IN THE LAND VALUATION TRIBUNAL
HELD AT AUCKLAND

LVP 02/05

IN THE MATTER	of a claim for compensation under Section 40(2) of the Public Works Act 1981
BETWEEN	**CHIEF EXECUTIVE OF LAND INFORMATION NEW ZEALAND** Applicant
AND	**SIMON JAMES, PETER JAMES, ALISTER PAUL JAMES, MIRANDA MARGARET JAMES and REBECCA HENRY PERCY JAMES** Respondents

Before the Auckland Land Valuation Tribunal

Chair:	His Honour Judge J D Hole
Members:	J W Charters, Esq K G Stevenson, Esq
Date of hearing:	3 – 6 April 2006
Counsel:	M T Parker for Applicant D E Wackrow for Respondents
Date of Decision:	3 May 2006

DECISION OF TRIBUNAL

Introduction

[1] This decision relates to an application for an order fixing the price of land being sold by the applicant to the successors of its former owner pursuant to s 40 Public Works Act 1981. Section 40(2)(A) gives the Tribunal jurisdiction to fix the price of the land in these circumstances. The price is to be its current market value at the date of the offer or, as in this case, the date the land should have been offered for sale. The relevant date is August 1989.

The Property

[2] The land is described in Certificate of Title Vol 80A Folio 626 as being Lot 1 on Deposited Plan 135879 containing an area of 1.0772 hectares. The title diagram shows a wide frontage to Wairau Road with a rear boundary adjacent to the western side of the northern motorway. Its northern side boundary is 92.6 metres in length and the southern side boundary is just over 43 metres. Registered against the title on 10 March 2005 was a telecommunications easement in gross. This did not exist as at August 1989: however, the parties have requested the Tribunal to take it into account as if it did exist as at that date because the land is being transferred to the respondents subject to that easement.

[3] The land occupies a prominent position on the eastern side of Wairau Road, Takapuna. It is situated between Wairau Road and the northern motorway, opposite Porana Road. It is the last site along Wairau Road prior to the motorway overpass. It is approximately nine kilometres from the Auckland central business district via the harbour bridge and motorway. The Takapuna commercial area is approximately four kilometres to the east.

[4] The land has a long frontage to Wairau Road which is the main arterial route leading through the industrial area of the Wairau Valley. As at August 1989, whilst the heavy traffic flow along Wairau Road was an advantage from the point of view of

advertising prominence, vehicle congestion had become a problem compounded in many cases by limited vehicle access on to other properties adjoining Wairau Road as a result of the Wairau Creek.

[5] Development along Wairau Road was of very much a mixed nature, including a number of open display yards for vehicles, caravans and boats, showroom premises and banking chambers. There were also a number of manufacturing and warehouse uses although the pattern of development was undergoing a transition from traditional manufacturing and factory-based activities to those of a semi-commercial nature.

[6] As at August 1989, the Wairau Valley was the only major industrial area on Auckland's North Shore. It was close to a large residential area. This was a source of labour for the businesses in the Wairau Valley. To the north, Constellation Drive was starting to develop in the same way. Land at Mairangi Bay and Albany had been subdivided but not yet developed for similar purposes.

Zoning

[7] As at August 1989, the land was zoned Recreation 1B under the Takapuna City District Scheme and Recreation 1 under the proposed scheme which had been notified in July 1988. All of the other land in the vicinity was zoned Industrial 2A under the Takapuna City District Scheme and Employment 1 under the proposed scheme.

[8] The Employment 1 zone under the proposed scheme was more restrictive than the Industrial 2A zone under the operative scheme. The predominant uses permitted in the Employment 1 zone included storage warehouses, trade warehouses, new technology uses, offices used in association with manufacturing, warehousing or new technology uses or small offices.

[9] The Recreation 1B zone under the operative scheme was intended for bush reserves and areas of significant natural landscape. Given that this was relatively

steep, bare land with its contour having been created by the construction of the motorway, the Recreation 1B zoning was obviously inappropriate. The Recreation 1 zoning in the proposed scheme was possibly more appropriate as it was intended for open space areas which served local residents' needs for neighbourhood reserves and was intended to provide visual amenity. Of the land's characteristics applicable to the Recreation 1 zone, visual amenity seems to have the most relevance.

[10] After cross-examination, all planners acknowledged that any Recreation zoning was unlikely to survive challenge and that a more appropriate zoning for the land under the proposed scheme was Employment 1

[11] ***Dilworth Trust Board and Dunholme Lawn Tennis Club Inc v Auckland City Council*** 7 NZTPA 198 is authority for the proposition that where an owner no longer derives an advantage from an unusually restrictive zoning and wishes to change the use of his land to a use not permitted by it, that zoning can be regarded as unreasonable. In such a case the zoning should be changed to one giving a wider range of uses; or (if the existing use is to continue) the land should be acquired by the relevant local authority with appropriate compensation to the owners. Both planners seemed to accept that both Recreation zones came within the concept of an "unusually restrictive zoning".

Valuation Methodology

[12] All valuers who gave evidence were agreed that, in assessing the value of the land, the first step was to determine a dollar rate per square metre for the land as if it were in a developed state. The dollar rate could be ascertained from a consideration of comparable sales which occurred prior to the relevant date. Sales subsequent to the relevant date might be useful in establishing trends only. Having established a dollar rate, adjustments should be made to it to allow for peculiarities incidental to the subject land which are not present in the comparables.

[13] Having established a dollar rate per square metre, those costs necessary to achieve the development needed to be deducted. A further deduction for holding costs incurred in the event of the development being delayed might be necessary.

[14] Valuation is not an exact science. The market value for any property cannot be determined solely by the undertaking of a mathematical exercise such as that outlined above. At the end of the day, the experienced valuer will stand back and, using his experience and market knowledge, whilst taking into account the mathematical calculation, will fix a market value in accordance with what he thinks is reasonable in the circumstance.

[15] In respect of this land, in its developed state it would not be entirely flat but would rise generally from the 16 metre contour towards the motorway at a gradient of one in 20. To determine what amounted to a usable area of land thus developed, the engineers referred to a concept plan. Whilst the two engineers who gave evidence each would have developed the land slightly differently, at the end of the day very little turns on this. The engineer, Martin Leak, considered that the usable area amounted to 7,979 square metres, whereas Mr Tony Day thought that it was limited to 7,065 square metres. The significance of this difference is that the dollar per square metre for usable land is obviously much higher than that for the balance.

Comparable Sales

[16] As at August 1989, the property market was a difficult one. Many large property companies had gone into receivership or statutory management. The effects of the share market crash of 1987 were becoming felt. The Government was recoiling from the effects of the Rogernomics reforms of the mid-1980's and was taking time to "have a cup of tea". The disputes between the Lange and Douglas factions subsisted. All in all, it was a time for investors to be nervous; as indeed they were.

[17] This nervousness manifested itself in the marketplace and, by late 1988, most property investors had withdrawn from the market. Many of the major life insurance

companies and superannuation funds were disposing of investment properties as a result of earlier Government policies. Thus, from about mid-1989 through to about 1991, the property investment market was described as 'soft'.

[18] Mr Gary Cheyne, a valuer called for the respondents, said that these market conditions were the worst that he had experienced in his career. He recognised that, in the Constellation Drive, Albany, Mairangi Bay industrial areas, sales showed consistent value levels leading up to August 1989 and through to 1991. He considered that those values were largely affected by the economic conditions prevailing at the time and that sale prices achieved for properties in those areas would be reflected in sales occurring in the Wairau Valley. Having analysed sales which had occurred in those areas (including some sales which had occurred after the relevant date), he thought that a starting point for the value of the land when developed would be $150 per square metre.

[19] Messrs Ian Gribble and Mark Parlane, valuers called for the applicant, thought that the Wairau Valley was an area quite discrete from Constellation Drive, Mairangi Bay and Albany. The Wairau Valley was almost completely built up with the subject land being the only undeveloped large parcel of land left. In these circumstances it was important to look at sales which had occurred within the Wairau Valley as these were more comparable with the subject land. Having analysed relevant sales in the Wairau Valley, Mr Gribble reached a starting point of $210 per square metre for the land when developed. Mr Parlane was more optimistic when he reached a figure of $225 per square metre.

[20] Some of the sales within the Wairau Valley suffered from having occurred almost a year to 18 months before August 1989 (when the market was more boyant). Nevertheless the Tribunal considers that those sales are more relevant to assessing the market value of the subject land than sales occurring elsewhere. Plainly in respect of the Wairau Valley sales, adjustments needed to be made for time and to take into account the prevailing economic downturn. However, those adjustments are far less significant than the sorts of adjustments necessary if sales

in Constellation Drive, Mairangi Bay and Albany are to be considered. In respect of the latter sales, not only must there be adjustments for time, but also significant locality adjustments are involved. This comes about because those sales involve land which was largely undeveloped and of a greenfield's nature. Furthermore, the northern motorway at that time finished at Tristram Avenue and did not reach Constellation Drive or the lands to the north. Finally, the lands at Constellation Drive, Mairangi Bay and Albany did not have an established residential hinterland equivalent to that at the Warau Valley. In summary, the sales mentioned by Mr Cheyne to support his value are not as comparable as those employed by the valuers for the applicant. However, the sales in Constellation Drive do confirm the existence of a relatively consistent market both before and after August 1989. Accordingly, they are of assistance as they show that, despite the very poor market conditions then prevailing, there were purchasers in the market place at that time for commercial and industrial land.

[21] Across Wairau Road from the subject property is a large parcel of land which is currently being developed as a Pak'N'Save retail outlet. In February 1987 the property was sold at $395 per square metre. It was resold in April 1988 at $442 per square metre. The property has three road frontages and thus excellent exposure. However it does suffer from the fact that it is within the 50 year flood plain, it has a sewer drain running diagonally through it and the Wairau Creek drain at its front. Furthermore, the April 1988 sale constituted some sort of trade in that at the time the property had been owned by Fletcher Building (Placemakers) and was sold to Diva Corporation which then provided other land for the establishment of a Placemakers retail outlet.

[22] The Pak'N'Save sales are supported by a sale at 141 Wairau Road. This 3,889 square metre site was sold in March 1987 for $1.7 million which extrapolates out to $437 per square metre. Its identified land value (for it was a developed property) works out at $1.5 million or $385 per square metre. This site is below the level of the road, has difficult access and half of it is within the 50 year flood plain. It has an awkward triangular shape.

[23] The sales at Croftfield Lane and Link Drive are closer to the relevant date. The lands were zoned Employment 1 in the Proposed District Scheme, although it seems that the purchasers may have anticipated ultimately being able to use the land for bulk retail. In fact, this did not occur until a decision of the Environment Court in ***Wairau Park Limited v North Shore City Council*** 1 NZRMA (TP) 150 on 20 September 1991. These sales confirm consistent land values from 1988 to mid-1989 within a range of $265 per square metre to $327 per square metre.

[24] It is clear from these sales that the Wairau Valley market was achieving higher sales values than Mairangi Bay, Albany or Constellation Drive. To a large extent, the Warau Valley sales values were driven by the scarcity value inherent in them.

[25] The Wairau Valley sales relate to properties which undoubtedly have difficult issues inherent in them. Such matters include being within the 50 year flood plain, the presence of the Wairau Creek, difficult access, and the necessity for additional piling and extensive foundations arising from drainage difficulties. In the Tribunal's opinion, by comparison the subject land, even after its extensive excavation works, is probably no worse (if not in some cases better) than the comparables just mentioned.

[26] When undertaking sales comparisons, it is useful to distinguish the usable land from the balance. Both Mr Cheyne and Mr Gribble did this. Mr Cheyne thought that the usable land in each case amounted to 50 percent of the total. This does not accord with the evidence of either Mr Leak or Mr Day. When Mr Cheyne applied his $150 per square metres to 50 percent of the subject land and then deducted engineering construction costs and made other deductions, he reached a negative result. Plainly, this was absurd as, indeed, he appreciated. When standing back from the property and applying his experienced judgment to it, he determined a value of $200,000 for it. [If he had applied his $150 per square metre to the usable area reached by Mr Leak (and his $23 per square metre to the balance) he would have reached a starting point of $1,261, 089. If he had then made the deductions

which the Tribunal agrees to, he was getting close to his $200,000 before taking into account holding costs].

[27] Mr Gribble applied $270 per square metre to the usable land and $67.50 per square metre to the balance. (He calculated the usable land as being of a greater area than did the engineers and the Tribunal prefers the Mr Leak's' assessment). His calculations (with the amended areas) amount to a market value before any deductions of $2,342,857 or $217 per square metre.

[28] Mr Parlane did not differentiate between usable land and the balance. He reached an overall rate of $225 per square metre which is similar to the $217 per square metre achieved by Mr Gribble's calculations.

[29] Thus, the Tribunal accepts that the starting point was between $225 per square metre and $217 per square metre. It rejects Mr Cheyne's assessment in this regard.

[30] The assessments reached by Mr Parlane and Mr Gribble are in respect of a developed property similar to the comparables. Certainly, the subject property does not have flooding or drainage problems. Its siting above the busy Wairau Road gives it good exposure but poor access. Unlike the other Wairau Valley (except for the New Zealand Post) comparables, it has good exposure to the motorway. Unlike all of the comparables, however, it has contour difficulties. Finally, an allowance for time between the comparable sales and August 1989 must be made.

[31] Having made allowances for all these factors, the Tribunal concludes that an appropriate market value for the developed property should equate with $200 per square metre or $2,154,400.

The Easement

[32] This was referred to in paragraph 2. It is for the conveyance of telecommunication cables along the eastern boundary of the land adjacent the

motorway. The issue for the prudent hypothetical purchaser in August 1989 would have been if it could have co-existed within the landscape amenity yard of 5 metres or if its area should be excluded from the useable area as determined by the engineers. The planner, Mr Putt, considered that the latter applied although he conceded that any problems associated with it could probably be resolved by agreement between its grantor and grantee. The Tribunal agrees. Furthermore, it is not satisfied that planting constraints applying to the landscape amenity yard would necessarily have precluded the existence of the easement within it and that it would have been possible to landscape the area in such a way as would not disturb the cables within the easement. Thus, the Tribunal considers that the prudent hypothetical purchaser would have concluded that the easement was not relevant to valuation.

Development Costs

[33] The allowable deductions from the starting market value of $2,154,400 must only be those which are peculiar to the subject property. Some development costs are universal and apply to all properties: these are not deductions which can be allowed as to allow them would amount to double counting. For example, the quantity surveyor, Mr Raymond Bennett, allowed $115,000 for preliminary and general. An analysis of those items indicates that they are all items which would apply to all properties.

[34] Both Mr Leak and Mr Day recognised that the prudent hypothetical purchaser investigating the subject land would probably undertake a more extensive engineering analysis than that provided to the Tribunal. In particular, a geotechnical investigation should have been undertaken. Had a geotechnical investigation been undertaken, it is likely that the estimates provided to the Tribunal by the engineers would have been more similar.

[35] The engineers were asked to work from a concept plan. It was no more than a concept. Thus, the engineering estimates produced to the Tribunal are inevitably imprecise. In some cases the estimates in respect of particular items were quite

close. In other cases, there was a significant divergence. The Tribunal has not analysed the various estimates with too great a particularity because of the imprecise nature of them. Thus, explanations for the Tribunal's decision in respect of these only applies where there were significant discrepancies.

[36] There was not a great deal of difference between the two estimates in respect of the retaining walls. To reach a figure in respect of the walls, the Tribunal has simply taken a middle figure which is $507,002.

[37] There was a very large discrepancy in respect of the figures for site clearance and excavation works. The main difference between the two engineers was that Mr Leak stated that he was aware of a number of places where waste product could be dumped free of charge within a short distance of the subject land. Mr Bennett, on the other hand, was unaware of these sites and, after consulting with third parties, concluded that it was necessary for the waste product to be disposed of with the incurring of tip fees. Mr Leak's evidence constitutes "best evidence" whereas Mr Bennett's relies on hearsay. Accordingly, Mr Leak's figure in the sum of $325,996 is accepted.

[38] Mr Day undertook a more detailed analysis of what piles were required and their nature than did Mr Leak. Accordingly the respondents' figure of $66,874 is accepted.

[39] Mr Day thought that to undertake engineering works in compliance with the concept plan a suspended floor was necessary in respect of part of the site. Mr Leak doubted this. He thought that the problem could be solved in a less expensive way. The Tribunal accepts Mr Leak's evidence in this regard.

[40] The sum applicable to additional site development must involve costs over and above those not applicable to comparable sites. Having perused the items to which this head refers, the Tribunal is satisfied that they were all costs which would have been incurred over and above costs applicable to comparable sites. For example, in the case of comparable sites, various services were provided to the boundary of the

site: not so in respect of the subject land. Thus, the Tribunal accepts a sum of $25,400 for this item.

[41] As indicated previously, the Tribunal does not accept the sum claimed by the respondents in respect of preliminary and general.

[42] After some consideration, Mr Leak accepted that he needed to allow a further 20 percent in respect of contingencies. This has been incorporated in the sums set out above. These total $925,272 – say $925,000.

Planning Consent

[43] As at August 1989 the land had a Recreation zoning. As indicated previously, such a zoning was so restrictive that any potential purchaser would have required that it be changed. Indeed, at about the relevant date, the National Roads Board did request the Takapuna City Council to change the zoning to a Commercial type zoning. In a memorandum dated 26 September 1989 the assistant planner to the Takapuna City Council indicated that the Council should not agree to the request without further studies being undertaken. Transit, the successor to the National Roads Board, did nothing concerning the rezoning of the land for another two years.

[44] The Tribunal doubts that the hypothetical purchaser of the land would have been as dilatory as Transit. Indeed, the hypothetical purchaser could have been expected to have taken all steps necessary to achieve a rezoning of the land as quickly as possible. At the time the Town and Country Planning Act 1977 applied and, in terms of it, district schemes could only be changed at the instigation of the local authority and not a private individual. [The situation is different under the Resource Management Act]. Thus if there were to be a zoning change, it was the new North Shore City Council which was to initiate it and follow it through. [The ***Dilworth*** decision plainly provided powerful ammunition to persuade a reluctant local authority to intitiate a change to its scheme. Additional ammunition could have been provided by the initiation of judicial review proceedings if the Council continued

with the attitude displayed by the assistant planner to the Takapuna District Council in September 1989].

[45] The Tribunal accepts that the likelihood of achieving a scheme change to a zoning applicable to adjoining land was absolute. The existing recreation zoning was unsustainable and violated the principle expressed in ***Dilworth***. The real issue, therefore, is the time that achieving such a change would have taken.

[46] The Tribunal recognises that an alternative way of achieving a zoning change to the subject land could have been by an application for a specified departure. This would have been a more expeditious method than the initiation of a scheme change. However, the prudent hypothetical purchaser would have recognised that the result of a specified departure application was by no means certain: the Council needed to be satisfied that the integrity of the scheme could remain if the departure were allowed. Perhaps, more importantly, a successful specified departure application would only have permitted the land being used for a specific purpose. This would not have suited a developer intending to on-sell the land. Possibly, if the prospective purchaser were an owner/occupier of the land a specified departure might have sufficed.

[47] Whatever method was employed to obtain a suitable zoning of the land would have involved the expenditure of monies. Mr Cheyne put the expenditure between $30,000 and $50,000. Mr Parlane initially thought $25,000 was sufficient but he increased his figure to $40,000. Mr Gribble thought $8,890 was sufficient.

[48] The Tribunal recognises that a specified departure application did not normally involve the expenditure of large sums of money. More importantly, where a Council initiated a scheme change, the expenditure of so doing was the responsibility of the local authority and not of the owner of the land. Nevertheless, costs would have been incurred in persuading the new local authority to effect the scheme change. The Tribunal takes a conservative view of these as it suspects that some of the costs mentioned by Mr Cheyne and Mr Parlane might have been based upon the

misapprehension that it was the owner who needed to incur the investigatory costs and not the Council. The Tribunal places a sum of $30,000 on this item.

Holding Costs

[49] The Tribunal accepts that there would have been quite significant delays in achieving the change in zoning. Until this was achieved the land could not effectively be used. Thus, the prudent hypothetical purchaser would build into his calculations holding costs. It is impossible to determine with any accuracy how long the change in zoning would have taken. It took Transit some nine years to achieve it. Transit's dilatory performance, however, cannot be equated with that of a developer or owner/occupier purchaser who might wish to achieve a more expeditious result. Nevertheless, even armed with ***Dilworth*** and the possibility of the threat, or, indeed, even the obtaining of judicial review, undoubtedly a lengthy period would have ensured. There were significant impediments in achieving a swift change of zone. These would have been apparent to the hypothetical purchaser in August 1989. They were:

(a) the prospective amalgamation of all the local authorities in the North Shore into one North Shore City Council;

(b) the proposed enactment of the Resource Management Act 1991; and

(c) that it was for a Council to initiate a scheme change under the Town & Country Planning Act 1977 and not a private individual.

[50] The Tribunal heard evidence about the muddle resulting from the amalgamation of the various local authorities and how the new North Shore City Council undertook the minimum planning work whilst it was sorting out its own internal difficulties. Inevitably this would have created delays and these would have been anticipated by the prudent hypothetical purchaser. Furthermore, the proposed enactment of the Resource Management Act 1991 and the uncertainties inherent in

the proposed new legislation were matters which needed to be taken into account by any prospective purchaser.

[51] Most of the anticipated delays would have related to persuading the North Shore District Council to undertake the change in zoning. Once the procedure had commenced, probably only six to 12 months (including an appeal period) would have ensued. The Tribunal considers that the likelihood of an appeal is small, given the meritorious nature of the case. Nevertheless, the prudent hypothetical purchaser needed to be realistic in this regard and the Tribunal thinks that a realistic time would not have exceeded two years.

[52] Mr Cheyne pointed out that bank interest rates applicable as at August 1989 were in the vicinity of 16 percent per annum. The hypothetical purchaser could have expected a reduction in interest rates as they were coming down from all time highs. The Tribunal thinks that he could have considered interest rates in the vicinity of 12 percent as being realistic. Mr Cheyne thought so.

Valuation

[53] The Tribunal considers that the market value of the land as at August 1989 would have been calculated in the following manner:

1.0772 hectares at $200 per square metre	$2,154,400
Less anticipated development costs	$ 925,000
Less costs of obtaining planning consent	$ 30,000
	$1,199,400
Less holding costs at 12% over two years	$ 287,856
	$ 911,544

say $900,000 (+ GST).

[54] The Tribunal fixes the price of the land as at August 1989 at $900,000 (+ GST).

[55] Costs are reserved. If not agreed, counsel are requested to submit memoranda in respect thereof within 3 weeks of the date of this decision.

Judge J D Hole

(Chairman)