

LAND COURT OF QUEENSLAND

CITATION: *GPT RE Limited (as responsible entity) & Anor v Department of Natural Resources and Water* [2009] QLC 0078

PARTIES: GPT RE Limited (as responsible entity)

- and -

Multiplex Property Funds Management Limited (as responsible entity)
(applicants)

v

Chief Executive, Department of Natural Resources and Water
(respondent)

FILE NO: AV2007/0560, AV2007/0571 and AV2007/0561

DIVISION: Land Court of Queensland, General Division

PROCEEDING: Appeals against annual valuations under the *Valuation of Land Act 1944*

DELIVERED ON: 2 June 2009

DELIVERED AT: Brisbane

HEARD AT: Brisbane

MEMBER: Mr RS Jones

ORDERS:

- 1. Appeals AV 2007/0561, AV2007/0560 and AV2007/0571 are allowed.**
- 2. The unimproved value of Lot 2 on Registered Plan 157971 as at 1 October 2006 is determined in the amount of Forty-eight Million Two Hundred and Eighteen Thousand Dollars (\$48,218,000).**
- 3. The unimproved value of Lot 30 on Registered Plan 204762 as at 1 October 2006 is determined in the amount of One Hundred and Eleven Million Six Hundred and Eighty-eight Thousand Dollars (\$111,688,000).**

CATCHWORDS:

STATUTES – CONSTRUCTION AND INTERPRETATION OF LEGISLATION – Determination of whether existing approvals associated with improvements on the land add value to the land pursuant to s.3(2B) of the *Valuation of Land Act Qld 1944* – consideration of whether or not infrastructure credits associated with previous building works carried out on the land add value to the land pursuant to s.3(2B) of the *Valuation of Land Act Qld 1944* as causing an increase in the value of the land that has happened in connection with a development approval, other approval or authority – treatment of infrastructure credits under s.3(1)(b) of the Act.

REAL PROPERTY – VALUATION OF LAND – Reduction in value of land encumbered by an easement limiting flexibility of development on the land.

VALUATION OF LAND – SALES EVIDENCE – Application of sales – consideration given to hypothetical maximum development permitted on subject land and sales – sale of land after valuation date accepted as evidence of value – relevance of sales of significantly smaller parcels of land – treatment of sale affected by existing tenancy and demolition costs.

Valuation of Land Act Qld 1944, ss 2, 3, 6 and 33.

Integrated Planning Act Qld 1997, ss 1.4.1 – 1.4.5, 3.5.15 and Schedule 10.

Perpetual Trustee Company Ltd v Chief Executive, Department of Natural Resources and Mines [2006] QLC 0017 (Unreported decision of Land Court)

AMP Life Limited & Others v Department of Natural Resources and Mines [2002] QLC 099 (Unreported decision of Land Court)

Leichhardt Municipal Council v Seatainer Terminals Pty Ltd [1981] 48 LGRA 409

PT Limited & Westfield Management Ltd v Department of Natural Resources and Mines [2007] QLAC 0077 (Unreported decision of Land Appeal Court)

Kent Street Pty Ltd & Ors v Department of Natural Resources and Mines [2008] QLAC 0221 (Unreported decision of Land Appeal Court)

Fraser v The Irish Restaurant and Bar Company Pty Ltd [2008] QCA 270 (Unreported decision of Court of Appeal of Queensland)

Brown v Rezitis (1970) 127 CLR 157

PH Clough v The Determination of the Valuer-General, Shire of Caboolture (80-237) 8 QLCR 70

The Valuer-General v Queensland Club (1991) 13 QLCR 207

Galli Developments (Qld) Pty Ltd v Department Natural Resources (1997) 17 QLCR 205

Riverside Drive Estate Pty Ltd v Valuer-General (1988 –

89) 12 QLCR 165
Schokman v Chief Executive, Department Natural Resources (1998) 19 QLCR 386
Morrison v Federal Commissioner of Land Tax (1914) 17 CLR 498

APPEARANCES: Mr R Traves SC with Mr R Anderson of Counsel instructed by Clayton Utz Lawyers for the applicants
Mr P Flanagan SC with Mr E Morzone and Ms J Brien of Counsel instructed by Crown Law for the respondent

Background

[1] The applicants have appealed against the assessment of the unimproved value assigned to their land by the respondent, the Chief Executive, Department of Natural Resources and Water. The relevant date of valuation is 1 October 2006 and the sites are located in the central business district of Brisbane. The appeals concern the following properties:¹

Applicant	Property Location	Appeal Number
GPT RE Limited	123 Eagle Street	AV2007/0560, AV2007/0571
Multiplex Property Funds Management Limited	10 Eagle Street	AV2007/0561

[2] The unimproved values originally assigned to the subject properties were \$137,000,000 (123 Eagle Street), and \$48,000,000 (10 Eagle Street). However, at the hearing of the appeals the respondent did not seek to defend the valuations as issued but, relying on the advice of Mr D Hill, a registered real estate valuer contended for the following valuations: \$140,890,000 (123 Eagle Street),² and \$51,090,000 (10 Eagle Street).³ At the conclusion of the hearing of the appeals the respondent contended for the following figures: \$123,450,000 and \$50,025,000 respectively.⁴ These figures are generally in accordance with Mr Hill's further valuations of the sites.⁵

[3] Relying on the advice of Mr G Jackson, a registered real estate valuer, the applicants contended for the following figures: \$82,500,000 (123 Eagle Street)⁶ and \$34,770,000 (10 Eagle Street).⁷

[4] 123 Eagle Street and 10 Eagle Street are located within the major commercial precinct sometimes referred to as the "Golden Triangle". This precinct is, broadly speaking,

¹ The real property descriptions of the subject properties are Lot 30 on RP204762 and Lot 2 on RP157971 respectively. Both properties are located in the parish of North Brisbane, county of Stanley.

² Exh.14.

³ Exh.13.

⁴ Respondent's written submissions at para [309].

⁵ Exh.45.

⁶ Exh.10.

⁷ Exh.9.

bounded by the Brisbane River, Queen Street, Edward Street and Margaret Street between Edward Street and the River. 123 Eagle Street is located adjacent to the Brisbane River and, located on the land is the prominent and prestigious commercial building known as the Riverside Centre. 10 Eagle Street is situated on the opposite side of the road to the south west of 123 Eagle Street. It also accommodates a prestigious commercial building, AMP Place. 10 Eagle Street is, generally speaking, a triangular shaped island bounded by Eagle Street, Market Street and Charlotte Street.

[5] Often in appeals under the *Valuation of Land Act 1944* (VLA) the valuation issued by the respondent has the benefit of the statutory presumption of correctness provided by s.33 of that Act. That is not the case here. In these appeals the only valuation evidence before me is the evidence of Messrs Hill and Jackson. In circumstances where the only probative evidence contradicts the valuations appealed against the statutory presumption of correctness will not apply.⁸

[6] In these appeals both valuers agreed that the subject sites should be valued in accordance with s.3(1)(b) of the VLA. Section 3 relevantly provides:

3 Meaning of *unimproved value*

- (1) For the purposes of this Act— *unimproved value* of land means—
- (a) ...
 - (b) in relation to improved land—the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that, at the time as at which the value is required to be ascertained for the purposes of this Act, the improvements did not exist.
- (2) ...
- (2A) The assumption mentioned in subsection (1), definition *unimproved value*, paragraph (b) is limited to the notional removal of the improvements only as at the time of valuation.
- (2B) For subsections (1) and (2), the unimproved value of land includes any increase in the value of the land that has happened in connection with—
- (a) a local planning instrument; or
 - (b) a development approval or other approval or authority under an Act, other than a hotel licence, relating to the land or an improvement of the land.
- (2C) Nothing in subsection (1) or (2) requires an assumption, in relation to improved land, that the improvements have never been made.
- (3) ...
- (4) Notwithstanding anything contained in this section, in determining the unimproved value of any land it shall be assumed that—
- (a) the land may be used, or may continue to be used, for any purpose for which it was being used, or for which it could be used, at the date to which the valuation relates; and
 - (b) such improvements may be continued or made on the land as may be required in order to enable the land to continue to be so used;
- but nothing in this subsection prevents regard being had, in determining that value, to any other purpose for which the land may be used on the assumption that any improvements referred to in subsection (1) had not been made.

⁸ *Perpetual Trustee Company Limited v Department of Natural Resources Mines and Water* [2006] QLC 0017 at paras 22-24; *AMP Life Limited and Others v Department of Natural Resources and Mines* [2002] QLC 0099 at paras 26-27 (unreported decisions of the Land Court).

[7] The term “development approval” in s.3(2B) has the same meaning as that term when used in the *Integrated Planning Act 1997* (IPA) which is:⁹

“**development approval**” means a decision notice or a negotiated decision notice that —

- (a) approves, wholly or partially, development applied for in a development application (whether or not the approval has conditions attached to it); and
- (b) is in the form of a preliminary approval, a development permit or an approval combining both a preliminary approval and a development permit in the one approval.....”

[8] These appeals were heard in conjunction with two other CBD sites located at 239 George Street and 69 Ann Street. The evidence in one appeal was evidence in the others. The hearing of all the appeals commenced 3 March 2009 and concluded on 14 April 2009 when submissions were finalised.

[9] Appeals concerning 5 further CBD properties, referred to as the “CBD 3” appeals, which all have the same relevant date of valuation (1 October 2006) are set to commence 16 June 2009 and are likely to occupy 15 Court sitting days.

[10] In circumstances where one of the “CBD 3” appeal properties is located within and three are located in very close proximity to the so-called “golden triangle” I considered it desirable to hand down my decision concerning these appeals as quickly as was practicable.

[11] Before proceeding further I should also say something about Mr Hill’s knowledge of the Brisbane central business district. It is fair to say that there was a fairly searching cross-examination about his knowledge of the subtleties of this market. During the course of this cross-examination, often without the benefit of access to maps or plans, Mr Hill was pressed on a number of matters and, in particular his knowledge of various precincts within the CBD area including the so-called legal and government precincts and the prestigious commercial precinct referred to as the “golden triangle”.

[12] While I accept that Mr Jackson appeared to have a more detailed and perhaps even a more sophisticated knowledge about some aspects of the Brisbane CBD, I do not accept that there is any reason for discounting the weight that ought be given to Mr Hill’s evidence when compared to that given by Mr Jackson because of these impressions.

Highest and Best Use

[13] The valuers agreed that the highest and best use for each of the sites as at the date of valuation was “commercial office development”.¹⁰ As the evidence evolved it became clear that this highest and best use included the potential for some retail component, at least at ground floor level. The nature and extent of the retail potential for each site was largely

⁹ Section 2 VLA and Schedule 10 *Integrated Planning Act 1997*.

¹⁰ Joint statement of valuers – Exh.15A p.1.

dependant on locational issues and, in particular, the volume of likely pedestrian traffic past and/or through the site.

The Sales Evidence – An overview

[14] In arriving at their respective valuations each of the valuers had regard to sales of four CBD properties. They were 333 Ann Street, 40 Elizabeth Street, 110 Mary Street and 480 Queen Street.

[15] In respect of the first three sales there is no dispute about the dates on which they occurred. They are 6 July 2006,¹¹ 8 March 2006 and 17 July 2006. In respect of the 480 Queen Street sale, Mr Jackson was of the opinion that it occurred on 28 December 2005. Mr Hill on the other hand formed the opinion that the sale occurred on 2 May 2006. Mr Jackson adopted the December 2005 date based on what he described as a put and call option. Mr Hill selected the 2 May 2006 date based on the fact that that was the date on which the parties entered into an actual contract for sale. In this context Mr Jackson also noted the 2 May 2006 date as being the date that the deposit was paid and the contract was entered into by the parties.¹² Having regard to the evidence regarding this transaction I have reached the conclusion that the best evidence is that the appropriate date to be adopted for this sale is 2 May 2006.

[16] Mr Hill also had regard to the sale of another CBD property located at 42-60 Albert Street. While there was initially some debate between the valuers about the date on which this sale occurred, the date of 2 April 2007 adopted by Mr Hill was eventually agreed to by Mr Jackson.¹³ Mr Jackson considered that this sale was not reliable evidence of value because it occurred some six months after the relevant date of valuation (1 October 2006) at a time when the CBD real estate market, according to him, was undergoing rapid market growth. In his evidence in chief, Mr Jackson stated his reason for rejecting this sale in the following terms:

*“the reason is because the market conditions prevailing moving into 2007 were quite different to those prevailing at the date of valuation. And that is evidenced by the levels of values being paid for sites in 2007 in what in my opinion was a very rapid market movement that occurred in early 2007 leading through that particular year”*¹⁴

[17] In respect of the sales at 333 Ann Street, 40 Elizabeth and 110 Mary Street the valuers agreed that these sales, when properly analysed, reflected a rate per square metre of \$7,100,

¹¹ Initially Mr Hill, the valuer for the respondent, was of the opinion that this sale occurred in June 2006, however for the purposes of these appeals, the respondent was prepared to proceed on the basis that the sale did occur 6 July 2006 (respondent’s written submissions at para 85).

¹² For example Exh.9 at p.19.

¹³ See Exh.15A- Joint statement of the valuers at page 2.

¹⁴ T.28 L.17 224.

\$7,900 and \$8,300 respectively. The valuers also agreed that when properly analysed the sale at 42-60 Albert Street reflected a rate per square metre of \$14,000.¹⁵

[18] As I understand his evidence, the basis for Mr Jackson reaching the conclusion that the 42-60 Albert street sale should not be considered reliable evidence of value were the sales of nearby properties located at 30 Albert Street and on the corner of Alice and Albert Streets. According to Mr Jackson, the 30 Albert Street property was sold in September 2007, the property on the corner of Alice and Albert Streets in February 2007 and the 42-60 Albert Street, as agreed, in April 2007. These sales, according to Mr Jackson, proved the existence of a significant change in the Brisbane CBD real estate market between 1 October 2006 and April 2007. In this context Mr Jackson stated:

“The first sale in February 2007 reflects an analysis of in excess of \$11,000 square metre of site area. The further two sales referred to reflect an analysis of approximate \$14,000 per square metre of site area. These sales clearly reflect a superior level of value to that prevailing in 2006. The sale in February 2007 (Corner Alice and Albert Streets) reflects a 25% increase in the two month period prior to taking up of an option agreement in April 2007 (42-60 Albert Street) for a similar sized corner site in the same locality of the city.”¹⁶

[19] Mr Jackson’s evidence on this issue was unconvincing. Both valuers were in general agreement that through 2006 to the date of valuation the market was increasing, on average, at a rate between 3.5% per month (per Mr Jackson)¹⁷ and 3.75% per month (per Mr Hill).¹⁸ For the purposes of resolving any further debate about this issue the respondent was prepared to proceed on the basis of an average increase of 3.625% however, no such concession was made by the applicants. Neither of the valuers was seriously challenged about their estimates of the rate of market growth. Further, it is clear that neither valuer was contending for an exact figure. For example Mr Hill arrived at his figure of 3.75% per month based on, among other things, sales and resales of development sites and improved sales. These different market segments revealed a range of increases of between 3% and 12.5% per month. Based on this information Mr Hill decided to “adopt” an increase of 3.75%.¹⁹ A review of the valuations carried out by Mr Jackson failed to reveal exactly how he arrived at his average growth rate of 3.5%. However, it is tolerably clear to me that he, like Mr Hill, did the best he could with the evidence available to him when deciding to “settle” on the rate of 3.5%.²⁰ In circumstances where it is clear that both valuers were adopting an estimate based on imprecise data, I have decided that, consistent with the

¹⁵ Exh.15B- Further joint report of valuers.

¹⁶ See for example Exh.9 at p.21. See also T.29 L.1 – L7, T.36 L.17-27 and T.37 L.8-L.16.

¹⁷ T.30 L.42.

¹⁸ See for example Exh.14 at p.18.

¹⁹ See for example Exh.14 at p.18.

²⁰ T.30 L.42.

submissions made on behalf of the respondent, it is reasonable to proceed on the basis of an average rate of increase of 3.625% up to the date of valuation.

[20] This rate is to be contrasted with the rate of growth contended for by Mr Jackson of in the order of 12.5% per month for the first few months of 2007.

[21] It is clear from his valuation reports that the primary basis for Mr Jackson reaching his conclusions about growth rates in 2007 is the comparison of the sale on the corner of Alice and Albert Streets and the sale of 42-60 Albert and, to a lesser extent, the sale of 30 Albert Street. However, it is equally clear that his analysis of these sales was materially flawed. In dealing with the property on the corner of Alice and Albert Streets, Mr Jackson proceeded on the basis that it was purchased by a development company in February 2007.²¹ That was not correct. As it transpired the acquisition of this property required the company to purchase over time a number of individual units from an apartment building known as “*The Carrington*”, together with a vacant parcel of land located at 23 Alice Street.

[22] The vacant land was purchased on 21 December 2006. In respect of the individual units, the evidence is to the effect that the company acquired a significant number of these in late 2006 but some as late as 2008. A negotiation process extending over some 18 months.²² The sale of the property located at 30 Albert Street involved a similar exercise with the owners of units in the apartment building known as “*Camelot Court*”. These negotiations apparently took place from about March 2006 into 2007. Most of the contracts occurred at various dates through 2007.²³ Mr Jackson agreed that his recorded date of sale for 30 Albert Street, September 2007, was wrong as was his recorded sale date of February 2007 for the Alice and Albert Street property. In respect of the latter, Mr Jackson said that the sale date should have properly been recorded as “*from a range of dates from essentially late 2006 to 12 September 2008*”.²⁴ Mr Jackson conceded that his assertion that this sales evidence reflected a 25% increase in the two month period between February 2007 and April 2007 was incorrect.²⁵ Notwithstanding him conceding the errors made in his analyses of these sales, Mr Jackson continued to try and justify his adoption of an average rate of increase in the Brisbane CBD real estate market of about 12.5% per month. I did not find this evidence at all convincing and do not accept it. On this topic I prefer the evidence of Mr Hill to the effect that through 2006 to April 2007 (the date of the 42-60 Albert Street sale) the average rate of increase of the Brisbane CBD real estate market was in the order

²¹ See for example Exh.9 at p.21.

²² See generally T.43 –T.44.

²³ See T.45 L.15-L.46 and Exh.28.

²⁴ T.50 L.7–L25.

²⁵ T.51 L.28-L33.

of 3.75% per month.²⁶ But, for the reasons expressed above I will adopt an average rate of 3.625% per month.

[23] In circumstances where there is no justification for Mr Jackson's position that there was a jump in the market growth rate of nearly 9% (from 3.625% to 12.5%) per month in early 2007 there is no basis for rejecting the 42-60 Albert Street sale on the basis of its date of sale. The probative value and application of the sale to the subject sites is dealt with below.

Hypothetical Maximum Development Potential

[24] Before dealing specifically with the application of the sales evidence it is necessary to deal with a matter raised by Mr Jackson concerning the development potential of the 480 Queen Street sale. In these appeals Mr Jackson expressed the opinion that this sale enjoyed potential for a level of development intensity materially superior to that enjoyed by the subject sites and, in particular, in comparison to 10 Eagle Street. If this were so then to bring this difference into account there would have to be some discounting of the subjects in comparison to this sale.

[25] According to Mr Jackson, when analysed the 480 Queen Street site revealed a development ratio (expressed in terms of gross floor area (GFA) over site area) of 20:1 whereas for 10 Eagle Street and 123 Eagle Street the respective ratios were about 10:1 and 7:1.²⁷

[26] The ratio of 20:1 was calculated by Mr Jackson by applying what had been approved over the site (exclusive of any additional land) to the area of the site. The approval in question was for residential purposes, involving a "straight residential (tower)". The residential development approved under the development approval (DA) which existed at the date of sale was never proceeded with, the purchaser intending to develop the site for mixed residential and commercial purposes.²⁸

[27] Intended development over the 480 Queen Street site has from time to time involved more than just a sale site per se. Proposals have included an adjoining site of 828m² known as the "*Dome nightclub site*" and 667m² of transferable side area (TSA) credits.

[28] The respondent submits that when this site is compared to the subject it must be on a like with like basis. I agree. That means that when comparing this sale to the subjects any other development advantages gained by the incorporation of adjoining land and/or TSA's ought be ignored. That does not mean that the potential to derive benefit from TSA's and/or amalgamation must be ignored but there is no probative evidence that the price paid for the 480 Queen Street site was influenced by this potential.

²⁶ See for example Exh.14 at p.18.

²⁷ Applicants' written submission paras 120(b), 121.

²⁸ Exh.9, p.23.

- [29] A difficulty with Mr Jackson’s approach is that it failed to properly bring into account the impact 667m² of TSA had on his calculations. Mr Jackson acknowledged that absent that 667m² of TSA, the hypothetical GFA yield of the site would be less.²⁹
- [30] The town planners retained by both sides, Ms Vigar for the applicants and Mr Brown for the respondent, agreed that the “*hypothetical maximum gross floor area under the town planning scheme*” for 10 Eagle Street was 52,155m²³⁰ and for 123 Eagle Street 147,075m²³¹. These figures were based on an agreed appropriate effective site cover (ESC) multiplier of 0.35.³² Mr Brown was asked to carry out an assessment of the hypothetical maximum GFA for the sales relied on by the valuers on the same basis. This calculation yielded a hypothetical gross floor area for 480 Queen Street (excluding adjoining land and TSA’s) of 39,885m²³³, which can be compared with the hypothetical maximum gross floor area for 10 Eagle Street of 52,155m². Because of its size, no sensible comparison in this context can be drawn between the hypothetical maximum GFA for 123 Eagle Street and 10 Eagle Street or 480 Queen Street.
- [31] According to Mr Brown, insofar as the subject sites and the primary sales relied on by me below are concerned, one held no material maximum hypothetical development advantage when compared to the others.³⁴ His evidence about this was not seriously challenged.
- [32] On balance, while I accept there is still some apparent tension between the level of residential development actually approved over the 480 Queen Street site (even allowing for the exclusion of adjoining land and/or TSA’s) and the agreed hypothetical maximum development calculations of the town planners, the best evidence is that, as at the date of valuation, there was no justification to discount the value of the subjects when compared to the 480 Queen Street sale on the basis of there being a material advantage in achievable maximum hypothetical development intensity potential. In this context I note that the valuation evidence was to the effect that the maximum hypothetical development potential was exactly that, hypothetical. Those levels were very rarely (if ever) achieved because of market/economic considerations.

Application of Sales Evidence

- [33] On the evidence before me I have reached the conclusion that the only truly probative evidence of the value of the subjects are the sales of 42-60 Albert Street and 480 Queen Street.

²⁹ T.75 L.20 – L.28.

³⁰ Exh.18, p.12, para 34.

³¹ Exh.19, p.14.

³² Exh.18, p.40; Exh.19, p.193.

³³ Exh.38, Table 1.

³⁴ T.343 L.30 – L.45; T.344 L.1-L.20.

- [34] Both valuers agree that all of the other sales are located in materially inferior locations.³⁵ The 400 George Street sale is located towards the north western fringe of the Brisbane CBD in what Mr Hill described as the legal precinct. The subjects are located towards the south eastern edge of the CBD in the prestigious “golden triangle” commercial precinct. Just how far apart this sale is in comparison with the subjects is demonstrated by the difference between Mr Hill’s analysis of this sale and his valuation of the subjects. Adopting Mr Hill’s analysis of this sale³⁶ of \$9,100/m² (including adjustments) he applies a rate of \$14,000/m² to the unencumbered areas of the subject properties. A premium of in excess of fifty percent. A similar result occurs if Mr Jackson’s analysis of this sale (adjusted for time) is compared to his rate applied to the unencumbered area of 123 Eagle Street of \$12,000/m². A smaller premium is yielded in a comparison of Mr Jackson’s analysis of this sale and the 10 Eagle Street land because he adopts the lower applicable rate of \$10,000/m². Differences of the type identified above confirm that this sale is not truly comparable to the subjects.
- [35] As to the 40 Elizabeth and 110 Mary Streets sales, not only are they located in inferior locations but they are materially smaller. The combination of inferior location and size mean, as Mr Hill correctly points out, that these sites will be developed in a way materially different to that which would occur on both of the subject sites. These two sales are not comparable. They are materially different in respect of size, location and use. In reaching this conclusion I am mindful of the fact that the 42-60 Albert Street sale is slightly further removed from the “golden triangle” precinct than the 110 Mary Street sale. This however is tempered by the fact that by virtue of its size, shape and two street frontage, the Albert Street sale has more in common with the subjects than either of these sales. More will be said about the location of the Albert Street sale below.
- [36] Turning to the 333 Ann Street sale its location, shape and size would suggest that it might be of some assistance. Unfortunately that is not the case. Adjusting for market movement between the date of this sale and the date of valuation this sale yields an analysed rate per m² of \$7,836. This rate strongly suggests to me that the sale price was probably depressed due to the presence of a long term substation lease over part of the land and the existence of some heritage listing related matters. I do not accept that the sale price might have been otherwise depressed because it was sold while the owners were in receivership.
- [37] Having regard to the matters addressed above, the four sales discussed so far are of no probative value other than to establish a base level below which the subjects could not fall.

³⁵ See for example Mr Hill’s valuation Exh.14 at p.24 (re 400 George Street), pp 25-26 (re 333 Ann Street); pp 27-28 (re 110 Mary Street) and pp 29-30 (re 40 Elizabeth Street). See also for example Mr Jackson’s valuation Exhs.9 and 10, Annexure 3.

³⁶ See for example Exh.14 at p.46.

- [38] Turning then to the Albert Street sale, the valuers agreed that it, when analysed, yields a rate of \$14,000/m². Discounting this rate to bring into account market movement between the date of sale and date of valuation, produces an applicable rate of about \$10,950/m².
- [39] The best evidence is that this sale is materially inferior to the subjects in location. According to Mr Hill it is situated in a “commercially fringe location”.³⁷ It is close to the centre of the so-called government precinct of the CBD as identified by Mr Hill. It also has the disadvantage of being listed in the flood management area of Brisbane.
- [40] That this property is materially inferior to both the subjects would usually mean that each of the subject parcels should be worth significantly more than this sale on a rate per metre basis. However, such a straightforward application of the sales evidence would ignore what was referred to from time to time by each of the valuers as the “discount for size” principle.
- [41] As I understand it, this principle in broad terms means that, all other things being generally equal, the larger the CBD site the lower the average rate per square metre a purchaser will pay for it. The principle seems to proceed on the basis that the pool of purchasers capable of acquiring and maximising development on the larger sites is much smaller than the pool of potential purchasers for smaller sites.
- [42] Proceeding on the basis of this principle, both valuers considered that, in comparing the sales to the subjects, adjustments had to be made downwards to take account of their size.³⁸
- [43] The difficulty with this principle is that all things are often not generally equal. For example, 123 Eagle Street is in the heart of the “golden triangle” on the Brisbane River. The Albert Street sale is located some distance from the Brisbane River in a fringe commercial area. Accordingly, differences in size have to be balanced against locational advantages. Further, it is clear that there is no definitive or even objectively measurable way of determining at what stage or level of size difference this principle begins to operate and to what extent.
- [44] Having regard to the evidence concerning this sale and the subjects, and, in particular the evidence of Mr Hill who dealt with this sale in much more detail than Mr Jackson, I have reached the conclusion that, even allowing for any adjustment for size, both are so superior to this sale in location that they would still attract a significantly higher dollar rate per square metre.
- [45] Turning to the 480 Queen Street sale, it is my opinion that it provides the best evidence of value. It is located on the edge of, if not partly within, the “golden triangle”, is of an area

³⁷ Exh.14 p.31.

³⁸ See for example Mr Hill, Exh.14 p.32 and Mr Jackson’s reports Exhs.9 and 10, Annexure 3.

sufficient to accommodate a significant and relatively prestigious commercial development and, like the subjects, offers the potential for river views.

[46] The valuers were in agreement that if no allowance has to be made for “holding costs” then the analysed rate/m² revealed by this sale (excluding any adjustment for market movement between date of sale and date of valuation) was \$11,625/m² and, if such an allowance was to be included then \$12,230/m².³⁹ Mr Jackson advocates for the former approach and Mr Hill the latter.

[47] This dispute arises in this way. Mr Hill contends that in analysing this sale, it is necessary to bring into account the fact that because of an existing lease and the necessity to demolish an existing building on the site, the purchaser would have to “hold” the property for a period of time before development could begin. The argument goes that the purchaser would have been prepared to pay more if he could have started development immediately following purchase. Mr Hill originally contended for a 12 month holding period. After having regard to certain concessions made by both valuers on this issue, the respondent finally contended for a period of six months.⁴⁰

[48] Before proceeding further I should make it clear that notwithstanding some of the cross-examination of Mr Hill about it, I can find no reason to go behind and depart from the valuers’ agreed analysed rate for this sale (prior to adjustments for market movement and holding costs) of \$11,625.

[49] Leaving aside the question of any holding costs for the moment but adjusting the analysed sale price to take account of market movement, this sale reveals an applicable rate/m² of \$13,740. If a further allowance was made for holding the property for a period of six months, the applicable rate would be in the order of \$14,000/m².

[50] As I have already said, the six month period relied on by the respondent represents the period that construction of a building commensurate with the highest and best use of the site as at the date of valuation would be delayed because of the existing lease (which had approximately 17 months to run after the date of sale) and demolition of the existing building on the site, which, I accept would take about three months. There is no real dispute between the valuers about the existence and term of the lease nor about the demolition period.

[51] I accept the submission made on behalf of the applicants that it is only when an existing lease actually delays development that it would be appropriate to adjust the sale. This approach is consistent with the reasoning of Sugarman J in *AG Robertson Ltd v The*

³⁹ Exh.15B p.2 - further joint statement of valuers.

⁴⁰ Respondent’s written submissions at para 77.

Valuer-General.⁴¹ According to Mr Jackson there would be no such delay because the time occupied by the existing lease and demolition would be otherwise spent on pre-development steps including putting together an appropriate team of consultants, gaining the necessary development approvals, obtaining finance and completing the building tendering process.⁴² According to Mr Jackson the lease would in fact be a benefit as it would provide some income during the pre-development period.⁴³

[52] The arguments for and against this issue advanced by the valuers are finely balanced. However, at the end of the day there is no direct evidence that the purchaser paid or the vendor was prepared to accept less than full market value because of any delays that might be caused by the existing lease and/or demolition. Nor is there any direct evidence that the price would have in any way been inflated in some way because of the existence of the lease. In the circumstances I will make no allowance for any delays in development. This results in an analysed rate of \$13,740/m².

[53] The application of this sale however is also complicated to an extent by the evidence of Mr Jackson to the effect that the price paid was inflated or included a premium because of the potential for a significant residential component being incorporated into the development of the site. The evidence is that the 480 Queen Street site is located in an area where there is more residential development than in the location of the subjects. That is not to say that there is no significant residential development in their vicinity.

[54] Mr Hill gave some evidence which, at first blush, might be seen to be supportive of Mr Jackson's view. For example, he agreed that it was reasonable to regard this sale as a residential sale,⁴⁴ that the highest and best use of the land appeared to be for a mixed commercial/residential use⁴⁵ and that as a site with mixed residential/commercial potential it was worth more than it would have been for solely commercial use.⁴⁶

[55] However, accepting this evidence on its own would fail to recognise Mr Hill's caveat that, because of its location, development of the 480 Queen Street site could not "work" unless as a combined residential/commercial project.⁴⁷ Mr Hill's evidence about this was not challenged and, as already mentioned, his opinion is consistent with the actual intentions of the purchaser of this site.

[56] Taken as a whole the evidence shows that: First, while the 480 Queen Street site is in a superior residential location to the subjects it is in an inferior commercial location. Second,

⁴¹ [1952] 18 LGR (NSW) 261-263.

⁴² See T.6 L.14-L.47, T.7 L.1-L.17, T.170-T.171.

⁴³ T.6 L.20, T.7 L.15.

⁴⁴ T.453 L.37-L42.

⁴⁵ T.454 L.45.

⁴⁶ T.456 L.30.

⁴⁷ T.455 L.10, T.456 L.22-L35.

while the subjects might not be located in an area with as much residential activity as is the 480 Queen Street site they still had potential for some residential component being incorporated into development of the sites.⁴⁸ Third, unlike the subject sites, 480 Queen Street would not accommodate, as a stand-alone project, only commercial development. What the evidence does not show is that there is any recognisable difference in the rate per square metre being paid for residential land when compared with that being paid for commercial land within the Brisbane CBD.

[57] In these circumstances I can see no sound basis for any reduction in the rate per square metre yielded by an analysis of this sale to bring into account its potential for residential development when comparing it to the subject sites. I cannot accept as reliable evidence the basis for a 10% reduction advanced by the applicants.⁴⁹ It is of some significance in this regard that Mr Jackson, in his valuations, despite making a number of adjustments in his analysis of this sale to take account of matters including delay in settlement, rent and demolition costs made no specific allowance, adjustment or discount for any residential premium that might be associated with the sale.⁵⁰ Even when comparing this sale to the other sales evidence and the subjects, while specific mention was made to a number of factors including elevation, aspect, views and level of development, no reference is made for the need to bring into account and adjust for the potential this sale had for mixed use development.⁵¹ If Mr Jackson really thought this was a matter that had to be brought into account one would reasonably expect to see it specifically addressed in his valuation reports.

[58] Accordingly, I will adopt as the applicable rate per square metre for this sale \$13,740.

10 Eagle Street

[59] In comparing the 480 Queen Street sale to 10 Eagle Street, there was much debate about whether it was superior or inferior in respect of various matters including shape, size, location (including river views); street access and exposure. While I accept that the sale is more regular in shape and is less likely to have its river views interrupted than the 10 Eagle Street site, there is no doubt in my opinion that 10 Eagle Street is a superior location overall, has superior street access and exposure and will, despite development on the opposite side of Eagle Street, still continue to have potential for some river views. On balance I have reached the conclusion that these factors tend to balance one another out and that the 10 Eagle Street site is equivalent in value, on a square metre basis, to the 480

⁴⁸ T.455 L.22-L25, T.456 L.7-L.10 per Mr Hill; T.309 L.15-L.33 per Ms Vigar re Riparian and 123 Eagle Street sites on the river.

⁴⁹ Applicants' written submissions para 118. See also T.621 L.10-L35.

⁵⁰ Exh.9 p.14 re 10 Eagle Street and Exh.10 p.17 re 123 Eagle Street.

⁵¹ Exh.9 p.23, Exh.10 p.26.

Queen Street sale. Accordingly I will adopt a rate of \$13,740/m². This rate, in my opinion, sits reasonably comfortably with the applicable rate derived from the Albert Street sale of about \$10,950/m² and my findings of fact concerning this sale.⁵²

123 Eagle Street

[60] The debate concerning the adjustments that have to be made having regard to size, location (including views) etc looms even larger for this site, than that concerning the comparison of the 480 Queen Street sale to 10 Eagle Street.

[61] The size and location of the 123 Eagle Street site might make it available to a much smaller pool of purchasers than for any of the sale sites and, for that matter, perhaps even the 10 Eagle Street site. That said, the location of this site, including its river frontage would go a long way to offsetting any disadvantage that might result because of its size. This is effectively acknowledged by the valuers when regard is had to the respective rates per square metre they apply to 10 Eagle Street in comparison to that applied to the 123 Eagle Street site.

[62] In the absence of any convincing reason to do otherwise I intend to adopt the same approach as Mr Hill and apply the same rate/m² to the unencumbered part of the 123 Eagle Street site as I have applied to 10 Eagle Street. I would note that this approach favours the applicants in that Mr Jackson applied a premium of \$2,000/m² to the 123 Eagle Street site when compared to the 10 Eagle Street site.

123 Eagle Street – Easement K

[63] The 123 Eagle Street site comprises a total area of 9,805m². Of this area, 2,184m² (about 22%) is described by the valuers as either being “burdened” or “restricted”. The source of this burden or restriction is Easement K which encumbers part of Lot 30. The purpose of the easement is to provide for “uninterrupted access of light and air”. The easement is of a triangular shape and, broadly speaking, lies within and adjacent to the eastern boundary of the site between Eagle Street and the Brisbane River.⁵³

[64] Mr Jackson discounts the value of the Easement area by about 70% to \$3,500/m². The reasons for this are summarised in his report in the following terms⁵⁴:

“in assessing the Unimproved Value, I have applied a lower rate to the easement affected area of the property, Easement K, which is 2,184 square metres in area, or 22% of the total site. I have applied a rate of \$3,500 per square metre to this area as it is restricted to development below ground and above ground to a height of RL 20.0 AHD, essentially allowing low rise, predominantly retail development fronting the boardwalk. Any development above this level is not permissible.”

⁵² At paras [38] to [44] above.

⁵³ See for example Exh.14, p.6.

⁵⁴ Exh.10, p.30.

[65] Originally Mr Hill adopted a similar level of discount. In a draft report prepared by him he initially valued the unencumbered part of the site at \$15,000/m² and the area encumbered by Easement K at \$6,000/m², a discount of 60%. The reasons for this level of discount were summarised in his draft report in the following terms:

“... the subject land area is affected by an easement, Easement K, which is triangular in shape and runs along the eastern boundary. The easement is restricted for the purposes of uninterrupted access for light and air above the plain of RL 20.0 AHD. Therefore development is limited within this area to the RL 20.0 AHD for potentially retail uses with basement car parking below. Therefore the land within Easement K is considered to have value though at a discount to full commercial value as to its limitations. For this restricted portion of land I adopt a discount of 60% of the full commercial value.”
[emphasis added]⁵⁵

[66] The reasons for Mr Jackson adopting a discount rate of 70% and Mr Hill of 60% are very similar. Mr Hill in his final report reduced the level of discount from 60% to 10%. The justification for this change is described in his later report in the following terms:

“... the subject land contains an easement, Easement K, which is triangular in shape and runs along the eastern boundary. The easement is restricted for the purposes of uninterrupted access for light and air above the plane of RL 20.0 AHD. Therefore development is limited within this area to the RL 20.0 AHD for potentially podium and/or retail uses with basement car parking below.

As per the joint planners report it states that,
‘Easement K impacts upon 2,184m² of the land above RL 20.0 AHD. However as the aim of this City Centre Local Plan GFA and ESC requirements is to encourage development to minimise ESC to 35% or less, and as 77% of the site is unconstrained above RL 20 AHD, Easement K should not adversely impact on GFA calculations above podium level.’

Easement K is not considered to limit development potential of the subject land as per the joint planner’s comments though it is recognised that the site does contain this easement on title. I therefore will discount this burdened area by 10% over the easement area.
[emphasis added]⁵⁶

[67] It seems tolerably clear to me that Mr Hill’s allowance of 10% is little more than a nominal discount for “blot on title”. This approach appears to be consistent with the oral submissions made by Mr Flanagan,⁵⁷ senior counsel for the respondent.

[68] In arriving at his discount of 70% Mr Jackson was particularly concerned with height restrictions on commercial development within the easement area. The same consideration which originally led Mr Hill to adopt a discount rate of 60%. According to Mr Hill, within Easement K “*development is limited within (the easement) area to the RL 20.0 AHD ...*”.⁵⁸ That theme remained constant throughout his draft report and his later report. The quote from the joint report of the town planners referred to by Mr Hill in his later report did not

⁵⁵ Exh.47-extract of Mr Hill’s draft report at p.39.

⁵⁶ Exh.14 p.39.

⁵⁷ T.589 L1-L5.

⁵⁸ Exh.14 p.39.

cause him to change his views on the limitations the easement placed on development within the easement area itself.

[69] To my mind Mr Hill, when he received the advice from the town planners, confused the concepts or issues of adverse impacts on gross floor area (GFA) calculations and adverse impacts on development potential within the area occupied by the easement.

[70] I accept that Easement K should not adversely impact on GFA and/or effective site cover (ESC) calculations. But that is not the end of the matter. On this issue, I accept the evidence of Mr Jackson to the affect that Easement K, in a not immaterial way, has a negative impact upon the design options available to a developer of the site. To put it another way, Easement K restricts the design flexibility which would have otherwise been available to the developer.⁵⁹

[71] However, I consider that while Mr Hill has tended to underestimate the impact of Easement K, Mr Jackson has tended to significantly overstate its impact. The Easement does not stand in isolation. While the subject land is burdened by that easement it has the advantage of Easements G and I over adjoining properties which offer protection in respect of light, air and views available to any development which might occur on the land. In this context I accept the respondent's submissions that any prudent purchaser of the site would look at the detriments and benefits offered by the existence of all of these easements and not just the negatives associated with Easement K.

[72] Also, in addition to the evidence that Easement K would not impact on GFA and ESC calculations, the evidence of the town planners strongly suggests that any development of the land in conjunction with the development of surrounding sites, even with Easement K in place, would be likely to result in a reasonable or similar outcome if not an "*equivalent result*".⁶⁰

[73] The evidence on this topic leads me to conclude that while development flexibility of the site is limited by Easement K it is not limited to the extent contended for by Mr Jackson. Mr Hill has understated the detrimental impact of Easement K but not to the extent that Mr Jackson has overstated it.

[74] In circumstances where there is simply insufficient evidence for me to be precise about this issue, I consider that the evidence, justifies a discount of 30%. In my opinion, a discount of this magnitude strikes a fair balance between the loss of development flexibility caused by Easement K and the considerable development potential still available on the site. I

⁵⁹ Evidence of Mr Jackson, Exh.10 p.30, T.110 L.27-L.35, T.118 L.40 to T.120 L.40.

⁶⁰ See for example evidence of Ms Vigar at T.296 L.35 to T.297 L.8; Mr Brown's further town planning report, Exh.36 paras 37 to 45.

acknowledge that the adoption of a 30% discount involves a degree of applying a “best guess” but sometimes that is the best the Court can do on the evidence before it.⁶¹

[75] On more than one occasion it was submitted on behalf of the applicants that any allowance for Easement K should not be looked at in isolation but as a part of the overall value of the site. According to the applicants “*the treatment of easement K has ultimately to be tested by the value derived for the site as a whole*”.⁶² In this context, it was asserted that Mr Hill’s allowance for the easement resulted in an overall reduction in the value of the site by only some 2.22%. It was submitted that this reduction is far too low and that the reduced site value of about 16% resulting from Mr Jackson’s approach was more realistic.⁶³ According to my calculations, applying the rates determined by me for the unencumbered and encumbered parts of the subject land the reduction, on an overall site basis, is in the order of 7%. This level of reduction does not strike me as being either unrealistically too high or too low.

[76] By reference to my determination concerning the unencumbered value of the land of \$13,740/m² the value for that area encumbered by Easement K is \$9,618/m².

Preliminary Calculations

[77] Before any adjustments which are said to be required pursuant to s.3(2B) of the VLA are considered, the unimproved value of 10 Eagle Street would be \$47,773,980 (adopt \$47,774,000) made up as follows:

$$3,477\text{m}^2 \times \$13,740/\text{m}^2$$

[78] Before carrying out a similar exercise for the 123 Eagle Street site, appropriate allowance has to be made for the value of the existing site works or site improvements which were in place as at the date of valuation. Aided by the advice of quantity surveyors the replacement cost of these site improvements was agreed in the amount of \$10,250,000 in round figures. The valuers, adopting this figure and then making further allowances including for interest on construction costs, rates, land tax and site holding costs, arrived at a total amount that had to be deducted from the notional unimproved value of the land to bring into account the full value of the site improvements. Mr Jackson valued the site improvements at about \$14,200,000⁶⁴ and Mr Hill at about \$15,450,000.⁶⁵ As I understand it, the difference between the two valuers on these figures is primarily as a consequence of the respective values attributed to the land. Because Mr Hill has a higher land value component his

⁶¹ *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd & Anor* [1981] 48 LGRA 409 at 434 per Hope JA; cited with approval by the Land Appeal Court in *PT Limited & Anor v Department of Natural Resources and Mines* [2007] QLAC 0077 at para 104.

⁶² Applicants’ written submission at para 46.

⁶³ Applicants’ written submissions at para 47.

⁶⁴ Exh.10 p.31 (as amended).

⁶⁵ Exh.45 and respondent’s written submissions at para 37.

allowance for, by way of example, site holding costs are higher than that which would be produced on Mr Jackson's figures. Thus, the higher total value of the site improvements by Mr Hill when compared to that of Mr Jackson.

[79] Having regard to the level of difference between the valuers on this issue and the respective differences between the valuers and myself concerning the value of the land, I intend to adopt a value of \$14,900,000 for the site improvements made up of \$10,250,000 (replacement value of the improvements) plus \$4,650,000 for rates, land tax and holding costs etc.

[80] Accordingly, the notional unimproved value of 123 Eagle Street is \$110,818,252 (rounded to \$110,818,000) made up as follows:

• Unrestricted area: 7,621m ² x \$13,740/m ²	=	\$104,712,540
• Restricted area: 2,184m ² x \$9,618/m ²	=	\$ 21,005,712
		\$125,718,252
• Less value of site improvements:		\$ 14,900,000
		<u>\$110,818,252</u>

Infrastructure Credits, Development Approvals and s.3(2B) of the VLA

[81] As already identified, pursuant to s.3(2B) of the VLA the unimproved value of land includes any increase in the value of the land that has happened in connection with a development approval, other approval or authority relating to the land or improvement thereon.

[82] Both of the subject sites are heavily improved with high quality commercial buildings, AMP Place and the Riverside Centre at 10 Eagle Street and 123 Eagle Street respectively.

[83] According to Mr Hill, in respect of 10 Eagle Street, "... *the subject land had the added value and benefit of an authority under the Integrated Planning Act 1997 to continue lawfully using the land for the purposes of development.*"⁶⁶ According to Mr Hill this site also benefits in value because of Brisbane City Council "*infrastructure credit for the subject property ...*".⁶⁷ Development on this site commenced in 1978.

[84] Turning to 123 Eagle Street, according to Mr Hill, development of this site was completed in 1986 and "*as at the date of valuation the subject property was considered to have a development approval in place due to the existence of the current use on the land and its approval in 1984*". As was the case for 10 Eagle Street, Mr Hill considered that the added value of the current use rights and the 1984 "approval" comprised of two elements. The

⁶⁶ Exh.13 p.35.

⁶⁷ Exh.13 p.36.

value of existing infrastructure credits and the value of the “*development approval*” in its own right.⁶⁸

[85] Relying on s.3(2B) and, to a lesser extent, on observations of the Land Appeal Court in *Kent Street Pty Ltd & Ors v Department of Natural Resources and Mines*,⁶⁹ the respondent submits that the value that the relevant authority and/or approval gives to the land, including any associated infrastructure credits, has to be included in the assessment of the unimproved value of the land.

[86] The applicants do not dispute that the added value of a development approval as defined for the purposes of s.3(2B) (provided such value is proved) should be brought into account pursuant to that section. However, they contend that in the circumstances of these appeals there is no probative evidence that the existing approvals do in fact add value.

[87] The applicants do dispute that infrastructure credits are caught by s.3(2B). As I understand the submissions made on their behalf that is so for three reasons. First, as at the date of valuation, such credits do not add value because they are dependant upon the occurrence of a future event, namely development of the land and do not otherwise arise “*in connection with*” a relevant approval or authority.⁷⁰ Second, the beneficiary of the credits will be the party responsible for the development who may or may not be the registered proprietor.⁷¹ Third, the credits only apply to water and sewerage headworks charges which may never materialise as future development of the land may not require such works to be undertaken.⁷² It is also submitted on behalf of the applicants that even if such credits are caught by s.3(2B) their value is considerably less than contended for by Mr Hill.

[88] I do not accept the second or third submission referred to above advanced by the applicants. The crucial question is whether or not, for the purposes of s.3(2B), there is a sufficient connection or nexus between the approvals and/or authority and the increase in the value of the land. It is not necessary for the owner of the land to be the eventual beneficiary of the credits. While the possibility of a future development approval not requiring sewerage and headworks cannot be discounted entirely it is extremely unlikely and, not a relevant consideration in the circumstances of these appeals.

[89] As to the first submission, for s.3(2B) to operate the increase in the value of the land must have crystallised and be in place as at the date of valuation. If not, it cannot be said that the increase in value “has happened”. Whether or not this has occurred is a question of fact.

⁶⁸ Exh.14 at p.36.

⁶⁹ Unreported decision of LAC, [2008] QLAC 0221 at para [90].

⁷⁰ T.645 L.10-L27: Applicants’ written submission, paras 166, 168 and 175.

⁷¹ Applicants’ written submissions, para 166.

⁷² Ibid, para 167.

- [90] The increase in the value of the land must also have happened “*in connection with*” the specified approvals or authority under an Act. This expression is often referred to as having wide meaning or import but must be read in the context in which it appears.
- [91] In respect of employment legislation Barwick CJ considered that the connection had to be close or real.⁷³ In *Fraser v The Irish Restaurant & Bar Company Pty Ltd*,⁷⁴ after reviewing a number of cases, Muir JA, concerned with contractual construction, considered there must be a “sufficient nexus”.
- [92] That the right to the credits has not crystallised as at the date of valuation and, in that sense has not “happened”, is not to the point. The issue is whether, at the date of valuation, the potential or opportunity to derive a benefit from the credits adds value to the land. It is the increase in value that has to have “happened” at the relevant date not the actual event that gives rise to the right to secure the benefit of the credits.
- [93] The evidence of Mr Hill is that the infrastructure credits are a “*derivative of the Development Approval*”.⁷⁵ Elsewhere in his valuations Mr Hill refers to the authorisation for or associated with the development relevant to the subject sites as if they were development approvals for the purpose of s.3(2B) of the VLA. The evidence on this topic is that they are not. Section 2 of the VLA incorporates into that Act the meaning of the words “*development approval*” as defined in the IPA. That definition commences with the words “*development approval means a decision notice or a negotiated decision notice that....*” That there is a decision notice is a prerequisite to determining whether or not a development approval in fact exists. The words “*decision notice*” are not defined in the VLA. It is therefore appropriate in deciding what meaning to give to those words to enquire if and how they are defined in the IPA. Those words are defined in the IPA in a very specific and prescriptive way.⁷⁶ It is tolerably clear that when the term “*development approval*” is used in s.3(2B) of the VLA it is meant to refer to an approval which would be capable of being described as a development approval under the IPA. That there is no decision notice, negotiated or otherwise, in the circumstances of these appeals is not surprising given the date development on these sites commenced. As Mr Brown points out, approvals and permits in respect of these developments were given under an entirely different planning regime. That, however, is not the end of this matter as “*other approvals*” or “*authorities*” under an Act for the purposes of 3(TB) might exist.

⁷³ *Brown v Reztis* (1970) 127 CLR 157 at 165.

⁷⁴ [2008] QCA 270 (unreported decision of CA) paras [40]-[44].

⁷⁵ Exhs.13 and 14 at p.36.

⁷⁶ Schedule 10 and s.3.5.15 of IPA.

[94] It was submitted on behalf of the applicants that any increase in the value of the land resulting from these credits depended on two events. First, the earlier payment of water and sewerage headworks contributions. Second, a subsequent approval for development. According to the applicants, understood in that way, the previous or existing approval is of no particular relevance⁷⁷ in the circumstances of these appeals.

[95] Under the readings “*in connection with*” and “*relating to the land or improvement of the land*” the following submissions are made for the respondent.⁷⁸

“269 The lawful use rights enjoyed by the owners and occupiers of the subject lands as at the date of valuations could only arise either pursuant to a DA (within the meaning of s3(2B) of IPA), or alternatively, pursuant to lawful continuing rights under ss1.4.1 to 1.4.5 of IPA (and equivalent provisions in the predecessor Local Government (Planning and Environment) Act 1991 and Local Government Act 1936). To the extent that the lawful rights were enjoyed pursuant to the protection afforded by ss1.4.1 to 1.4.5, the protected rights are “authorised by an Act” within the meaning of s3(2B) of the Act.

270 In both cases, the increase in value that has happened in connection with those lawful rights is to be valued under s3(2B) of the Act. The Court need not concern itself with whether the lawful use rights attached to the land or some other part of the premises including the building, such that if the building is notionally removed, the lawful use right continues or not. Section 3(2B) alone requires such increase in value to be assessed as part of the unimproved value.

271 Ms Vigar’s suggestion also ignores the words “relating to the land or an improvement of the land” in s3(2B)(b). The words “relating to...an improvement” can only be construed presupposing the earlier existence of the improvement, at least for the purposes of that subsection. Those words, and the pre-existence of the improvement, are consistent with the words “has happened”. The clear intention is that any increase in the value of the land that has in fact happened and which existed in relation to or in connection with a DA relating to the earlier existing but notionally removed improvement must be taken into account. This may effect a change in the law, but as stated, this was the intention of the legislature by its enactment of s3(2B) and, as stated above, has been so acknowledged by the LAC as a change to the law.”

[96] I accept that the lawful use rights identified and relied on by the respondent relate to the land or an improvement on the land. But, as the heading for that part of the IPA, *Existing uses and rights protected* suggests, ss 1.4.1 to 1.4.5 are concerned with protecting the status of pre-existing lawfully constructed buildings and lawful user/occupier rights. Neither these rights under the IPA nor the original approvals or authorities underpinning them brought into existence, created or, as I understand it, even protect the right to the benefit of the infrastructure credits in issue.

⁷⁷ Applicants’ written submissions, para 175 at p.60.

⁷⁸ Respondent’s written submissions, paras 269, 270, 271.

- [97] I have not been referred to any evidence that shows that any increase in the value of 10 Eagle Street resulting from the infrastructure credits happened in connection with an approval or authority relating to the land.
- [98] While I accept the proposition advanced by the town planners to the effect that, but for the initial approval and development of AMP Place the infrastructure credits would not exist or have “arisen”,⁷⁹ that is not to the point. There must be a sufficient nexus between those credits and an approval and/or authority for the purposes of s.3(2B). For the purposes of that section the approval and/or authority must be one “*relating to*” the land or improvements thereon. The words “*relating to*” should be read to mean or refer to an existing relationship or connection. No relevant development approval, other approval, permit or authority existed at the date of valuation. As Mr Brown says “...*the approvals listed in the town planning certificate do not include any that provide for the development of the AMP Place building. This is due to the provisions of the town plan at the time (1978)...*”.⁸⁰ The existing infrastructure credits are the product of or arise out of the prior payment of headwork charges or contributions associated with the existing development on the land which was authorised by permits issued under previous town planning regimes. There is nothing to suggest that the authority permitting development to occur some decades ago has any relevant status other than to perhaps provide a springboard for the operation of the protection provided by ss 1.4.1 to 1.4.5 of the IPA.
- [99] For the reasons expressed above I find that any increase in value arising from existing infrastructure credits associated with the 10 Eagle Street site is not caught by s.3(2B) of the VLA.
- [100] Turning then to the value of the authority or approval itself, Mr Hill calculates the value to be \$808,632. This figure is arrived at by calculating the benefits of the so-called “*development approval*” and then discounting that calculation to take account of the time between the date of the approval and the date of valuation.
- [101] The main benefits of the “*development approval*”, according to Mr Hill include: savings in time (because the site is able to be developed immediately), savings in consultancy fees including architects, town planners etc and savings in council charges.
- [102] Mr Hill has erred in treating the authority that in fact exists as if it were in fact a development approval. That is not the case. As the respondent points out in his written submissions existing authorities and/or approvals are concerned with affording protection

⁷⁹ Exh.18 para 46 (10 Eagle Street) and to similar effect Exh.19 para 53 (123 Eagle Street).

⁸⁰ Exh.18 para 33.

for the use of the land and improvements thereon. As much is clear from the evidence of Mr Brown:

“The properties at 10 Eagle Street (Gold Tower), 239 George Street (Hitachi Tower) and 69 Ann Street (BAC Building) were erected at a time when the Planning Scheme in force at the time allowed for the development of that land for commercial and related purposes without the need to obtain any form of town planning approval.

In other words certain use rights pertained to the land and were able to be exploited by erecting a building, which was subject to the erection (sic) of a permit for building works under the law prevailing at the time.

The property at 123 Eagle Street was subject to the obtaining of a town planning approval whereupon a permit could then be obtained for building works.

The continuing lawful use of these developments has been protected by successive legislative provisions i.e. both the lawful use of the land and the lawful use of the building on the land for those purposes is protected.....”⁸¹

- [103] I have little doubt that the existing authority/approval would provide comfort for a purchaser of the land in its improved state. That is because they protect the existing commercial use of the property. But that is an entirely different situation from that confronting the valuer valuing the land on the basis that, as at the date of valuation, the improvements on the land did not exist. Despite the recent amendments to the VLA that is still a fundamental requirement to the valuation exercise prescribed under s.3(1)(b) of the Act.
- [104] The status of the authorities authorising the building on the land has already been dealt with. And there is no objective evidence which supports Mr Hill’s opinion that existing authorities or approvals would in any way lead to the savings identified by him. In fact the evidence of Mr Brown, it seems to me, strongly suggests to the contrary.⁸² On balance I prefer the evidence of Mr Jackson to the effect that as at the date of valuation the prudent purchaser would not consider the existing authorities or approvals add any value to the land. Accordingly I make no allowance for what Mr Hill describes as a “development approval” over 10 Eagle Street.
- [105] Turning to 123 Eagle Street, no evidence of any specific approval is identified or referred to by Mr Hill. Instead he asserts that “...*the subject property was considered to have a development approval in place due to the existence of the current use on the land and its approval in 1984*”⁸³ Despite there being no evidence of a current development approval as defined for the purposes of s.3(2B), as was the case concerning 10 Eagle Street, Mr Hill proceeded on the basis that such an approval or its equivalent did in fact exist as at the date of valuation.

⁸¹ Exh.41; See also Exh.18, para 33 and Exh.19, paras 31-33.

⁸² T.357 L.30-48; T.358, T.359 and T.360 L.1-L.30.

⁸³ Exh.14, p.36.

- [106] As identified above in paragraph [99], the best evidence is that the development on this site was subject to obtaining town planning approval and then a permit for building works. The continuing occupation and use of the building has then been protected by successive legislative provisions culminating in those provisions of the IPA referred to in the respondent's written submissions.
- [107] As discussed, these provisions would be likely to provide valuable comfort for a purchaser of the land and improvements wishing to continue its current use. However, there is no probative evidence to show that the existing approvals or authorities would lead to the savings contemplated by Mr Hill in the valuation exercise required under s.3(1)(b) of the Act. The evidence of Mr Brown again suggests to the contrary. As is the case concerning 10 Eagle Street I prefer the evidence of Mr Jackson to the effect that, as at the date of valuation the so-called "*development approval*" relied on by Mr Hill adds no value to the land.
- [108] Also, for the reasons I gave concerning 10 Eagle Street, I do not accept that any added value that has happened because of infrastructure credits attached to this site could reasonably be said to have happened "*in connection with*" any development approval or other approval or authority "*relating to*" the land or improvement on the land for the purposes of s.3(2B).
- [109] For the reasons expressed above I make no allowance for any so-called "development approvals" over 123 Eagle Street.
- [110] The conclusions reached by me regarding the value of the development approvals are to be distinguished from the decision of the Land Appeal Court in *Kent Street Pty Ltd*. In that appeal a significant allowance was made for the added value a development approval gave to the land. However, the facts in that appeal are quite different to those in these appeals. In *Kent Street* the parties accepted that the land should be valued on the basis that a development approval for the purposes of s.3(2B) of the VLA was in place. The only dispute was about quantum where the respondent contended that the added value could not be less than \$3,900,000 and the applicants contended for a figure of no more than \$400,000.⁸⁴ The Land Appeal Court, based on the evidence before it, adopted the former figure. That is to be contrasted with these appeals where there is quite specific evidence about the type and nature of the authorities/approvals pertaining to the land and evidence that the worth of those approvals was nil as at the date of valuation.

⁸⁴ *Kent Street* at para 152-159.

Infrastructure Credits and s.3(1)(b) of the VLA

- [111] Notwithstanding my findings concerning infrastructure credits and s.3(2B) of the VLA it is necessary to consider their treatment under the valuation exercise prescribed by s.3(1)(b) of the Act which requires the valuer to value the land on the basis that, as at the date of valuation, the improvements on the land did not exist. But, pursuant to s.3(2C) of the VLA, the valuer is no longer to proceed on the basis that the improvements on the land had never existed. That being the valuation exercise required under s.3(1)(b) prior to the 2008 amendments to the Act.⁸⁵
- [112] Since the removal of intangible improvements from the definition of improvements in s.6(1) and s.6(5) of the VLA, infrastructure credits could not sensibly fall within the definition of improvements for the purposes of the Act. In this context infrastructure credits can be distinguished from the operation of man which enhance the value of land.⁸⁶ While the existing building works associated with the credits are undoubtedly the operations of man the credits themselves are not. They exist by virtue of the operation of the policies of the Brisbane City Council under its town planning regime and arise out of a prior payment of headwork charges. It might once have been arguable that infrastructure credits ought not be included in the unimproved value of land because of their direct association with the improvements on the land which, prior to the 2008 amendments to the VLA, were required to be assumed never to have existed. The argument being that if the improvements never existed how could it be maintained that credits arising directly from the development of those improvements could continue to exist. That is no longer arguable by virtue of the operation of s.3(2C).
- [113] It was submitted on behalf of the applicants that the infrastructure credits are so connected with the physical improvements on the land that they should themselves be considered an improvement and, as a consequence, be considered not to exist as at the date of valuation. Reliance was placed in particular on the treatment of a development approval by the Land Court in *PT Limited & Ors v Department of Natural Resources and Mines*⁸⁷ and the treatment of a liquor licence by the Privy Council in *Toohey's Limited v Valuer-General*.⁸⁸
- [114] In *PT Limited*, the Learned Member was concerned with whether or not a development approval fell within the inclusory definition of intangible improvements for the purposes of ss 6(1) and 6(5) of the VLA as it then was. The Member relevantly concluded that a development approval was:

⁸⁵ *Clough v Valuer General* (1981) 8 QLCR 70; *Queensland Club v Valuer General* (1991) 13 QLCR 207; *PT Limited & Ors v Department of Natural Resources* (2007) QLAC 0077 (unreported decision of the Land Appeal Court).

⁸⁶ *Morrison v Federal Commissioner of Land Tax* (1914) 17 CLR 498 at 503 per Griffith CJ.

⁸⁷ [2006] QLC 0068 (unreported decision of the Land Court).

⁸⁸ [1925] AC 439.

“... a non physical improvement which gives a benefit to the land, so that benefit would be an intangible improvement which falls to be considered under the inclusory aspects of s.6(5) ...”⁸⁹

As I have already referred to, the 2008 amendments to the VLA remove from the definition of improvements intangible improvements. That aside, there are significant differences between a development approval and the infrastructure credit in issue here. Central to the reasoning of the Member in *PT Limited* is that the DA permitted or allowed the development and ongoing use of the physical improvements on the land.⁹⁰ Infrastructure credits are an entirely different creature. They permit or allow nothing other than the right to be claimed or brought into account upon specified prerequisites being satisfied. In *PT Limited* the Member also considered it to be of some significance that a development approval could not be said to be merely a statutory entitlement.⁹¹ I respectfully agree with that distinction but would add that credits of the type under consideration here bear many of the hallmarks of a statutory entitlement.

[115] Turning then to *Toohey’s* case; in *Webster v Director-General, Department of Lands*⁹² the Court of Appeal, in considering the treatment of water licences, sugar cane assignments and liquor licences under land valuation legislation, referred to *Toohey’s* as authority for the proposition that the nexus between a liquor licence and the licensed premises is sufficiently strong to enable it to be regarded as an improvement. On behalf of the applicants, it is submitted that an infrastructure credit is “*analogous to the hotel licence in Toohey’s case*”.⁹³ In *Webster* the Court of Appeal determined that the water licence under consideration, unlike the liquor licence in *Toohey’s*, was not an improvement nor was it so necessarily associated with an improvement on the land that it had to be excluded from consideration in determining the unimproved value of the land. In reaching that conclusion, Davies and Thomas J after consideration of the judgment of Murray CJ in *Basey & Howie v Commissioner of Taxes*⁹⁴ said:

“*it is true that a waterworks licence is a complex hybrid, and that it does not come to the land naturally. However such a licence cannot be regarded as a personal benefit. It is primarily concerned with the land on which it can be used rather than with the person of the registered owner. It is not a transitory benefit and in our view once the land gets such a benefit it should be regarded as a feature to be taken into account when an assessment is made of the unimproved value of the land. ...*”

[116] On the evidence before me I have reached the conclusion that the infrastructure credits are not an improvement nor are they an integral part of or inseparable from the existing

⁸⁹ At para [671]. See also para [701].

⁹⁰ At paras [662], [671] and [701].

⁹¹ At para [662].

⁹² [1996] 2 QdR 318 at 324 per Davies JA and Thomas J.

⁹³ Applicants’ further written submissions dated 25/5/08 at para 2.

⁹⁴ [1919] SALR 53 at 71.

improvements on the land. In the event that the existing improvements were demolished the credits do not disappear. They remain to be taken advantage of by the person who next develops the land. As the respondent puts it their existence is not dependant upon the existence of the improvements on the land. In this context I respectfully adopt the words of Davies JA and Thomas J as an apt description of the infrastructure credits and conclude that they should be regarded as a feature of the land to be taken into account when assessing its unimproved value.

[117] Under the artificial valuation exercise prescribed under s.3(1)(b) of the Act the notional prudent purchaser acquiring the land as at the date of valuation would, while acquiring it absent any improvements thereon or appertaining thereto, would nonetheless be acquiring it with the benefits (if any) of any infrastructure credits attaching to the land. This approach appears to be consistent with that adopted by the Land Court in cases such as *Galli Development (Qld) Pty Ltd v Department of Natural Resources and Water*⁹⁵ and *Riverside Drive Estate Pty Ltd v Valuer General*⁹⁶ where the Court included the added value previously paid headwork charges gave to the land.

[118] Whether or not infrastructure credits do add value and, if so, to what extent is a question of fact. On behalf of the applicants it is argued that there is no probative evidence that they do add value. Second, if they do add value it is not to the extent advocated by the respondent.

[119] Based on advice from the Brisbane City Council the respondent advocates for figures of \$545,402 and \$1,008,497 for 10 Eagle Street and 123 Eagle Street respectively. On behalf of the applicants it is submitted that if the infrastructure credits do in fact add value, the appropriate starting point for determining the level of value is \$467,285 and \$915,679 respectively.⁹⁷

[120] It was Mr Jackson's primary opinion that the infrastructure credits would not add value. Central to Mr Jackson's opinion about this was that the amounts involved were so small in comparison to the costs associated with developing the sites as to not warrant consideration. Second, the prudent purchaser/developer would see these credits as simply being part of the profit and risk elements associated with such a development project and, if the project reached completion stage, these credits would be treated as a "bonus".⁹⁸

[121] I do not accept Mr Jackson's evidence that infrastructure credits, in the circumstances of these appeals, would not add value to the land. The credits have a value in dollar terms that a prudent vendor would be unlikely to relinquish for free. On the other hand the prudent

⁹⁵ (1977) 17 QLCR 205. See also *Schokman v DNR* (1998) 19 QLCR 386.

⁹⁶ (1988-89) 12 QLCR 165.

⁹⁷ Exh.25 and applicants' written submission at para 176.

⁹⁸ T.24 - T.25.

purchaser would have to acknowledge the benefits to be derived from the credits are something that he should have to pay a reasonable price for.

[122] The value of the credits as calculated by Mr Hill are based on savings which would be achieved in the development of the land. In the absence of any decisive evidence about the value of the infrastructure credits in these appeals I agree that an appropriate starting point for determining their value is by reference to what might be saved by the purchaser in developing the land.⁹⁹

[123] The figures adopted by Mr Hill were those provided by Mr Cronin an employee of the Brisbane City Council. When carrying out his calculations Mr Cronin relied, at least in part, on facts or assumptions provided to him by Mr Brown on behalf of the respondent.¹⁰⁰ Of particular relevance in this regard is the gross floor area and net lettable ratio of 90% Mr Brown asked Mr Cronin to assume for the purpose of his calculation. On this issue I consider that Mr Brown has tended to overstate this ratio and prefer the more conservative approach of Mr Jackson. Accordingly I will adopt his starting point for determining the value of the credits.

[124] Turning to the second aspect of Mr Jackson's argument that the value of the credits should not be valued on a cash equivalent basis. The applicants, relying on evidence from Mr Hill contended that the value of the credits should be discounted by 20% to take account of the time between the notional purchase of the land (1 October 2006) and the date at which the benefit of the credits was likely to mature, three to four years later. The discount of 20% and the time frame of three to four years comes from Mr Hill's evidence to the effect that, from the date of conception of a CBD project to the time of completion may take three to four years. And, if the benefit of the credits was deferred for that period a discount of in the order of 20% would be appropriate.¹⁰¹ In this context Mr Hill did not seek to distinguish the time it would take to develop one particular CBD site in comparison to any other of the sites considered by him. Mr Hill later sought to retract this apparent concession but I did not find his evidence about this convincing. He had no evidence that the prudent purchaser would pay the full face value of the existing credits and, in fact, he had not turned his mind to what the real value of the credits in the market place might be.¹⁰²

[125] While Mr Hill's estimate of three to four years was not challenged, to a large extent it is irrelevant. It is not the date of the completion of the project that is critical but the date the developer pays the infrastructure charges associated with the project. That might occur,

⁹⁹ The approach adopted by the Land Court in *Galli* at 230.

¹⁰⁰ T.389.

¹⁰¹ T.486 L.24 – T.487 L.14.

¹⁰² T.489 L.43 – T.490 L.15.

according to Ms Vigar, as late as completion of the project but it may be earlier.¹⁰³ While the applicants contend for a discount of 20% on the basis that the benefit of the credits will not mature for three to four years,¹⁰⁴ the respondent says, in effect, that the credit should be given their full face value on the basis that “*developers often pay such charges immediately they are imposed (before construction) to hedge against likely increases ...*”.¹⁰⁵ Despite this positive assertion no reference to the evidence was given to support it. I am not aware of any direct evidence being given as to when the prudent purchaser/developer would be likely to pay imposed infrastructure charges or how they were otherwise dealt with in the marketplace.

[126] On the limited evidence before me I have decided to proceed on the basis that the prudent purchaser/developer would pay the infrastructure charges associated with the project sooner rather than later to avoid the escalation in the cost of those charges referred to by Ms Vigar.¹⁰⁶ The earliest this payment could be made would be some time immediately after approval of the development by the Council. However, there is some evidence that from the time of purchase of a CBD site to the time of development approval could take in the order of nine months.¹⁰⁷ To bring into account this time lag between date of purchase and date of approval I will reduce Mr Hill’s rate of discount (for three to four years delay) of 20% to 5% for a one year delay in payment.

[127] Accordingly, I find the added value the infrastructure credits give to 10 Eagle Street is \$443,921 and for 123 Eagle Street is \$869,895 calculated as follows:

- $\$467,285 \times 0.95 = \$443,920$ (in round figures)
- $\$915,679 \times 0.95 = \$869,895$ (in round figures)

Final Calculations

[128] For the reasons set out above the unimproved value of 10 Eagle Street is determined in the amount of \$48,218,000 made up as follows:

Land Value	=	\$47,774,000 ¹⁰⁸
Added Value of DAs	=	nil
Added Value of Infrastructure Credits	=	<u>\$ 443,920</u>
Rounded to		\$48,218,000

And for 123 Eagle Street \$111,688,000 made up as follows :

¹⁰³ T.266 L.16-L44.

¹⁰⁴ Applicants’ written submissions para 177.

¹⁰⁵ Respondent’s reply at para 38.

¹⁰⁶ T.266 L.35-L40.

¹⁰⁷ T.169 L.40-L.47 per Mr Jackson re 480 Queen Street.

¹⁰⁸ See para [77] above.

Land Value	=	\$110,818,000 ¹⁰⁹
Added Value of DAs	=	nil
Added Value Infrastructure Credits	=	<u>\$ 869,985</u>
Rounded to		\$111,688,000

Orders

1. Appeals AV 2007/0561, AV2007/0560 and AV2007/0571 are allowed.
2. The unimproved value of Lot 2 on Registered Plan 157971 as at 1 October 2006 is determined in the amount of Forty-eight Million Two Hundred and Eighteen Thousand Dollars (\$48,218,000).
3. The unimproved value of Lot 30 on Registered Plan 204762 as at 1 October 2006 is determined in the amount of One Hundred and Eleven Million Six Hundred and Eighty-eight Thousand Dollars (\$111,688,000).

RS JONES
MEMBER OF THE LAND COURT

¹⁰⁹ See para [80] above.