

HEADNOTE

Compensation for land acquired under Pts V & VI Public Works Act (1981). Rural Residential zoning. Designation for Water Works. Suitability of site. Premium for higher use designation. Injurious effect. Profit & risk. "Before & After" method. Alternative approaches. Willing seller willing buyer. Benefit to Tribunal of Valuer evidence. Roadside inspection of subject property unacceptable.

IN THE LAND VALUATION TRIBUNAL OTAGO REGISTRY LVP 11/98

BETWEEN FREDERICK GEORGE FOX
 Applicant/Vendor
AND DUNEDIN CITY COUNCIL
 Purchaser

Tribunal: Judge JE Macdonald
 Mr JW Briscoe

Hearing: 9 and 10 November 1998

Counsel: Mr D. More for the Applicant
 Mr J. Butler for the Purchaser

Decision:

RESERVED DECISION OF THE MEMBERS OF THE OTAGO LAND VALUATION TRIBUNAL

This is an application for the Tribunal to determine the level of compensation to be made by the Dunedin City Council to Mr Fox relating to a parcel of land located on the western slopes of Kaikorai Valley. The application results from an Agreement for Sale and Purchase between the parties dated 19 September 1997 relating to Lots 2-7 inclusive on a proposed plan of subdivision containing 15.26 ha more or less, subject to a number of special conditions which include:

1. The parties acknowledge and agree that the purchase price shall be a sum equal to the level of compensation awarded by the Land Valuation Tribunal arising from a claim for such compensation brought by the vendor under Parts V and VI of the Public Works Act 1981 or by agreement between the parties.
2. The parties hereto acknowledge and agree that the deposit payable by the purchaser represents partial satisfaction

3. The survey of the property shall be at the cost and expense of the purchaser...
4. The vendor will withdraw its objection to the purchaser's application to take part of the land the subject of the agreement under the Public Works Act, notice of which was served on the vendor on 6 December 1996. The vendor's notice of objection is dated 10 January 1997.
5. The Agreement acquisition price is the lowest price the parties would have agreed upon for the property at the time of entering into this Agreement upon the basis of payment in full at the time at which the first right in the property is to be transferred to the purchaser.
6. This Agreement is subject to and conditional on this Agreement and all its terms being ratified before a meeting of the Dunedin City Council.
7. The purchaser agrees with the vendor that it will arrange for the issue to the vendor of separate Certificates of Title for Lots 1 and 8 on the plan of subdivision attached hereto ("the house lot").
8. The settlement date shall be one month after the release of the Land Valuation Tribunal's determination of the compensation payable.
9. The parties hereto agree that the vendor shall be permitted to retain an additional piece of land of not more than 2 acres from the land adjacent to Lot 1, currently shown as part of the proposed Lot 7.... The rights of way as shown on the attached plan shall be modified accordingly.
10. The parties hereto agree that they will do no such acts...."

The total area of the property comprises 18.6277ha of freehold land.

In December 1992 application was made to the Dunedin City Council for resource consent to subdivide the title into six allotments, consent being granted on 15 March 1993.

The Rural G zoning provides for rural residential lifestyle development of sites not less than 2.0ha. A variation to that consent was sought from Council to increase the number of allotments to seven and make changes to the rear land access. Resource consent was granted, and advised by letter dated 18 January 1994.

On 10 November 1994 the Council wrote to Mr Fox under the heading "Designation of Sites for Water Works Purposes" advising him that as part of the new District Plan for the City, the Water Department had identified the property as a proposed site. Subsequently there was a meeting on site on 15 December 1994 with the City Council Water Manager, Mr Fox and his Surveyor Mr N. Pitts.

On 5 December 1994 Mr J. Dunkley, Registered Valuer, provided at the request of the Dunedin City Council a valuation of Lots 2,3,4, and 5 on a proposed plan of subdivision with a combined area of 11.16ha.

On 22 June 1995, Mr Pitts applied to Council for consent under section 223 of the Resource Management Act to seal the title plan and also for a Resource Consent Application (Land Use). The title plan was sealed by Council giving it a further currency of three years from the date of seal. The land use application was not granted.

The Dunedin City District Plan, notified in July 1995 resulted in:

1. The land being zoned Rural which provided for dwelling houses on sites not less than 15 ha compared

to the 2ha under the Rural G provisions.

2. The designation of proposed Lots 2, 3,4 and 5 for water treatment and storage purposes.

Due to delays before the proposed plan became operative, the Council withdrew the designation and issued a separate notification issued by Mr Arnold sitting as Commissioner, on 20 December 1995, confirming the designation subject to various conditions.

The total holding is an irregularly shaped parcel of land bounded by Townleys Road to the Southwest and Reservoir Road to the Northwest. Aspect is predominantly south-easterly overlooking the southern Kaikorai Valley commercial/ industrial area and various residential suburbs. Contour is generally easy rolling ridge top with steeper south/southeast slopes. Altitude ranges between 60 and 120 m. A high voltage electricity transmission line runs in a northwest/southeast direction through the property, these lines being supported by one tower. The property is in pasture, with some re-growth gorse on the steeper sidings, and is generally well fenced. The brick dwelling built in the 1980s comprises 200m², plus other outbuildings and a sleepout, these being situated on Lot 1 adjoining Townleys and Mt Grand Roads.

Mr N. Pitts, Registered Surveyor, gave evidence of his involvement with the property which commenced in December 1992 when on behalf of Mr Fox he made application to the Dunedin City Council to subdivide the 18.63 ha into six allotments. He latterly prepared a plan providing for an additional 9580m² (approx.) of land extending to the northeast of Lot 1 (Mr Fox's dwelling) to be incorporated in Lot 1, to act as a buffer from the water treatment plant.



Mr N.J. Harwood, Registered Civil Engineer and Dunedin City Council Water Manager, noted that Dunedin's water supplies were graded E, and have been graded "completely unsatisfactory, very high level of risk" by the Ministry of Health. He gave evidence that to avoid high electricity costs which would be incurred if water had to be pumped around the City, the best strategy was to have two treatment plants with one at a low level and one at a high level. Other sites had been considered for the water treatment plant but none of those alternatives were as suitable as Mr Fox's land. In Mr Harwood's opinion, the land of Mr Fox was the most suitable because it was the closest site of the right size in relation to the existing raw water reservoir and was also stable, unlike some other potential sites which had stability problems. As well as being suitable geologically, the land was suitable hydraulically because of its height and the excellent access for Council's requirements.

Mr J. Dunkley's valuation in December 1994 of the proposed Lots 2,3,4 was for \$185,000 plus GST. Although Mr Fox was happy to sell the land, he did not agree with the figure. On 10 November 1997, Mr Chapman who had taken over the file from Mr Dunkley reported to Council, this time on the basis of Lots 2-7 inclusive. Following this, on 14 November 1997, the Council's Solicitor offered the sum of \$220,000. That offer was declined. Council had also requested a valuation of the proposed Lots 2,3,4 and 5 in respect of a compulsory acquisition scenario but having regard to the Sale and Purchase Agreement, the Tribunal finds no benefit in this exercise.

The water treatment plant as set out on plans produced by Mr Harwood will comprise 3 x 20,000m³ water storage tanks, a treatment building of 1,500-1,600m², a flocculation building

and associated mixers, a clarification filtration plant plus a secondary filtration building. Amongst various conditions set out by the Commissioner on 20 December 1995 in relation to the Dunedin City Council requirement for a designation of land for "water treatment plant and water reservoirs" purposes were that:

"No buildings shall be located within 6m of the property boundary. No building height shall exceed 10m above the ground".

Other conditions related to noise levels, lighting and various other matters.

Mr Harwood recommended that because the land was being purchased by Agreement and not being taken compulsorily, it was the Dunedin City Council's view that no compensation should be paid for injurious effect to Mr Fox's remaining land. He argued that the effect of the conditions imposed by the Commissioner would be that there would be more control over the water treatment plant than if the subdivision planned by Mr Fox had proceeded. Special condition 1 of the Sale and Purchase Agreement refers to compensation being claimed under Parts V and VI of the Public Works Act 1981 and that specifically provides for compensation as a whole, including injurious effect.

Mr Harwood also gave evidence that once commenced, the construction works would extend over a six year period before the plant became operational. He also commented that new technology could change building size and placement, as well as noise levels, but regrettably found himself unable to be more precise.

There was considerable discussion regarding the specified date.

In his evidence, Mr Orchiston, valuer for Mr Fox, produced his figures effective as at the date of the Sale and

Purchase Agreement - 19 September 1997 for Lots 2-6 and Part Lot 7 as follows:

Land	\$240,000
Planning Premium	\$60,000
	\$300,000
Injurious effect	
(on Lot 1 - dwelling Site)	\$20,000
	\$320,000

To this he added an unspecified claim for legal and finance costs, plus GST (if any).

Following a request from Mr Fox's solicitor, Mr Orchiston produced a further report on 2 September 1997 investigating the possible effect of the proposed works on Lot 1. Mr Orchiston assessed the effect on the homestead at \$20,000 which he calculated as 10% of his estimated value of the improvements and land comprising Lot 1. In that report dated 2 September 1997, Mr Orchiston's comments "as you are aware, I have not been instructed to undertake a detailed valuation of the house and Lot 1. An estimate of value...." Not to have done so is most unsatisfactory and Mr Orchiston as a valuer of some considerable experience should well know that if instructions received do not permit him to undertake a valuation adequately, competently or completely, then he should request further instructions or alternatively, advise that he is not able to proceed. Section 62(1) of the Public Works Act 1981 states "the amount of compensation payable under this Act, whether or land taken, land injuriously effected, or otherwise, shall be assessed in accordance with the following provisions." It was therefore proper to take injurious effect into account and in order for Mr Orchiston to proceed under the mandate that the Act provides.

As well as undertaking a valuation on a hypothetical subdivision basis, Mr



Orchiston also considered three property sales, the most relevant being 496 Taieri Road comprising 18 ha of bare land which sold in June 1996 for \$255,000. A smaller parcel of 9.2ha of bare land in Babsie Road sold in September 1996 for \$123,000.

Argument was put forward that the Before and After method valuation was the only method to adopt. We are in agreement with Archer J. where in **Tilby & Others v Valuer-General** (LVC 1953) he states:

"the Court has frequently pointed out that as it is unusual for any one method of valuation to be conclusive and beyond question, it is the duty of the valuer to check his valuation, when made by what seems to be the most reliable method, by any other method of valuation which is appropriate to the case".

Having regard to profit and risk it is pertinent to note that approval to subdivide the property into eight lots had been granted by the Council on 18 January 1994. Mr Orchardson in his earlier valuation, made no allowance for profit and risk while Mr Chapman had used 10%. However, in preparing his last valuation, Mr Orchardson also adopted 10% for profit and risk which in our opinion, adequately reflects due allowance for the risks associated with the project and a reasonable return, appropriate to the circumstances.

Mr Orchardson contended that his separate assessment of \$60,000 over and above the \$240,000, which he variously described as planning premium, special value, and special purpose advantage, should be taken into account in that "special purpose" did not form part of the value for land taken up under the Public Works Act. He argued that as Council had already designated the land for a special purpose, the Council should not be able to avoid paying a premium for

land that was "designated for a higher use". He said that there was an opportunity cost advantage for the

Council to use this site as opposed to others and gave examples of special purpose sites such as television, microwave or radio repeater sites. The Tribunal considers that because an owner cannot utilise a site or property in a way that another could, should not preclude that owner from negotiating the best possible price. Equally, however, an intending purchaser would not necessarily indicate any special interest or need. In such cases, scarcity is often a factor, both as to availability of a particular site, and also the number of potential purchasers with a need for that particular site. Section 62(1)(b) of the Public Works Act 1981 states that:

"The value of the land shall be taken to be that amount which the land if sold in the open market by a willing seller to a willing buyer on the specified date might be expected to realise, unless -

- (c) 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 shall be not be taken into account;"

It appears to us that we have a willing seller and willing buyer in light of the Sale and Purchase Agreement. We also have a property that was approved for subdivision into eight lifestyle lots. However, we are constrained by section 62(1)(d) which states:

"The special suitability or adaptability of the land,..... shall not be taken into account if that purpose is a purpose to which it could be applied only pursuant to

statutory powers, or a purpose for which there is no market apart from the special needs of a particular purchaser.....".

Mr A.G. Chapman provided a valuation of \$222,000 for the Dunedin City Council, this figure excluding any assessment for injurious affection. Mr Chapman described the involvement of his firm in the acquisition process and produced a valuation prepared by Mr J. Dunkley, Valuer, dated 5 December 1994. That report related to Lots 2,3,4 and 5 on the proposed plan of subdivision with an area of some 11.16ha. Mr Dunkley was not called to give evidence. Mr Chapman also produced a valuation prepared by Mr W.D. Guild dated 13 November 1995. Mr Guild was not called to give evidence in support of his report. Without the benefit of seeing and hearing witnesses supporting their submissions, and their response under cross-examination, the Tribunal finds little benefit in such reports being produced.

On 24 May 1996, Mr Dunkley again reported to the Council updating the previous valuation. However, on 6 June 1996 Mr Chapman provided a report to the Council and we set out his opening paragraph:

"Thank you for your facsimile of 28 May 1996. As discussed, we have reinspected the property from the roadside only and now provide value estimates of:

- (a) The balance of the property; and
- (b) The entire property including the house.

Again, on reporting to the Council on 10 November 1997, Mr Chapman reinforces his previous statement, stating:

"We record that the writer has

inspected the property only from the roadside and has not at this time approached Mr Fox to obtain access for a more detailed inspection. In the circumstances it is felt appropriate to rely on evidence already available to me particularly given that the value of the individual Lots do not appear to be a major difference between the parties..

This was in response to a written request from the City Council instructing Mr Chapman to undertake an assessment of value in respect of an Agreement between Mr Fox and the Council and also in respect of a compulsory acquisition scenario.

This Tribunal does not accept that it was appropriate for Mr Chapman to rely on evidence that he had available to him at that time. The essence of Mr Chapman's difficulty is that he failed to physically inspect the property. Not to have done so is a serious error of judgment.

Mr Chapman also produced hypothetical subdivision calculations for Lots 2-8 inclusive followed by another calculation relating solely to Lot 8. He called this a Before and After valuation and justified this approach using section 62(b)(ii) of the Public Works Act 1981. That particular section refers to:

".....may be assessed by determining the market value of the whole of the owner's land and deducting from it the market value of the balance of the owner's land after the taking or acquisition."

The presence of Lot 1, which is part of the whole appears to have escaped Mr Chapman's attention.

Mr Chapman produced no sales of comparable blocks of land placing total reliance on the mathematical calculations of the hypothetical subdivision process.

Mr Orchiston provided a basic figure of \$240,000 plus an assessment of \$20,000 for injurious effect providing a total of \$260,000. In light of the evidence produced, the Tribunal finds to that effect (less deposit of \$25,000 paid 6 November 1997).

The question of interest arises. There is an issue as to the appropriate rate and the date from which it should commence. Having considered the respective submissions of Counsel the Tribunal considers the specified date should be 6 December 1996 being the date of notification under the Public Works Act. As to the interest rate we consider 9% p.a. to be appropriate having regard to interest rates at that time.

Costs will be reserved at the request of Counsel.

J.E. Macdonald
Chairman