BEFORE THE AUCKLAND
LAND VALUATION TRIBUNAL LVP 001/05

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

BETWEEN **JOHN CHRISTOPHER WAUGH AND KAREN ROBINSON**

Claimants

AND **MINISTER OF LANDS**

Respondent

Before the Auckland Land Valuation Tribunal

Chair: His Honour Judge J D Hole

Member: K G Stevenson Esq

Date of hearing: 30 October 2006 – 2 November 2006

Counsel: Mr R P Thomas for Claimants
Mr M T Parker for Respondent

Date of Decision: 22 November 2006

INTERIM DECISION OF TRIBUNAL

Introduction

1. During the second world war a number of tunnels were dug in the vicinity of the south yard of the Devonport Naval Base to protect munitions from air raid attack. In 1942 one of these tunnels, which had been built under Emergency Powers, was extended to provide access between the north and south yards of the Naval Base. It passes under 13 properties, as well as roads and Navy land.

2. The tunnel's use for vehicular traffic travelling between the north and south yards has continued notwithstanding that the Emergency Powers ceased to apply. There was a belief that the Navy had a statutory right or easement in respect of it.

3. Further investigations were undertaken in 1996. It was then appreciated that there was no longer any legal power to use the tunnel. Accordingly the Navy approached affected landowners to negotiate appropriate easements. Except for the claimants, all other property owners whose lands were affected reached settlements with the Navy whereunder the Navy was granted easement rights in respect of the tunnel in exchange for compensation. The compensation varied from between $32,500 to $2,500.

4. This proceeding is to determine the compensation payable to the claimants resulting from the grant by them of an easement authorising the use of the tunnel through their property.

5. The claimants did not reach a settlement with the Navy. The proximity of their property to the northern tunnel portal raised different issues. Furthermore, the tunnel and proposed easement affected a large part of their property and the terms of the proposed easement imposed greater restrictions on the use of their land than applied in the case of the other property owners.

High Court Action

6. In 2002, the claimants commenced proceedings in the High Court against the Navy alleging trespass. A decision in the trespass action was issued out of the High Court at Auckland on 6 April 2006 and is reported as ***Waugh v Attorney-General*** [2006] 2 NZLR 812. The claimants' action was sustained and it was held that the claimant could elect to seek damages upon the basis of the benefit derived by the Navy from the wrongful act. Damages were payable for the period between 6 March 1996 (when the claimants purchased the land) to 2 July 2004 (being the date of the grant of the easement, the subject of this proceeding, to the claimants).

7. In determining appropriate damages it was held that these should be assessed by a determination of an annual rental value of the whole of the claimants' property. Given that the user was under the surface of the land, this should be discounted by 75 percent. On the basis of an annual rental of $56,000, the total rental for the period in question after a discount of 75 percent was $118,220 which was accordingly the amount of damages awarded.

8. In determining the annual rental, the Court relied upon the evidence of Mr Walker to reach a land value of $810,000 as at 2 July 2004. Significantly, Mr Dean, the valuer giving evidence for the Crown, did not give an opinion as to what he thought the land value was as he had not valued it. (The Crown had not appreciated that damages for the trespass would be calculated in the manner adopted by the Court).

The Property

9. The property is a fee simple site situated at 18 Rutland Road, Devonport. It adjoins the north yard of the Naval Base. It is a 1,012 square metre site limited as to parcels. Erected on the land is a two level villa which was probably built around 1910. The property is zoned Residential 3A under the

North Shore Part Operative Plan and subdivision is a limited discretionary activity with a minimum site area of 400 square metres. Thus, the property is subdivisible as of right.

10. The tunnel's north portal is located just to the north of the northern boundary of the property. If the land were subdivided into two parts and, treating the northern allotment as the rear lot, the tunnel crosses it diagonally in a southwest-northeast direction. Thus it is the rear lot which is primarily affected by the tunnel. The tunnel passes over the front lot to a very small degree.

The Easement

11. Considerable evidence was heard as to the effect of the easement upon the land and upon a potential purchaser. In the valuation scenario, the effect of the easement affects the after value. In this case, the after valuations vary from $765,000 to $805,000.

12. The easement grants to the transferee (Her Majesty the Queen for defence purposes) the right of way and tunnel, the right to convey water, drain water and sewage, to convey electricity and to have telecommunications. It comprises a significantly greater area than the actual tunnel and this suggests that it gives the transferee the right to increase the tunnel's size. The Tribunal considers that whilst this is technically a possibility, the likelihood of it happening is small because of the costs involved and the limited usefulness of the tunnel: there are roads which can be used to get between the north and south yards.

13. The most significant provisions in the memorandum of transfer creating the easement are contained in cl 14 and 15. The easement is divided into two parts. Part BB, which affects about two thirds of any rear allotment, contains the most restrictive provisions. Over that portion of the easement the owner of the property is able to carry out normal residential gardening activities

which do not involve excavation beyond the planting of usual garden plants and weeding. However, he is not permitted to carry out any other excavation work or to construct or place any structure over that area without the prior consent of the transferee.

14. The balance of the easement as it effects the claimants' property is described as AA. The property owner does have the right to excavate and put in foundation piles provided the work does not introduce into a space which is 3.15 metres above the tunnel crown and a 4.5 metres span either side of the centre line of the tunnel. This is known as the "non penetrable area". No excavation work is permitted which will intrude into the non penetrable area. As of right, the property owner is permitted to construct and build over the area provided the structure is a light structure in accordance with NZS 3604:1999 for timber framed buildings. The structure must not in any way penetrate the non penetrable area. Before any such construction, however, full details of it must be given to the transferee.

15. Suffice to say that the terms of the easement significantly limit the ability of any owner of the rear allotment to build a dwelling over the land. However, the engineer, Mr Giles, was satisfied that it was possible to build a normal wooden residential building on the rear section in such a way as no penetration of the non penetrable area would occur and of such a design as would enable the transferee to consent.

16. The Tribunal acknowledges that it is possible that a potential purchaser of the property might refrain from purchasing as a result of the presence of the easement and its restrictive terms. However, in the valuation exercise the potential purchaser must not only be a willing purchaser but also act reasonably prudently.

17. The Tribunal accepts the evidence adduced by the Crown to the effect that such a purchaser is unlikely to be deterred from purchasing without further investigation. Not only would he obtain legal advice but also engineering

advice. It is likely that he would consult with the transferee to ascertain what might or might not be permitted. Mr Giles' evidence satisfies the Tribunal that once this exercise has been undertaken the prudent purchaser is unlikely to be deterred from purchasing the property.

Valuation Methodology

18. There is no dispute about this. The claimants are entitled to "full compensation" from the Crown for the grant of the easement: s 60(1) Public Works Act 1952. Pursuant to s 62(1)(b)(ii) of the Act, the Tribunal is directed to undertake its assessment of full compensation by: "determining the market value of the whole of the owners' land and deducting from it the market value of the balance of the owners' land after the taking or acquisition". Thus, the process adopted by all valuers of deducting from the "before capital value" of the property its "after value" to determine the compensation payable conforms with s 62(1)(b)(ii). The compensation awarded must be an amount that fairly and adequately compensates the owner for the loss: ***Poverty Bay Catchment Board v Forge*** [1956] NZLR 811.

Some Misconceptions

19. During the course of the hearing it was apparent that some of the participants were labouring under some misconceptions. None of these have any significant relevance to the ultimate determination by the Tribunal. However, they are mentioned briefly for the record.

(a) Capital Value/Land Value

At p 8 of the claimants' submissions, it is suggested that the key point was the unimproved value of the land prior to the acquisition of the easement interest. This is not correct. When considering both the before and after values, it is the capital value which is significant.

This is quite clear from s 62(1)(b)(ii) of the Act which refers to "the market value of the whole of the owners' land". Indeed, significantly, all valuers approached the valuation process by comparing the before and after capital values. In some instances, of course, in order to assess a capital value it was necessary to compare sales evidence pertaining to bare land. However, where bare land is concerned, normally the land value equates with its capital value.

(b) Issue Estoppel

Initially, a fundamental tenet of the claimants' case was that the Tribunal was bound by the unimproved valuation of the property referred to in the High Court judgment in ***Waugh v Attorney-General*** (supra). It will be recalled that the High Court used Mr Walker's unimproved valuation in the sum of $810,000 as the basis for the assessment of rental which ultimately (through further calculations) transposed into damages for the use of the tunnel up to the date of the granting of the easement. The claimants suggested that this Court was bound by the High Court finding as to the unimproved value of the land in a before situation because of the operation of the doctrine of issue estoppel.

Both legally and factually this argument is untenable. Under issue estoppel, a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been determined against that party even if the objects of the first and second actions are different. The matter must, however, have been directly at issue in the first cause of action rather than collaterally or incidentally at issue.

In the High Court proceeding, the unimproved value of the land in a before situation was not put at issue. Indeed, it was not even debated as the valuer for the Crown did not appreciate that it might be relevant

in the calculation of damages. What was at issue in the High Court proceeding was whether or not a trespass had occurred and, if so, what measure of damages was appropriate. I note that, in *Laws of New Zealand (Estoppel)* at para 20 the learned authors state *(inter alia)* that a useful test is whether it is possible to appeal against a finding which is contended as founding an estoppel. Obviously, an appeal would not be lodged against the High Court finding that the unimproved value in a before situation was $810,000.

If an appeal were to be lodged against the High Court judgment it would be lodged either against the finding that a trespass had occurred, or the damages awarded, or, possibly, both. They were the issues in respect of which a determination was necessary. Significantly, Cooper J in the decision appreciated that the Land Valuation Tribunal proceedings were to follow and he was careful to say nothing which might prejudice them.

In any event, factually, issue estoppel is not relevant. The finding by the High Court that the unimproved value of the land in a before situation was $810,000 has no bearing on the calculation of the property's capital value. All valuers determined the capital value of the property in a before situation by comparing the property (as a whole) with sales of other similar properties. Furthermore, in the assessment of compensation, as mentioned previously, compensation is calculated by ascertaining the difference between the capital value in a before situation and the capital in the after situation.

Even if the unimproved value of the land in the before situation were relevant, and issue estoppel applied, all that would happen is that this would affect the land value in an after situation in exactly the same way. In other words, if a valuer thought that the unimproved value of the land in the before situation was $800,000 but was obliged to fix it

at $810,000 and if the valuer thought that the land value in an after situation was $700,000, then he would inevitably increase the after valuation by $10,000 to take into account the starting point which was the before valuation. Thus the difference between the two valuations would remain the same.

(c) 20 Rutland Road

Considerable weight was given by the claimants to a sale which took place at 20 Rutland Road. The Tribunal accepts that there are similarities as to what occurred at 20 Rutland Road with the subject property. However, 20 Rutland Road was sold in April 2005, whereas the relevant date for the determination of compensation is 2 July 2004. All valuers agreed that the market was rising steeply over this period. Accordingly, the sale at 20 Rutland Road which occurred so long after the relevant date is of very limited value. It does not even assist greatly in determining a trend because of the steeply rising market. See, for example, Archer J in ***Poverty Bay Catchment Board v Forge*** [1956] NZLR 811 at 812-3.

The Tunnel

20. None of the valuers referred to the existence of the tunnel when preparing their before valuation. Mr Walker did refer to it in his after valuation and made certain deductions in respect of its visual effects, vibration and fumes, and the risk of liability. Whilst the existence of the tunnel may not have been legalised when a before valuation was undertaken, nevertheless it did exist and if its presence affected the capital value in any way this should have been disclosed. However, the same effects derived from the existence of the tunnel would have applied to the after situation. In fact, this is a very small point because the existence of the tunnel *per se* is unlikely to have affected the capital value in either a before or after situation. Whilst Mr Walker did claim some deductions in respect of it in his after valuation, some of the deductions

to which he referred related to the easement and not the tunnel. Matters such as noise, visual effects, vibration and fumes, and risk of liability generally related more to the close presence of the north yard than to the tunnel itself. Such deductions as were justified would have been very small indeed.

Determination of Compensation

21. Mr Walker had completed an assessment on behalf of the applicant and Mr Dean for the Crown. The Crown obtained a second opinion based on a kerbside inspection from Mr Gribble. His independent valuation assessment relied on the information contained in the other valuers' reports with respect to a description of land and improvements.

22. All valuers employed the before and after valuation method described in para 18. There was little difference between the valuers on the after value but a wide divergence of opinion on the before value. Figures were:

	Before	**After**	**Compensation**
Walker	$1,145,000	$770,000	$375,000
Dean	$ 862,000	$765,000	$ 97,000
Gribble	$ 930,000	$805,000	$125,000 - $160,000

23. An average of the after values is $780,000. This has been adopted that as an appropriate assessment. Although the property sold some nine months after the date at $770,000 there was evidence that the marketing of the property could have had a negative impact on the price achieved.

24. In determining the before value, all valuers proceeded on the basis of a direct comparison with the sales evidence. Unfortunately there were only two sales of subdivisible sites. They were at 25 Summer Street and 8-10 Glen Road both of which sold in early 2004 at $1,421,000 and $1,485,000 respectively. However, neither had been subdivided and on inspection the reasons were clear. The Glen Road site contained a large and very attractive villa plus

sleepout/cottage on elevated land and would have been difficult to subdivide without having a negative impact on the value of improvements. Similar comments apply to 25 Summer Road where subdivision would have involved the removal of a large garage and attractive site development in the rear yard which included an inground pool.

25. The Tribunal agrees with the valuers that those properties are far superior to the subject which is a rather plain villa in average condition, on a sloping site which backs on to the Navy base and is in an inferior location. It was clear that both properties had been purchased as quality residential properties rather than for their subdivisional potential. However, a direct comparison with the subject indicated that Mr Walker's before value of $1,145,000 appeared high.

26. In their calculations all valuers considered value on a hypothetical subdivision basis adopting separate values for an assumed front site plus the rear land. The sales on improved single sites were therefore of assistance in determining the value of an assumed front site. Messrs Walker and Dean had the advantage of a surveyor's plan which confirmed a front site including the villa of between 545 square metres and 595 square metres. Mr Gribble had completed an assessment dividing the land in half at 506 square metres per site. Adopting an area on the front site of not less than 550 square metres and assuming that it were a separate title, that front site would:

- provide a modest sized sloping site with no significant outlook and with access to the rear site along one side.
- contain a plain villa of approximately 160 square metres that was presented in average condition needing redecoration inside and out and attention to some deferred maintenance particularly to the amenity areas.
- be located in a less desirable part of Devonport when compared to some of the sales evidence.

27. The evidence confirmed a rapidly rising market during 2004. Thus the sales in 2004 and up to the operative date of 2 July 2004 were relevant. Sales noted included the following:

3 Mozely Avenue	761m^2	5/04	$1,000,000
31 Abbottsford Terrace	451m^2	5/04	$ 910,000
24 Summer Street	632m^2	2/04	$875,000
40 William Bond Street	626m^2	5/04	$685,000
42 Mozely Avenue	465m^2	5/04	$781,000
84 Calliope Road	660m^2	5/04	$710,000
43 Roslyn Terrace	377m^2	5/04	$880,000
4 Putone Avenue	696m^2	6/04	$830,000
41 Glen Road	592m^2	7/04	$984,000

28. All the above sales were inspected in conjunction with the parties. Number 3 William Bond Street was considered comparable but put to one side as it was affected by the tunnel easement.

29. The Tribunal considers that the majority of the sales were superior to the subject site due primarily to location, condition of improvements and contour. Thus the Tribunal concludes that the subject villa on a front site of approximately 550 square metres to 600 square metres would sell at a price above 84 Calliope Road but less than 42 Mozely Avenue. Accordingly a value for that part of the property at $740,000 has been adopted.

30. The Tribunal then considered what added value should be attributed to the rear site. All valuers had considered this on the basis of adopting a land value for the proposed Lot less an allowance for the costs of subdivision, profit and risk and holding costs. Assessments were:

	Value of Site	**Less Costs**	**Net Value**
Walker	$400,000	$135,000	$265,000
Dean	$270,000	$113,000	$157,000
Gribble	$329,000	$105,500	$223,500

31. The subdivision costs are comparable but there is a significant difference between the valuers on the value of an assumed freehold rear site. Sales evidence on vacant sites was as follows:

36A Bayswater Avenue	369m^2	7/04	$330,000
47A Beresford Street	501m^2	12/03	$330,300
5 Merani Street	613m^2	2/04	$485,000
13 Old Lake Road	536m^2	5/03	$426,000
	resold	10/03	$720,000
57C Norwood Road	465m^2	7/04	$540,000
19A Waterview Road	400m^2	1/04	$500,000
22 Waterview Road	1223m^2	9/03	$663,000
48 Ngataringa Road	450m^2	1/02	$202,000
	resold	9/03	$277,500
33 Rutland Road	404m^2	9/03	$175,000

32. A review of this evidence confirms that several of the higher priced sites are far superior to the subject due to the location, contour, views and in some cases proximity to Narrowneck Beach. Little emphasis has been placed on the sale at 33 Rutland Road as it occurred in September 2003 and there were significant movements in sale prices after that date. Furthermore the price appears low when compared to other sales. Although 48 Ngataringa Road was not viewed by the Tribunal, the price achieved for that site, when combined with the evidence in Bayswater, appeared to comprise the most useful comparisons. They are all flat sites of a similar size to that proposed but do not have to contend with the issues on the subject of sloping contour, protected trees and proximity to the Navy Base. A starting point for the value of the rear lot of $300,000 has been adopted.

33. Costs of obtaining that site then need to be deducted. The evidence ranged from a low of $105,500 to $135,000 with the higher rate inflated by an increased Reserve Contribution on the higher valued site. Thus $110,000 as the likely costs of obtaining a freehold title to the rear land seems appropriate.

34. The value of the property before the effects of the easement are considered is therefore as follows:

Value of front site	$740,000
Net value of rear site ($300,000 less $110,000)	$190,000
Total Value before easement	$930,000

35. That conclusion has then been compared with the sales evidence available. As expected, given the far superior characteristics of those properties, this value is well below the subdivisible sites at 8-10 Glen Road and 24 Summer Street. It is in excess of comparable single sites and therefore takes into account the subdivisional potential of the property.

36. Having established the starting value of $930,000 compensation can therefore be shown as follows:

Value before easement	$930,000
Value after easement	$780,000
Compensation	$150,000

Reimbursement of Valuation Fees of $9,298.13

37. This claim relates to attendances made by Mr Walker and incurred by the claimants between February 2001 and January 2003. Initially, the Crown took the view that these expenses were not justifiable as they did not relate to the assessment of compensation arising from the granting of the easement. Indeed, for quite some time the Crown was of the opinion that the attendances claimed (some of which related to meetings between the valuer for the Crown and Mr Walker) had not occurred.

38. At the hearing, however, it was recognised that Mr Walker was involved in meetings with Mr Dean. However, the concern of the Crown seems to be

whether or not the sum claimed was reasonable as Mr Walker was claiming for some 69 hours in respect of general advice which he had given to the claimants and the reading of background reports. The Crown is correct that, in 2001, the attendances by Mr Walker were not directly relevant to the assessment of compensation and, indeed, most of his attendances related to advice given as to the form of easement that should be accepted by the claimants. Nevertheless, the Tribunal is satisfied that the purpose of Mr Walker's attendances on the claimants was to advise them as to how the various forms of easement proposed would affect the property in valuation terms. In these circumstances, it was inevitable that the hours which he claimed for would be much more extensive than those claimed by Mr Dean (who only made claims where he was involved in actual compensation negotiations).

39. The claim seems to made under s 76(1)(c) of the Act, which reads:

> *"[Where] the Minister or local authority has initiated negotiations for the acquisition of a public work or any land not previously advertised or available for sale, and the Minister or local authority discontinues the negotiations – the notifying authority, the Minister or the local authority, as the case may be, shall, on receiving an application in that behalf from the owner of the land, pay to the owner such sum of money as will fairly reimburse him for the actual and reasonable costs and expenses incurred by him as a direct result of the notification, the issue of the proclamation or declaration that has been revoked, or the initiation of the negotiations, as the case may be".*

40. It is difficult to see how this section authorises the compensation sought. It seems to relate to a refund of expenses where acquisition of land has been abandoned.

41. The Tribunal is happy to consider this matter further. However, it needs to be informed of the legal basis upon which the claim is made. This can be clarified when memoranda are submitted to the Tribunal in respect of claims for costs in accordance with s 90 of the Act.

Interest

42. Given that the compensation awarded is in excess of the interim payment already made by the Crown, interest on the balance is appropriate. The Tribunal is not certain when the interim payment was made and, in these circumstances, the memorandum referred to in the preceding paragraph should also set out an interest calculation. Interest will be at the usual rate of 7.5 percent per annum.

Conclusion

43. The Tribunal fixes compensation payable in respect of the granting of the easement in the sum of $150,000.

44. As the claim for compensation in respect of expenses has not been determined finally, this decision is an interim one only. When memoranda have been received in respect of that matter, interest, and s 90 costs, a final decision will be released covering all matters. Counsel are asked to submit memoranda within 14 days.

Judge J D Hole
(Chairman)