VALUATIONS
CASE NOTE

CUSHMAN & WAKEFIELD

Cushman & Wakefield Valuations have a dedicated Government, Legal & Corporate team specialising in compulsory acquisition, S88K easement acquisition and general real property litigation matters. We are pleased to continue our ongoing series of valuation case notes with our summary of the recent decision of the NSW Land & Environment Court in Croghan v Blacktown City Council.

Croghan v Blacktown City Council [2019] NSW LEC 2 & 9 (January 2019)

Before

Molesworth AJ

Key Issues

Land Acquisition (Just Terms Compensation) Act, 1991.

COMPULSORY ACQUISITION – Valuation methodology – whether "piecemeal" or "before and after" approach is most appropriate.

COMPULSORY ACQUISITION – Degree of flood affectation and effect on development potential – extent to which potential purchaser would seek advice on flood affectation – parameters of "public purpose for which the land was acquired" per s 56(1)(a) of the Valuation of Land (Just Terms Compensation) Act 1991 – whether statutory disregard in this instance requires that s94 contributions plan, or SEPP or Council flood mapping, be disregarded – statutory disregard of public purpose applies only to the land that has been acquired.

COMPULSORY ACQUISITION – Whether changed access arrangements constituted injurious affection – whether any betterment offset injurious affection.

COMPULSORY ACQUISITION – COSTS - compulsory acquisition of land - principles costs in class 3 compulsory acquisition proceedings - respondent made offer of compromise per r 20.26 of the Uniform Civil Procedure Rules 2005 (UCPR) more than four months prior to hearing - costs in accordance with UCPR r 42.15(2).

Plantiff required to pay costs incurred after offer of compromise was rejected.

Decision

"Before and after" approach is most appropriate, that the statutory disregard only applies to land acquired, injurious affection for changed access and corresponding betterment on position argued. Applicant's costs awarded up to date of "Offer of compromise" and Respondent's cost paid by Applicant after this date (except for costs of listing error).

Matter

Mr Croghan's 5.55 hectare property situated at 1568 Windsor Road, Vineyard was firstly subdivided into three (3) lots and then 9 months later two (2) of the lots were compulsorily acquired by Blacktown City Council as part of the planning process for development of the Riverstone Precinct within the North West Growth Centre.

The land was subdivided into Lot 10 of 1.361 ha zoned RE1 Public Recreation, Lot 11 of 0.7564 ha zoned SP2 Drainage and Lot 12 of 3.433 ha zoned partly R2 Low Density Residential and partly SP2 Educational Establishment. The Council compulsory acquired Lots 10 and 11.

The land is situated to the western side of Windsor Road (State Road) and the eastern side of O'Connell Street. Lots 10 and 11 had frontage to O'Connell Street and the remaining Lot 12 only had frontage to Windsor Road. Part of the acquired land (Lots 10 & 11) was flood affected.

Mr Croghan was dissatisfied with the level of compensation determined by the Valuer General and appealed.

The main issues to be resolved were the extent of flood affectation, the underlying zonings of the land absent the public purpose, the limitation of access of Windsor Road and the market value of the land. The Respondent also argued betterment by way of smaller lot size due to subdivision into the three lots.

Discussion

Expert evidence was heard in the areas of hydrology, traffic engineering, surveying, and town planning and valuation, in order to determine the market value of the acquisition land and Injurious Affection to the residue the land under Section 55 under of the Just terms Act.

Statutory Disregard (Sec 56(1)(a) - After detailed consideration Molesworth AJ determined that the Statutory Disregard only applies to the acquired Land, and only relates to any increase or decrease in the value of that Acquired Land arising as a consequence of the public purpose.

Hydrology - Molesworth AJ considered that, as well as having regard to the Council and SEPP Flood maps, the hypothetical prospective purchaser would seek out and obtain property-specific information to be in a position to explore a range of options that might be adopted to address the identified flooding issues.

"Piecemeal" or "before and after" approach to valuation - Molesworth AJ commented that there is a very real distinction between a conclusion founded on a confident assertion and a conclusion founded on the rational analysis of propositions regarding available evidence. He then decided that the "before and after" method is accepted as being the appropriate methodology.

Education Zoned Land - The Court agreed that there is no statutory disregard with respect to the land zoned SP2 Infrastructure (Educational Establishment) in this instance as the statutory disregard is only to disregard "the public purpose for which the land is to be acquired" (in this instance being drainage and public recreation).

Injurious Affection - changed access arrangements - In the Court's view, there is no basis for concluding that there would be any greater disadvantage to the Retained Land by reason of the access rearrangement than 5%. In reaching these conclusions, the Court noted the Council's DCP includes provisions at cl 3.4.4 relating to temporary access to arterial and sub-arterial roads. Subject to the approval of RMS, temporary access may be made available for the purpose of carrying out development provided traffic safety is not compromised.

Betterment - the Respondent Council contended that the 5% diminution would be offset by a 5% adjustment for betterment on the basis of the reduced size of the Retained Land. This was accepted by the Court, however the Court was not satisfied that the discussions of betterment comprehensively considered all 'influences'. It appeared to the Court that the valuers failed to consider two potential beneficial implications (Housing-land abutting a recreation reserve should surely be able to achieve higher market value due to the amenity of 'parkland next door'. Likewise, land for a foreshadowed school) of the proposal to carry out the public purpose on the Acquired Land. As neither valuer nor counsel explored these aspects of betterment in their evidence, the Court was constrained to make no more than obiter observations.

Disturbance - Costs

In a second judgement (NSWLEC 9), the Court noted that an Offer of Compromise dated 27 September 2017, made pursuant to r 20.26 of the Uniform Civil Procedure Rules 2005 (UCPR), offering to resolve the proceedings by the Respondent Council paying to the Applicant $5,246,204.98, plus legal costs as agreed or assessed. The offer was open, in accordance with the rule, for 28 days.

The Court summarised the stress placed by the Applicant's counsel on the fact that his client was a "lay party" who could not have been expected to second guess his own expert's advice. The Court observed that the difficulty with this proposition is that, at the time of the Offer of Compromise, the "lay party", the Applicant, was not self-represented and had not been so for over 14 months. The Claim for Compensation, was followed by the Valuer-General's Determination of Compensation with a differential of some $6,355,251.00 (from the Applicant's Claim) which should have conveyed some uncertainty to the Applicant and his team? The valuation report accompanied the Valuer-General's Determination of Compensation was available to the Applicant and his legal and valuation teams for a whole year prior to expiry of the Offer of Compromise.

The Court ordered:

In accordance with UCPR r 42.15(2)(a), the Respondent Council shall pay the Applicant's costs assessed on the ordinary basis from the time the proceedings were commenced until 27 September 2017.

Subject to Order 4, in accordance with UCPR r 42.15(2)(b), the Applicant shall pay the Respondent Council's costs on an indemnity basis from 28 September 2017, excluding any costs incurred in relation to the inadvertent listing error on 15 December 2017.

Impact

With regard to valuation evidence, this judgement reinforced that the Court prefers evidence which is rationally and transparently explained in written and oral evidence, rather than a conclusion founded on a confident assertion and reliance upon a benchmark over many years.

The Costs order from the 2nd Judgement creates a judgement that goes against the starting position in any consideration of costs in a Class 3 compensation claim is that "an applicant who has been dispossessed of an interest in land is entitled to have the value of that interest assessed by the Court and to receive a favourable costs order when that is done". It provides that by "an Applicant acting reasonably" should take account of all matters including the Valuer-General's Determination and that he is represented by experts in the field who should advise him properly.

Should you have any queries regarding this recent decision or wish to discuss compulsory acquisition or litigation matters involving real property, please feel free to contact our Government, Legal and Corporate team below.

In addition to this Case Note, Cushman & Wakefield Valuations look forward to providing updates from our wider team as we expand nationally over 2019.

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