Steps in the Resumption Process — Recent Decisions

By Justice N.A. Hemmings

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The right to compensation for the compulsory acquisition of land is vested by statute. All legislation in Australia seeks to assess in economic terms the sum which, if possible, will put the dispossessed owner in the same position after resumption as before.

Some States for that purpose now compel by legislation a consideration of special identified factors to expand or limit what otherwise would be considered by the courts to be relevant to determine such compensation. However, in New South Wales upon publication of notice of such acquisition of land, the fee simple thereof is converted into a claim for compensation which is described simply as "for the value of the land taken"; Section 124 *Public Works Act 1912*. In the absence of a specified catalogue of relevant considerations, the matters to be taken into account, and valuation principles as to the meaning of "value of the land", remain elaborated in judge made law.

What might be the relevant consideration in such assessment in New South Wales is mainly a question of fact and must vary with each particular case. This paper examines decisions, particularly those of the Land and Environment Court, which determine the circumstances which must be ignored, notwithstanding that they affect the value of the land at the date of resumption.

The main approach to the ascertainment of the value of land is the "selling" approach. In the days when the right to use land was less regulated, such assessment was relatively simple to perform. As a matter of basic principle the "selling" test described in *Spencer* v. *The Commonwealth of Australia*[1] is as appropriate today as it was when initially formulated. The loss to the dispossessed owner is the sum which a prudent purchaser would be prepared to pay to the vendor for the land at date of resumption after a hypothetical process of voluntary bargaining. For that purpose, each party must be assumed to be cognisant of all relevant circumstances which might affect the value of the land.

Case law concerning compulsory acquisition has developed over some 150 years and had its relevant genesis in the significant acquisition of land for railways in England in about 1840. At the time of *Spencer's*[1] decision, town planning control over the use of land was an unknown concept. However, such matters have become probably the most significant and complex circumstances affecting land value. The opinion of a town planner or lawyer is often essential to enable the valuer to determine the highest and best use of the land and the appropriate basis of valuation.

Many circumstances which affect the market value of the land have been excluded by decisions of the courts. The case law is, however, mainly decisions on particular factual situations of appropriate matters to be taken into account or ignored in the valuation process. As exposed in a most important decision of the Court of Appeal *(Housing Commission of NSW v. Falconer*[2]), many decisions over the years have been erroneously elevated to the mantle of "principles of law". In addition, when such "principles" were closely examined, it became apparent that the expression "value of the land" had often been given a meaning by judges which went far beyond that intended by the *Public Works Act.* The correctness of *Falconer's*[2] decision was confirmed, and the inappropriateness of the application of decisions on legislation in other States to the assessment of compensation in New South Wales was explained by the Court of Appeal in *The Minister Administering the Heritage Act 1977* v. *Haddad & Ors.*[3]

Circumstances ignored in the assessment of compensation are usually steps taken which were intended to affect artificially the value of the land at date of resumption. It has also long been recognised that steps may be taken by both the owner and the resuming authority. An analysis of the decisions of the courts might suggest that the steps taken by the dispossessed owner before resumption have led to a different destination than those taken by the resuming authority, notwithstanding they may have an effect upon value.

The court rarely disregards steps taken by the dispossessed owner before resumption which are likely to bring about an appreciation in the market value of the land. These steps include, for example, the obtaining of approvals of statutory authorities for subdivision, building and development. Abortive expenditure for such steps has also been allowed as special value to the owner or as an item of disturbance.

It would be difficult to justify exclusion of such steps because such approvals run with the land. They identify with certainty the lawful use of the land and avoid delay in its development and, regardless of ownership, are likely to enhance the market value of the land at the date of resumption. But it is still a ques-

tion of fact whether such steps actually enhance market value; see *Kennedy Street* v. *The Minister*[4]; *Falconer* v. *The Minister*[2]; *Haddad* v. *The Minister*[3]; *Santana Tea & Coffee Pty Ltd* v. *Minister for Public Works*[5]; *Polegato and Anor* v. *Griffith City Council*[6].

The significance of a development approval was considered in the matter of *Bergman* v. *Holroyd City Council.*[7] The assessment by the respondent council of compensation to a dispossessed owner ignored the fact that the resumed land had the benefit of a development approval. The council valuer based his valuation, without adjustment, on comparable sales of land which had no similar consent and were merely zoned for a similar purpose. The valuation was rejected because such sales could not reflect the certainty of development potential, or have a similar ability for immediate use as did the resumed land. See also *Power* v. *Department of Education*[8] with respect to comparability of sales with a development consent.

The steps taken by the resuming authority leading up to resumption might be put into categories, ie:

- those which affect the value of the land in the marketplace;
- those which affect the value in the hands of the owner for a purpose particularly suited for the use to which the owner wishes to put the land; and
- those which cause a collateral loss to the owner but do not affect the value of the land.

The legislation expressly obliges compensation to be assessed without reference to steps taken by the resuming authority to implement the public works. However, it is well established that, before implementation, mere knowledge of the impending construction of public works and the inevitability of compulsory acquisition may have an adverse effect upon the market value and the number of sales of land generally in an affected area. Such knowledge may also affect the way in which land is maintained, developed or utilised for its highest and best use; see *Woollams* v. *The Minister.*[9] In *Tatmar Pastoral Company Pty Ltd* v. *Housing Commission of NSW*[10], the number of sales of comparable land was reduced and prices paid were rejected because the resuming authority had made a threat of possible compulsory acquisition.

However, the obligation to ignore such effect is not a valuation principle, and it is a question of fact whether mere knowledge of such public works has any significant effect upon the market value of land; see *Koutsouras* v. *State Rail Authority.*[11] In that matter the reasons for generally low land prices as a consequence of a relatively poor development of a retail area were attributed to factors other than mere foreknowledge of the public work.

While land must be valued by reference to the potential it may have to whoever may be the owner of it, it has been long accepted that in compensation cases the value of the property must be the value to the owner, and that value may exceed such market value. The two most distinguishing features of the principles governing the assessment of compensation (rather than for rating purposes) are the duty to determine the value of the land taken, and that value to the owner. The latter concept is common to all legislation and is well known to the valuer. Landmark decisions such as *Pastoral Finance Association Ltd* v. *The Minister*[12], and *Commonwealth* v. *Millege*[13], distinguish its meaning from market value, and incorporate elements such as special value and disturbance.

In many circumstances, "value of the land" and "value to the owner" have the same meaning. They both mean market value if the owner of the land is regarded as one of the persons interested in purchasing the land and, in the hypothetical sale, likely to pay such amounts as would enable him to use the land for his present or intended purposes.

But it follows that if the land by reason of its zoning or otherwise is particularly suited for the use to which the dispossessed owner is putting it, and that makes it more valuable to him than to others in the market, the land must be valued not only on that market value but also its value having regard to such special value; see *Falconer*[2] at 572-3.

In *Britton & Anor* v. *The Minister for Education*[14], section 124 of the *Public Works Act* was construed widely rather than narrowly. The court found that before resumption disturbance was caused to the applicant's subdivisional activities by steps taken by the Department of Education over a number of years, and those steps deliberately frustrated such subdivisional activity. The court found that compensation must reflect the disturbance caused by the steps taken by the resuming authority.

The principles in *Britton's*[14] case were applied in *Haddad*[3]. That matter concerned, inter alia, a claim for pre-resumption disturbance for losses caused by a series of steps by the resuming authority, including a number of conservation orders imposed by the Minister under the *Heritage Act.* The applicants were awarded compensation for disturbance arising out of such pre-resumption steps.

The amount awarded was made up as follows:

1. Market value of land	$375,000
2. Loss on rising market over 18 months as special value/disturbance	$56,250
3. Agreed improvements	$106,112
4. Loss on increased costs of building house on alternative land over 18 months	$20,000
5. Notional legal costs, disbursements and stamp duty on repurchase	$15,000
6. Abortive expenditure	$3,458
7. Special value for disturbance prior to resumption	$50,000
Total	$625,820

An appeal against such decision has been upheld and a reconsideration is pending; *Minister Administering the Heritage Act* v. *Haddad & Ors.*[3]

The owner had purchased land to grow fruit and vegetables and erect a family home, and claimed special value and losses incurred to find and set up an alternative site. Unfortunately, while questioned, not all of the above elements were considered in the appeal. However, the matter was returned because the court was said to be in error in awarding Item "2" above as "Special value/disturbance".

While the Court of Appeal said that it may be possible to justify a sum of 25% of the market value as special value or disturbance relating to loss of business, it could not include increase in value of comparable land which would be purchased to set up business again. This was because the "selling"

approach had been adopted, and the appropriate test is what the plaintiff would pay for the land "sooner than fail to obtain it". Court decisions in other States were said to relate to different legislation and therefore were irrelevant.

While making no comment on the correctness of *Britton*[14], the Court of Appeal emphasised again what was said in *Falconer*[2], ie that steps taken by the resuming authority before resumption which may lead to business losses may only be taken into account insofar as they constitute an element in the "value of the land". Mere loss of income pending a resumption is not recoverable if it is merely a collateral loss to such owner; see also *Wimpey Construction UK Ltd* v. *The Minister;*[15] cf. *Santana Tea & Coffee.*[5]

A similar situtation was considered in *Polegato.*[6] The court was satisfied that the subject land did have a special value because the applicant had obtained a development consent for the erection of a number of shops and flats on the land. In order to ensure that compensation did not exceed the commercial value of the special advantage of the land, subjective matters such as sentimental or emotional attachment were excluded. Notwithstanding changes in the planning and building requirements of the council, the owner was entitled to complete that proposal. However, before resumption, fruition of the project was brought to an end by the action of the council and its servants which had an effect of applying a "freeze" to the development.

In particular, the court found that the steps taken by the council and the conduct of its officers frustrated the owner's project before resumption to the point leading to the abandonment of such project. It found that there was little doubt that the council desired to achieve such end, and was aware that if the applicant continued to implement the consent and construct the shops and flats, the council on resumption would be faced with increased compensation. It was said that to take cognisance of the process and its effect upon the applicant would not only deny the compensation for disturbance, but also reward delay by a resuming authority. This decision is also on appeal.

The most common step taken by a resuming authority which has an effect upon the value of land is procuring the alteration of the provisions of an environmental planning instrument in order to facilitate the purpose for which the land is to be compulsorily acquired. While legislation requires that compensation for the compulsory acquisition of land must not include an alteration in value which is due to the works underlying the acquisition, for many years the courts displayed a reluctance to apply that principle when such value was depreciated because of the rezoning or reservation for the public purpose; see *Stocks & Parkes Investments Pty Ltd* v. *The Minister*[16].

The landmark decision to consider steps taken to impose a restriction on land use for the proposed establishment of public works and the effect on the value of land was *Housing Commission of NSW* v. *San Sebastian Pty Ltd.*[17] That decision put beyond doubt that in assessing compensation for the resumption of land, where there is a nexus between such planning controls and the intended resumption, such steps in the planning process which had an effect upon value of land must be ignored. The principles explained in *San Sebastian*[17] apply not only to alterations in the provisions of an environmental planning instrument, but to any other step which has an effect upon value up or down.

However, that decision also acknowledged that a change in zoning which was related merely to the ordinary discharge of the duty of a consent authority to implement planning controls, must be taken into account. Therefore, to apply the *San Sebastian*[17] principle to changes in planning restrictions, a determination was required as to whether or not there was an actual nexus between the proposed zoning of the land and the intention to resume.

In *Hieronymus and Anor* v. *Minister for Education,*[18] the court considered the effect upon value of two steps taken in the resumption process, ie:

i) the registration of a deposited plan of the resumed land as the amalgamation of an unsubdivided portion of the lands owned by the dispossessed owner prior to resumption, and that of the land owned by the Education Department; and
ii) the rezoning of the land 2(c) residential.

In the notice of compulsory acquisition, the land to be resumed was identified in a deposited plan as part of a new allotment incorporating land which was already in the ownership of the resuming authority. Such plan was lodged without the owner's consent.

In normal circumstances, subdivided land would be expected to command a higher price than that which had merely a potential or an approval for such subdivision. However, it was clear that the registration of the deposited plan was for the purpose of, and only for the purpose of, such resumption, and therefore was a step in the process of compulsory acquisition. In such circumstances, any effect upon value as a consequence thereof was disregarded for the purpose of the assessment of compensation.

Before the resumption, the land, which was part of a large dairy, was included in a Draft Local Environmental Plan in which it was zoned Residential 2(a). Apparently, the intention was that the land become part of the adjoining village area rather than remain in the non-urban zone. However, the purpose for which the land was to be resumed was already a permissible use in the existing non-urban zone, and the resumption therefore was not facilitated by the change in zoning to Residential 2(a).

There was a strong inference that the decision to rezone the subject land and in the draft LEP would be influenced by the need for the school to expand, because of location, shape, lack of frontage and poor access. However, it ultimately became common ground that the effect of the provisions of the draft LEP upon value by zoning it Residential 2(a) should not be ignored in the assessment of compensation.

The provisions of section 116 of the *Environmental Planning and Assessment Act, 1979* ("the EP&A Act") now eliminate the need to prove that nexus. That Act also requires that an environmental planning instrument must make

provision for or with respect to the acquisition of land where such environmental planning instrument "reserves" the land exclusively for a public purpose (section 27(1)[a]). These provisions were designed to overcome the anomalous situation that such steps could be taken and thereby land could be effectively sterilised by a zoning for a public purpose without any intention to resume the land. The obligations imposed by section 116 which are intended to ensure that the land is valued without having any regard to the zoning for public purposes apply only if the land is compulsorily acquired.

Notwithstanding a zoning for what is apparently a public purpose, the consent authority has in some cases attempted to avoid its obligation to acquire the land so zoned, or ignore such zoning in the assessment of compensation. In a number of cases the resuming authority has sought to rely upon the difference in terminology in some planning instruments between a "zone" and a "reserve" of land for a public purpose. It is now well settled that "reserve" in section 27(1)[a] of the EP&A Act includes a "zone" because it means land set apart or imprinted by a planning instrument for a particular purpose; *Carson* v. *Department of Environment and Planning*[19] (at 104). The Land and Environment Court has held that it has a similar meaning in section 116[b] *(Brooks* v. *The Minister for Planning and Environment*[20], and *Bergman*[7]).

Section 116 has given rise to a considerable amount of litigation. Unfortunately, while the effect of such steps must be ignored, neither the Act nor *San Sebastian*[17] explains the nature or extent of planning controls, if any, which are deemed to replace those for the public purpose. In a number of cases it has been contended that in such circumstances the land either

a) is uncontrolled by an environmental planning instrument, or
b) is unzoned under such instrument and all uses are permissible thereon, or
c) has restored the planning controls existing before the zoning for the public purpose, or
d) is deemed to be subject to planning controls which would have applied had there never been any intention to resume.

The court has rejected (a), (b) and (c), and now consistently applies (d) to determine the highest and best use of resumed land to which section 116 and the *San Sebastian*[17] principle apply; *Wimpey*[15]. The likely planning control is a question of fact which must be determined in the circumstances of each case. This is usually a simple exercise and the resumed land is deemed to have the same zoning as that of adjoining land.

The resuming authority in some cases purports to ignore the zoning for public purposes, but reflects its effect in other ways. In *Proprietors of Strata Plan 20754* v. *Council of the Shire of Hawkesbury,*[21] the council resumed land to expand an existing public car park. The land resumed was appropriately zoned and was physically used for car parking purposes. The council valuer carried out a before and after exercise, but regarded the highest and best use of the land as being for car parking spaces in each exercise. The court held that this effectively reflected its public purpose zoning and ignored the potential of the land for redevelopment for commercial purposes. The "before and after" approach was rejected, and the land was valued wholly as being available for commercial purposes.

However, in *Scarf and Ors* v. *Canterbury Municipal Council,*[22] land similarly zoned was acquired to expand an existing public car park. It was held that while such zoning for a public purpose must be ignored, section 116 does not preclude as a matter of fact the appreciating effect upon value as a consequence of the prior acquisition and use of the adjoining land for that public purpose.

A common difficulty also arises when the resuming authority intervenes in the planning process but at date of resumption the land is not actually zoned or proposed to be zoned for a public purpose. In such circumstances section 116 has no application and the *San Sebastian*[17] principles apply.

In *Tatmar*[10] the court was satisfied that the resuming authority had persuaded the planning authority to postpone rezoning of the land from non-urban to residential until after resumption.

In *Power*[8] rezoning was not necessary for the public purpose, but the court was satisfied that the council did not proceed further with a proposed rezoning of land for residential and commercial purposes because of representations by the resuming authority.

In each case, by an application of the *San Sebastian*[17] principles, the court determined the likely planning control had there been no intervention by the resuming authority.

Many disputes also arise as to whether the particular zone is for a public purpose at all. In *Brooks*[20], the owners sought declarations as to the obligations of the minister and council as a consequence of zoning part of land "7(a) Environmental Protection Wetlands". The minister argued that the subject zone not only did not reserve the land for a public purpose, ie "open space", but also that there was no obligation to acquire it because the zone did not reserve it *"excusively"* for that purpose (section 27). The zone only permitted, with consent, "agriculture"[c,d] and "recreation"[e] areas, all other uses were prohibited. Both "agriculture"[cd] and "recreation area"[e] were defined.

The owner contended that the zoning did not in reality permit the use of the land for private purposes, and was a step taken in an attempt to avoid an obligation to acquire and to pay compensation which should be assessed without regard to such zoning. Both submissions were rejected. It was held that neither "agriculture"[c, d] nor "recreation area"[e] limited the use of the land exclusively to development by the public sector because it included private and commercial use. See also *Blake* v. *Lake Macquarie City Council,*[23], and *Wotton* v. *Wingecarribee Shire Council and Anor.*[24] The *Brooks'*[20] decision is now on appeal.

Brooks'[20] decision followed *Carson,*[19] in which it was held that an "open space" zone was not *exclusively* for a public purpose because one of the few permitted uses was a "utility installation". Such zone was said to contemplate a private purpose. The council therefore had no statutory obligation to acquire land zoned for such purpose.

The consequences of *Carson's*[19] decision have been widely criticised in planning circles. Most open space zones permit the use thereon

of utility installations, but there has now been a flood of cases wherein councils have denied an obligation to acquire. It has also been claimed that *Carson's*[19] case has revealed that land may be zoned for a public purpose, but the obligation to acquire may be deliberately avoided by a council by including in the zone some obscure or unlikely private purpose.

It is also claimed that not only is the obligation avoided, but the mere inclusion of such private purpose in the range of permissible uses will enable purchase at a depreciated value. This may occur if the private purpose is not feasible, and the highest and best use is actually for the public purpose.

If such fears are well founded and those steps are taken by a resuming authority, the scheme and purpose of the legislation will be defeated.

Conclusions

1. The statutory right to compensation in New South Wales is not as wide as that available in other States.

2. In the absence of specified statutory criteria, the principles governing its assessment in New South Wales will continue to need elaboration in judge made law on particular factual situations.

3. Notwithstanding section 116, the principles in *San Sebastian*[17] still have considerable work to do.

4. *Carson's*[19] case has exposed that there is an opportunity for statutory authorities to take steps to avoid the obligation to acquire land zoned for a public purpose, and avoid assessment of compensation in accordance with section 116. In such circumstances it may purchase such land at depreciated values.

The author is a judge in the Land and Environment Court of New South Wales.

Definitions

Environmental Planning and Assessment Act, 1979

Section 27(1):

a. "Where an environmental planning instrument reserves land for use exclusively for a purpose referred to in section 26(c), that environmental planning instrument shall make provision for or with respect to the acquisition of that land by a public authority unless the land is owned by a public authority and is held by that public authority for that purpose."

Section 116:

b. "(1) Where land reserved by an environmental planning instrument pursuant to section 26(c) or proposed to be reserved by a draft environmental planning instrument is resumed or appropriated, the value of that land shall be determined as if it had not been so reserved or proposed to be reserved."

Environmental Planning and Assessment Model Provisions, 1980:

c. " 'Agriculture' has the meaning ascribed to it in section 514A of the *Local Government Act*, 1919."

Local Government Act 1919, section 514:

d. " 'Agriculture' and 'Cultivation' include horticulture and the use of land for any purpose of husbandry, including the keeping or breeding of live stock, poultry, or bees and the growing of fruit, vegetables and the like, and 'agricultural' and 'cultivate' have a corresponding meaning."

Environmental Planning Instrument:

e. " 'Recreation area':
a) a children's playground;
b) an area used for sporting activities or sporting facilities;
c) an area used by the council to provide recreational facilities for the physical, cultural or intellectual welfare of the community; or
d) an area used by a body of persons associated together for the purpose of the physical, cultural or intellectual welfare of the community to provide recreational facilities for those purposes;
but does not include racecourses or showgrounds."

Footnotes

1. *Spencer* v. *The Commonwealth of Australia* (1907) 5 CLR 418).
2. *Falconer* v. *Housing Commission of N.S.W.*, 39 LGRA 365. *Housing Commission of N.S.W.* v. *Falconer* [1981] 1 NSWLR 547.
3. *Haddad* v. *The Minister*, Land and Environment Court, 27 July 1987 (unreported). *Minister Administering the Heritage Act* v. *Haddad & Ors*, Court of Appeal, 23 December 1988 (unreported).
4. *Kennedy Street* v. *The Minister* [1963] NSWR 1252.
5. *Santana Tea & Coffee Pty Ltd* v. *Minister for Public Works*, Land & Environment Court, 30 July 1986 (unreported).
6. *Polegato and Anor* v. *Griffith City Council*, Land and Environment Court, 10 March 1988. This decision is published in this issue on page 201.
7. *Bergman* v. *Holroyd City Council*, Land and Environment Court, 6 July 1988, unreported.
8. *Power* v. *Department of Education*, Land and Environment Court, 29 August 1989 (unreported).
9. *Woollams* v. *The Minister*, 2 LGRA 338.
10. *Tatmar Pastoral Company Pty Ltd* v. *Housing Commission of N.S.W.*, Land and Environment Court, Cripps J, 17 March 1982 (unreported).
11. *Koutsouras* v. *State Rail Authority*, Land and Environment Court, 27 October 1988 (unreported).
12. *Pastoral Finance Association Ltd* v. *The Minister* [1914] AC 1083.
13. *Commonwealth* v. *Millege* (1953) 90 CLR 157.
14. *Britton & Anor* v. *The Minister for Education*, Land and Environment Court, Perrignon J, 3 May 1985 (unreported).
15. *Wimpey Construction UK Ltd* v. *The Minister* (1983) 53 LGRA 75.
16. *Stocks & Parkes Investments Pty Ltd* v. *The Minister*, 17 LGRA 192, 425; 25 LGRA 243. *The Minister* v. *Stocks & Parkes Investments Pty Ltd*, 33 LGRA 361.
17. *Housing Commission of N.S.W.* v. *San Sebastian Pty Ltd* (1978) 140 CLR 196.
18. *Hieronymus and Anor* v. *Minister for Education*, Land and Environment Court, 29 June 1989 (unreported).
19. *Carson* v. *Department of Environment and Planning* [1985] 3 NSWLR 99.
20. *Brooks* v. *The Minister for Planning and Environment and Anor*, Land and Environment Court, 16 December 1988 (unreported).
21. *Proprietors of Strata Plan 20754* v. *Council of the Shire of Hawkesbury*, Land & Environment Court, 25 July 198 (unreported).
22. *Scarf and Ors* v. *Canterbury Municipal Council*, Land and Environment Court, 9 August 1989 (unreported).
23. *Blake* v. *Lake Macquarie City Council*, Land and Environment Court, Stein J, 3 August, 1989 (unreported).
24. *Wotton* v. *Wingecarribee Shire Council and Anor*, Land and Environment Court, 21 February 1989 (unreported).