ten years after the publication of the by-law in the Gazette, provided the work is carried

out in accordance with the plans and specifications submitted to and approved by the Council, and provided he has entered into an agreement with the Council providing that when the land is dedicated and revested under the provisions of subsection (5) of this section, or is purchased or acquired by the Council under the provisions of subsection (11) of this section compensation in respect of the building so modified between the old street alignment and the new shall be claimable by and payable to him or his heirs successors and assigns only in accordance with the following provisions:

- (I) if the land is dedicated and revested, or is purchased or acquired by the Council, within one year after the publication of the by-law in the Gazette, the full value added to the building by the modification is claimable and payable;
- (II) if the land is dedicated-and revested, or is purchased or acquired by the Council more than one year, but not more than twenty years after the publication of the by-law in the Gazette, the value of the building shall be reduced by one-tenth for each year between the date of the first modification of the building, and a date ten years thereafter;
- (III) if the land is dedicated and revested, or is purchased or acquired by the Council more than twenty years after the publication of the by-law in the Gazette, no compensation is claimable or payable in respect of value added by the building modification so approved;
- (IV) if, within the period of twenty years after the publication of the by-law in the Gazette, the Council requires the demolition and removal of the building in order that the land shall be dedicated and revested in accordance with the provisions of paragraph (b) of subsection (5) of this section, the amount claimable and payable as compensation in respect of the building modification shall be calculated in accordance with the foregoing provisions of this sub-paragraph;

(V) if the owner of the land, of his own volition removes the building so modified and the land is thereupon dedicated and revested in accordance with the provisions of paragraph (b) of subsection (5) of this section, no compensation is payable in respect of the building."

(c) A Council, for reasons it deems sufficient, may refuse to approve plans and specifications for the modification of a building between the old street alignment and the new.

(d) Notwithstanding the provisions of sub-paragraph (iii) of paragraph (b) of this subsection, no person may modify a building between an old and a new street alignment:

(i) on any street which is under the control and management of the Commissioner of Main Roads, unless with the consent of the Commissioner.

(ii) on any street where the new street alignment has been prescribed at the request of the Metropolitan Region Planning Authority or other body, unless with the consent of the Authority or body.

3. The present subsection 4 to become subsection 4(a) and a new subsection 4(b) to be added

(b) such an order may be made by the Governor on the recommendation of the Minister either:

(i) at the request of the Council; or

(ii) if the Council on a written request from a person whose land is affected by a street alignment refuses, or neglects for a period of three months, to request the Minister to seek the order at the request of that person, but the Minister shall not seek such an order at the request of a person

unless and until he has obtained the views of the council of the municipality, and, if the building is between the old and the new street alignments on a street under the control and management of the Commissioner of Main Roads, or is in a street for which a new street alignment has been requested by the Metropolitan Region Planning Authority, or some other body, he has also obtained views of the Commissioner, the Authority, or other body, as the case requires.

4. To delete subsection (7) and insert a new subsection (7)

(7) "The Council shall pay compensation, in accordance with the provisions of the *Public Works Act 1902*, to the owner of the land, portion of which is dedicated and revested under subsection (5) of this section, but the amount claimable and payable as compensation for the value of a building or portion of a building modified by agreement with the Council under the provisions of paragraph (b) of subsection (3) of this section shall be subject to the provisions of that paragraph."

5. The deletion of subsection (8) of section 364

6. To amend subsection (II) of section 364 by adding at the end thereof -

"The amount claimable and payable as compensation for the value of a building or portion of a building modified by agreement with the Council under the provisions of paragraph (b) of subsection (3) of this Section, shall be subject to the provisions of that paragraph."

7. To add a new subsection (12) as follows -

"Where a council prescribes a new street alignment under this section at the written request of the Commissioner of Main Roads, the Metropolitan Region Planning Authority, or other body, then, unless there is an agreement between the Council and the Commissioner, or the Authority, or other body which provides otherwise the Commissioner, Authority, or other body shall indemnify the Council against the cost

of purchase, or claims for compensation arising out of the dedication and revesting or resumption of land under this section, and shall reimburse the Council for expenditure so incurred."

8. To amend subsection (2) of section 364 by adding at the end thereof -

"who shall make a notation on the certificate of title, or deed, of the fact that a street alignment by-law affects the land. "

9. To amend subsection (1) of section 694 by adding at the end thereof -

"and also of any agreement with the council for the modification of a building between an old and a new street alignment, made under the provisions of sub-paragraph (iii) of paragraph (b) of subsection (3) of this Act."