BEFORE THE AUCKLAND

LAND VALUATION TRIBUNAL **LVP 20/01**

IN THE MATTER	of a claim for compensation under the Public works Act 1981
BETWEEN	**JULIAN NUTSFORD-CUMMING**
	Claimant
AND	**MINISTER OF LANDS**
	Respondent

Before the Auckland Land Valuation Tribunal

Chair:	His Honour Judge J D Hole
Members:	R M McGough, Esq K G Stevenson, Esq
Date of hearing:	26 March 2002
Counsel:	B Stafford Bush (Valuer) for Owner Ms L Hansen for respondent
Date of Interim Decision:	30 April 2002

INTERIM DECISION OF TRIBUNAL

Introduction

[1] Julian Nutsford-Cumming, the "Owner", owns a semi-rural rear lot in the Greenhithe area. It is largely covered in bush and scrub. On the land there is a dwelling with developed grounds. The property has sub-divisional potential. It has a total area of 3.6840 hectares described in Certificate of Title 56C/1040.

[2] Transit intends to build a motorway cutting a swathe of approximately 2.1 hectares through the land. As a result, an area of 0.35 hectares will be severed from the remaining land. Accordingly, the Minister of Lands, "Transit", has agreed to acquire both the 2.1 hectares and the 0.35 hectares.

[3] After extensive negotiations the parties entered into an advanced compensation agreement dated 24 February 2000. It provided for an interim payment of compensation of $508,000 (including GST) being $445,000 for the land and $63,000 for injurious affection. The settlement date for payment of the $508,000 was 24 March 2000. That is also the date at which the balance of compensation is to be assessed.

Agreed Parameters

[4] The parties have been unable to agree as to the balance of compensation payable in respect of the land. However they are agreed in respect of the following:

- That in accordance with section 62(1)(b)(ii) Public Works Act 1981 compensation is to be assessed by determining the market value of the whole of the land and then deducting from it the market value of the balance of the land after the taking or acquisition.

- As there is no evidence of comparable block sales in the area, the market valuation of the whole of the land needs to be assessed upon the basis of an hypothetical subdivision of the land. It is agreed that a subdivision constitutes the highest and best use in these circumstances.

- The value of the balance of the land is agreed although the method of describing the agreement is at issue. The owner says it is $450,000 inclusive of Goods and Services Tax, if any; Transit says it is $400,000 exclusive of GST.

- In respect of the "before" valuation, a sub-divisional plan, costings, likely selling price of sections and the house and curtilage, and an appropriate level of profit and risk allowance are all agreed.

Issues

[5] The parties have been unable to agree on two matters. They are:

- If the award should be expressed as GST inclusive or excluding GST. Included in this is a question as to how GST should be treated in the "before" hypothetical subdivision valuation.

- If the house and curtilage should be subject to the profit and risk allowance in the hypothetical subdivision valuation.

[6] To resolve both of these issues it is necessary to refer to the Act. Section 60(1) provides that the owner is entitled to full compensation. Whilst not attempting to analyse the various cases which have considered this section, it is worth noting that in *Drower v Minister of Works [1984] 1 NZLR 27* the High Court pointed out that *"the nature of compensation involves rendering something equal to what has been lost"* and that the word "full" "*implies a direction that the entitlement must not be whittled down in any respect."* Full compensation is assessed in accordance with section 62. Section 62(1) starts with the basic proposition that compensation for land shall be the value of the land which if sold on the open market by a willing seller to a willing buyer might be expected to realise.

GST

[7] It seemed to be accepted that if this land were sold on the open market the contract would describe the price either as being "GST inclusive" or "plus GST". It was also acknowledged that if there had been evidence of sales of comparable blocks of land available then this evidence would have been the preferred starting point for

undertaking the "before" valuation. Generally this sort of evidence would have referred to sales prices as being "GST inclusive" or "plus GST". It follows that if the recognised method of describing the sales price of this and comparable land is "GST inclusive" or "plus GST" then any compensation award in respect of the land should follow the recognised sales practice. In other words, in applying section 62(1)(b), if the open market uses the formula of "GST inclusive" or "plus GST" for a sale of the land then the award must do likewise. The important point is that the amount of money paid by a purchaser, whether described as "GST inclusive" or "plus GST" (for both descriptions mean the same thing), is the same and that a purchaser does not alter the purchase price because of the incidence or otherwise of GST.

[8] If one accepts that the award must be "GST inclusive" or "plus GST", then it follows that any method of its valuation must in some way recognise that it is inclusive of GST. Not so, argues transit.

[9] Transit argues that in using the hypothetical subdivision methodology the method itself precludes an allowance for GST. Transit referred to the model in Table 10.19 of ***R J Jefferies Urban Valuation in New Zealand Volume 1 Second Edition*** where no allowance is made for GST. It also referred to the ***New Zealand Institute of Valuers Guidance Note 1*** where it was pointed out that in respect of non-residential valuations the parties are usually GST registered and accordingly the valuation should be on a plus-GST basis.

[10] The Tribunal has no difficulty with either the model or the Guidance notes. However, neither has been prepared for the situation where the award is ultimately to be expressed in GST inclusive terms.

[11] Transit also argues that if an allowance is made in the hypothetical subdivision budget for GST this would result in two different market values depending on whether or not the vendor was required to pay GST. This is incorrect. The market value does not alter: what alters is the net return to the vendor. A useful analogy is to consider the effects of income tax on such a transaction. Whether or not a vendor might be subjected to income tax on a particular sale is dependent on

that person's taxation status. It has never been suggested that because a person may be subjected to income tax that the sale price of his land should alter accordingly.

[12] Accordingly the Tribunal agrees with the owner's submission that where the award is to be expressed in GST inclusive terms the valuation method must also be undertaken on a GST inclusive basis.

Profit and Risk Allowance

[13] In preparing his hypothetical subdivision valuation, the valuer for the owner excluded the house and curtilage from the allowance made in respect of profit and risks. He acknowledged that this was a novel approach. He argued that in a lifestyle block the house and curtilage often comprise a large part of the overall value so that if in a future subdivision the house were removed there would be a significant reduction in value. He said that the logical approach is to design the subdivision around the house and curtilage. Accordingly the house and curtilage should be excluded from the profit and risk allowance which applies to the balance of the subdivision.

[14] The Tribunal rejects this proposition. Section 62(1)(b) specifically requires all the land to be valued on a market basis. In this case the preferred valuation method for the "before" valuation is the hypothetical sub-divisional 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.

[15] However, the tribunal accepts that the appropriate profit and risk allowance for a house and curtilage remaining when land is being subdivided may be different from that applicable to the balance of the land. For example, a house and curtilage may be quickly split from the balance and sold off well before the rest of the sections; in which case possibly a smaller allowance would be applicable. On the other hand it is possible to envisage a situation where the location of the house and curtilage precludes its earlier sale in which case the allowance applicable to it would

equate with that applicable to the balance of the land. In this case there is no evidence requiring the Tribunal to consider a different profit and risk allowance in respect of the house and curtilage from that applicable to the balance of the land.

Revised "before" valuation

[16] To calculate the land's value in the "before" situation the hypothetical subdivision budget must be re-calculated as follows. The house and curtilage become subject to the profit and risk allowance and an allowance is made for GST.

Gross realisation 10 sections		1,783,000
Lot 11 house and curtilage		540,000
Gross realisation		2,323,000
Less GST		258,111
		2,064,889
Sales, marketing and legal 5% of $2,323,000		116,150
		1,948,739
Profit and Risk @ 22.5%		357,931
Therefore outlay		1,590,808
Development costs etc		
Earthworks and services	320,000	
Reserve contribution (land in lieu)	Nil	
Holding costs @9% averaged over 18 months	107,379	
Contingencies	9,000	
		436,379
Value Before		1,154,428
Plus GST		144,303
Hypothetical Subdivision Value inclusive of GST		1,298,731
		(say $1,300,000)

Award

[17] To reach the award figure it is necessary to deduct from the "before" valuation of $1,300,000 (inclusive of GST) the "after" valuation of $450,000 (Inclusive of GST). This amounts to $850,000 (inclusive of GST).

[18] As an interim payment of $508,000 (inclusive of GST) on account of compensation has already been made, the balance is $342,000 (inclusive of GST, if any).

Interest

[19] The Owner is entitled to interest on the balance of $342,000 from 24 March 2000. The rate of interest should fairly reflect the opportunity cost of the funds. Usually in compensation cases that will be calculated upon the basis that if the owner had been in receipt of the compensation it would have been invested in real property. The Tribunal does not have before it any information as to a likely return on such an investment. However, for the period concerned the Tribunal has awarded interest at 8% in respect of other cases. In the absence of any information to the contrary, such an interest award seems appropriate here.

Costs

[19] In addition the owner is entitled to reasonable costs which have not yet been quantified. In ***Chamberlain v The Minister of Land and the Minister of Conservation (20/12/90), HC Whangarei AP17/89; AP 19/89*** and in ***F M McNulty & ors v Minister of Survey and Land Information (9/7/93) HC Dunedin M61/92*** it was held that the costs of assessing a claim prior to hearing should be included in the compensation claim itself. These are different from section 90 costs which are the costs of the hearing. It will be appreciated that different considerations can apply to the fixing of each.

[20] This is an interim decision. It can be made final if the parties so require. However, if this is required the parties must file an appropriate Memorandum within 21 days. It should set out each parties' position as to costs so this aspect of the claim and hearing can be incorporated in the final award.

Judge J D Hole (Chairman)