BEFORE THE AUCKLAND
LAND VALUATION TRIBUNAL **LVP 71/03**

IN THE MATTER of a claim for compensation under the Public Works Act 1981

BETWEEN **THE MINISTER OF LANDS**

Applicant

AND **COLIN JAMES WECH**

Respondent

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: 12 - 14 July 2005

Counsel: Mr M T Parker for Applicant
Mr W Korver for Respondent

Date of Decision: 21 September 2005

DECISION OF TRIBUNAL

Introduction

1. This decision relates to an application to determine compensation payable to Mr C J Wech for 19.37 hectares of land which was acquired by the Crown for motorway purposes.

2. Mr Wech owns farmland at Weranui Road, Waiwera, on the south bank of the Waiwera River. The motorway alignment cuts through the property, dividing it into two unequal sized portions.

3. As the land could not be acquired by agreement, a notice of intention to take the land was given on 12 February 2000. The land was acquired by proclamation dated 16 November 2000. The specified date for assessing compensation, therefore, is 16 November 2000.

4. Mr Wech took no formal steps to have compensation assessed. Accordingly, pursuant to s 79 of the Public Works Act 1981, notice was given by the Crown on 18 March 2002 of its intention to bring the claim. This application was lodged on 29 September 2003.

5. Pursuant to s 60(1)(a), Mr Wech is entitled to compensation for the 19.37 hectares of land acquired for the motorway alignment. In addition, pursuant to s 60(1)(b), he is entitled to compensation for injurious affection. This is because only part of the land has been taken and the motorway will have some effect on the balance of the land retained.

The Property

6. The legal description of the property is Part Allotment 10 and 11, Parish of Waiwera, being all the land comprised and described in Certificate of Title Vol NA 763 Folio 260 (limited as to parcels) and subject to Gazette Notice D563934.1 (pertaining to the land acquired for motorway purposes by the Crown).

7. Prior to the acquisition of the 19.37 hectares for motorway purposes, its area was 83.057 hectares.

8. Improvements on the land consisted of an early weatherboard villa and ancillary farm buildings. A somewhat makeshift secondary residence occupied by Mr Wech's son was constructed on the land without local authority consent in 2000. In addition, on the land there was a garage/workshop building which was used by Mr Wech's daughter as a residence.

9. The property is irregularly shaped, lying to the southern side of Weranui Road, to which it has a frontage of 1850 metres. Most of the land is steep to rolling contour, rising steadily from the Weranui Road frontage on to a number of ridges and gullies. Some of the land close to the road frontage is of easier contour, particularly towards the western end of the property where the original dwelling is sited.

10. Most of the land is in pasture, some of which had gorse infestation as at the specified date. Approximately one-quarter of the property is in native bush. The lower reaches of the property contain numerous wetland areas and the north-eastern boundary of the property borders a wild life refuge. The land adjacent to the wild life refuge rises steadily towards the west and, at this point, a driveway had been formed which lead to the second dwelling occupied by Mr Wech's son. This dwelling benefited from attractive north to north-easterly views overlooking the Waiwera River and its surrounding area. The homestead occupied by Mr and Mrs Wech is at the north-western end of the property and does not enjoy views of the same quality. It has an attractive rural outlook.

Valuation Approach

11. All valuers involved in this claim agreed that the assessment of compensation for the acquired land should be on the basis of the "before and after" method. This method requires an assessment of the market value of the entire

property prior to acquisition; and the balance of the property after acquisition. The difference between the two valuations equates with the value of the land which has been taken. This approach accounts for any loss in value (injurious affection) which may arise as a result of the proposed works.

Hypothetical Subdivisions

12. In February 2004, Tracy Smith, a registered surveyor and planner with Harrison Grierson Consultants Limited of Auckland, prepared a subdivision concept plan for the original property. Lot 1 related to the balance of the land after six lots were subdivided from it. Lot 1 contained the existing farmhouse; Lot 6 contained the dwelling occupied by Mr Wech's son; Lots 2, 3 and 4 were bush lots and Lots 5, 6 and 7 were wetland blocks.

13. At the same time she prepared a subdivision concept plan for the balance remaining which showed five additional lots in addition to Lot 1 (being the balance of the land containing the existing farmhouse). Lots 2 and 3 were bush lots and Lots 4, 5 and 6 were the wetland blocks. The second dwelling on the property fell within land being taken for the motorway. The proposed Lot 7 on the initial concept plan (which was located at the north-eastern corner of the site) had to be relocated because of the audio and visual effects of the motorway. This lot was now placed in the north-western site corner.

14. Whilst Mr Wech's advisers never actually agreed to the Tracy Smith plans, nevertheless they were used by them initially for valuation purposes. Likewise, the valuers for the Crown adopted the same approach.

15. In May 2005, Mr P B Riley, acting on instructions from Mr Wech, produced a new subdivision concept plan for the balance remaining after acquisition. This involved the subdivision of land on the broad north-south ridge running through the property. Unlike the Tracy Smith plans (whereunder access to the various allotments was provided by Weranui Road) the Riley plan involved the utilisation of existing tracks on the property plus some additional roading.

Subsequently, upon learning that his proposed Lot C was untenable (because of Iwi issues) Mr Riley relocated it.

16. Whilst consideration of the Riley plan involved more than a day of evidence, and whilst its last minute production involved a considerable amount of investigatory work by the various valuers, its usefulness to the assessment of compensation proved negligible. Even the valuer for Mr Wech, Mr Stafford-Bush, conceded at the end of his evidence that the Riley plan was "a disappointment". In reaching this conclusion, Mr Stafford-Bush had not previously included in his costings the likelihood that the Rodney District Council would require the plan to be publicly notified before resource management consent could be considered. Whilst there was some debate over this matter in the course of the hearing, the Tribunal is satisfied that, having listened to Mr William Kapea (the liaison person for the local Iwi in respect of the motorway construction activities), a notified application would have been required.

17. Further, whilst it is not the province of this Tribunal to endeavour to second guess the outcome of such an application, it was quite apparent from Mr Kapea's evidence that the Iwi would be requesting time to allow an archaeological investigation of the ridge to be undertaken. There was sufficient evidence available to Mr Kapea to indicate that the ridge may have once been the site of a significant pathway between the East Coast and the Kaipara Harbour and accordingly the pathway should be protected.

18. The Tribunal concludes, therefore, that even allowing for the most optimistic view of the Riley concept plan (as exhibited by Mr Stafford-Bush), the presentation of that plan simply constituted an unhelpful diversion. The comment made by counsel for the Crown that the plan "appears to have been done in haste and without adequate regard to the District Plan requirements and potential archaeological and Iwi issues" is not unfair.

19. It follows that all valuers (including Mr Stafford-Bush) effectively accepted that their valuations should proceed upon the basis of the original Tracy Smith concept plans.

Principles Applicable to Assessment of Compensation

20. The following principles have been taken into account. They are not set out in any particular order. They are:

    (a) The value is to be the amount which the land, if sold on the open market by a willing seller to a willing buyer on the specified date, might be expected to realise (s 62(1)(b)).

    (b) Where the value of the land taken for any public work has on or before the specified date been increased or reduced by the work or the prospect of the work, the amount of that increase or reduction is not to be taken into account (s 62(1)(c)).

    (c) Mr Wech is entitled to receive full compensation for the taking of the land (s 60(1)). One of the effects of this is that the benefit of the doubt must be in favour of Mr Wech rather than the Crown. However, this does not mean that the Tribunal is entitled to embark upon a frolic of its own, although the Tribunal does not have to accept either party's valuation evidence (***Doherty v Commissioner of Highways (No 2)*** [1974] 7 SASR 57 at 83).

    (d) The best evidence of the market value of the land is that of comparable sales of other land either before or at the specified date. Whilst the Tribunal is entitled to take into account evidence of sales which occurred after the specified date, that evidence is only relevant where it tends to confirm what would have been the reasonable expectations of a well informed and reasonable purchaser at the

specified date (***Poverty Bay Catchment Board v Forge*** [1956] NZLR 811).

(e) The sales approach is the preferred approach to value (***Boat Park Limited v Hutchinson*** [1999] 2 NZLR 74 at 84).

(f) The comparative sales approach adopted by this exercise can be applied on either or both of the following bases:

(i) by comparing the sales evidence on a "simple area per hectare basis"; and/or

(ii) by comparing the same evidence on a potential residential development basis.

(g) When considering the comparative sales approach, only the sales evidence of properties which are truly comparable with the subject property is relevant. Sales of properties which are not comparable to the subject property are unhelpful. Thus, the exercise does not involve an analysis of all sales which may have occurred in the area over the relevant time and then the averaging out of those sales after analysis. Whether or not a sale is a comparative sale can sometimes be gauged by the level of adjustments required. Large adjustments may indicate that the sale is not a helpful comparison.

(h) Put simply, the process of valuation is the breaking down of market evidence to simple common denominators, with the application of those denominators to the land being valued. The denominators selected can vary from case to case and will be dependent on the quality of the evidence adduced.

21. Whilst the principles set out above are well recognised, in this case it has been necessary to repeat them because in some fundamental respects

counsel and the valuer for Mr Wech seemed to ignore them. In particular, Mr Wech's valuer, when endeavouring to assess block values, ignored the correct sales comparison approach. He endeavoured to locate every possible sale and then embarked upon an analysis of that sale introducing, in some cases, very large adjustments. He then proceeded to average out his adjusted sales to reach his valuation. Instead, it would have been preferable if he had concentrated on his best comparable sales.

22. Worse, both counsel for Mr Wech and Mr Stafford-Bush relied heavily on one particular sale (Strakas). Ultimately, when it was indicated to counsel that this sale occurred in June 2003 (about two and a half years after the specified date) counsel recognised that a consideration of the sale was misleading. In addition, Mr Wech's counsel and valuer endeavoured to rely upon a decision of this Tribunal (***Gray v Minister of Lands*** – LVP 051/03). This decision is dated 23 April 2004: does not constitute a sale; further, as it was given in April 2004, it was not known to the hypothetical purchaser on the specified date.

Adjustments for Injurious Affection

23. All valuers agreed as to the adjustments to be made for injurious affection in respect of the new residential allotments created in the Tracy Smith concept plan. However, they disagreed on an adjustment in respect of the balance of the land (being Lot 1). Mr Stafford-Bush seemed to think that the best way of making an adjustment for injurious affection in respect of the balance of the land was to apply an overall percentage in respect of it across the whole of the balance of the land without regard to a consideration as to whether, or how, it was injuriously affected by the proposed work.

24. On the other hand, Mr Morse, one of the valuers for the Crown, pointed out that it was important that only those areas of Lot 1 which were likely to be affected should be taken into consideration. He suggested, and the Tribunal agrees, that the portion of the balance of the land most likely to be affected

was the homestead site and curtilage. The balance of the land was unlikely to be affected simply because it would remain farmland and not be occupied for residential purposes. In the Tribunal's opinion, the approach taken by Mr Stafford-Bush lacks logic and is not sustainable.

25. Mr Morse provided the Tribunal with evidence of some research which he had undertaken in the Dairy Flat area as to the effect of a motorway on sales. He looked at four properties, two of which were very close to the motorway and in his view could have been expected to have been injuriously affected. He compared the sale prices of those two properties with two other similar properties some distance from the motorway and which were not affected by it. The prices were virtually identical; and he concluded from this research that there is an argument that the presence of a motorway has very little affect on the prices of properties close to it.

26. Nevertheless, he was prepared to accept the valuers' accepted approach that, in a situation such as that experienced by the Wech property, some injurious affection adjustment was necessary to the new residential lots plus the homestead and curtilage.

Profit and Risk

27. It was surprising to the Tribunal that confusion remains as to the application of an adjustment for profit and risk in costings applicable to hypothetical subdivisions. This was specifically addressed by this Tribunal in its interim decision dated 30 April 2002 in ***Nutsford-Cumming v Minister of Lands*** – LVP 20/01. In that case, as here, the valuer for the owner excluded the house and curtilage from the allowance made in respect of profit and risks.

28. At paragraph 14 of that decision, the Tribunal stated:

> *"The Tribunal rejects this proposition. Section 62(1)(b) specifically requires all of the land to be valued on a market basis. In this case, the preferred valuation method for the "before" valuation is the hypothetical subdivisional approach. This is because*

both parties recognise that in respect of the "before" situation the highest and best use of the land is a subdivision. Of necessity this involves a hypothetical subdivision of all the land including the house and curtilage"..

29. In determining whether it is appropriate to exclude the house and curtilage from a profit and risk adjustment, the starting point is to determine what the highest and best use of the entire property is. Another way of looking at it is to ask objectively who, at the specified date, the hypothetical purchaser is likely to be and what he is likely to want the property for.

30. Unlike the ***Kett*** situation and the ***Gray*** situation (where the properties' highest and best use was for lifestyle use), in this case all valuers accepted that the highest and best use of the Wech property was for subdivisional development. It was accepted by all valuers that it was possible that a developer might not proceed with a development of all the land at once.

31. However, whether or not the hypothetical purchaser is likely to develop all of the land immediately or in stages, nevertheless when he acquires the land for development purposes he does so in the expectation that he will make a profit from it. It is possible that, in some instances, that profit might be allocated in such a way as will enable him to pay off mortgage debt and allow him to remain on part of the property. How he allocates his profit is irrelevant. The important point is his expectation at the time of purchase of a profit to be derived from the acquisition of all the land. The expectation of profit necessarily involves the anticipation of risk. Thus, where the highest and best use of land is subdivisional development, then all of the land must be the subject of a profit and risk adjustment.

32. The same principle applies even where, as here, the developer retains his dwelling on the property being developed, as it is the whole of the property which is subject to the development. Were the owner to develop the land himself, he effectively becomes the "hypothetical purchaser/developer", and the value to him at the commencement of the subdivision is no greater than

what he could receive for the whole property on the open market on that day. That principle was ultimately agreed to by all valuers.

33. As mentioned in ***Nutsford-Cumming***, in some instances the profit and risk adjustment applicable to the homestead and curtilage may be less than that applicable to the balance of the land, for example where the house and curtilage might be quickly split from the balance and sold off well before the rest of the sections. In this case, however, there is no evidence to indicate that Lot 1 would be in this situation.

Block Sales Valuation

34. The evidence indicates that the market for rural land in this locality up to and for some time after the specified date was stable. Sales evidence between 1999 and 2001 confirms no significant price movements during that period.

35. In accordance with the principle set out in paragraph 20(d) the Tribunal considers that the relevant evidence is that which was available to the hypothetical purchaser up to the specified date.

36. When considering the value of subdivisible land, the Tribunal focused on the sales at 1 Puhoi Road, Joblin Road and 927 Weranui Road. These blocks ranged in area from 27.3 hectares to 68.67 hectares and indicated confirmed sale prices from $775,000 to $1,350,000 including GST. Analysed land values ranged from $13,700 per hectare to $21,660 per hectare.

37. The Tribunal agrees with the Crown's valuer, Mr Roberts, that the best comparable sale was that at 1 Puhoi Road. It analysed to a land value of $13,700 per hectare which was a figure agreed to both Mr Roberts and Mr Stafford-Bush.

38. The Tribunal does not accept the locality adjustment of 40 percent allocated to the sale at 1 Puhoi Road by Mr Stafford-Bush. Although the property is

situated adjacent State Highway 1, the Tribunal considers that it is very well located, being close to the Puhoi Village and to the recreational facilities at Waiwera. Accordingly, any adjustment for location should not exceed 10 percent. The property was in better condition and had superior improvements to the Wech property. However, it had almost identical subdivisional potential to the Wech property.

39. An analysis of the sale at 1 Puhoi Road indicates that the value to be ascribed to the Wech property on a "block comparison" basis is in the range of $1,150,000 to $1,200,000 inclusive of GST before any deduction for injurious affection arising from the motorway. That confirms a range of $13,850 to $14,450 per hectare, which is a useful starting point when considering the "before" value.

Hypothetical Subdivision Approach

40. Due to the limited number of directly comparable sales, the Tribunal agrees with the valuers for both Mr Wech and the Crown that the hypothetical subdivisional approach provides a more robust result than the comparison of block values approach.

41. As there was ample comparative sales evidence pertaining to both small lots and non-subdivideable larger blocks, a valuation based upon a hypothetical subdivision has been considered. Both Mr Stafford-Bush and Mr Roberts agreed on section sale prices and undertook a hypothetical subdivisional budget approach. However, there was no agreement on the value of the larger Lot 1.

42. After a review of the evidence the Tribunal has adopted a value on Lot 1 of $550,000 (including GST). It is essentially a large, undulating to steep, non subdivisible block with extensive areas of bush and poor pasture containing considerable gorse. Thereupon the Tribunal has used the agreed "small lot" values and completed a calculation on a "hypothetical subdivision" basis.

Using a 20 percent profit and risk margin, the Tribunal's calculations on the before value are as follows:

Land Value of Lot 1, 72.8 hectares		$ 550,000
Plus Improvements		$ 140,000
		$ 690,000
Plus small lots as agreed		$1,500,000
Total realisation		$2,190,000
Less GST		$ 243,333
		$1,946,667
Less sale costs @ 4.5%		$ 98,550
		$1,848,117
Less profit and risk @ 20%		$ 308,019
		$1,540,098
		say $1,540,000
Less development costs	$226,270	
Less marketing costs	$ 4,000	
Less holding costs – 9% over 6 months	$ 69,300	say $ 300,000
Nett residual block value (excluding GST)		$1,240,000
Plus GST		$ 155,000
Nett residual value (including GST)		**$1,395,000**
which equates to $16,795 per hectare		

If one uses the same budget but allows 25 percent for profit and risk, the nett residual block value (including GST) amounts to $1,328,625 which extrapolates out to $15,996 per hectare. Both these results compare favourably with the result achieved by the bulk sales approach (see paragraph 39).

To calculate the value after acquisition, using the agreed section values, the following budget is applicable:

Land Value of Lot 1, 53.43 hectares		$ 450,000
Less allowance for injurious affection		$ 50,000
		$ 400,000
Plus improvements		$ 94,500
Plus agreed lot values		$1,045,000
		$1,539,500
Less GST		$ 171,055
		$1,368,445
Less selling costs at 4.5%		$ 69,277
		$1,299,168
Less profit and risk at 20%		$ 216,528
		$1,082,640
Less development costs	$ 173,910	
Less marketing	$ 4,000	
Less holding costs at 9% over 12 months	$ 48,719	
	$ 226,629	(say) $ 226,630
Nett residual value (excluding GST)		$ 856,010
Plus GST		$ 107,001
$ 963,011 (say) **nett residual value (including GST)**		**$ 963,000**

If a profit and risk adjustment of 25 percent is adopted, the nett residual value,including GST, (rounded off) comes to $916,500.

43. As will be apparent, the Tribunal has adopted the agreed section prices. The section prices proposed by Mr Morse (the other valuer for the Crown) indicated reduced section prices and the Tribunal accepts that Mr Morse's figures were well supported by sales evidence. However, the Tribunal has had regard to the injunction to the effect that, when assessing compensation, any benefit of the doubt should favour Mr Wech. Accordingly, it has adopted the more generous sales figures accepted by Mr Roberts (on behalf of the Crown) and Mr Stafford-Bush.

44. Upon this basis, therefore, if a profit and risk factor of 20 percent is used, the "before" value amounts to $1,395,000 and the "after" value amounts to $963,000. This gives a difference of $432,000 (including GST).

45. If a profit and risk adjustment of 25 percent is used, the "before" value amounts to $1,328,500 and the "after" value is $916,500. This gives a difference of $412,000 including GST.

46. Using the same hypothetical subdivision approach, but adopting values on Lot 1 slightly in excess of those adopted by Mr Roberts, the resulting difference using a 20/25 percent profit and risk margin is a range of $435,000 - $456,000.

Determination

47. It will be apparent that the Tribunal's assessment of value for compensation purposes (whatever approach is used) is about that adopted by Mr Roberts in the sum of $450,000. It is higher than the figure suggested by Mr Morse. It is significantly less than the figure proposed by Mr Stafford-Bush in the sum of (using his lowest figure) $900,000.

48. It will also be apparent that the valuation evidence provided by Mr Stafford-Bush resulted in valuations greatly in excess of those provided by the Crown and accepted by this Tribunal. The Tribunal considers that this is not simply a case where the evidence adduced on behalf of Mr Wech constituted a different opinion to that provided by the Crown. This is a case where, in the Tribunal's opinion, the evidence for Mr Wech was based on a number of propositions which were patently wrong and which contravene established principle. These include:

(a) the reliance on a block sale and a Land Valuation Tribunal award which exceeded the specified date by a significant margin;

(b) the failure to focus on the most comparable sales when fixing the block values for the land, despite glaring pointers which indicated that the approach taken was likely to be wrong. These pointers included the very high adjustments needed and the fact that his valuation was so different from that of the two other valuers. He may not have known about this latter matter initially, but after the exchange of briefs it would have been apparent.

(c) The injurious affection adjustment proposed by Mr Stafford-Bush was patently wrong and defied any logical foundation; and

(d) The profit and risk adjustment proposed on behalf of Mr Wech was undertaken in a manner which had previously been disapproved of by the Tribunal in ***Nutsford-Cumming v Minister of Lands*** (supra). It was not supported by the decisions of this Tribunal in ***Minister of Lands v Kett*** (LVP 01/04) or ***Gray v Minister of Lands*** (supra).

49. Finally, the Tribunal records that, in its opinion, on an analysis of the admissible evidence available to the Tribunal and with the adoption of correct principles, a result which was somewhere between the Roberts and Morse valuations was an inevitability. This would have been apparent to the

advisers for Mr Wech when they were preparing for his hearing. The Tribunal thinks it is likely that it influenced the decision to instruct the preparation of an alternative concept subdivisional plan at a very late stage. These last minute efforts made on behalf of the advisers for Mr Wech in a vain attempt to bolster their unsupportable case resulted in the hearing of this case taking much longer than it should have. Further, they will have caused the Crown representatives to spend fruitless hours in investigating the evidence, only to conclude that it was of no use to the Tribunal. Indeed, it is the Tribunal's firm opinion that this was a case which should have settled at an early stage. In that regard, given the gross disparity in valuations, it would have been sensible for Mr Wech's advisers to have obtained a second opinion as to valuation.

Conclusion

50. Notwithstanding the Tribunal's own calculations, given the requirement that compensation should not be assessed on a niggardly basis, the Tribunal is satisfied that the compensation as assessed by Mr Roberts is appropriate. Accordingly it fixes compensation in the sum of $450,000 (including GST). It recognises that an advance payment has already been made to Mr Wech in the sum of $360,000 (including GST and interest). In these circumstances, Mr Wech is entitled to interest at 7.5 percent per annum on $90,000 from 17 November 2004 to the date of the payment of the balance of compensation owed to him.

51. Costs are reserved. Counsel are to submit a memorandum in respect thereof within 14 days.

Judge J D Hole
(Chairman)