LAND COURT OF QUEENSLAND

CITATION:	*Courtney Bay Pty Ltd v Gold Coast City Council* [2004] QLC 0103
PARTIES:	Courtney Bay Pty Ltd (claimant) v. Gold Coast City Council (respondent)
FILE NO:	A2003/0714
DIVISION:	Land Court of Queensland
PROCEEDING:	Claim for compensation payable consequent upon the resumption by the Gold Coast City Council of an easement for drainage purposes
DELIVERED ON:	29 November 2004
DELIVERED AT:	Brisbane
HEARD AT:	Brisbane
MEMBER	Mr RP Scott
ORDERS:	**1. I order that the respondent pay to the claimant compensation in the amount of One Hundred and Ten Thousand Five Hundred and Fifty Dollars ($110,550).** **2. In the exercise of the discretion granted under s.28, *Acquisition of Land Act 1967*, I order that interest be paid by the respondent to the claimant on the amount of One Hundred and Ten Thousand Five Hundred and Fifty Dollars ($110,550) from 22 March 2002 at a rate of 5.5 per cent per annum up to and including the date upon which final payment of compensation is made.**
CATCHWORDS:	Resumption - Determination of compensation - Taking of drainage easement - Before and after valuation method appropriate

Resumption - Determination of compensation - Difficult case - Use of broad 50% discount not approved

Resumption - Determination of compensation - *Pointe Gourde* principle - Finding as to scheme - Works outside resumed drainage easement included

Resumption - Determination of compensation - Authority of Court to determine notwithstanding error or timidity by claimant

Resumption - Determination of compensation - Goods and Services tax - deal with separately from compensation - Letter of undertaking from respondent to claimant suitable

Resumption - Determination of compensation - Drainage easement - Loss in value of resumed area includes activities of constructing authority in managing easement - Additional injurious affection on balance land also possible

Resumption - Determination of compensation - Drainage easement - No discount for visual unattractiveness to balance land - Use not for residential or retail but for possible mini storage

Valuation - Sales - General reliance on basket of sales - Insufficient explanation as to how applied figures derived - Rationale necessary

Valuation - Use of top-down method - reliability of development costs - Two optional methods employed

Valuation - Sales comparison - Site constraint expressed as a cost - Whether appropriate - Site constraints on sales not expressed as a cost - Comparison method

Valuation - Town planning - Development condition - - Construction of drain at developer's expense - Whether relevant or reasonably required - s.3.5.30 *Integrated Planning Act 1997*

Valuation - Sales - Goods and Services Tax - Should be disregarded in applying sales

Evidence - Expert witness - Valuers often required to provide evidence the expertise of others - Evidence of experts (engineers) preferred for engineering issue

APPEARANCES: Mr G Hiley QC with him Mr A Skoien for the claimant
Mr B Cronin for the respondent

SOLICITORS: Quinn Box & Muller for the claimant
Gall Standfield & Smith for the respondent

[1] In this proceeding the claimant seeks compensation pursuant to ss.12 and 20 of the *Acquisition of Land Act 1967* in respect of a drainage easement ("Easement C") taken on 22 March 2002 by the respondent over land at 166 Fryar Road, Eagleby, described as Lot 3 on RP 900630, County of Ward, Parish of Boyd ("Lot 3").

[2] The process for the taking of Easement C commenced on about 28 June 2000 when the respondent provided in the form of a letter notice of its intention to acquire an easement. The procedure was then advanced by the provision of a Notice of Intention to Resume under the provisions of the *Acquisition of Land Act* on 5 June 2001. Taking of Easement C was effected by gazette resumption notice published on 22 March 2002. That becomes the relevant date for the purpose of assessment of compensation (s.12(5), s.20). The easement comprises a rectangular drainage easement 20 metres wide and 142.697 metres long containing an area of 2,854 m². Easement C runs directly north across the balance parcel from a point about a third of the way along its southern boundary.

[3] The matter was referred to the Court by the claimant by way of an Originating Application dated and filed on 26 September 2003 in which compensation was sought in the amount of $546,234. By leave that amount was amended on the last day of hearing to $271,410 of which $260,000 was for loss of land value and $11,410 was for fencing of the Easement C area.

[4] At the commencement of the hearing the respondent contended for an assessment of Nil compensation. On the fourth day of hearing the respondent adjusted its position to an assessment of compensation of $35,000. A major reason for the difference between the compensation figures of the claimant on the one hand and the respondent on the other lay in the respondent's contention that before resumption the claimant would have been required, as a condition of development of its land, to have constructed a major drain through it. Following resumption and the construction of the Easement C drain, no such drain (which I call the developer's drain) would need to be constructed as a condition of development, thus in the respondent's view there would be a considerable saving in development costs.

[5] Subsequent to the taking of Easement C the respondent has performed certain works within Easement C including the placement of box culverts ("the southern crossing") from the southern end of Easement C for a distance north of some 16 metres into the

balance parcel. It has also constructed a 16 metre wide open drainage channel generally grassed but with a narrow concrete invert at its low point from the opening of the culvert crossing to the northern boundary of the balance parcel: a distance of some 126 metres. It seems that these works were completed in around June 2003. The easement structure is designed to carry water from an underground pipe to its south and to discharge that water into an open drain to its north.

The Land

[6] Prior to resumption, Lot 3 contained an area of about 2.235 ha in a roughly hatchet shaped block of land, though the head was a large rectangular block and the handle was a substantial piece of land. It was bordered by parkland on the north and the west. To the south the head was bordered by land developed for community/commercial/retail purposes and a large bituminised car park area. To the east of the head lay land developed as a shopping centre. Lot 3 was subject to a drainage Easement B running from a point towards the eastern end of the southern boundary with the easement boundary being approximately 6 metres from the eastern boundary of the head. Easement B runs directly north to the northern boundary, where it flows into a drain travelling west to east in the park land located there. Prior to the development of the tavern discussed below, Easement B was an open drain with a concrete invert at its low point.

[7] The enlarged handle of the hatchet and a small part of the head of Lot 3 had, prior to the subject resumption, been developed for the purpose of a tavern, with a bottle shop, which has a car park towards its rear, that is towards its western end. That car park intrudes slightly into the head of the hatchet and over the location of the northern part of Easement B. A diversion drain was constructed to take flow from the open drain in Easement B that would not be accommodated by 600 mm pipes placed under the car park as part of the tavern development. The tavern development proceeded following an appeal by the developer to the Planning and Environment Court and pursuant to a consent order of that Court of 15 September 1999. Lot 3 was purchased by the claimant on 23 December 1999 for $650,000, according to Mr Snape, a valuer called by the claimant.

[8] I will from this point refer to the head of the hatchet as the balance parcel. It is rear land. That parcel was vacant at the date of resumption and remained so at the time of hearing. Driveway access had been developed in conjunction with the development of the tavern land. The driveway access runs parallel to the northern boundary of Lot 3 and feeds into the car park at the rear of the tavern building. The driveway access therefore provides physical access to Lot 3, including the balance parcel, from Fryar Road which Lot 3 fronts to the east. Physical access to the western part of the balance parcel, which

contains the land most suited to development, would need to cross the diversion drain or the suggested developer's drain.

[9] The balance parcel is located in the Local Shopping zone of the Town Planning Scheme for the Gold Coast City Council in force at the relevant date, being a transitional planning scheme under the *Integrated Planning Act 1997*. It is located in the Town Centre and Convenience Sub-Precinct of the draft planning scheme being located in the town of Eagleby.

Witnesses

[10] The claimant called the following witnesses:

- Greg Connors, a town planner
- William Douglas Weeks, an engineering hydrologist
- Ian Murray Snape, a certified practising valuer
- David Nigel Dover, a civil engineer.

[11] The respondent called the following witnesses:

- Russell Jon Ryter, a town planner
- Trevor Charles Johnson, a civil engineer.
- Gregory Alan Morrison Lambert, a certified practising valuer

[12] It is not disputed in this proceeding that the "before and after" method of valuation is the appropriate method of assessing the compensation payable to the claimant. That method has the advantage of measuring the compensation due to the taking of an interest in land together with severance and injurious affection (*Brisbane City Council v Lansbury* (1977) 4 QLCR 502). Furthermore, both parties have adopted the approach that the value of the tavern land should not be included in the valuation calculations either before or after the acquisition of Easement C.

[13] In company with counsel and the two valuers I inspected the balance parcel and its surrounds, as well as the various sales properties referred to by the valuers in their valuation reports. With the consent of the parties, I recently carried out a further inspection of the balance parcel. These inspections assisted me in my understanding of the evidence.

Flooding

[14] The balance parcel has two issues related to flooding and drainage. First, it is located in an area of inundation of the floodplain of the Albert and Logan Rivers though is well away from the main flow paths of the river and is an area of backwater. Such flooding may be referred to as backwater flooding.

[15] The second issue is that there is a local catchment that flows through the property from the south. The runoff from the local catchment ultimately flows to the river. That can be

referred to as the local catchment flow which drains through a low-lying part of the land, including Easement B.

[16] Backwater flooding, as an issue, may be further subdivided into two issues. The first is the requirement to ensure that development undertaken in the form of buildings on the relevant land be above the defined flood level. The second issue is a potential loss of floodplain storage produced by any filling on the property which may increase flood levels elsewhere in the floodplain. The floodplain storage is indicated by way of a non-fill encroachment contour line. Any filling below that line, if permitted, would need to be compensated for by the provision of a similar volume of flood capacity elsewhere in the floodplain.

[17] In his report Dr Johnson said that runoff from the site must be allowed to flow across the site. In addition, any development on the land must allow adequate drainage waterway area to ensure that no constriction of the flow path from upstream increases upstream water levels or divert the flow path. Whilst Dr Weeks employed different language I understand him to have agreed with these propositions.

[18] Council policy which applies to the filling on the balance parcel is embodied in the Flood Affected Code which is referenced in the Town Plan. This Policy requires:

- The land to be built upon must be filled to or be at the post-filling designated flood level of AHD RL5.8 metres
- Only that portion of the site above the non-fill encroachment line (at RL4.33 metres) can be filled without provision of compensatory earthworks
- Filling below the encroachment line is permitted if the total flood storage volume is maintained by compensatory earthworks
- Filling below the encroachment line may be permitted if hydraulic studies are carried out to demonstrate that there would be no change in flood levels.

[19] Prior to the resumption and construction of Easement C there was a flow across the parking area to the south of the balance parcel which would have naturally flowed towards the south-eastern corner of the balance parcel, then down Easement B. Higher flows would have entered the low-lying area in the balance parcel. Near the south-eastern corner and abutting the southern boundary of the balance parcel is, however, a block of land upon which a childcare centre has been constructed. That effectively places the childcare centre on the natural flow path. Development of the childcare centre included the provision of a pipe but not one which would have accommodated all of that natural flow. Much of the flow, therefore, was directed to a point west of the childcare centre where it then flowed onto the balance parcel at a point some distance from the south-eastern corner and Easement B.

[20] The respondent has constructed a major culvert under the parking area which collects runoff from the catchment upstream of River Hills Road which bounds the parking area to its south. That culvert carries flow under the car park then through Easement C on the balance parcel. The local drainage from the car park is discharged through smaller pipes under the childcare centre and into Easement B on the balance parcel.

[21] Before the construction of the underground drainage through the car park there would, in Dr Johnson's opinion, have frequently been a flow across the car park. That flow would have included flow from the catchment upstream of River Hills Road.

Land Areas

[22] Before resumption, Lot 3 could conveniently be divided into a number of identifiable parts. The resumption of Easement C further complicated that division. The identification of the areas of each part is important to the exercise of assessing compensation in this case. Mr Connors provided evidence of relevant areas in his report, however Mr Lambert performed his own calculations which "for the sake of simplicity" the claimant adopted. Those areas were contained in Mr Lambert's initial valuation tendered at the commencement of proceedings, though I hasten to add they were varied in some respects in an amended valuation which he later relied upon. The claimant did not adopt those amended areas. The relevant areas in his initial valuation are as follows:

Easement B	579 m²
Eastern Strip (between Easement B and eastern boundary of balance parcel where it abuts the shopping centre)	467 m²
Western Block (to the west of Easement B)	15,082 m²
Total of Balance Parcel	16,128 m²
Tavern Land	6,222 m²
Total of Lot 3	22,350 m²

[23] Mr Lambert later in his amended valuation adjusted these areas, for reasons discussed below, to:

Easement B	245 m²
Eastern strip	467 m²
Developer's drain	3,089 m²
Western development area	12,075 m²
Eastern development area	252 m²
Total of balance parcel	16,128 m²
Tavern Land	6,222 m²
Total of Lot 3	22,350 m²

[24] The parts of the land can be broken up as follows:

After resumption

Easement B*	579 m²
Eastern Strip*	467 m²

Eastern development section* (between eastern boundary of Easement C and western boundary of Easement B)	2,662 m²
Easement C	2,854 m²
Western Severance (west of western boundary of Easement C)	9,566 m²
Total of Balance Parcel	16,128 m²
Tavern Land	6,222 m²
Total of Lot 3	22,350 m²

* Overall called the eastern severance.

[25] The western block of 15,082 m² before resumption includes, towards its east, an area that falls within the non-fill encroachment line. On the respondent's view the developer's drain would be located within that low-lying area, leaving 12,135 m² of western development area in Mr Lambert's initial report or 12,075 m² in his amended report. In his initial report he adopted a developer's drain design provided by Dr Johnson. It was located in such a way that it left a roughly triangular portion to its east which included part of Easement B and the eastern strip. That "triangular area", as I will call it, had an area of 1,046 m². Whilst the claimant did not concede that the developer's drain would be required, its final position was that the development area to the west of the low-lying area would be about 12,000 m².

Before Valuation

[26] It will be convenient to first introduce Mr Lambert's approach which was to proceed on the assumption that in comparison with sales the balance parcel was all sound land apart from Easement B and the eastern strip; to strike a value on that basis at $43 per m² ("the top value") then to deduct the estimated cost of bringing the land to that top value, that is of rectifying unusual site constraints to immediate development. The net figure is the value that Mr Lambert applied. This approach may be called the top-down method. In the initial valuation tendered in evidence he struck his top value in this way:

Triangular Area 1,046 m² x $43.000/m² @ 50% diminution factor	$22,489
Area lost for Developer's Drain 2,947 m²	Nil
Remaining area 12,135 m² x $43.00/m²	$521,805
	$544,294

[27] He had engineering advice from Dr Johnson that the total cost of providing the developer's drain, access over the drain and associated matters would be $216,000 including a 15% contingency allowance. He, therefore, deducted these costs from his top value to yield a net value of $328,294.

[28] In his amended valuation, which was the valuation Mr Lambert adopted as his final valuation, he employed a similar top-down approach. In this valuation, however, his top value was $522,249, though still based on a value of $43 per m² for sound land.

[29] His top value was arrived at as follows:

Easement B - 245 m²	Nil
Eastern Strip - 467 m²	Nil
Area lost for developer's drain - 3,089 m²	Nil
Western development area - 12,075 m² @ $43 per m²	$519,225
Eastern development area - 252 m²	$3,024
Total	$522,249

[30] Of greatest impact in his amended before valuation was, however, the adoption of a costs figure of $101,775 including a 15% contingency allowance, instead of the original $216,000 advised to him by Dr Johnson. The deduction of this new costs figure from his amended top value yields a net land value of $420,474. I descend into the details of those various figures below. At this point, though, I can say two things about those costs. First, the respondent has abandoned the costs which appeared in Mr Lambert's initial valuation in favour of those included in his amended valuation. Second, the estimated cost of the developer's drain, based on Dr Johnson's design, was accepted by the parties as being $25,000: an estimate provided by Mr Dover.

[31] Mr Snape did not describe the highest and best use of the balance parcel in his report, however accepted the description provided by Mr Lambert:

> "I consider the highest and best use of the balance rear subject land both before and after resumption to be that of an industrial nature, i.e. service industry, showroom, car repair station, transport terminal and warehousing."

[32] Mr Lambert noted that mini storage units had been proposed for the balance parcel in a plan prepared for the claimant by Eldon Bottcher.

[33] In his primary valuation report Mr Snape valued 15,121.7 m² of land before resumption at $45 per m², totalling $608,476.50. He arrived at the land area by deducting from the Lot 3 total area of 22,350 m², the area of the tavern land, the eastern strip and Easement B, all of which he included at 7,228.3 m². His value of $45 per m² therefore included land below the non-fill encroachment line. Mr Snape did not place a value on the Easement B area and the eastern strip. That is not to say that he placed a nil value on these areas; they were simply not included in his valuation report as part of his before or after valuations, apparently being treated in a similar manner to the tavern land, that is of having the same value before as after. In submissions senior counsel for the claimant maintained support

for Mr Snape's value per m² but said that the developable area of the balance parcel was some 12,000 m² only.

[34] In his valuation process Mr Snape said that he took into account the nature of the subject land without making any express allowance for any particular feature. He conceded that he had not proceeded on the basis that the land was susceptible to flooding. Mr Snape had proceeded on the basis that the balance parcel did not require fill, whereas the need for some filling and site preparation of the western development area was identified by the claimant in its case. Fill costs were not introduced by the claimant until Mr Dover's response report to Dr Johnson's report. Mr Snape made no mention of the need to provide access over the diversion drain, though it was submitted for the claimant that such access would need to be provided. For the sake of clarity, I should point out that such access would not be needed on the respondent's argument, as it proposed the developer's drain whose construction would displace the diversion drain. The developer's drain would, however, require access to be constructed over it.

[35] In an addendum to his primary valuation report Mr Snape provided some calculations showing the land, as if sound, to have a value of about $55 per m² then a net value of $45 per m² after costs including filling costs are deducted.

[36] It was submitted for the claimant to the effect that Mr Snape's value of $45 per m² took into account the possibility of additional costs associated with the perception of unusual site constraints. It is neither explicit not apparent in Mr Snape's primary valuation report that specific site constraints affecting the balance parcel were taken into account. Access bridging, drainage and filling are not mentioned in that report. Moreover, there is no mention in his consideration of his sales evidence, to which I refer below, of points of comparison between the individual sales and the subject property identifying site constraints as being material in the valuation process. Apart from that, he said in oral evidence that it was the benefit of the engineering report that led him to adopt $55 per m² as a top value. In short, it was a calculated figure, not a figure arrived at by consideration of sales evidence.

[37] Indeed, there is no reasoning apparent on the face of his valuation report which attempts to judiciously place the value of the balance parcel at a level which might be demonstrated by his sales. His figure of $45 per m² was settled on after a general consideration of the sales only. Such an approach was criticised in the Supreme Court of Western Australia in *Flotilla Nominees Pty Ltd v Western Australian Land Authority & Anor* [2003] 129 LGERA 65 where at 89 Pullin J said:

> "In my opinion, it is not enough for a valuer to select a basket of sales said to be comparable, showing a large range of prices and then settle on a

> figure within the range, without explaining how it is derived from the basket of sales information relied upon."

[38] In the instant case Mr Snape said that he could find no comparable sales, though he failed to include the sale relied on by Mr Lambert, which I find below to be the most comparable basis. The absence of truly comparable sales or the failure to find them will often be the lot of a valuer, however that does not negate the need to present a rationale as to the value finally adopted.

[39] In his valuation report Mr Snape relied in part on a town planning report prepared by Mr Connors. Mr Connors' report suggested a gross floor area (GFA) possible on the before resumption land based on a theoretical maximum and a loss of GFA calculated on the same basis. Mr Snape did not slavishly adopt Mr Connors' theoretical figures but approximately halved them. I accept that the real potential GFA was probably less by half again than the figures assumed by Mr Snape. He appeared to concede as much in cross-examination.

[40] Notwithstanding this apparent error in Mr Snape's valuation, it is not an error that, by itself, demonstrably infects his approach, in my view. That is because his error would presumably have been applied consistently in the process of his consideration of the sales. Before dealing with the sales evidence provided by the two valuers, it will be convenient to dispose of a number of other issues.

Access - Before Resumption

[41] In the before resumption scenario the balance parcel, as part of Lot 3, had legal access to Fryar Road which the lot fronted. Physical access would probably have been via the access constructed on the tavern land to a point towards the north-east corner of the balance parcel. Access into the balance parcel from that point now falls for discussion.

[42] If I were to assume for the moment that the prudent purchaser would not envisage construction of the developer's drain, then there is, nevertheless, an issue of access to the developable land in the western part of the balance parcel. This is because there is a need to cross the diversion drain and because, as Dr Johnson said, there is an obligation in constructing such a crossing not to worsen the flood conditions. The evidence was that the diversion drain is outside the boundary of Easement B, however it is within the non-fill encroachment line and cannot be peremptorily filled. A crossing which allows the drainage to continue unimpeded would need to be constructed. There would be a similar need if the developer's drain was to be constructed.

[43] The cost of providing physical access by bridging a developer's drain or the diversion drain before resumption, or Easement C after, was a matter in issue between the parties.

Whilst various estimates of cost for a single lane crossing were raised in evidence, the parties settled on an amount of $25,000 plus 15% contingencies as not being an inappropriate estimate. The real question came down to whether the prudent purchaser would proceed on the basis of a single or double lane crossing. The claimant acknowledged the need to cross the diversion drain, assuming no developer's drain, but did not suggest a particular cost. I will proceed on the assumption that the cost would have been similar to that of crossing either the developer's drain or the Easement C drain.

[44] In a letter of 23 April 2004 which was tendered by consent following the removal of an objectionable paragraph, Colin Beard provided evidence on this issue. I take judicial notice that Mr Beard is a qualified traffic engineer. His opinion was premised on the after resumption scenario, but would seem to apply equally to that before. He suggested that an access point of entry to the west would need to accommodate vehicle and pedestrian movements, and would necessitate a crossing of approximately 9 metres in width.

[45] A letter from the respondent dated 4 May 2004 provided for the purpose of evidence in the trial, said that a two-way vehicular/pedestrian crossing would need to be up to 8 metres wide. Such a crossing would be needed for an intensive use such as industrial. A 3.6 metre wide crossing would suit a single vehicle design. The letter said that the actual crossing requirement would depend on any development application actually made, but went on to suggest that a 3.6 metre crossing would be acceptable for a low volume use storage unit facility within Lot 3, provided two-way movement could be provided by the side of the access structure. Dr Johnson thought such an arrangement would be acceptable.

[46] Mr Lambert assumed a two-way crossing in his amended valuation and in submissions Senior Counsel for the claimant offered no strong objection to that. I will proceed on the basis that whilst a prudent purchaser may seek to reduce costs and argue for a single crossing, he would probably be forced to accept the commercial realities that for a development of about 12,000 m², hopefully with an industrial component, a two-way crossing would be required at a cost of $50,000 plus 15% contingency.

Fill - Before

[47] Putting aside the non-fill encroachment line Easement B and the eastern strip, the higher developable land was not all to a level which would have allowed development without some filling. Council's general requirement consistent with the Queensland Urban Drainage Manual was that the minimum floor level of buildings be 300 mm above the Q100 flood level with that particular level being nominated by Council. Contour RL5.8 AHD which part of the developable land fell short of, was the identified Q100 contour.

[48] In his report Dr Johnson proceeded on the assumption that the minimum level of the developable land would need to be RL5.8 metres and that to achieve this about 1.08 ha would need to be filled to an average depth of about 1 metre. This would require 10,750 m^3 of material in total. He estimated that 2,000 m^3 of this would be available from the developer's drain. He costed the net 8,750 m^3 @ $12 per m^3, placed and compacted. The total cost was therefore estimated at $105,000.

[49] Mr Dover said that in his experience Council had often relaxed its requirements in commercial developments such that the floor level of buildings could be at the Q100 level, not 300 mm above it. One example where such relaxation did not occur was in the development of the tavern on Lot 3; another was in the development of a Harvey Norman electrical appliance and furniture outlet. The probable development on the balance parcel both before and after resumption would be at the lower end of the commercial class of development as I understand the evidence, such that the prospect of there being some relaxation of requirements might be considered by a hypothetical prudent purchaser to be more probable than in the case of a development such as the tavern or a Harvey Norman outlet.

[50] A prudent developer would usually not proceed on the basis that there was no risk that Council would insist on its standard requirement. Indeed Dr Johnson said that his advice to a client would be to assume the worse case scenario – though Dr Johnson professed no experience in developments where relaxation had occurred. Nevertheless, Mr Lambert's unqualified adoption of Mr Dover's estimate indicates that he was prepared to exclude any consideration of risk of this nature.

[51] Whilst Mr Dover said that floor levels of buildings would need to be at the RL5.8 level at least, surrounding areas including car parks could be at RL5.5 or lower and landscape areas could be lower again.

[52] Based on this assumed scenario Mr Dover calculated the need for 5,375 m^3 of fill. Of this total he assumed, as Dr Johnson had, that 2,000 m^3 would come from the developer's drain and that the balance of 3,375 m^3 would be obtained by the cut and fill technique. He costed the cut and fill exercise at $4 per m^3. His costing was therefore $13,500 plus contingencies and in Mr Lambert's amended valuation he adopted this figure.

[53] The claimant's submission was however that the developer's drain would not have been a Council requirement. On that basis the 2,000 m^3 of fill from the developer's drain would have been available only if the developer extracted that fill.

[54] The cost of obtaining that fill was included in Mr Dover's estimated cost for the construction of the developer's drain at $8.00 per m³ therefore totalling $16,000 plus contingencies.

[55] Mr Dover's fill volumes were based on an average fill depth of 500 mm therefore the 2,000 m³ would have covered an area of 4,000 m². Assuming a sound land value of either $43 per m² or more, the exercise of extracting and utilising 2,000 m³ from the area of the developer's drain would appear to be worthwhile.

[56] On the basis discussed thus far fill costs would have been $29,500 ($13,500 plus $16,000) before any allowance for contingencies.

[57] Mr Dover was drawn to say that the filling exercise discussed above would be part of a "normal" site development cost for a commercial development. The valuation task that I think needs to be undertaken is to ascertain in comparison with sales evidence the extent to which the need for such works might vary site to site. None of the sales on which I have placed reliance below was so level as to not require any site preparation for the provision of a building pad and an evenly presented non-building area. It is fair to conclude therefore that in a cost estimate of $29,500 there would be an element of site preparation that the filling process has addressed. This is a matter that needs to be taken into account in the process of comparison with the sales as in the case of the balance parcel, the costing results in the production of a level building pad in addition to the filling exercise.

[58] If I were to undertake this exercise in an arbitrary fashion I would estimate the proportion of $29,500 that represents site preparation. There are, however, other matters that enter the equation. One such matter is that the level of site preparation depends on the type of development to be undertaken. A development such as that of the tavern which took place on Mr Snape's Sale 7 involved the use of the high land for the main building and the low land for car parking (see para [92]). Such a development has a large area of car parking because of the nature and level of visitation. However the developments suggested for the balance parcel before resumption would not appear to fall into that category.

[59] Another matter that falls for consideration under this topic is that whilst in the case of the balance parcel I have the advantage of detailed expert evidence on the topic of site filling, such evidence has not been provided with respect to the comparable sales. That is not a reason however for disregarding the evidence presented. It was submitted for the claimant that in the comparison process the cost of fill was not a matter of such significance that it should separately be taken into account. Reliance was placed on what

Gobbo J said in *Waalt Homes v Road Construction Authority* (1987) 64 LGRA 346, at 352:

> "If one is seeking to arrive at the common starting point of a vacant land sale, more or less capable of being developed, then one should take into account any significant expense to bring the sale in question to that point. This is on the basis that the purchaser would have taken this likely expense into account in formulating his price."

[60] The claimant emphasised the phrase "significant expense" and submitted that $13,500 for fill did not meet that description. As a proportion of the price that might be paid for the balance parcel on the basis of it having a value of $43 per m² for about 12,000 m², the suggested fill cost was not significant, it was submitted.

[61] My reasoning has led me to conclude that the fill costs that a prudent purchaser would calculate would be higher than $13,500. More importantly is the view that I have formed that though the judgment in *Waalt Homes* refers to costs as that was the evidence under consideration, what His Honour appears to have had in mind was the significance of the relevant feature in the mind of the hypothetical prudent purchaser. Filling of the balance parcel is a feature of such significance that it is appropriate in my view for a valuer to take it into account when conducting the process of comparison with sales.

Drainage Issues – Developer's Drain

[62] Had the childcare centre not been built or had sufficient drainage capacity been provided as part of its development, the upstream flow, including that to the south of River Hills Road, would have entered the balance parcel towards its south-east corner in the vicinity of Easement B. What appears to the claimant to have been an ill-considered decision in not catering for drainage along its natural path is, however, a product of history confronting any developer of the balance parcel at the date of resumption. It might have been a different matter had there been evidence to the effect that the low volume drainage under the childcare centre resulted from an intention of the respondent to construct the drainage from River Hills Road and through Easement C and therefore formed part of the scheme of which the resumption was part.

[63] I must view the balance parcel as it existed at the relevant date but without any effect that the scheme of resumption may have had on the land. (*Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands (Trinidad)* [1947] AC 565). I find that scheme comprises both the culvert which runs from upstream of River Hills Road then under the car park and Easement C which now traverses the balance parcel.

[64] There was considerable debate between the parties as to whether the Gold Coast City Council ("the Council") would have in granting consent to development of the balance

parcel, imposed a condition requiring the construction of a drain through the land at the developer's expense. That developer's drain would, in the respondent's submission, be similar in specification to Easement C and would be the subject of a grant of easement to the Council in accordance with the usual practice. It would be located in the low-lying part of the balance parcel; that is, further to the east than Easement C.

[65] Stormwater naturally flowed to the south-east corner of the balance parcel in the vicinity of Easement B. The imposition of the childcare centre on that flow path diverted that water to its west. A development of the balance parcel would need to ensure that the stormwater which touched that site found its way to the vicinity of Easement B; that there be no constriction of flows onto the land and that stormwater generated on the development land be disposed of. It was submitted for the claimant that a development of the balance parcel which did not include Easement B or the eastern strip could satisfy the requirement that flow be directed to the area of Easement B by the provision of a collection structure on the upstream boundary of the site. The overland flow that skirted to the west of the childcare centre would then enter the balance parcel, proceed to drain down into the lower land within the lower land and the area of Easement B. The evidence of both Dr Weeks and Dr Johnson was to the effect that this was feasible. The adequacy of Easement B to take the upstream flow would, in the claimant's submission, be irrelevant to its suggested development proposal.

[66] A drainage easement of the type proposed by the respondent would not have been required for a development that did not include the Easement B land or the eastern strip, according to the claimant, on the basis that it would not have been reasonable or relevant in terms of ss.3.5.30 of the *Integrated Planning Act*:-

> **"3.5.30 Conditions must be relevant or reasonable**
>
> **(1)** A condition must -
>
> (a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or
> (b) be reasonably required in respect of the development or use of premises as a consequence of the development.
>
> **(2)** Subsection (1) applies despite the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, an assessment manager or concurrence agency."

[67] I am prepared to accept that submission. The conclusion I draw on this issue was arrived at on the basis of the arguments presented by the parties. Questions were put by the respondent to expert witnesses namely Mr Connors, Dr Weeks and Dr Johnson suggesting

that any development of Lot 3 would require a drain of the order of that proposed by the respondent and such questions were answered in the affirmative. I do not know what was in the witnesses' minds as to the development of Lot 3 when providing their evidence, but it seems that it could not have been confined to a development that did not include Easement B and the eastern strip. Presumably they each had in mind some comprehensive development of Lot 3 of the type represented in the Eldon Bottcher plan; or possibly that the Council would be likely to prefer that a developer construct the drain at his expense, rather than the task of constructing the drain being left to Council resources. Council's attitude and preference would, however, be subject to the law.

[68] In his expert report Mr Ryter said "... any development proposal for Lot 3 immediately prior to the relevant date would have been required to accommodate stormwater, including stormwater from upstream in the catchment ...". He referred to clause 17.16 of the Planning Scheme which provided that the Council would need to consider "whether the land should be drained and/or filled to make a satisfactory building site". That is not a suitable basis which supports the above opinion, nor does it lead to a conclusion that the developer would reasonably be required to construct a developer's drain of the type proposed by the respondent. Such a drain is irrelevant to a building site.

[69] The development of the tavern was a development of Lot 3. The consent order of the Planning and Environment Court included a development condition that required a flood study of the "subject land", that is Lot 3 and, I stress, not just part of Lot 3. Another condition provided:

> "3. Sufficient drainage is to be provided through the subject land, verified by the hydraulic analysis, at no cost to the Respondent and to the satisfaction of the Respondent's Chief Executive Officer, to demonstrate that the proposed works can allow the passage of the 2, 10 and 100 year ARI flows through the subject land without causing detrimental flooding impact on adjacent properties, or safety concerns for pedestrian and vehicular traffic." (my emphasis)

[70] The drainage provided in the relevant part of Lot 3 included the piping under that part of the tavern car park that extended into the balance parcel and the provision of the diversion drain.

[71] It did not require the provision at the developer's expense of a drain similar to the developer's drain. The low-lying area might be characterised as being at the rear of the tavern land but, nevertheless, part of Lot 3. The fact that it is at the front of the balance parcel does not mean that it would attract a different requirement from that which applied in the case of the tavern land. In the claimant's proposal for the development of 12,000 m² to the west of the low-lying area, none of "the proposed works" would affect the

passage of flows through the subject land except to the extent that the flow to the west of the childcare centre would need to be directed away from the development site towards the Easement B and diversion channel flow path within the balance parcel. The same might be said of the 12,135 m² in the same vicinity included in Mr Lambert's initial valuation, though I adjust this area for other reasons below.

[72] The urbanisation of a parcel of land results in that land generating a greater volume of flow downstream than it would have generated in its natural state. To that extent a parcel of land at the downstream end of a catchment will need to accommodate a greater flow than it would have before upstream development occurred. Before that downstream parcel of land has been developed it will have taken a certain volume of flow and must, after development, continue to take that flow and not inhibit it. In addition, the development of that land must manage the concentration and increase of flow from its own urbanisation. As long as those two requirements are met, the development will have complied with reasonable and relevant local council requirements.

[73] A hypothetical prudent purchaser with knowledge of the conditions relevant to the tavern project and the nature of the development that took place there, would justifiably conclude, I think, that no drainage requirement of the order of that proposed by the respondent would lawfully be imposed as a condition of consent to develop the western 12,000 m² or so of the balance parcel as suggested by the claimant or the 12,135 m² in Mr Lambert's initial valuation.

[74] The conclusion that I have drawn does not fully, however, dispose of the issue in favour of the claimant. The collection structure proposed by the claimant and mentioned above would have, on Dr Johnson's estimate which the claimant accepted, cost $10,000. In addition to this cost there would also be the cost of obtaining fill in the amount of $16,000 in addition to the fill obtained by the cut and fill technique. The total cost of these two items at $26,000 exceeds the cost of $25,000 which the respondent accepted as being the cost of the developer's drain. The $25,000 figure was provided by Mr Dover and it included a cost of $16,000 for excavation and the winning of fill. On the basis of those figures alone, to which should be added a contingencies allowance of 15%, a prudent developer would elect to construct the developer's drain.

[75] The appropriate conclusion to draw in these circumstances is that a hypothetical prudent purchaser would elect to construct the developer's drain as part of the development. It may be that the developer would elect to grant a drainage easement to the Council over the developer's drain, however that is not, as I see it, a matter relevant to value. Apart from the small advantage in cost in constructing the drain compared with the approach

suggested by the claimant, a developer would, I think, prefer a well constructed and grassed drain located at the entrance to his development to the unsightly diversion drain that was placed there as part of the tavern development.

Developer's Drain Design

[76] In contrast to Easement C which is constructed straight across the balance parcel and does not take advantage of the low-lying land, the parties agreed that the developer's drain could be designed in a way that was more sympathetic to the development potential of the balance parcel. The developer's drain would be constructed such that it took stormwater from a point on the southern boundary of the balance parcel to the west of the childcare centre, then in a design presented by Dr Johnson it would swing towards the eastern boundary and track parallel to that until it flowed out over the northern boundary. The distance from the eastern boundary would be dictated by the edge of the tavern car park tarmac. The drain would utilise the low-lying land in the balance parcel. The design location of that drain was, for the purpose of argument, accepted by the claimant, however Mr Dover suggested that a narrower drain design would have been appropriate. That question of the drain design was, however, disposed of as an issue by Mr Lambert's acceptance of Mr Dover's cost estimates for the drain.

[77] In his initial valuation Mr Lambert had employed the developer's drain design provided by Dr Johnson and in so doing concluded a top value of $544,294. In his amended valuation he employed his own developer's drain design and using the same top land value of $43 per m², he estimated the top value at $522,249. The difference in top values came about both because Mr Lambert presented his version of a possible location of the developer's drain and because he modified the value he applied to that part of the balance parcel lying to the east of the developer's drain. I will first consider Mr Lambert's drain location.

[78] Mr Lambert's design modified Dr Johnson's design by having the drain curve across from its point of entry to the eastern boundary, then track back along that boundary to the north until it came to the tavern car park whence it curved to the west then back to the north, running parallel to the Easement B pipes under the car park. It would partly be superimposed on the Easement B open drainage section. It is that which led him to reduce the area of Easement B in his amended valuation (see paras [22] and [23]). Mr Lambert's developer's drain design was promoted by the respondent as being advantageous to a developer, compared with Dr Johnson's layout, because it provided a slightly larger block of land to the west. The development area to the west for Mr Lambert's amended design was measured by him at 12,075 m². That is, however, a little

smaller than the area for that land included in his initial valuation (12,135 m²), though that might be because Dr Johnson's layout of the drain failed to take into account the extent of the tavern car park works. In Mr Lambert's design the area of land occupied by the drain would be larger than in the case of Dr Johnson's design.

[79] In submissions the claimant placed no value on the area to the east of the developer's drain. That was done, as I understand it, on the basis of its submission that if the development of the balance parcel did not include Easement B and the eastern strip, no developer's drain would have properly been required by the Council. Mr Snape placed no value on this area though, as I have observed at para [33], that was apparently for other reasons. Given my conclusion that a prudent developer would construct the developer's drain in any event, I see no need to place an embargo on some value being placed on this area.

[80] The angle of layout of the developer's drain in Mr Lambert's layout is such that it creates a small (252 m²) triangle of land to its east referred to as the eastern development area in Mr Lambert's amended valuation. Mr Lambert placed a value of $3,024 on that land on the basis of its value as a source of fill for the western development land. He assumed a one metre depth of fill being extracted from that land at $12 per m³ in value to produce his estimated value. The need for that fill is not apparent on the evidence, given that Mr Lambert adopted Mr Dover's fill cost estimate.

[81] Dr Johnson's developer's drain layout severed an area of 1,046 m² in the area between that drain and the eastern boundary of the balance parcel. I have referred to this earlier as the triangular area. In his initial valuation Mr Lambert placed a value of $22,489 on that land on the basis that it was worth 50% of his top value of $43 per m² for development land. He explained in oral evidence that he considered that area of 1,046 m² of land to have such a value on the basis of its potential use for outdoor storage or parking. Neither he nor Mr Snape was critical of that aspect of his initial valuation. In fact, nothing much was said about it. Mr Lambert said quite simply in cross-examination that he had approached his valuation for a similarly located but smaller area in his amended valuation on the basis that the drain layout was different.

[82] There is no compelling reason, therefore, for me to adopt Mr Lambert's drain layout, particularly as it led him to a lower valuation for this area which was not adequately justified. Mr Lambert was not sworn as an expert in such matters as drain design. I recognise that registered valuers will often be called upon to provide evidence in respect of matters that are the expertise of others. In the present case, however, there were two qualified engineers who gave evidence on this matter. In the circumstances, I must prefer

their evidence. I adopt Dr Johnson's drain layout.

[83] In the circumstances, I place no reliance on that part of Mr Lambert's amended valuation which values the land under discussion at $3,024. It became clear to me, once I came to focus on after resumption valuation issues that the value of the eastern severance, including the area under discussion were affected by similar though not identical issues. They were probably issues of the type which led Mr Lambert to his valuation approach to this area in his initial valuation, though were not articulated there. I see no reason to differentiate between the value of this 1,046 m² either before or after resumption. To attempt to do so would be to bring an undue refinement into the valuation process,. I will, therefore, place a value of about $17 per m² on this 1,046 m² of land in accordance with the conclusion drawn at para [241]. That calculates to $18,000.

Before Costs

[84] In summary, I conclude that the costs to be taken into account in the before valuation are:

Developer's drain (including $16,000 for fill)	$25,000
Cut and fill of western development land	$13,500
Crossing of developer's drain	$50,000
	$88,500
Contingencies 15%	$13,275
	$101,775

[85] In oral evidence Mr Lambert said that a risk allowance should be added to this cost figure to cover risks associated with completing the works as planned. Mr Snape was not asked about this item and whilst there was some suggestion in cross-examination of Mr Lambert, particularly with respect to after resumption costs that a figure of perhaps 20% be included, I see no need to vary Mr Lambert's 10% in the before resumption scenario. A 20% allowance is more akin to that which might be required in a complete development of the land. Mr Lambert described this allowance as being for risk only with no profit element. Whilst I find difficulty with the theoretical correctness of such a proposition, I think that 10% is appropriate. Inclusion of this allowance brings the total costs before resumption to $111,952.50 which I will round down to $111,950.

Development Area

[86] The claimant's estimate of the developable area in the before scenario was approximated only at 12,000 m². In his initial valuation Mr Lambert adopted 12,135 m² for this western land, but changed that to 12,075 m² in his amended valuation, based on his own developer's drain design. Now the 12,000 m² suggested by the claimant was not fixed as, in submissions, my attention was drawn to the availability of lower land to the east of that area that the claimant submitted could have been utilised for such things as road,

parking and landscaping. Land put to such uses would have a value for that purpose, however no figure was suggested by the claimant. *Melwood Units Pty ltd v The Commissioner for Main Roads* (1976) 3 QLCR 209 at 233 provides authority for this Court to determine compensation notwithstanding any error or timidity on the part of a claimant. In the circumstances, I think it appropriate that I settle on a figure greater than 12,000 m² as being development land. In so doing I need to keep in mind that Mr Lambert's initial estimate of 12,135 m² was based on Dr Johnson's developer's drain layout which was a little further east than the tavern car park would have permitted. In the circumstances, I will settle on a figure of 12,100 m² as being developable land in the west of the balance parcel. I see no need to modify the fill cost estimates based on this small adjustment.

Sales

[87] Both Mr Lambert and Mr Snape employed the method of comparison with sales in carrying out their respective valuations. Mr Snape said that he could find no sales that were directly comparable to the balance parcel so had general regard to selected sales in settling on his figure. He included 15 sales in his valuation. Sales 1(a),(b) and (c) comprised three sales in the Pacific Gateway Industrial Estate which sold for prices of $117 per m², $132 per m², and $135 per m² respectively. Mr Snape conceded that they are not comparable to the balance parcel but were included for the benefit of providing a global picture, as he put it.

[88] His Sale 2 was of a property at 29A Logan River Road, Beenleigh having an area of 6,452 m² which sold on 31 July 2003 for $557,500, which calculates to $86.40 per m². He said that the sale land presents as a very similar situation to the balance parcel in that it is rear land with a long driveway access alongside industrial buildings. Whilst Mr Snape thought the Sale 2 property to be limited to industrial use, Mr Lambert said that there was a proposed mini storage development in the minds of the purchaser at the time of sale; that is, a use similar to the one designed by Eldon Bottcher for the balance parcel before resumption. The sale is an after-date sale in a market which Mr Snape acknowledged was more buoyant than that of the Eagleby area. He said that the sale was "not directly comparable to the subject in some respects".

[89] Mr Snape's Sale 3 is located at 179 Main Street, Beenleigh having an area of 7,159 m². The sale took place on 4 June 1999 for a price of $865,000 which calculates to $121 per m² for the land. This sale took place prior to the purchase of Lot 3 by the claimant. Mr Lambert said that he could find no areas of comparability between this sale property and the balance parcel. Mr Snape did not press its comparability.

[90] Sale 4 in Mr Snape's valuation is located at 38 Herses Road, Eagleby and has an area of 4.09 ha. The sale occurred on 20 December 2001 for $384,000 which equates to $9.40 per m². This sale is relied on by Mr Snape to support a figure of $15 per m² in his after-valuation for land suggested to have no direct economic use. I return to that issue below. I also deal with Mr Snape's Sale 5 later in these reasons.

[91] The sixth sale in Mr Snape's valuation took place on 5 July 2003 for a price of $3,250,000. The sale is located at 204 Main Street, Beenleigh, has a land area of 2.9 ha and the price calculates to a figure of $112 per m². Mr Snape considered the sale property to be overall superior to the balance parcel whilst Mr Lambert's opinion was that the sale was so superior that it was not comparable with the land being valued. Clearly a sale at $112 per m² cannot be employed to support a value of about $45 per m² by direct comparison.

[92] Sale 7 is located at 98 Distillery Road, Eagleby, has an area of 9,068 m² and sold on 21 December 2001 for $700,000 according to Mr Snape's valuation report. On that basis the sale equates to a figure of $77 per m².

[93] Mr Lambert said that the price allocated to this sale land resulted from an apportionment of a sale totalling $1,550,000 which involved the sale land, another parcel of land, a liquor licence and an offsite bottle shop. Mr Snape was not aware of this complication to the sale, however expressed the view that the apportionment seemed appropriate. How he might have formed that view without an appreciation of the full nature of the transaction is not known to me.

[94] Sale 7 suffers the disability of being at a price whose validity as representing market value depends on the opinion of the valuer who seeks to rely on it. Even if I put aside this disability, as I call it, the proposed use of the sale land as a tavern is quite superior to that probable on the balance parcel. The sale land is well exposed with a two-street frontage and has exposure to the Pacific Motorway. Its apportioned sale price of $77 per m² is quite removed from the value either valuer suggests for the balance parcel.

[95] One point of comparison that should be noted is an opinion expressed by Mr Snape that the lower car park land is below flood level whilst the main tavern building has been constructed on the high land. That opinion was reinforced by the tender of Exhibit 28 which indicated the sale land as being almost fully flood affected. That singular point of comparison does not however elevate the sale to a position of utility in the valuation process.

[96] Not far from the Sale 7 property we find Mr Snape's Sale 8 at 89 Distillery Road, Eagleby. That land has an area of 3.44 ha which sold on 13 February 2003 for $710,000.

Mathematically that equates to a figure of $20.64 per m². Mr Snape said that a significant proportion of the rear sale land is low lying river floodplain and unsuitable for building. The land is surrounded by low quality industrial and horse grazing uses and was considered by him to be inferior to the balance parcel.

[97] Mr Lambert said that he accepted this sale as having "some elements of comparability" as he put it though at one stage also said that he did not think the sale to be relevant. I take the second of these comments to be a convenient response during cross-examination.

[98] The Sale 8 land has a major drain on the south-eastern corner and has a large area of land that is low lying river front land. Exhibit 28 suggests that all of the land is below the non-fill encroachment line. Mr Lambert suggested that the land had commercial potential whilst Mr Snape thought it would be limited to open storage uses.

[99] It transpired that on 28 November 2003 the Council approved, subject to conditions, a development of a showroom on the front section of the Sale 8 land covering an area of 8,800 m² or 23.25% of the site. The Council had on 17 May 2002 refused an application for a material change of use for a showroom, catering business, timber yard, and retail nursery, having a greater scale and intensity to that finally approved. The purchaser would have had the benefit of the earlier application and its treatment by the local authority to refer to. It seems the purchaser was well prepared as the application which was finally successful was lodged on 13 March 2003, that is one month after the date of the contract of purchase.

[100] Whilst Mr Snape has calculated an overall price of $20.64 per m² for the sale land , it seems that it is the front section of the land that carries the main value. If for example, I applied Mr Snape's $15 per m² to the rear land giving it a value of $395,000 that leaves a price for the front 8,800 m² of $315,000 or about $36 per m².

[101] The Sale 8 land is not rear land but is flood prone. It is much larger overall than the balance parcel but its area of development land is a little smaller than is available on the claimant's land. The Director of Planning, Environment and Transport noted in his report to his employer Council that the building would be on piers and that there would be compensatory earthworks to cater for flood storage. Counsel for the claimant properly, in my view, described these conditions as onerous. I accept Mr Snape's opinion that the sale land overall is inferior to the balance parcel. I also conclude that the developable portion is somewhat inferior but the superior usage of the development on the sale land and the fact that it has a road frontage compensates for that inferiority.

[102] Sale 9 in Mr Snape's valuation is located at Lahr's Road, Ormeau, has an area of 15.48 ha and sold on 1 August 2000 for $5,000,000. That equates to $32.30 per m².

[103] The sale property was purchased for the development of a stage of the Motorway Business Park. Stage 1 had already been developed and has become a prestigious industrial estate. Whilst its present status was not apparent at the date of sale, the location of the sale land promised it greater and more prestigious potential than would ever have been contemplated for the balance parcel.

[104] I accept that the sale land sold in a lower market than would have prevailed in the area of the balance parcel at the relevant date and the size of it is such that the price would be less per m² than for a site the size of the balance parcel.

[105] Mr Snape said that the sale land has some major issues with respect to drainage. He said that he did not attempt to compare the sale directly with the balance parcel. Indeed it cannot be so compared as it is a vastly different parcel.

[106] Sale 10 is found at 101 Burnside Road, Yatala, has an area of 4.06 ha and sold on 2 October 2003 for $1,600,000. That calculates to $39.40 per m². In oral evidence Mr Snape clarified a statement in his valuation report which said that the sale was used for market evidence by explaining that it was "not a particularly useful sale". Certainly he did not compare it directly with the balance parcel. In any such comparison the sale land appears superior in many respects: it is not rear land; it is in Yatala, a superior industrial area to Eagleby; it is good sound land and the sale took place some 19 months after the relevant date in a rising market. Given these points of comparison one might have expected a price higher than $39.40 per m². Mr Snape raised the prospect that services may not be available to the land, but that suggestion does not appear consistent with the fact that there is a large building on the other side of the road from the sale.

[107] Both Mr Snape and Mr Lambert applied a higher value than this sale reveals. That and the above comparison suggest that the sale should be set aside as not being a useful basis for direct comparison.

[108] Also in Burnside Road and at the corner of Lahr's Road, is a reference to a group of sales which I describe as Sale 11. No individual sales were cited by Mr Snape, however he said that 1.6 to 2 hectare serviced industrial lots have recently sold between $165 per m² and $200 per m² in that location.

[109] I accept Mr Lambert's evidence that these sales are in an area of completed industrial lots that are not comparable with the property being valued. The sale prices in comparison with the value suggested by both valuers for the balance parcel bears this out.

[110] I will deal with Sales 5, 12 and 13 in Mr Snape's valuation following discussion of some of Mr Lambert's sales.

[111] Mr Lambert's Sale 1 is at 22A Spanns Road, Beenleigh, has an area of 20,200 m² and sold on 19 June 2003 for $1,020,000. That calculates to $50.50 per m². There were some improvements on the sale land which Mr Lambert valued at $150,000, a figure accepted by Mr Snape, leaving the land component at $43.07 per m².

[112] In his comparison Mr Lambert said that site works had been undertaken including cutting, levelling and retaining, and that there are no access or drainage issues on the property. Whilst his comment about access and drainage raises a question as to whether he took these features into account in his comparison, I deal with this issue below. Mr Lambert went on to say that the sale land was comparable rear land, but enjoyed a superior location. Given his appreciation of the market movement since the relevant date, Mr Lambert discounted the sale by 10% to about $39 per m², then in his comparison added that level of discount back on the basis that the balance parcel may have some higher use in the fullness of time given its zoning as Local Shopping.

[113] In an earlier valuation not tendered in evidence Mr Snape had regard to this sale on the basis of it being comparable. He said that he omitted the sale from his primary valuation despite its physical characteristics because it had improvements on it, because of its zoning and because there was different surrounding developments from that in the vicinity of the balance parcel. He described uses surrounding the sale as being basically industrial. He also said that a development of the sale land would require extensive earthworks. I will take these points in order.

[114] Whilst I can understand a valuer being concerned with the question of improvements they were not substantial in this case. Indeed Mr Snape accepted Mr Lambert's figure of $150,000 for that component in the sale.

[115] As to the zoning: the evidence of Mr Connors suggested a development of the sale land would probably be similar to the types of uses that might be placed on the balance parcel. Under the *Integrated Planning Act* no development is prohibited and an application for development for a use for warehouses/storage would appear appropriate. Mr Snape appeared to accept this notwithstanding his stated reasons for jettisoning the sale. Mr Lambert has therefore adopted a more generous position on this point given his add back of 10% for the balance parcel's zoning.

[116] Mr Lambert described the need for earthworks as minor, that is, as needed for a building pad only. He, therefore, directly disagreed with Mr Snape on this point. Not only does this difference of opinion present me with a difficulty but I have the added difficulty that in the case of the balance parcel the earthworks requirements has been addressed in a very detailed way and has been reduced to actual figures by Mr Lambert. The sale has not

received the same treatment even though Mr Lambert said it was his main basis.

[117] I formed a clear view that Mr Lambert generally had a greater grasp of detail than did Mr Snape in the process of comparison between his sales and the balance parcel. It is clear in Mr Lambert's valuation report that he focussed closely on points of comparison whilst the opposite can be said of Mr Snape. I am therefore inclined to think that Mr Lambert's evidence as to the need for minor earthworks only in the form of providing a building pad is closer to the mark.

[118] Having said that I also need to say that it is obvious that Mr Lambert has not taken into account the fact that the cost of fill he catered for in his final before valuation of the balance parcel would also have provided a level building pad. That, is in a comparison between his Sale 1 and the balance parcel, he has applied a discount allowance that ought not to have been applied. He did not do this expressly but it is inherent in his comparison. On that basis alone and assuming the correctness of all of the points of comparison, Mr Lambert's top value would be greater than $43 per m².

[119] Sale 2 in Mr Lambert's valuation is Lot 2 Octal Street, Yatala. The sale property has an area of 31,290 m², and sold for $1,000,000 in September 2003. That calculates to $31.95 per m².

[120] Mr Lambert described the sale land as being hatchet-shaped with 80% comprising rear "head". There is a moderate slope down to the southern boundary towards Sandy Creek and the property will require cutting and levelling for a building pad which will result in some loss of land due to batter embankments, in his opinion. He said that the sale land is comparable rear land but inferior in location and in an area whose uses would be inferior to that likely on the balance parcel. It is therefore overall inferior to the balance parcel in his opinion.

[121] Mr Snape observed that the sale is in a "fairly ordinary industrial estate (that is) tucked well away from the highway". That appears to accord with Mr Lambert's opinion.

[122] Mr Snape introduced a further two sales in Octal Street which I will refer to respectively as his Sales 12 and 13:

Lot 487	**Sale date**	**Sale Price**	
6,512 m²	28 August 2001	$440,000	$67.50 per m²
Lot 453			
6,823 m²	7 February 2003	$484,000	$71 per m²

These two lots are smaller than the balance parcel and fully developed. One is on a corner. Mr Snape seemed to place little reliance on them saying only that they show a progression in sale price.

[123] Mr Lambert's third sale is at 112 Stapleton-Jacobs Well Road, Stapleton, has an area of 29,400 m² and sold on 14 November 2001 for $1,000,000. That equates to a figure of $34.01 per m². In his comparison Mr Lambert said that the sale property is comparable rear land which benefits from minor secondary street frontage to a high traffic road. He considered it, however, to have inferior location attributes and potential for a use inferior to that possible on the balance parcel. Mr Snape offered no disagreement to that comparison.

[124] Mr Lambert's Sale 4 is also in Octal Street being the infill of the hatchet created by his Sale 2. It is described as Lot 457 Octal Street selling on 28 February 2002 for $570,000. It has an area of 15,470 m² and its sale price equates to $36.85 per m². Mr Lambert said that some site works were required on the sale, that it had superior street frontage to the balance parcel though is inferior in location and in potential use.

[125] Mr Snape considered the sale to be suitable to compare with the balance parcel and generally agreed with Mr Lambert's comparison though stressed the need for a substantial amount of fill to be applied to the sale land. He was not aware however that fill had been placed on the land before the sale, though I do not know if all of the required fill was provided at that stage.

[126] Sale 5 in Mr Lambert's valuation comprised Lots 1 and 2 Lahr's Road, Ormeau. The sale took place on 7 September 2001 for $1,873,685. The area of the sale is 31,000 m² which results in a sale price calculation of $60.50 per m². In Mr Lambert's opinion the sale property is superior to the balance parcel as no site works are required and is ready for immediate development. There are no access or drainage issues. It is generally in a superior location, has superior direct street frontage, exposure to the Pacific Motorway, albeit set back and has a potential for a higher use than is likely on the balance parcel.

[127] Mr Snape offered no objection to Mr Lambert's comparison. In cross-examination it was suggested to Mr Lambert that his comparison between this sale and the balance parcel indicates that he had already taken into account all of the site differences including the matter of fill as part of the process of striking his figure of $43 per m². While Mr Lambert rejected that suggestion I have already noted that the preparation of a building pad or platform would have been duplicated in the case of his Sale 1 comparison. The same criticism would appear to apply in the case of his Sale 5, though he made no express mention of the need for a building pad on the sale land.

[128] Sale 6 is at 7 Christensen Road, Stapleton selling on 1 July 2003 for $827,000. The sale land has an area of 22,600 m², so calculates to a selling price of $36.60 per m². Mr Lambert said that the land is undeveloped and is located adjacent to Stapleton Industrial

Park at the northern extremity of Christensen Road. The land has an irregular shape and falls several metres from the street front to the rear boundary. It adjoins Sandy Creek along its southern boundary where there is some low-lying land apparently with poor drainage. About 1.6946 ha of the sale land is usable after allowing for land buffers and open space. A development permit allowing development in accordance with the General Industry zone issued on 28 November 2001, that is prior to the sale.

[129] In his comparison with the balance parcel Mr Lambert noted that some site works were required on the sale land which includes a component of unusable land. It has, he said, superior street frontage but inferior location attributes to the balance parcel and the nature of development being undertaken in the vicinity of the land is inferior to that likely on the balance parcel, in his opinion. Mr Lambert observed that the sale took place 16 months after the relevant date for present purposes and that the market had improved during that period.

[130] Mr Snape agreed generally with Mr Lambert's comparison between his Sale 6 and the balance parcel, though was anxious to stress the site works required on the sale land: works he described as "major".

[131] I now return to Sale 5 in Mr Snape's valuation. That sale property is located at Reisers Road, Beenleigh, which is also known as Morrison Lane. The land has an area of 1.462 ha and sold on 23 April 2001 for $550,000 which equates to $37.62 per m². Mr Snape described the sale property as being low lying with land he classed as commercial industry. It is bounded by the Pacific Motorway, though has no access or visibility from that road, in his opinion, is near the railway line and is most suited to outdoor sale/storage and suchlike. He thought the land could possibly be subject to minor flooding at its north-western end.

[132] Mr Snape considered the sale property to be "much inferior" to the balance parcel both before and after acquisition and said that it provides excellent comparative value evidence. No detailed comparison was, however, supplied.

[133] Mr Snape said that in April 2004 his Sale 5 property resold for $915,000 which equates to a price of $62.59 per m². Mr Lambert said that the suggested 2004 sale was subject to vacant possession and that the contract had not settled at the time of trial. In any event, he says the 2004 sale is too removed in time from the relevant date to assist. I agree with that view having regard to the evidence from both valuers as to the high level of activity and growth in the relevant market between the date of resumption and the date of this resale.

[134] Mr Lambert said that the earlier sale is a useful basis for valuation, however he disagreed with Mr Snape's opinion on comparison saying that the sale property is superior to the balance parcel. He said that the land does not flood and that the manager on site had told him of this. Mr Snape said, however, that there was some risk of flooding at the western end, though he did not cite his source.

[135] Whilst Mr Lambert considered that the Sale 5 land did not have a significant fill requirement, Mr Snape thought otherwise. Mr Snape also said that there may be difficulties in filling if drainage channels from the motorway were interfered with or needed to be accommodated.

[136] My inspection of the sale land assisted my appreciation of this evidence. I do not accept that there was a substantial need for imported fill, but conclude that significant levelling would be required.

[137] Mr Snape acknowledged that the Sale 5 land would be a suitable site for advertising signage which could generate income. The sale land has superior locational attributes, in Mr Lambert's opinion, and superior access to the balance parcel.

[138] I do not accept Mr Snape's opinion that this sale is "very much ... inferior" to the balance parcel. The points of comparison discussed above simply do not support that conclusion. I note Mr Lambert's opinion that the sale is superior to the balance parcel, but need also to take into account that the value he placed on the balance parcel is higher. I think that taking account of all of the comparable sales, which I discuss in the following paragraph, that would be the correct conclusion.

[139] Overall, the sales evidence selected by Mr Lambert provides better comparison evidence than those properties referred to by Mr Snape. Indeed, I accept Mr Lambert's view that it is Mr Snape's Sale 5 only that affords suitable comparison with a balance parcel, though I think his Sale 8 to be useful supporting evidence, albeit one difficult to analyse. I think that sales such as Mr Lambert's Sales 2, 3 and 6 effectively provide a "floor" value to the balance parcel and that his Sale 5 creates a "ceiling". His Sale 4 appears to sit well with his Sales 2, 3 and 6, however can be put aside because of the doubts I have as to its fill status. Sale 1 in Mr Lambert's valuation is clearly the most direct comparison and provides for a refinement of the value figure indicated broadly by the floor and ceiling sales. Nevertheless, it is not a perfect basis for comparison with the balance parcel and required some adjustments to be made (see paras [112] and [113]). I will modify those adjustments in favour of the claimant.

[140] It was submitted for the claimant that in view of the sales it is surprising that Mr Lambert adopted a before value of $20.36 per m² in his initial valuation, then $34.82 per m² in his

amended valuation. These are figures net of costs. The criticism is not valid, however, as each net value figure was based on a different area.

[141] I need to adjust Mr Lambert's comparisons further, however, by taking into account the discussion on fill provided earlier. Having regard to that, as well as the comparisons provided and to the need to lean in favour of the claimant, I conclude that the value of the balance parcel is $45 per m². I stress that in drawing this conclusion I place no reliance on Mr Snape's opinion that the balance parcel is worth $45 per m².

[142] I apply that figure to the western development area of 12,100 m² to produce a top value for that area of $544,500 before resumption .

Before Value

[143] In summary, I conclude the top value of the balance parcel is as follows:

12,100 m² western development land @ $45 per m²	$544,500
1,046 m² to east of developer's drain	$18,000
	$562,500
Less Costs	$111,950
	$450,550

Mr Lambert's September 2000 Valuation

[144] In a valuation report Mr Lambert prepare for the respondent dated September 2000, he did not approach the valuation by way of striking a top value then deducting costs such as for fill, nor for a developer's drain. It was put to Mr Lambert that he had at that time not considered the filling and drainage issue to be as prominent as it appears in his initial valuation or the amended valuation provided during proceedings.

[145] Mr Lambert explained that his approach in September 2000 was not to compare the balance parcel to sales but to adopt the actual purchase of Lot 3 as his basis. What he did then was to apportion that sale price between the tavern land and the balance parcel. As such, he explained, the features of the balance parcel including his observation that the land was subject to local and regional flooding were taken into account in the apportionment of the sale price.

[146] I find that explanation to be acceptable. He now has a much later relevant date for valuation purposes so has preferred to seek sales evidence other than of the sale of Lot 3.

[147] There was also discussion in the context of that September 2000 valuation of the issue of access to the balance parcel. Excerpts were read to me from the valuation report relating to this issue, however the document was not tendered. I can take that matter of access no further.

[148] Mr Lambert was not aware of the issue of the non-fill encroachment line when he completed his 2000 valuation. That does not mean however, that the effect of that line is an issue that a prudent purchaser would not have become aware of. Mr Lambert's

research as far as it went did not reveal the presence of the line though it did lead to an appreciation that a large section of the balance parcel was low lying and in a natural flow path. A hypothetical prudent purchaser would in my view have taken these facts further by ascertaining the effect on the land. That is what Mr Lambert's present valuation approach does and needed to, given that it is not now based on the earlier sale of Lot 3.

Goods and Services Tax

[149] Mr Lambert's Sale 4 in his valuation report was said to have sold for $570,000. Mr Snape said that the sale price was $627,000. It transpires, however, that in each of his sales Mr Lambert has brought them to a common denominator by ascertaining the price exclusive of Goods and Services Tax (GST) and that the sale price of $570,000 was presented on that basis.

[150] Mr Snape seemed to be of the view that if someone had to pay GST it was appropriate that it be included in the sale prices. I could assume from this that he did include GST in his sale prices, though that is not beyond doubt. For example, he had detailed knowledge of Mr Lambert's Sale 1, but made no criticism that the sale price included in Mr Lambert's valuation report was low or did not include GST. There was no other criticism made by either valuer of the sale prices of the other.

[151] It is preferable that valuers make it clear in their valuation reports whether a sale includes or excludes GST. I think it also appropriate that valuations for the purpose of compensation be prepared on the basis that GST is not included. It is then a matter for the parties to deal with the GST question separately. In the present case this issue was suitably addressed by the parties in the form of a letter of undertaking provided to the claimant from the respondent.

[152] Accordingly no provision for GST is made in my determination of compensation for the taking of Easement C.

After Scenario

[153] After resumption, the claimant is confronted with Easement C which cuts through the balance parcel in a location that any prudent developer of the land would not have selected. The easement had the effect of taking 2,854 m² out of development contention. It leaves a severed area to its west of 9,566 m². The total eastern severance is 3,708 m² in area, part of which is Easement B (579 m²), part the eastern strip (467 m²) and part what I have called the eastern development section (2,662 m²).

[154] In his after valuation Mr Lambert employed the top-down method once again, concluding in his initial valuation that the after top value was $548,293 made up as follows:

Easement B and eastern strip 1,046 m² x $43 per m² @ 50% diminution factor	$22,489

Easement C 2,854 m²	Nil
Remaining area 12,228 m² x $43 per m²	$525,804
	$548,293

[155] From this figure he deducted development costs of $172,000 to yield his net figure of $376,293. In his amended valuation Mr Lambert's top value might be summarised as follows:

Eastern severance 3,708 m² x $43 per m²	$159,444
Easement C 2,854 m²	Nil
Western Severance 9,566 m² x $43 per m²	$411,338
	$570,782

[156] He deducted development costs of $13,500 for fill for the western severance, the cost of crossing Easement C and costs for the eastern severance totalling $121,987 before the addition of a contingency factor. Once a contingency allowance of 15% is added, the cost became $195,012. He deducted $10,000 from that figure for what he identified as a saving in the landowner not having to carry out a flood study in the after resumption scenario. He called this an enhancement. His net costs therefore became $185,012 which, when deducted from his top value, led to a net value of $385,770. He deducted this from his amended before value of $420,474 to provide a difference before to after of $34,704, which he rounded up to $35,000. He later agreed to adopt a risk allowance of 10% which would adjust these figures further. There seems to be no benefit in my further considering Mr Lambert's initial valuation, but to focus on his amended valuation.

[157] I will refer to Mr Snape's after resumption valuation as appropriate in the context of the following discussion. In his primary valuation report and in an addendum to that, Mr Snape presented a number of assumed factual scenarios which have limited application given various conclusions I have drawn on relevant issues and the final position adopted by the claimant. That final position was to adopt Mr Snape's before value of $45 per m² for an area of 12,000 m² and to discount that by about 50% to cater for the suggested consequences of the resumption.

The 50% Argument

[158] It was submitted for the claimant that the effect of the resumption was to discount by 50% the value of that part of the balance parcel which had development potential before, that is 12,000 m² x $45 per m² @ 50% equals $270,000. That is the basis for the figure in the amended claim for compensation which, for reasons not fully explained, became $260,000 under this heading.

[159] Faint reliance for the adoption of that percentage was placed on a part of Mr Snape's valuation where he said that the western severance would have a value of $15 per m² if access across Easement C was not permitted. The $15 per m² represented a two-thirds

reduction from the $45 per m² Mr Snape considered as the value for the balance parcel before resumption.

[160] I can see no process of reasoning that connects the two-thirds reduction and the suggested 50% discount.

[161] The claimant's submission further relied in part on Mr Lambert's evidence. In his initial valuation Mr Lambert had valued the developable area of the balance parcel before resumption at $43 per m², that is $521,805 and had deducted what he considered to be additional costs of $216,000, that is a reduction of almost 42%.

[162] His overall before value was $544,294 taking into account the value he had placed on the Easement B and eastern strip areas. Thus on the total area of the balance parcel its value was $20.36 per m². The claimant drew my attention to the fact that this is greater than 50% less than the $43 per m² that Mr Lambert had placed as a top value on developable land.

[163] There is a fallacy in the argument that places reliance on Mr Lambert's figures as supporting a 50% reduction, as the 50% figure employs his developable area (12,132 m²) a value of $43 per m² as a top value, then uses the overall value of $20.36 per m² for 16,128 m² as the end point.

[164] Mr Lambert had not in the above figures purported to place a value on the balance parcel before and after resumption but had attempted to identify a before value with the additional cost element not being referable only to the drainage requirement. Apart from that Mr Lambert abandoned his initial before and after value in favour of an exercise tendered as Exhibit 24. In that exhibit the additional costs in the before exercise are about 20% of the top land value.

[165] The claimant next takes the above submission and says that it is hard to see why Mr Lambert's post resumption costs of $185,000 in his amended valuation would not produce a similar discount before questions of severance/isolation of parcels and uncertainty about development possibilities are considered.

[166] That proposition suffers the same disabilities as the 50% submission discussed above in my opinion. I will proceed to consider the after resumption value on the top-down basis.

Western Severance

[167] There is one important difference between the before and after access situations. Before resumption, access across the developer's drain can readily be constructed by a developer as he owns the relevant land. If an easement was granted to the Council over the developer's drain, it would reasonably be made subject to the necessary access

requirements of the balance parcel being met. In the after resumption scenario where the respondent has constructed the Easement C drain, the claimant does not enjoy a strong position for negotiating access – he must go cap in hand to the Council seeking its indulgence.

[168] In the after scenario the claimant is confronted with Easement C which is subject to the following:

> "**No Structures etc on Easement**
>
> 7. The Owner shall not at any time, without the express written permission of the Council:
>
> 7.1 erect any buildings or structures (other than fences) upon the easement or any part thereof or otherwise permit the easement or any part thereof to be used in such a way as to obstruct or interfere with the relevant works and/or the proper and effective use thereof by the Council;
>
> 7.2 install concrete, bitumen or other pavement or driveways on the easement or gardens or landscaping involving concrete, brick or other permanent materials;
>
> 7.3 remove or stockpile or permit the removal or stockpiling of any soil, sand, gravel or other substance or material on the easement or construct any roads, dam walls, or other earthworks on the easement which would in any way obstruct or interfere with the relevant works and/or the proper and effective use thereof by the Council.
>
> **Damage to Structures etc**
>
> 8. The Council shall in its sole discretion determine how and in what manner the rights acquired by the Council hereunder are exercised. The Council must not wilfully damage or destroy any matter to any extent greater than is reasonably necessary in order to exercise the Council's rights hereunder but:-
>
> 8.1 the Council is not otherwise responsible for any damage to or destruction of any matter in the course of the exercise by the Council of its rights hereunder; and
>
> 8.2 the Council is not under any obligation to reinstate or repair any matter damaged or destroyed in consequence of the exercise by the Council of its rights hereunder and its only obligation where any such matter has been so damaged or destroyed is to leave the easement in as clean and tidy a state as is practicable having regard to the nature of the matter which has been damaged or destroyed and the work which it has done; and

8.3 the Council is not in any event responsible for any inconvenience or disturbance to the owners or occupiers of the easement arising out of the course of or by virtue of the exercise by the Council of its rights hereunder.

Removal of Unauthorised Structures etc

9. If a building, structure or other material or thing is erected, placed, found or installed upon the easement in contravention of Clause 7, the Council may, in addition to any other remedies and after having first given the Owner reasonable notice of its intention to invoke this clause, enter upon the easement and remove or demolish the relevant matter and, if it does so:-

9.1 it may dispose of the relevant matter or any resultant demolition materials in such manner as it sees fit without being liable to account to the Owner therefore (except as provided in Clause 9.2); and

9.2 it may recover, in any Court of competent jurisdiction, costs actually incurred by it in taking that action (including internal wage and salary costs) less any moneys actually received by it as a result of disposing of the relevant matter or any resultant demolition material."

[169] Clause 7 was not addressed as giving rise to any question of construction, both parties proceeding on the basis that an access crossing of the type assumed in the before resumption scenario would be caught by the clause. Thus in order for the claimant or its successors in title to construct such access with Easement C in place it would need to obtain the express written permission of the Council. The discretion in clause 7 is unfettered, that being made expressly clear in clause 8.

[170] It seems to be conceded by the parties that it is practicable to construct an access crossing which would not "obstruct or interfere with the relevant works and/or the purpose and effective use thereof by the Council". Indeed in a letter of 4 May 2004 to the claimant (Exhibit 20), the respondent said:

> "Firstly, Clause 7 of Easement C does not in itself restrict the construction of works within the Easement area but retains to Council the necessity for your client to gain written permission to the construction of any proposed works prior to their construction. Council's proper consideration of any approach for permission would be based on the necessity that proposed works did not impinge upon the utility of the easement area for the purpose for which the easement was acquired, that is, drainage purposes, after which consent would be given.
>
> The Council has no objection in principle to granting consent to the construction of a bridge or access over an open drain such as Easement C."

[171] The letter went on to discuss the specifications of such an access crossing and to say that written permission would usually be sought by way of a Development/Operational Works Application as provided for in the *Integrated Planning Act*. Should permission be granted as a result of such an application then it would attach to the land (s.3.5.28 of the Act).

[172] I will treat that letter as not being post resumption evidence that would not have been available to a prudent purchaser but as evidence of what such a purchaser would have been advised had he made appropriate inquiries of the respondent or of any competent town planner with the requisite experience.

[173] The questions that need to be considered, therefore, are concerned with the view that a hypothetical prudent purchaser would take as to the prospect of permission being granted and the possible location of an access crossing, the subject of any permission.

[174] In addition to these issues, the claimant raised the question as to the uncertainty of the likely circumstance of any action by the respondent under clause 8 of the easement document. I will dispose of that issue immediately. I notice that both parties proceed on the assumption that the area affected by Easement C has lost its full value. In such circumstances whatever takes place on that area and within the terms of the easement document is catered for in compensation for loss of land unless it injuriously affects the land retained by the claimant. There was no evidence of any anticipated injurious affection, apart from the physical appearance of the drain which I discuss below. I will now turn to the issue of access and will deal with the two points mentioned in para [173].

[175] As part of the construction of the Easement C drain, the respondent constructed an access which extends for about 16 metres along the length of the easement area where it abuts the southern boundary of the balance parcel. That access comprised a culvert which provides a cap to what would otherwise be an open drain in that location. The access was constructed for the purpose of giving the respondent a means of getting to the culvert headwalls. It is wider than is needed for that purpose, its extra width being a result of the respondent's wishing to provide an access point for the claimant. Certainly, I think that a prudent purchaser would not contemplate the prospect of access being refused over that access constructed by the respondent. It might be said that in theory there is a risk that access would not be permitted across the southern section of Easement C, however I think on the evidence there is no discernible risk that should be taken into account.

[176] The claimant now says that this access point probably represents the Council's preferred access location. I do not think that the fact that, in constructing Easement C, the respondent provided access to the south can be taken to indicate that access would be confined to that location. Clearly, it was constructed there because that is where the

headwalls of the culvert are and where access would be needed by the Council.

[177] I will now further consider the question of whether a prudent purchaser would perceive a likelihood of the Council granting permission for an access crossing to be constructed by him in some other location.

[178] There is a number of matters that point to the prospect of permission being granted:

(i) Clause 7 of the easement document conveys to me that the grantee is concerned about interference with the purpose of the easement, i.e. drainage, not with a prohibition on every use of the easement area.

(ii) The fact that the respondent has covered the Easement C drain by a culvert at the southern end demonstrates that bridging it is consistent with the purpose of the easement.

(iii) Other examples were referred to by witnesses where permission to construct access over similar easements has been given.

(iv) Exhibit 20 is an indication of the Council's intentions. I recognise that the letter is couched in qualified language as to the nature of the permission that would actually be granted but that is understandable. First, it would not be appropriate for Council to provide carte blanche permission in circumstances where it does not have before it a particular application to consider. Second, the Council can only be committed by its resolution (*Russell v Brisbane City Council* (1955) QSR 419).

(v) The tavern development includes the covering of Easement B in part of the car park and the provision of a pipe there. Apparently this work was carried out with the permission of the respondent as the consent order indicates development over Easement B. In the respondent's submission this shows a "facilitative approach" by the Council.

[179] Matters which tend to show that permission may not be granted include:

(vi) Point (iv) above. There is no certainty given the form of the letter and the requirement to obtain formal approval. I do not think that this raises a *Jones v Dunkel* ([1959] 101 CLR 298) issue. It is more a matter of deciding how a hypothetical prudent purchaser would weigh up the available evidence.

(vii) As a counterpoint to (iii) above I note that there were examples referred to in the evidence where permission was not forthcoming. Those examples however appear quite different to me from the present case, in that it appears that specific reasons for refusal were present.

[180] The preferred point of access would be towards the north of the balance parcel. That would allow a natural continuation of the access constructed for the tavern. The question is whether a prudent purchaser could expect access to be in that location. If it were only to the south in the location where access has been constructed by the respondent, any utility of the eastern severance would be compromised as an access route would need to be constructed travelling north to south within that severance and then travelling over the southern access point into the western severance.

[181] In Exhibit 20 the respondent said:

> "In general, the number and location of accessway structures would be determined at the time of a development application for Lot 3 and would also be subject to normal traffic and town planning considerations."

[182] It is unfortunate that the respondent did not, as it could easily have, rule in or out any suggestion that access via the northern route would have been available. Perhaps it was influenced by the position adopted by its valuer, Mr Lambert who proceeded on the assumption, though it was unstated in his report, that access would be guaranteed in the north. He made mention in his valuation report of the access constructed by the respondent, but in fairness said it was difficult to quantify what worth that might add to the claimant's land after resumption.

[183] I cannot accept the submission from the claimant that Mr Lambert assumed that access would be confined to the south. Mr Lambert said in his initial valuation report that the claimant would need to take into account in the after scenario the cost of bridging Easement C. He would not have done so had he assumed that access would be to the south where access was provided by the respondent.

[184] Mr Snape focussed particularly on the access issue. He did not value the western severance on the basis that access might have been a prospect high or low but presented optional scenarios based on access either being available or not. Each scenario resulted in a net value figure different from the other. That approach is not particularly helpful in the present context. What needs to be addressed here is the question of the view that a hypothetical prudent purchaser would adopt as to the prospect of obtaining permission to locate access in its most advantageous position towards the north. Mr Snape expressed confidence that access would be permitted in that location.

[185] There is no indication in the evidence that access towards the north, the centre or the south, would be practically preferable from a town planning perspective. From a traffic movement perspective I would think that the north would be preferred as it would offer a more fluid connection with the tavern access.

[186] Exhibit 20 does not evince an intention to contain access to the south, nor to limit access via one point only.

[187] A Council should generally be assumed to act reasonably, therefore to approve a northern location in the absence of any compelling reason as to why it should be elsewhere. The claimant submitted that the fact that the council located Easement C straight through the balance parcel rather than swinging it to the east points to evidence of a local authority acting unreasonably. Given this, "how could one be sure that the Council would act reasonably on the question of access?" the claimant asks. The point is properly made, however it may well be that the design and placement of Easement C was approached as an engineering issue, whilst the question of access would be approached as a matter of planning. Apart from that, I do not think that evidence of one less than thoughtful act is evidence of a propensity to act that way when confronted with an opposing view. There was no evidence placed before me that the claimant had objected against the resumption in the form it was proposed, whereas a prudent developer would strenuously argue for access to be allowed in the northern location.

[188] The claimant drew my attention to the failure of the respondent to call any evidence to indicate the likely (or certain) manner in which the respondent would exercise its powers under the easement document. It was suggested that this raised a *Jones v Dunkel* point. I have averted to that issue to an extent above. To those comments I would add that the issue cannot be disposed of by the respondent saying what it will or would do in the form of a letter. Exhibit 20 appears to have gone as far as it could except for the point raised in para [182] above. The question is one for the hypothetical prudent purchaser taking into account the advice he might expect.

[189] There was no evidence placed before me to the effect that there would have been some practical impediment consequent upon the permitting of access in the northern location. No witness gave a reason why, or proffered opinion to the effect that, a preferred location would have been other than to the north. Indeed the weight of the evidence from Mr Snape, Mr Connors and Mr Lambert was that access in that location might reasonably be expected. A hypothetical prudent purchaser would, I think, approach the issue from that perspective.

[190] The evidence points, to my mind, to a high probability that access would be permitted in a position convenient to the development to be undertaken on the western severance. I comfortably conclude that a hypothetical prudent purchaser would form the view that the prospect of permission being granted for an access structure over Easement C in the northern location would be high though not guaranteed. The prospect of permission

being granted must be qualified given the state of the evidence; such qualification arising as a matter of principle. The principles that are relevant in a situation such as I now confront invite me to lean in favour of the claimant and to resolve such obscurity as exists in its favour (*Robinson & Co v Collector of Land Revenue* (1980) 1 WLR 1614 at 1621).

[191] The claimant submitted that even the slightest uncertainty would play heavily on the mind of the hypothetical prudent purchaser. I conclude that such a purchaser treating with a hypothetical prudent vendor would not expect to garner a substantial discount to the price of the western severance based on the issue of access over the Easement C. The circumstances of the present case point quite clearly to the prospect of suitable permission being granted. The hypothetical parties to a transaction of the type envisaged in *Spencer v The Commonwealth* (1907) 5 CLR 418 would not however assume that that prospect is a reality. The value of the western severance would, I think, on that basis be discounted but in a nominal way.

[192] Dr Johnson suggested that access to the south through the adjacent shopping centre may even be possible. That would make use of the southern Easement C crossing, however this suggestion was not seriously taken up by the parties.

[193] Another reason advanced by the claimant for reducing the value of the western severance was the visual unattractiveness of Easement C. I do not accept that as valid. This is neither a residential area nor a retail block of land, but a parcel of rear land that has the potential for such uses as mini storage. The presence of a well-constructed drain would not, I think, detract from its value for such purposes.

Eastern Severance

[194] In his original valuation Mr Snape said that the eastern development section comprising 2,702.7 m² (that is excluding Easement B and the eastern strip) could possibly be developed on a limited scale. He suggested a building 18 metres wide and 120 metres long having a gross floor area of 1,000 to 1,200 m². He also expressed the view in that report that should the eastern severance be required to facilitate access to the western severance via the southern access way, a reduced building development of 600 m² to 800 m² gross floor area would be possible. Given my conclusion on the issue of access, that option is redundant except that it points to development potential in this area.

[195] At one point in his primary valuation report, Mr Snape placed a value on this severance based on a reduction of one-third from his before value, that reduction being largely, if not exclusively, based on its shape, as I understand his evidence. I accept that its shape is a detractor. At that part of his valuation he was assuming that the eastern severance was available for development as one of his scenarios. He applied $20 per m² to this area,

assuming it would be needed for access purposes. None of his figures takes the Easement B and eastern strip area into consideration.

[196] In his addendum to his valuation report in what he described as scenario 1A, he expressed the view that this severance had a nil value even if it could be filled, because it would be economically prohibitive to fill it. That opinion was based on the assumption that access to the western severance would not have been available. None of the other scenarios included in Mr Snape's addendum to his valuation need to be considered. Indeed, I gain little assistance from the various opinions advanced by Mr Snape as to the value of the eastern severance, except that he appeared to be of the view that as a filled site that part of this severance, excluding Easement B and the eastern strip, would have development potential.

[197] In his amended valuation Mr Lambert assumed the development of the whole of the eastern severance. Not all of it would accommodate buildings, the lower areas and the Easement B area being used for access and car parking or landscaping. That development would involve the piping of Easement B (covering 579 m²), the filling of that area and the filling of the eastern strip (467 m²) as well as the eastern development section. Mr Lambert again employed the top-down method.

[198] In the after scenario there was no assumed developer's drain towards the east of the balance parcel which would have created a small severance to its east. Easement C obviates the need for the developer's drain, therefore on Mr Lambert's reasoning the land to the east of Easement C right up to the eastern boundary is now contained in a contiguous block, although one containing Easement B, the eastern strip and the lower land. It is a block that is, however, not physically contiguous with the western severance and which contains a low-lying area below the non-fill encroachment line.

[199] The eastern severance is 32.9 metres wide whilst Easement B and the eastern strip are each 6 metres wide. Thus the eastern development section is 20.9 metres wide. Mr Lambert gave evidence of a development in Brisbane Road, Labrador on a lot that is 29.145 metres wide and with a length of 184.7 metres. The buildings were constructed backing onto an open drain which the developer did not fence.

[200] The Labrador example was given, as I understand it, to demonstrate that a narrow block such as the eastern severance was able to be developed with buildings backing onto the Easement C drain. There was no example to indicate that a lot with a 20.9 metre width was economically developable. There would, therefore, appear to be added impetus from the respondent's perspective, for the inclusion of Easement B and the eastern strip in any development of the land to the east of Easement C.

[201] The issues that arise are therefore:

- the use of the eastern severance for access to the west
- the surrender or use of Easement B
- the filling costs
- filling within the non-fill encroachment line
- the cost of piping Easement B

[202] I will commence the discussion of these issues on the assumption that the eastern severance would not be required to provide access to the west. In other words, access to the west is assured. I proceed on the basis that if it is of value to the balance parcel after resumption, a prudent purchaser would seek and accept a surrender of Easement B or, alternatively, a right to deal with its flow by piping and placing fill over it.

[203] In a letter from the respondent to the claimant dated 28 June 2000 which advised the claimant of the respondent's intention to acquire Easement C, it was said that Council had resolved on 12 May 2000 that subject to the acquisition of the Easement C area "the existing easement in Lot 3 on RP 900630 be surrendered". The easement referred to is Easement B. In Exhibit 20 the respondent said with respect to Easement B:

> "Such easement would be surplus to Council's needs provided your client could confirm that stormwater flows within such area were to be redirected into the area now defined as Easement C. This matter could also be properly considered by Council as part of the aforementioned Development/Operational Works application."

[204] The requirement to redirect the Easement B flow into Easement C appears to be consistent with construction Drawing 33157 prepared for the respondent on 3 December 2001, and provided along with other drawings, to the claimant on 7 June 2002. These documents became Exhibit 25. Drawing 33157 shows the design location of Easement C and the location of Easement B.

[205] The drawing shows an existing 750 mm pipe and a 375 mm pipe feeding from the east into the open concrete invert drain in the upstream section of Easement B. Drawing 33156 also shows a pipe crossing into the Easement B open drain from the childcare centre having a dimension of 900 mm. Stormwater coming into the Easement B open drain from these sources then flows down the open drain until it reaches a point some 10 metres before the entrance to the 600 mm pipe constructed under the western end of the tavern car park. At that point the flow can enter the diversion drain or flow through the 600 mm pipe and then flow into the open concrete invert drain in the park to the north of Lot 3.

[206] Drawing 33157 also shows a "future 750 pipe" and a "future 450 pipe", apparently to convey stormwater from Easement B to Easement C.

[207] These two drawings were not introduced into evidence with the support of their authors, nor is their status made clear on the face of the documents. They were, according to the letter of 7 June 2002 to the claimant, construction drawings for Easement C but the reference to those elements of the drawings not concerned with the Easement C design has not been explained. The drawings were not put to Mr Dover. A number of questions concerning drawing 33157 remain unanswered.

[208] In particular, was it considered appropriate in the "design", as I will call it, to maintain Easement B or at least a drain in its location as well as direct part of the stormwater from Easement B into Easement C so as to make the diversion drain redundant? The diversion drain gives the appearance of being a temporary structure.

[209] Mr Lambert's piping costs for Easement B assume that the diversion drain is not needed. The basis for that assumption was not fully explained, however seemed to depend on the proposition that Easement C now takes sufficient flow to allow the diversion drain to be dispensed with. There was no expert evidence to the effect, however, that that is a correct understanding of the effect of Easement C. He also assumed no cross drainage to Easement C.

[210] I note Dr Weeks' advice that a flood study of the balance parcel would be needed after resumption for any development proposed on that land. Presumably, it would not be until such a study is carried out that the fate of the diversion drain would be known.

[211] It seems to me to be improbable that stormwater flow from the three drains flowing into Easement B could be accommodated by the 600 mm pipe under the tavern car park, hence the need for the diversion drain. It also seems that given the probable temporary nature of the diversion drain, the two cross-drains between Easement B and Easement C would be needed for Easement B to be able to be piped and filled. Exhibit 20 appears to recognise this. There was no evidence that the respondent intended constructing the two cross-drains referred to in drawing 33157, however its agreement to the provision of a 600 mm pipe under the tavern car-park section of Easement B suggests that such cross drainage was in contemplation at that time.

[212] Drawing 33157 appears to be based on a ground survey. As such it should, in the respondent's submission, be more reliable than the opinion advanced by Mr Dover based on a small scale contour plan in which he expressed doubt that cross-drainage from Easement B to Easement C at right angles to Easement B was possible. That opinion would lead to a design requiring longer cross-drains from Easement B meeting Easement C in a downstream location. The difficulty I have with that submission is that its basis was not put to Mr Dover.

[213] It is difficult to determine a consistent line between the respondent's letters of 28 June 2000 and 4 May 2004, and the drawings under discussion. That difficulty is compounded by Mr Lambert's decision in his amended after resumption valuation to jettison any reliance on any cross-drains between Easement B and Easement C and to propose the piping of all stormwater presently catered for in Easement B and the diversion drain in a 600 mm pipe. Not only does that not meet the requirements of the respondent in its May 2004 letter, requiring piping of Easement B to Easement C, but it proposes a pipe to carry a flow that appears on the evidence would exceed its capacity.

[214] The flow into Easement B from the combined sources of three pipes of 900 mm, 750 mm and 375 mm respectively, would appear to be greater than the volume that a 600 mm pipe could take, even if the 900 mm pipe under the childcare centre would receive a lesser flow following the construction of the scheme of works which gave rise to the resumption.

[215] The question of the surrender of Easement B should not be approached on the basis of what is known at the time of hearing except to the extent that that is evidence that confirms a foresight as at the date of resumption and does not provide a hindsight: *CMB No.1 Pty Ltd v Cairns City Council* (1999) 1 QdR 1 (CMB No. 1). At the relevant date a hypothetical prudent purchaser would have gleaned from Exhibit 18 that the respondent would have been approachable to consider a surrender of Easement B and from Exhibit 25 that some form of cross-drainage from Easement B to Easement C was in contemplation. What the terms of any such surrender might have been and whether they would have included cross-drainage alone or cross-drainage together with piping of Easement B are unknown from this evidence, although Exhibit 20 appears to require cross drainage only. Certainly there was no evidence that the respondent would have considered the surrender of Easement B on the sole basis of it being piped in a 600 mm pipe. I think, however, that it is reasonably clear that the Council would have considered the surrender of Easement B if piping was installed sufficient to allow its flow to be accommodated and discharged in a manner and location acceptable to it. Mr Ryter said that his experience was that local authorities readily relinquish an easement, such as Easement B, where it has no utility.

[216] What I have said thus far about the surrender of Easement B applies with equal force to the other option presented by Mr Lambert, that is the piping of Easement B without its surrender. Mr Lambert was concerned only with the outcome of Easement B area, that is its piping, filling and use as part of the development of the eastern severance, but not as a site for buildings. In his evidence he appeared to confuse the idea of surrender and that of

simply piping and filling the Easement B area, however that was not fatal to his general proposal concerning Easement B, as he assumed the inhibitions of the easement even if it were surrendered.

[217] In valuing the eastern severance, Mr Lambert adopted these areas with which Mr Snape agreed:

Easement B	579 m²
Eastern strip	467 m²
Eastern development section	2,662 m²
	3,708 m²

He placed a top value on that area at $43 per m², calculating to $159,444 from which, in his amended valuation, he deducted costs needed to bring that land to a developable state. Those costs were:

Fill	$71,196
Piping Easement B	$34,880
15% contingency	$15,911
	$121,987

He later added a further 10% to his costs to cover the risk associated with the completion of these works. That brought the total site works figure to a rounded $134,000.

[218] If the above works are carried out, there will be no need to spend an estimated $63,250 (including contingencies and risk allowance) to cross the diversion drain after resumption. I come to this again below, however will first deal with Mr Lambert's costs included in the previous paragraph. The first of these costs is for fill.

Fill

[219] Whilst there was some evidence from Mr Dover that some surplus fill could be generated from the development process, Mr Lambert assumed the importation of 5,933 m³ of fill at a cost, which is not disputed, of $12 per m³ placed and compacted. He calculated the volume of fill needed based on the need to fill 3,708 m² to an average depth of 1.6 metres. That totalled $71,196 plus contingencies. The 1.6 metres depth was arrived at from an understanding of Mr Dover's evidence that the low point in the eastern severance was at RL4.2 metres and had to be filled to RL5.8 metres. The difficulty with that is that I was not taken to where Mr Dover said that and could not find it myself. I did find where he said that the invert of Easement C was at RL 4.2 metres.

[220] It was put to Mr Lambert that given the poor quality of the information he had available, perhaps a further 1 metre depth of fill might be needed. Whilst Mr Lambert did not concede that suggestion, he agreed that if a further 1 metre depth of fill was needed, the cost would be increased by $44,500 plus contingencies. He observed however, that Mr Dover had said that fill could be to a level below RL5.8 metres given the prospect of the

Council relaxing the requirement of filling to that level. I have already, in considering the before resumption valuation, proceeded on the basis that such a relaxation might be expected.

[221] Two other factors would appear to operate to reduce the cost of fill. First, there is the prospect that I mentioned earlier of spoil being available on site from excavations for footings and such like. Second, there is the prospect that all of the fill proposed by Mr Lambert would not be needed. There is no need to fill the car park areas to RL5.8 metres. This would be of particular interest if the bulk of car parking was to be located in the eastern severance as Mr Lambert suggested. Immunity against a Q10 event only was required for the tavern car park development.

[222] The claimant was critical of Mr Lambert's fill volume estimation on the basis that he is not an expert in such matters. That is fair criticism, however it does not mean that a useful estimation exercise cannot be undertaken based on the evidence available. I have perused the contour plan which indicates that whilst there was quite a bit of land in the eastern severance overall below RL4.2 metres, the land in the eastern development section is much higher. Mr Lambert has not, I think, been ungenerous in his estimate of 1.6 metres, however I will add a further 20% to his figures to allow a conclusion in favour of the claimant in circumstances where the fill estimate was not provided by the relevant expert. That is, fill volume should be increased to 7,120 m^3 at a cost of $12 per m^3, totalling $85,440. The addition of a contingencies allowance of 15% would yield a figure which I round to $98,000.

[223] Filling within the encroachment line can take place only if it is compensated for by making available within the encroachment line a similar capacity to receive backup flood water. The construction of the drain in Easement C has increased the flood receiving capacity on the balance parcel, but I do not know how the respondent might take that into account in any application to fill within the non-fill encroachment line. That drain was constructed at the Council's cost. I have no evidence to say that it would be taken into account in considering an application to fill within the non-fill encroachment line, nor do I have sound evidence of the extent of compensatory flood capacity created by the construction of Easement C. Apart from that there is a need for a flood study to be carried out if a landowner wishes to fill within the encroachment line. No flood study with that in mind has been prepared, as I understand it. I lean to the view, however, that permission might be granted given the longstanding position of the respondent that Easement B could be surrendered. Council would be presumed to know that such a surrender would be of value to a landowner only if filling in the manner proposed by Mr

Lambert was contemplated. A not insubstantial risk, however, remains.

Piping Easement B

[224] Mr Lambert assumed that the open drain section of Easement B would be piped in a 600 mm pipe to connect with the pipe of that same dimension which presently lies under part of the tavern car park. His adoption of a 600 mm pipe costing was based on advice provided directly by Dr Johnson to Mr Lambert in a document not tendered. I have already expressed my concern at the adequacy of such a pipe.

[225] The pipe length would be 87.2 metres in Mr Lambert's estimate and was costed by him at $400 per lineal metre, totalling $34,880, plus contingencies. The evidence points, I think, to this cost being low given the doubt that I have expressed as to the adequacy of a 600 mm pipe. I will, in the circumstances, carry out my own estimation. Dr Johnson provided evidence in his report that 1,650 mm pipe would cost $710 per metre. Now I would think, without the benefit of expert opinion, that such a pipe would be larger than would be needed to pipe Easement B. The best that I can do is to assume a pipe of a size between 600 mm and 1,650 mm at a price of, say, $450 per metre. That is the all up price would be $39,240 plus contingencies. An alternative might be to run two 600 mm pipes, given that there is a 600 mm pipe only under the tavern car park.

[226] The larger pipe would feed into the 600 mm pipe presently in place under the tavern car park. I do not know the cost of removing the existing 600 mm pipe under the car park and replacing it, so will assume that the flow down the pipe in Easement B could be split into two. One of these would be the existing 600 mm pipe and the other an additional 600 mm pipe running parallel to that for a distance that the claimant suggests to be 55 metres. The cost of that parallel 600 mm pipe would be $22,000 at a costing of $400 per metre plus contingencies. The cost of piping Easement B could therefore be $61,240 plus contingencies, though the claimant suggested a figure of $56,800 plus contingencies. I will adopt the claimant's suggested figure for the purpose of the exercise, though I express no confidence in either it or my own estimate. The costs of site works on the eastern severance are difficult to estimate with any accuracy.

[227] The cost of site works would at a maximum be $163,320 including contingencies ($98,000 filling and $65,320 piping). I do not accept the respondent's contention that these costs should be reduced by $10,000 to cater for a suggested enhancement in the claimant not being required to carry out a flood study after resumption. There was no evidence pointing to a flood study having been carried out by the respondent as part of the Easement C works that would have been suitable to the claimant's needs after resumption. Nor was there evidence that the claimant could have cost-free access to any such study

that might have been carried out. Dr Weeks' opinion was that a suitable flood study would be needed after resumption, not withstanding the completion of the Easement C works. I accept his opinion which was specific in its application to the circumstances of this case.

[228] Mr Lambert accepted as appropriate the need to add a risk factor to such costing figures. His 10% figure was for the purpose of completing the works and did not include any risk of permission being granted or risks as to the level of costing discussed above. I have already concluded that the surrender of Easement B would be a probability if its stormwater could be disposed of to the satisfaction of the respondent. The prospect of gaining permission to fill the non-fill encroachment line area is however a matter that is less clear. In the circumstances I think that a prudent purchaser would adopt a risk factor of 10% only if he was satisfied that permission would be forthcoming. I will, for the moment, assume that permission will be granted, so will settle on a gross maximum cost of $180,000 including a risk factor of about 10%.

Top Value

[229] Whether a hypothetical prudent purchaser would consider carrying out such works depends on the gain to the value of the retained land overall. Mr Lambert put that value at $43 per m² overall. I have decided that this overlooks some points raised by Mr Snape, particularly that the splitting of the development into two parts would result in some inefficiencies in the development, including less flexible access. Mr Snape allowed a 20% discount catering for the splitting factor and others that seem to comprise either duplication or matters I have not allowed for, such as fencing. (see [242] et.seq.)

[230] The value of the western severance is affected by the fact that access to it is required over Easement C. That feature is largely catered for by the inclusion of a cost estimate of $63,250 which includes contingencies and risk. I have found there to be a slight risk that access permission may not be granted in the preferred northern location and will discount the value of the land retained after resumption accordingly. An access risk does not apply only to the western severance as a failure to obtain permission to access the west in the preferred northern location would also impact in the east which would then be used in part as an access route. It is appropriate, therefore, that the discount for risk, such as it is, apply overall.

[231] The claimant suggested that the need for fencing Easement C and the visual effect of the drain on the western severance would reduce its value. I have rejected those suggestions. The fact that the western severance is now smaller would not, I think, reduce its value in that it remains a sizeable development lot with a regular shape. It is rear land both before

and after resumption. The eastern severance has an inferior shape after resumption which would reduce the flexibility of design and layout options available to it. On that basis the discount that applies to its top value must be greater than that applied to the western severance.

[232] Prior to the application of a discount to cater for the abovementioned issues, the top value of the western severance would be $430,470 (9,566 m² x $45 per m²) and that of the eastern severance $166,860 (3,708 m² x $45 per m²). Having regard to the abovementioned discount factors, I will adjust these values to $420,000 and $150,000 respectively.

[233] Based on these top values and employing Mr Lambert's top-down approach, but with the site costs as adjusted by me, the value of the balance parcel after resumption would be presented thus:

Exercise A

Top value of western severance	$420,000
Top value of eastern severance	$150,000
Overall top value	$570,000
Less site costs	$180,000
Net value	$390,000

[234] Now because the above site works would have produced a filled and drained site, there would be no need for the provision of a crossing of the diversion drain at a cost of $63,250. That cost would apply, however, if Easement B, the eastern strip and the low-lying land were not filled. An alternative way of carrying out a top-down approach would therefore be as follows:

Exercise B

Top value of western severance		$420,000
Cost of fill	$13,500	
Cost of crossing Easement C	$50,000	
Cost of crossing diversion drain	$50,000	
	$113,500	
Plus 15% contingencies		
Plus 10% risk		$143,600
Net Value		$276,400

A simple comparison of these two exercises demonstrates that it would be preferable to carry out the site works on the eastern severance as proposed by Mr Lambert. There are some other aspects, however, that need to be taken into account.

[235] In the case of Exercise A, what the actual costs of fill and piping would be is uncertain as is the critical question of whether permission would be forthcoming to allow filling within the non-filled encroachment line. The uncertainty as to piping costs has been catered for

in my adoption of a maximum cost and I have increased Mr Lambert's fill estimate. The risk of gaining permission to fill within the non-fill encroachment line is a factor that is difficult to take account of. There was no evidence to indicate how the Council might address this question in the particular circumstances that applied after the resumption and the construction of the Easement C drain. Nevertheless, it is tolerably clear to me that a hypothetical prudent purchaser would entertain the prospect of permission being granted.

[236] On that basis then and assuming the floor price for the after resumption land to be $276,400 in accordance with Exercise B, a *Spencer* type transaction could be assumed to take place at a higher figure, given the potential gain demonstrated in Exercise A. Given my view as to the prospect of gaining permission to fill within the non-fill encroachment line, the price would, I think, be substantially higher than is revealed in Exercise B.

[237] Now Exercise B does not include any value for the eastern severance. If one views the eastern severance as part of the whole of the retained land after resumption and assuming for the moment that its independent development potential is minimal or highly uncertain, it nevertheless offers some potential for use in conjunction with the western severance by way of the provision of car parking, landscaping and open storage. Its use for such purposes would require less fill than was the subject of discussion above; would therefore be less expensive to develop and would, presumably, attract less risk of approval to fill being granted. It seems similar in that respect to the low-lying land on Mr Snape's Sale 7 (see paras [94]-[95]).

[238] The eastern severance lends itself, at the least, to providing most of the parking that would be required for the development of the western severance. There is one disadvantage in that approach, that being that there would be some disruption to the ease of use of the site. That is a disadvantage that needs to be taken into account, however it has a positive feature in that it allows the western severance to be developed more intensively than if it were a stand-alone site. I do not accept the claimant's submission that the western severance faces additional costs for loss of land for parking, road and landscaping. Not only is here no direct evidence of that, but it disregards the potential that lies in the eastern severance.

[239] As part of the balance parcel whole, the eastern severance therefore would add a value to that of the western severance that value being also influenced by the possibility that it could be filled and Easement B piped and filled also. There is no precise way of ascertaining that value that was revealed to me. Nevertheless, it is an aspect that I think a prudent purchaser would take into account.

[240] On that basis Exercise B would be adjusted by the inclusion of a value for the eastern severance.

[241] My reasoning has led me to a figure of $340,000 for the value of the claimant's land after resumption. That figure accords with what I have said above. It assumes a value for the eastern severance for inclusion in Exercise B at about $17 per m². That figure sits comfortably, I think, with the development value of the western severance. It is also consistent with Mr Snape's Sale 4 discussed in para [90]. The value of the eastern severance must be higher given its development potential. It represents a risk factor of $50,000 on the Exercise A approach in para [233] which leans in favour of the claimant given the state of the evidence concerning filling below the non-fill encroachment line after resumption.

Fencing

[242] The claimant claims $11,410 on the basis that it now has to fence Easement C for the safety of the developed site. The respondent's position on this question is that as there would have been a requirement for the construction of the developer's drain before resumption, any need to fence would be the same before as after. In any event the respondent submits there would be no need to fence a drain of the type proposed. An example of such an unfenced drain was provided in the form of the development at Labrador referred to earlier.

[243] I accept that neither the developer's drain nor Easement C would need fencing. They are broad based drains and flow into another broad based drain to the north which is not fenced and is located in parkland open to the public.

[244] The respondent has provided some fencing within Easement C at the headwalls to the culvert coming from the car park area. Such fencing is needed because of the steep drop created by those headwalls. I observe in passing that similar fencing would not appear to be required on the developer's drain as it would have been designed to take overland flow, thus obviating the need for a culvert and headwall.

[245] The claimant did not take up and lead evidence supporting Mr Snape's suggestion that the resumption would lead to higher premiums for public liability insurance cover.

Conclusion

[246] Compensation for loss of land is therefore determined as follows:

Before value	$450,550
After value	$340,000
	$110,550

Orders

1. I order that the respondent pay to the claimant compensation in the amount of One Hundred and Ten Thousand Five Hundred and Fifty Dollars ($110,550).

2. In the exercise of the discretion granted under s.28, *Acquisition of Land Act 1967*, I order that interest be paid by the respondent to the claimant on the amount of One Hundred and Ten Thousand Five Hundred and Fifty Dollars ($110,550) from 22 March 2002 at a rate of 5.5 per cent per annum up to and including the date upon which final payment of compensation is made.

RP SCOTT

MEMBER OF THE LAND COURT