McKee v Valuer-General; Comesky v Valuer-General - [1971] NZLR 436

Court of Appeal Wellington
16, 17 September; 20 October 1970
North P, Turner and Richmond JJ.

Valuation of land -- Government valuation -- Unimproved value -- Change of operative district scheme -- Potential use enhances unimproved value -- Valuation of Land Act 1951, ss 2, 10, 19.

The appellant owned land within a residential zone in the City's operative district scheme. In December 1966 the operative district scheme was changed so as to make multi-unit flats a "conditional use" within a residential zone. Before the alteration the limit had been three units and, earlier again, multi-unit flats had been a predominant use in a residential zone. In 1966 the Valuer-General pursuant to s 10 of the Valuation of Land Act 1951 carried out a quinquennial revaluation of the area. The price obtained for land, in respect of which consent to use thereof for multi-unit flats, exceeded the sale price of comparable land in respect of which no such consent had been obtained, and that excess bore a definite relationship to the number of units authorised. Each of the objectors had obtained consent and had erected a block of six flats on their respective land before the date of the revaluation. The objectors accepted the increase of the capital values to their properties as proper but contended that the increase in value attributable to the use as flats should be ascribed to the value of the "improvements" and not as the Valuer-General had done to the "unimproved value". Wilson J upheld the Valuer-General in ascribing the increased value to the "unimproved value" of the properties. The objectors appealed against this decision.

Held:

1 "Unimproved value" and "capital value" both depend upon the valuer's estimate of realisation, but the "value of improvements" is determined by calculation so that the "unimproved value" plus the "value of improvements" cannot exceed the "capital value" (see p 440 line 43).

Dictum of Archer J in Valuer-General v Epps [1964] NZLR 810, 811, referred to.

2 The restrictions which the zoning of a town planning scheme imposed upon the land and buildings within a zone were to be taken into account in assessing the unimproved value of the land within that zone (see p 438 line 27; p 442 line 14).

Royal Sydney Golf Club v Federal Commissioner of Taxation (1955) 91 CLR 610, followed.

Golland v Randwick Municipal Council [1961] AC 82 and Tetzner v Colonial Sugar Refining Co Ltd [1958] AC 50, referred to.

3 The consent obtained was not an "improvement". In assessing the "unimproved value" the valuer must put the consent on one side as if it had not been obtained, and assess the value of the land without it but with the chance of obtaining such consent (see p 439 line 4; p 445 line 15).

Re an Arbitration between Auckland Hospital Board and Auckland Rugby League Inc [1966] NZLR 413, approved.

Royal Sydney Golf Club v Federal Commissioner of Taxation (1957) 97 CLR 379, 384 and Valuer-General v Addington Raceway Ltd [1969] NZLR 327, referred to.

Judgment of Wilson J [1970] NZLR 760, affirmed as varied in 3 (supra).

Other cases mentioned in judgment

Public Trustee of NSW v Commissioner of Inland Revenue [1966] NZLR 257.

Toohey's Ltd v Valuer-General [1925] AC 439.

Valuer-General v General Plastics (NZ) Ltd [1959] NZLR 857.

Note:

Note Refer 16 Abridgement 157.

Note:

The following statement of facts is taken from the joint judgment of Turner and Richmond JJ who in turn took them from the judgment of Wilson J [1970] NZLR 760:

Note:

On 16 December 1963 the City of Upper Hutt altered its operative district scheme under the Town and Country Planning Act 1953 to make apartment houses (in which term is included blocks of flats) containing more than two household units a conditional use of land in areas which in the scheme were zoned "residential". Before that date, the limit had been three units; earlier again any use as multi-unit flats required no consent. Both the pieces of land to which the objection before us applied were situated in a residential zone under the City's scheme, and in both cases the consent of the City Council necessary for conditional use of multi-unit flats was duly obtained after 16 December 1963; and in each case a block of six flats was completed at some time before the date as at which the valuation of the land was made.

Note:

It was accepted in the judgment of the Supreme Court that under the conditions which we have mentioned the price which could be obtained for land in a residential zone in respect of which consent had been obtained for use for multi-unit flats exceeded the sale price of comparable residential land in respect of which no such consent had been obtained; and that the excess bore a definite relationship to the number of units authorised. For the objectors it was conceded in the Supreme Court that the capital values of the objectors' properties shown in the Government Valuation as at 1 November 1966, were proper amounts; but it was contended that that part of the values attributable to the grant of consent to conditional use as multi-unit flats should have been ascribed to improvements, and not included in unimproved value. The Valuer-General had included an amount representing the extra value due to the grant of consent to the unimproved value in each case.

Appeal

This was an appeal by two separate appellants from a decision of the Supreme Court (Administrative Division) [1970] NZLR 760 disallowing their objections to the valuations of their respective land made by the Valuer-General pursuant to s 10 of the Valuation of Land Act 1951.

Cooke QC and von Dadelszen for the appellants.

Cain for the respondent.

NORTH P.

The question we are called upon to determine on this appeal is whether in view of the provisions of the Town and Country Planning Act 1953 the judgment of the Administrative Division of the Supreme Court (Wilson J and Messrs A D Carson and W H Hartnell) sitting at Welling on 30 October 1969 correctly interpreted the provisions of the Valuation of Land Act 1951 in so far as it defined the matters to be taken into consideration in determining the unimproved value of the appellants' land for rating purposes.

The relevant facts appear to be these. The Valuation of Land Act 1951 makes provision for the revision of district valuation rolls at 5-yearly intervals. In accordance with this provision there was a re-valuation of the Upper Hutt City as at 1 November 1966. The Upper Hutt City, as it was entitled to do under the Rating Act 1925, had adopted the system of rating on the unimproved value of land in its district. The two appellants who are owners of blocks of multi-flats objected to the amounts fixed as the unimproved value of their land. At the time the objections were made, it was thought that there might be a distinction in principle between the two objections but at the time the case came on for hearing before the Land Valuation Court, counsel were agreed that no such distinction existed. Accordingly both objections were heard together and the Court was told that these two objections were typical of a number of objections received by the Valuer-General and were to be regarded as test cases.

[After recounting the facts North P continued].

In the Court below, Mr Relling for the two objectors, conceded that the increase in the capital value of their properties shown in the new government valuation was a proper amount but he contended that this increase should be ascribed to improvements, not to the unimproved value as had been done by the Valuer-General. This argument failed for the reasons given by Wilson J in the Court below. With respect, I am of the opinion that the conclusion reached by the Judge was right, both for the reasons given by him, and for the reasons given in the joint judgment of my two brethren which I have had the advantage of reading and considering. Nevertheless, in my opinion the error in the approach of the government valuer to this problem, was that in the case of the lands owned by the two appellants, he proceeded on the basis that he could take into account the fact that the council had already granted consent to the conditional use of their land for the erection of multi-unit flats. For the reasons which my brethren have given, in my opinion this approach was wrong. The government valuer was required to determine the unimproved value of the lands in question which were zoned as available for "residential" purposes. This being so, in my opinion he could not single out the appellants' lands, where consent had already been given, for different treatment from lands in the same zone where consent had not yet been given for otherwise rating equities would not be preserved. In my opinion the correct approach as my brethren have said, was for the government valuer to determine what price purchasers would be willing to pay at the time of the valuation with no more than the prospect that the council would grant to them the right to erect multi-unit flats on the land in question. Obviously enough the price would depend on a number of circumstances including the size and situation of the land under consideration. But even if the land in every way was suitable for the erection of multi-unit flats, the prospective purchasers would surely have some regard to the possibility that the council for one reason or another might

decline to grant them consent to the use of that land for the purpose which the purchasers had in mind. Moreover, the council is entitled to make its consent subject to "such conditions as the council may impose, whether generally or in respect of the particular use". Accordingly in my opinion, it was for the government valuer to determine what price purchasers could be expected to pay for the lands in their unimproved state with the prospect merely and not the certainty that the council would grant its consent on reasonable conditions. That this is so is I think made clear in the case cited by my brethren, Royal Sydney Golf Club v Federal Commissioner of Taxation (1955) 91 CLR 610; (1957) 97 CLR 379. Undoubtedly the effect of the adoption of a town planning scheme will affect the value of land in the city according to the zone in which it is placed. But if the council has shown a disposition to grant owners of land in a "residential zone" permission to use the land for the erection of say multi-unit flats then I would think that it is likely that a prospective purchaser in competition with others might well be prepared to pay for a suitable section a considerably greater sum than would be the case if he was confined to the "predominant" uses specified in the code of ordinances. But while I think this is so, I do not consider that it necessarily follows that he would be prepared to pay as high a price as he might have been willing to pay if the land was in a zone in which the erection of multi-unit flats was a permitted use. It will be the responsibility of the valuer to determine as best he can, what price a purchaser would be willing to pay having regard to all these circumstances.

In conclusion I should say that I have considered carefully Mr Cooke's submission that the consent if already granted by the council is a separate right of item of property analogous to an hotel licence. I agree with my brethren that this ingenious argument cannot be allowed to prevail.

The Court being unanimously of opinion that the appeal should be allowed, it is allowed accordingly and the case is remitted to the Supreme Court with a direction that the appellants' objections should be re-heard and a decision reached upon the application of the principles more particularly laid down in the joint judgment of my two brethren.

The joint judgment of Turner and Richmond JJ was delivered by

TURNER J.

This is an appeal by two separate appellants from a decision of the Administrative Division of the Supreme Court (Wilson J and Messrs A D Carson and W H Hartnell) sitting at Wellington on 30 October 1969, wherein that Court disallowed the appellants' objections to two separate valuations of their respective lands made by the Valuer-General pursuant to s 10 of the Valuation of Land Act 1951, in the course of the Government revaluation of the City of Upper Hutt as at 1 November 1966. It was agreed before the Supreme Court that the two objections were typical of a number received by the Valuer-General, and were to be regarded as test cases. For this reason, and because the point of principle which they raised appeared to be undecided at least in this country, the parties agreed in terms of the proviso to s 22(1) of the Land Valuation Proceedings Act 1948 that the objections should not be referred to a Land Valuation Committee, but should be heard and determined by the Supreme Court, and leave was granted accordingly. The cases were heard together in the Supreme Court by consent. It was originally thought that there might be a distinction in principle between them, but this point was abandoned by consent of all parties. The Supreme

Court disallowed both objections. Both objectors sought leave to appeal to this Court from this decision, and leave was granted accordingly on 23 April last. The two appeals were presented together before us by consent.

[After setting out the facts the judgment continued.]

The question to be determined in the Supreme Court was whether the Valuer-General had acted correctly in including the extra value of the property due to the grant of consent of conditional use in the unimproved value of the land.

"Unimproved Value" is defined in s 2 of the Valuation of Land Act 1951 as follows:

> "'Unimproved value' of any land means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to impose, and if no improvements (as hereinbefore defined) had been made on the said land."

> "Value of improvements" is defined in the same section as "the added value which at the date of valuation the improvements give to the land". "Capital Value" is thus defined in the same section:

> 'Capital value' of land means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realise at the time of valuation if offered for sale on such reasonable terms and conditions as a bona fide seller might be expected to require".

The same section also defines "improvements" in the following terms:

> "'Improvements' on land means all work done or material used at any time on or for the benefit of the land by the expenditure of capital or labour by any owner or occupier thereof in so far as the effect of the work done or material used is to increase the value of the land, and the benefit thereof is unexhausted at the time of valuation; but, except in the case of land owned or occupied by the Crown or by a statutory public body, does not include work done or material used on or for the benefit of the land by the Crown or by any statutory public body, except so far as the same has been paid for by the owner or occupier either by way of direct contribution or by way of special rates on loans raised for the purpose of constructing within a county any road, bridge, irrigation work, water races, drainage works, or river protection works . . ."

In the definition of "improvements" there follow three provisos which we omit here, because they do not appear to have any relevance to the consideration of the case before us.

It may help towards an appreciation of the exact issue in this case if it is noticed that while "unimproved value" and "capital value" both depend upon the valuer's estimate of realisation, the "value of improvements" is not so to be determined, but is arrived at by a process of calculation, the result being that unimproved value plus value of improvements will never exceed capital value, although the value of the improvements, if arrived at by a separate process of estimation, might, if added to unimproved value, produce a different result. The process of adjustment to which we have referred is distinctly alluded to in the judgment of Archer J in the Land Valuation Court in Valuer-General v Epps [1964] NZLR 810 at the top of p 811.

Before the Supreme Court the principal submission made by Mr Relling, who there appeared for the objectors, was that the grant of consent to conditional use as multi-unit flats was the result of work done "for the benefit of the land" by the owners, and therefore an improvement to the land, the value of which should have found its place in the value of improvements, but not in the unimproved value. This submission, which was rejected by the Supreme Court, was repeated before us by Mr Cooke, who argued the case for the objectors before us. To it he added another which had not been made in the Court below, viz that even if conditional-use consent does not itself amount to an improvement, it does not necessarily follow that any value attaching to it must be part of the unimproved value of the land. In this connection Mr Cooke attempted to liken the consent granted by the City Council to the grant of an hotel licence; he asked us to regard it as something given personally to the applicant, not necessarily attaching to the land at all. The consequence, said Mr Cooke, was that its benefit was not to be reflected in any increase in his valuation. Mr Cain, for the Valuer-General, adopted the reasoning of Wilson J in the judgment appealed from on the first of these submissions; as to Mr Cooke's second point his contention was that the facts in the case before us distinguished the case completely from the group of hotel licensing cases.

We now consider the first of the arguments presented for the appellants -- viz that if the grant of consent is to be considered as having added anything to the value of the land, it is the value of the improvements, and not the unimproved value, that is increased. We begin our examination of this argument by adopting the principle enunciated by the High Court of Australia in Royal Sydney Golf Club v Federal Commissioner of Taxation (1955) 91 CLR 610. There the question was whether the effect of the zoning adopted by the County of Cumberland was a matter to be taken into account in assessing the unimproved value of the appellant's golf course; the land was zoned "rural" in the County planning scheme. It was argued that this zoning amounted to no more than an encumbrance or restrictive obligation affecting the title to the golf course, and that it was therefore a matter to be left out of account in assessing the unimproved value. The judgment of the High Court (Dixon CJ and McTiernan, Webb, Fullagar and Kitto JJ) rejected this argument, saying at p 624:

> "Is not (the County scheme) rather a law operating over an area of country within the State which, though not large, is chosen independently of all questions of title or ownership and controlling the use to which owners in fee simple or for any less estate or interest occupiers, licensees and indeed even trespassers, may put the land? Its nature and purpose seem to bring the restrictions flowing from the scheme under the second description. However the title may be derived and whatever may be the form of ownership, occupation or enjoyment, the use of all land within the scheme is affected actually or contingently, presently or in the future, but in varying degrees and subject to varying conditions. In the case of land within the area coloured dark green the restriction, if not more proximate, is at all events more stringent. But it is nevertheless a restriction which arises from the law affecting an area in which the land lies, and not something altering the hypothesis upon which the Federal statute requires the land to be assessed. It must be taken into account in ascertaining the unimproved value of the land."

This decision received the approval of the Judicial Committee per Lord Radcliffe in Golland v Randwick Municipal Council [1961] AC 82.

In Tetzner v Colonial Sugar Refining Co Ltd [1958] AC 50 the Judicial Committee, in considering the proper method of assessing the unimproved value of land in a case very different from that now before us, thus expressed the principle, which we think one of general application, as follows, at p 57:

> "The land will then be valued void of buildings but situated in the community with the amenities and facilities which have grown up around it".

We add; and with any disadvantages which a general zoning clause in a town planning scheme has imposed upon it.

In the same way as is indicated in these decisions we have no difficulty in deciding that in this country the restrictions which the zoning of a town planning scheme imposes upon the land and buildings within a zone are to be taken into account in assessing the unimproved value of the land within that zone.

But this is only the first step; and its validity was not disputed as an essential step in Mr Cooke's argument. That argument depended upon what further modification (if any) should be made to the assessment so arrived at, if and when the valuer takes into account any dispensation from the zoning restrictions brought about by a grant of consent to a conditional use. It seems to us important to notice, at this stage of the discussion, that what is being valued is not -- as Mr Cooke really invited us to decide -- the land, in its original condition, plus the consent; what the valuer is required by the Act to assess as the unimproved value of the land is "the sum which the owner's estate therein might be expected to realise. . . ." This sum may, and indeed often will, be greater or less according as a hypothetical prospective purchaser may assess his prospects of securing from the local authority a consent to conditional use. But this is a very different proposition from the one advanced by Mr Cooke, who contended that the value of the consent actually obtained must be assessed, and, so assessed, must be absorbed in the value of the improvements.

Whatever may be the position where the owner of vacant land has actually obtained consent to a conditional use thereof involving the erection of buildings, and the valuation is made before the buildings have been erected (and we return later to this topic), the assessment (as here) where the buildings have actually been erected pursuant to the consent before the valuer enters upon his task, must be of the unimproved value of that land "as if no improvements had been made on the land". And he must make his valuation as at the date when it purports to be made. He must therefore, as on that date, consider the land as if the buildings actually erected upon it had been removed and the land were again vacant.

If these principles are applied to the actual case before us, it will be seen that as at the date when the valuations were made, the appellants were not by any means in the same position as that in which they had been at the moment of obtaining consent to conditional use. That consent had been obtained long before. And the buildings whose erection it had authorised had actually been built upon the land, and now constituted improvements on it. These improvements the Act instructs the valuer to ignore, valuing the land as if they had not been placed upon it.

"Conditional use" is now defined in s 2 of the Town and Country Planning Act 1953 as amended and reprinted in the 1966 Statutes as:

> ". . . any use specified in the operative district scheme as a use that is permitted only if the Council consents and only subject to such conditions as the Council may impose, whether generally or in respect of the particular use or in respect of the particular site."

Conditional use is an explicit use, the consent to which may be granted subject to specific and detailed conditions; s 28C again refers expressly to this point. Though these provisions were not yet enacted at the date when the valuation in this case was made, they imported no new conception into the statute, for both the term "conditional use" and its consequences were already common places of town planning administration -- see, for instance, the Town and Country Planning Act 1953, Second Schedule, and the Town and Country Planning Regulations 1960 (SR 1960/109), in force at the material date, and, in this case, the code of ordinances of the Upper Hutt City. For some reason or other, or for none at all, the actual resolution of the Council granting the consent in this case to conditional use was not put before us, or before the Court below; but from the correspondence which was produced to us by consent, following on a direct question from the Court, it abundantly appears that the consents given in these cases were particular consents for the erection of particular buildings, the detailed plans and specifications of which were before the local authority, and that consent was given subject to specific conditions and requirements which the Council laid down in granting it. These specific buildings were thereupon erected, and it seems to us inescapable that the construction to which (inter alia) the Council had given its consent had been completed, and that if the buildings had then been destroyed, as for example by fire, another new consent would have been necessary before other and different blocks of flats could have been erected in place f the original ones. If, then, the valuer was obliged to contemplate the land, as at the moment of valuation, but with the buildings actually upon it notionally removed, he was left with notionally vacant plots, the owners of which had not at that

moment any consent to the erection thereupon of fresh new buildings, but might be said to have had a greater or less chance of obtaining such a consent, depending on the inference to be drawn from the fact that they and/or others had (or had not, as the case may be) previously been successful in obtaining one.

This is the conclusion to which Perry J came in the Supreme Court in Re an Arbitration between the Auckland Hospital Board and the Auckland Rugby League Inc [1966] NZLR 413, in which case he thus set out a proposed draft direction to be given to a valuer in essaying a task not very different from the one which faced the valuer in this case (but in that case there were no buildings on the land). At p 426 Perry J said:

> "The law requires you to take into account in your valuation the chance, if any, of permission being obtained for some other use at some future time, and to value such chance and to add such figure (if any) to the valuation otherwise reached on the assumption that there is no possibility of its being used for any other purpose than as designated."

And it is the conclusion to which Kitto J came in the second part of the litigation in the Royal Sydney Golf Club case. His decision is reported in (1957) 97 CLR 379 and at p 384 he said:

> "The restrictions, so long as they remained undiminished, made the adoption of that course impossible. They must therefore have had a depressing effect upon the value of the land. But that effect could not have been as great as it would have been if the restrictions had been completely incapable of removal or relaxation. In determining the value of the land I must allow for such possibilities as there were that the restrictions might be removed or relaxed; cf City and South London Railway Co v St Mary Woolnoth and St Mary Woolchurch Haw; Corrie v MacDermott. And in doing so I must take into account not only all that was then generally understood or ascertainable but the situation as it actually was in respect both of fact and of law; for the supposition must be made, in order properly to apply the test of value laid down in Spencer v The Commonwealth, that a price is arrived at in bargaining between a hypothetical prudent purchaser and vendor each of whom is equipped with knowledge of the existing circumstances: Deputy Federal Commissioner of Taxation v Gold Estate of Australia (1903) Ltd."

We recall, for the sake of completeness, that Tompkins J expressed a similar view, sitting in the Land Valuation Court at Christchurch, in Valuer-General v Addington Raceway Ltd [1969] NZLR 327.

We have not found ourselves moved from this conclusion by the argument which Mr Cooke based upon the definition of "improvements" in s 2 of the Valuation of Land Act. In the definition section of that Act "unimproved value" is defined, in the terms which we have already set out, as the sum which the owner's estate might be expected to realise "if no improvements as hereinbefore defined had been made on the said land". "Improvements" are defined as:

> "All work done or material used at any time on or for the benefit of the land by the expenditure of capital or labour by any owner or occupier thereof in so far as the effect of the work done or material used is to increase the value of the land, and the benefit thereof is unexhausted at the time of valuation . . ."

Mr Cooke contended that the work done by the appellants in securing the consent of the local authority to conditional use was work having the effect of increasing the value of the land, and that the benefit of this was unexhausted at the time of the valuation. The value of the consent which had been obtained, he contended, should therefore find its place in the value of the improvements. This argument, which at the hearing seemed to use to have enough merit to cause us at least to ponder over it, fails because even if the grant of consent to conditional use can be regarded (as we for ourselves would doubt) as the direct fruits of such work as may have been done by the appellants to obtain it, yet it is not that consent, or the appellants' work in obtaining it, which is the thing to be valued. Not the consent actually obtained, but the chance of obtaining another, and different, consent, if the buildings be notionally removed, is the factor to be considered by the valuer in deciding by how much, if at all, the unimproved value of this property must be greater than what it would have been without any chance of consent to conditional use.

It may of course possibly happen that the valuation is made at a stage where consent to conditional use has been obtained, but the buildings have not actually been commenced. In such a case, depending possibly on the terms of the con-

sent, it may be that the owner is in a position virtually to assign the benefit of the consent with a transfer of the land. If this is possible, no doubt the price which he receives will reflect the value to the

purchaser of the consent. But this still does not mean that the value of the consent is to be ascertained and included in the unimproved value. Nor on the other hand does it mean that the consent is an "improvement". The consent already obtained is something not to be included at all in assessing the unimproved value. The valuer must put the consent on one side, as if it had not been obtained; and assess the value of the land without it, but with the chance of obtaining another similar one.

For these reasons we are of opinion that the judgment of Wilson J was right in so far as he thought that the extra value given to the land by the chance of obtaining a consent to conditional use was a factor to be added to the unimproved value which it would have had without such chance; but that he was in error in supposing (as appears from implication from the judgment rather than expressly) that what was to be valued was the land plus the actual consent to conditional use which had been obtained. What was to be valued was the land with such chance as the owner might properly be estimated to have had of obtaining such a consent, as at the date of valuation, if the buildings had been removed from the land and he had, as at that date, found himself in possession of a bare plot.

In the course of the argument there was some considerable discussion of the judgment of Archer J in Valuer-General v General Plastics (NZ) Ltd [1959] NZLR 857. That was a case of "existing use" within the meaning of s 36 of the Town and Country Planning Act 1953. The effect of this section is that, notwithstanding restrictions imposed by zoning under a town planning scheme, those who, prior to the adoption of the scheme, are already using land or buildings for a non-conforming use are protected by the statute, and may continue, after the adoption of the scheme, such nonconforming use, without being required to obtain any approval or consent in respect of it. In the General Plastics case Archer J decided that, having regard to the wording of s 36, the owners' right to continue a non-conforming use, which of course passes with a transfer to a purchaser, is one which flows from the existing use of the buildings on the land. In these circumstances Archer J said at p 860:

> "The legal position appears to be that so long as the present buildings are available and in use for purposes of a similar character to those for which they have been used in the past, and so long as they do not require substantial reconstruction or alteration or addition, the property may still be used for the purposes in question, although they do not conform to its residential zoning. If, however, the buildings were moved or destroyed, the right to use the land for industrial purposes would at once come to an end, and the restrictions imposed by the town planning scheme in respect of residential land would become fully effective.
>
> "It follows, in our opinion, that if, in accordance with the authorities cited, we are required to disregard the improvements in order to assess the unimproved value of the subject land, we must also disregard the right to continue to use this property for industrial purposes which is a right flowing entirely from the existence of the buildings and from the uses to which they have been put."

We respectfully think that in this passage Archer J correctly expressed the law. But the considerations which influenced him in that case have no application to the one before us, in which permitted conditional use, and not existing use, is the operative consideration. It certainly cannot be said that conditional use flows from the existence of the buildings; indeed

the existence of the buildings depends in this case upon the grant of conditional use.

It remains to deal formally with Mr Cooke's alternative argument, which, so it seems to us, has already impliedly been disallowed by the logic of what we have already said. That argument was that the consent, the value of which it was contended by the Valuer-General should be added to the unimproved value, was an advantage undoubtedly of some value, but one unconnected with the land, comparable in this respect to an hotel licence. Mr Cooke cited and relied upon Toohey's Ltd v Valuer-General [1925] AC 439, where the Judicial Committee upheld an objection to a valuation incorporating in the unimproved value of the land the value of a publican's licence held in respect of the premises upon it; and he added, for good value, a dictum of McGregor J in Public Trustee of New South Wales v Commissioner of Inland Revenue [1966] NZLR 257, 258. But we have already held that the value of the consent to conditional use in this case, as such, is not a consideration which the valuer is directed to take into account at all in assessing the unimproved value. He is directed to assess this by estimating the sum which the land would be likely to bring without improvements. What the valuer may, and indeed must, take into account in assessing the unimproved value is the chance which the owner of the land may have of obtaining a new consent to conditional use it, as he is required by the Act to assume, the buildings which have already been erected pursuant to the consent already obtained be now regarded as removed. He does not

value the consent already obtained at all; and Toohey's case, which could be of assistance only in deciding into what category the value of the consent should fall, becomes completely irrelevant.

For these reasons we would allow the appeal with the consequences which the President has proposed.

Appeal allowed.

Solicitors for the appellant: Hogg, Gillespie, Carter and Oakley (Wellington).

Solicitors for the respondent: Crown Law Office (Wellington).