[HIGH COURT OF AUSTRALIA.]

ROYAL SYDNEY GOLF CLUB . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

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1954, SYDNEY, *June* 8;

1957, *Mar.* 4-7;

MELBOURNE, *May* 22.

KITTO J.

Valuation—Land—Land tax—Golf-course—Golf club—Facilities and amenities—Use by members—Unimproved value of land—Method of valuation—Matters which should be considered—County of Cumberland Planning Scheme—Regard to provisions and effect—"Vacant land"—"Built-up land"—Restrictions—"Land upon which there are no buildings"—Land Tax Assessment Act 1910-1950, *ss.* 3, 10, 13, 25, 26, 27, 31, 33, 44M (8)—*Local Government Act* 1919-1951 (*N.S.W.*), *ss.* 342G, 342N, 342Y, 342AA, 342AB, 342AC—*Local Government (Amendment) Act* 1951 (*N.S.W.*), *s.* 2—*County of Cumberland Planning Scheme Ordinance, cll.* 10, 11 (1) (2) (3), 12, 14, 16, 17.

An area of land was assessed for tax by the respondent under the *Land Tax Assessment Act* 1910-1950 (Cth.); the owners of the land appealed against the valuation placed on the land by the respondent. The land was laid out as a golf course and it was agreed that it was "vacant land" as defined by the County of Cumberland Planning Scheme Ordinance enacted under the *Local Government (Amendment) Act* 1951 (N.S.W.). As such it was reserved for open space and any work to change its character was prohibited. The Ordinance contained no general power to remove restrictions arising under its provisions and short of repeal of the Ordinance or its complete rescission by the Governor under s. 342M of the *Local Government Act* 1919-1951 the only way in which the prohibition could be lifted appeared to be by a suspension of the provisions of the scheme by the Minister under s. 342Y of the Act. Clause 17 of the Ordinance provided that the owner of the land so restricted might require the responsible authority to acquire such land. It appeared that funds at the disposal of the authority were so limited that such a requisition would prove embarrassing and that accordingly the provisions were suspended in relation to this and other land; as a result the land became available for interim development; but for this the further permission of the county council was required. There was evidence that to grant such permission except as to a very small area would be contrary to the policy of the council.

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Held: that the repeal or rescission of the Ordinance was little more than a theoretical possibility and that in view of that and the evidence of the county council's policy and since this was not a case in which the restrictions would operate for a limited period, a method of valuation could not be supported which aimed first to ascertain what value the land would have had on the relevant date had it been free from the restrictions of the Ordinance and then to fix on deductions reflecting the depressive effect of the restrictions; and that the correct method was to value the land as if it were reserved for open space and then to allow for such chance as there was that the restrictions would be removed.

Clause 17 of the *County of Cumberland Planning Scheme Ordinance* does not apply to " built-up land ".

APPEAL.

Upon an appeal by the Royal Sydney Golf Club against an assessment for land tax under the *Land Tax Assessment Act* 1910-1950 for the year ended 30th June 1951 on the unimproved value of certain land owned by the club, *Kitto* J., pursuant to s. 44M of that Act stated a case for the opinion of the Full Court of the High Court. The facts stated in the case were agreed between the parties.

The questions of law upon which the opinion of the Full Court was sought were as follows:—

1. In arriving at the unimproved value under the *Land Tax Assessment Act* of the land the subject of the appeal, should the land be valued without regard to the provisions and effect of the *County of Cumberland Planning Scheme Ordinance?*

2. If question 1 is answered " No ", is it open to me to find that (a) the land the subject of the appeal, or (b) the said land except the respective sites of the buildings thereon and the respective curtilages thereof, is vacant land within the meaning of Pt. II of the *County of Cumberland Planning Scheme Ordinance?*

The Full Court answered the questions as follows:—1. In arriving at the unimproved value under the Act of the land the subject of the appeal such land should not be valued without regard to the provisions and effect of the Ordinance. 2. It is open to *Kitto* J. to find that the said land, except the respective sites of the buildings thereon (not being buildings of the class of which examples are given in the definition of " vacant land ") and the respective curtilages thereof, is vacant land within the meaning of Pt. II of the Ordinance.

The case stated and the judgment of the Full Court are set out in *Royal Sydney Golf Club* v. *Federal Commissioner of Taxation* (1).

The appeal came on for further hearing before *Kitto* J.

(1) (1955) 91 C.L.R. 610.

W. J. V. Windeyer Q.C. and *B. B. Riley*, for the appellant.

J. D. Holmes Q.C. and *R. M. Hope*, for the respondent.

Cur. adv. vult.

The following written judgment was delivered :—

KITTO J. The proceeding before me is an appeal against an assessment of land tax under the *Land Tax Assessment Act* 1910-1950. On 30th June 1951 the appellant was the owner, within the meaning of that Act, of certain land at Rose Bay, comprising a little over one hundred and forty-two acres, three roods, upon parts of which it has erected a club-house and other buildings. An area of about seven acres was exempt from land tax under s. 13 (*g*) (3) and s. 13 (*h*) of the Act : *Federal Commissioner of Taxation* v. *Royal Sydney Golf Club* (1). The remaining area of one hundred and thirty-five acres, three roods was not exempt. It had been laid out as an area for the game of golf. It comprised an eighteen-hole championship course and a nine-hole or short course, and at several places on it were small buildings of an ancillary character. The assessment was made on the footing that the unimproved value of the non-exempt land at the date mentioned was £364,176. The appellant's objection, which has now to be treated as an appeal, sets out a contention that by reason of restrictions placed on the use and enjoyment of the non-exempt land by the *Local Government* (*Amendment*) *Act* 1951 (N.S.W.) its unimproved value on 30th June 1951 was only £34,000.

The non-exempt land was shown coloured dark green on the scheme map referred to in the *County of Cumberland Planning Scheme Ordinance*, which is contained in the schedule to the *Local Government* (*Amendment*) *Act* 1951 (N.S.W.). It was therefore subject to the provisions of Pt. II of that Ordinance, which applied to land so shown as from the " appointed day ", viz. 27th June 1951. Those provisions imposed certain restrictions in relation to such land, the restrictions varying according as land was " built-up land " or " vacant land " in the sense of the following definitions, which are in cl. 8 of the Ordinance : " ' Built-up land ' means all land other than vacant land ; ' Vacant land ' means land upon which immediately before the appointed day there were no buildings or upon which the only buildings were fences, green-houses, conservatories, garages, summer-houses, private boat-houses, fuel sheds, tool-houses, cycle sheds, aviaries, milking bails, hay-sheds, stables, fowl-houses, pig sties, barns or the like."

(1) (1943) 67 C.L.R. 599.

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When the appeal first came before me, counsel for the commissioner made two submissions of law as to the basis upon which the value of the non-exempt land should be determined. One submission was that no regard at all should be had to the provisions and effect of the Ordinance. The other was that if the restrictions of the Ordinance were to be taken into account it should be on the footing that, having regard to the character of the non-exempt land considered as an integral part of the whole one hundred and forty-two acres, the non-exempt land, or that land except the respective sites and curtilages of the small buildings above mentioned, was " built-up " land within the meaning of the Ordinance. On a case which I stated to the Full Court both these submissions were rejected. The Court answered the questions in the case by saying, first, that the non-exempt land should not be valued without regard to the provisions and effect of the Ordinance, and, secondly, that it was open to me, on certain agreed facts which were set out in the case, to find that that land except the respective sites and curtilages of the small buildings (not being buildings of the class of which examples are given in the definition of " vacant land ") were " vacant land " within the meaning of Pt. II of the Ordinance : *Royal Sydney Golf Club* v. *Federal Commissioner of Taxation* (1).

The parties are now agreed that all the small buildings were of the class mentioned, and that having regard to the second answer given by the Full Court the whole of the non-exempt land (to which I may now refer simply as the appellant's land) should be considered " vacant land ". To such land Div. 2 of Pt. II applied (cl. 9). The application of the provisions of that Division, since the land was coloured dark green on the scheme map, was as follows. It was " reserved " for the purposes of parks and recreation areas (cl. 10). Except as provided by cl. 11 (2) and cl. 12, no person could lawfully erect a building or carry out work of a permanent character or make any permanent excavation on the land (other than a building or work or excavation required for or incidental to the purposes mentioned) or spoil or waste it so as to destroy or impair its use for those purposes (cl. 11 (1)). Clause 11 (2) and cl. 12 of the Ordinance gave the county council certain powers to relax a prohibition created by cl. 11 (1) ; but those powers were not exercisable with respect to the appellant's land, because the first applied only where the purpose for which land was reserved could not be carried into effect immediately after the appointed day, and the second applied only where in the opinion of the county council the development which had taken place before the appointed

(1) (1955) 91 C.L.R. 610.

day in the immediate vicinity rendered land unsuitable for the purpose for which it was reserved. No one could doubt that the purpose of the reservation of the appellant's land could be carried into effect immediately after the appointed day, and there was no room on the facts for the county council to have the opinion that existing development in the vicinity rendered that land unsuitable for that purpose.

The Ordinance created no general power to remove restrictions arising under its provisions. Short of a repeal of the Ordinance by Parliament or its complete rescission by the Governor under s. 342M of the *Local Government Act* 1919-1951 (made applicable, presumably, by s. 2 (3) of the *Local Government (Amendment) Act* 1951), there was only one way in which the prohibition imposed by cl. 11 (1) might be lifted. The Ordinance was enacted by s. 2 of the *Local Government (Amendment) Act* 1951 as the scheme required by Div. 8 of Pt. XIIA of the principal Act (the *Local Government (Amendment) Act* 1919 as amended) to be prepared for the County of Cumberland; and it is to be deemed an Ordinance made by the Governor prescribing the scheme under s. 342K of the principal Act (s. 2 (2)). The scheme embodied in it is a prescribed scheme to which the provisions of Pt. XIIA of the principal Act relating to prescribed schemes shall apply (s. 2 (3)). Division 7 of that Part contains a provision, in s. 342Y, that where a resolution for the preparation of a scheme varying a prescribed scheme has taken effect or the Minister has directed the preparation of such a scheme, the Minister, if after consideration of a report by the Advisory Committee it appears to him expedient so to do for securing, *inter alia*, that any development prohibited by the prescribed scheme may be carried out notwithstanding the provisions of that scheme, may notify the suspension of the provisions of the prescribed scheme pending the coming into operation of the varying scheme, and such provisions shall be suspended accordingly (sub-s. (1)). Any such notification may suspend the provisions of the scheme either as respects the whole of the land to which the varying scheme is to apply or as respects any specified portion of it, and either as respects all development or as respects development of any specified class (*ibid.*). A result is that the provisions of Div. 7 with respect to the control of interim development apply to development to which the notification relates (sub-s. (2)): and that means that interim development (including the erection of any building: s. 342T) shall not be carried out except as may be permitted either by ordinance or by the council under the authority of an ordinance (s. 342U). The Ordinance relating to this topic is the *Town and*

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Country Planning (General Interim Development) Ordinance (No. 105), gazetted on 9th November 1945 and amended by proclamations of 28th March 1947 and 16th April 1948. It seems that, having regard to cl. 6 and the definitions of " Interim development authority " and " Area " in cl. 3 of this Ordinance, and to a delegation to the county council gazetted on 31st August 1951, the county council was the body to grant or refuse permission for interim development, subject only to any intervention of the Minister under s. 342v.

In order to complete the description, so far as it is material, of the situation created with respect to the appellant's land by the operation of the *County of Cumberland Planning Scheme Ordinance*, reference must be made to cl. 17. This provision is in Div. 4 which applies both to vacant land and to built-up land (cl. 16). Its terms are as follows :—" The owner of any land reserved under Division 2 of this Part upon which the erection of any building or the carrying out of any work of a permanent character or the making of any permanent excavation is prohibited or the owner of any land so reserved on which the responsible authority has refused to approve of the erection of a building or the carrying out of any work of a permanent character or the making of any permanent excavation may, by notice in writing, require the responsible authority to acquire such land. Upon receipt of any such notice the responsible authority shall acquire the land to which the notice relates."

Presumably the first limb of the first paragraph refers to the case where the prohibition of cl. 11 (1) is absolute, in the sense that the facts are not such that an approval under cl. 11 (2) or cl. 12 could be given, while the second limb refers to the case where an approval under one of those provisions could be given and has been applied for but has been refused. It is the first limb which applies here.

As at 30th June 1951, then, the effect of the *County of Cumberland Planning Scheme Ordinance* in relation to the appellant's non-exempt land was that no building could be erected on it and no work of a permanent character could be carried out on it, unless the scheme should be suspended so far as that land was concerned under s. 342y and permission for the erection of buildings or the carrying out of work upon it should be given by or under the provisions of an Ordinance. It seems clear that if the scheme had not applied to the land the most economic method of dealing with it would have been the method of sub-division and sale of residential blocks. The restrictions, so long as they remained undiminished, made the adoption of that course impossible. They must therefore have had a depressing effect upon the value of the land. But that

effect could not have been as great as it would have been if the restrictions had been completely incapable of removal or relaxation. In determining the value of the land I must allow for such possibilities as there were that the restrictions might be removed or relaxed : cf. *City and South London Railway Co.* v. *St. Mary Woolnoth and St. Mary Woolchurch Haw* (1) ; *Corrie* v. *MacDermott* (2). And in doing so I must take into account not only all that was then generally understood or ascertainable but the situation as it actually was in respect both of fact and of law ; for the supposition must be made, in order properly to apply the test of value laid down in *Spencer* v. *The Commonwealth* (3), that a price is arrived at in bargaining between a hypothetical prudent purchaser and vendor each of whom is equipped with knowledge of the existing circumstances : *Deputy Federal Commissioner of Taxation* v. *Gold Estates of Australia* (1903) *Ltd.* (4).

Theoretically, the position at the material date was that the *County of Cumberland Planning Scheme Ordinance* might at some time be simply repealed by Parliament or rescinded by the Governor under s. 342M and might not be replaced by any provisions of a similarly restrictive kind : but having regard to the nature, purpose and history of the scheme I think that there was little more than a theoretical possibility of such an eventuality. It is not so easy to decide what was the likelihood that an owner of the appellant's non-exempt land might be able to procure, either as to the whole or as to any part of that land, a suspension of the scheme and a permission for residential use, so that sales of sub-divided residential blocks might become feasible.

The only valuer called as a witness for the commissioner, a Mr. Jackson, considered the matter on the footing that the modifications required in order to enable the land to be sold in sub-division, as building lots surrounding an internal area left available for golf or other recreational purposes, could be obtained as a matter of course, and within two or three years, or at most four, from that date. His belief that this was the situation was formed upon the erroneous supposition that the land was " built-up " land, and upon an impression that financial considerations would make it imperative for the county council to consent to the use of his hypothetical lots for residential purposes. His error as to the classification of the land was *prima facie* important, because if the land had been " built-up " land Div. 2 of the Ordinance would not have applied to it, and the only restriction upon its use would have been that contained in

(1) (1903) 2 K.B. 728 ; (1905) A.C. 1.
(2) (1914) A.C. 1056.
(3) (1907) 5 C.L.R. 418.
(4) (1934) 51 C.L.R. 509, at p. 515.

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cl. 14 in Div. 3, viz. that it should not be used without the consent of the county council for any purpose other than the purpose for which it was used immediately before the appointed day. That would have meant that to enable the land to be used for residential purposes all that was required was the county council's consent. But if Mr. Jackson was right in thinking that financial considerations made it imperative for the county council that the appellant's land should be released from its restrictions to the extent necessary to allow of residential use, the mistake as to classification would not have great significance: the more elaborate and radical procedure required for "vacant" land would no doubt involve the passage of a somewhat longer period than he had allowed for, but the result would as surely be achieved. In fact, if he had been right in regarding the land as "built-up" land he would have been wrong in his impression as to the financial considerations; for they depended, as I shall show in a moment, upon the applicability of cl. 17 of the Ordinance, and in truth that clause did not apply to "built-up" land. This was so because, although Div. 4 as a whole is made applicable both to "vacant" and to "built-up" land (cl. 16), it is obvious that cl. 17 by reason of its own terms has nothing to say to "built-up" land, since that land cannot be "reserved under Division 2". But his mistake was in the nature of a compensating error: he was right in thinking that cl. 17 applied, for contrary to his belief the land was "vacant" land.

What then were the relevant financial considerations? They are not proved very clearly, but they seem to have been as follows. The planning which led to the promulgation of the scheme had proceeded, until early in 1951, on a belief, or an assumption, that the county council would have available a sum of £15,000,000 to cover the compensation which would be payable for injurious affection to land-owners by the operation of the scheme, the cost of certain intended acquisitions of land for foreshores and open spaces, and the cost of such acquisitions as the council might be required to make by virtue of cl. 17. But in January 1951 it had become apparent that for these purposes no more was likely to be available than £5,000,000. The scheme was nevertheless put into effect and on the scheme map a large number of golf links, race-courses and the like were coloured dark green. As a result the council was faced with the fact that, if it should be called upon under cl. 17 to acquire all these lands in addition to compensating the owners for injurious affection in respect of them, the financial resources available would prove gravely inadequate. Perhaps it was a mistake, as was thought by Mr. Davis the county council's solicitor, to

colour these lands dark green, for according to him it was not anticipated that public funds should be used for the acquisition of privately-owned lands already used for open space purposes. In any case, as Mr. Davis stated in relation to the concrete case of the appellant's land, if an owner had wanted to sub-divide it the necessary finance would not have been available to enable the county council to refuse to agree at the cost of having to acquire the land.

The council made the same compensating errors as Mr. Jackson was to make later; and, because of its belief that lands of the kinds referred to were "built-up" land to which cl. 14 applied, it saw in a yielding under cl. 14 to applications for consent to building development a way, and the only possible way so long as cl. 17 continued to apply to those lands, of obviating the embarrassment of demands under cl. 17 for their acquisition. Even if it had realised that the lands were "vacant" lands, it might have regarded the procedure of s. 342y of the principal Act as a way of escape similarly effective though much more cumbersome. But, as it was, that procedure had a different attraction. It provided the means whereby the lands referred to might be taken out of the scheme, and therefore out of cl. 17, while still remaining subject to a considerable degree of restriction pending the preparation of a varying scheme, and might ultimately be dealt with in a varying scheme which might or might not contain such a provision as cl. 17.

In fact, within sixteen months of the appointed day on which the *County of Cumberland Planning Scheme Ordinance* took effect the first part of this procedure was carried out; for on 24th October 1952 a *Gazette* notice was published under s. 342y, suspending the scheme, as respects all development, in relation to forty-eight tracts of land, all being golf links, race-courses or other sporting areas, and applying to them the provisions of Div. 7 of Pt. XIIa of the *Local Government Act* with respect to the control of interim development. The appellant's land, under the description "the Royal Sydney Golf Links", was included in the notice. This *pro tanto* suspension of the scheme resulted, of course, from a ministerial decision, made after consideration of a report of the Town and Country Planning Advisory Committee; so that it was probably in train for some considerable time before the date of the *Gazette* notice. Mr. Davis, who not only was the solicitor to the county council but had been one of three original executive officers of that body and was closely connected with the formulation of council policy, said in evidence that one purpose of the suspension was "to show that there was no intention whatever of acquiring the

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land or interfering with its existing use." Certainly one result in fact was that thenceforth an application for permission to put these lands to residential development could be dealt with on its merits in the light of policy, and without the coercive influence of a fear that refusal would entail an obligation to acquire. There was always the possibility that under s. 342v (3) or (5), the Minister might take the matter out of the county council's hands, but a notional purchaser, considering the land on 30th June 1951, could not reasonably expect that there was much chance of his ever being able to get permission for the use of any substantial part of the appellant's land for residential purposes contrary to the council's policy. Now, that policy, held with a firm conviction that the public interest demanded its fulfilment, was so far as possible to keep the lands coloured dark green on the scheme map to their existing uses as open spaces for purposes of recreation, and to allow only what was called " conforming development ", i.e. development conforming to the character of the land as impressed upon it by open-space zoning : Exhibit J., p. 216. The council had declared its belief, in a report made to the Minister for Local Government in 1948 : " Open space is woefully deficient, even on past standards. The task is not only to regain lost ground, but to match the current trends of increasing leisure, better transport and keener appreciation of physical and aesthetic recreation " (Exhibit J., p. 148). No one, looking at the matter on 30th June 1951 and having before him the material which is before me, could have doubted that a proposal to divert to residential use any " dark green " land which was actually being used for the playing of golf would be regarded by the county council as conflicting seriously with the application in the county of principles which it had a public duty to protect by all means in its power. It considered, indeed, that the recreational areas within the confines of the scheme were insufficient, and that no less than a further four acres per thousand of the district population was required for golf courses to bring the total up to the desirable standard : Exhibit J., p. 136. In the closely-settled locality in which the appellant's land was situated, a reduction in the area available for recreation would have been considered, I think, especially obnoxious to the principles of the scheme.

There was one and only one exception to the general unwillingness of the county council to see golf club lands sold for residential purposes. It was prepared to give favourable consideration to what Mr. Davis called " perimeter subdivisions ". Unfortunately the expression was not completely self-explanatory, and when Mr. Jackson was told by Mr. Davis something of the attitude which

the council took up (in 1951) in relation to golf courses he formed the conclusion that approval of the subdivision into building blocks of the street frontages of lands like the appellant's could certainly be obtained. In fact, however, I am satisfied that the county council's willingness to allow subdivisions of portions of golf club lands for building purposes was not nearly so far-reaching. It extended only to surplus land on the outskirts of courses, surplus in the sense that it either was not in fact being used for purposes of recreation or could be spared without substantially affecting such purposes.

It was not much wonder that Mr. Jackson got a wrong impression, for even in giving his evidence Mr. Davis did not at first make it clear that "perimeter subdivision" was an expression which he used with a special meaning. He said that an inquirer would have been told, at 30th June 1951, that "any application for subdivision, especially perimeter subdivision, would receive favourable consideration." It was at a late stage of his evidence that he confined this statement to "perimeter subdivision"; and then, when asked whether that meant lands on the perimeter (of golf courses) and not being used for recreational purposes, he replied: "Yes. It is rather difficult, but there is plenty of land on the perimeter of some of them which forms part of the course, but there is so much land available that, by a little re-arrangement of the course itself, that land becomes surplus. In any case such as that it will come within what I said before, it will receive favourable consideration. The only case in which the word 'favourable' would not have been used, in my opinion, would have been where it affected the use of the land for the purpose for which it was being used. That happened actually in the Liverpool case, where we allowed fifty-three acres, I think it was, to go to residential development, and the course was re-arranged for that purpose." In answer to a further question he explained that an earlier statement he had made about permission for alienation having been given in respect of some land of the Pymble Golf Club referred only to land which was not within the playing area at all.

Mr. Davis admitted in cross-examination that "veiled threats" which had come to his knowledge that the appellant might desire to carry out some residential subdivision of its land had been "unwelcome" to the county council "from a planning point of view"—which he agreed meant from the point of view of public policy. He suggested early in his evidence that the council's policy as it existed on 30th June 1951 was such that a person inquiring whether permission might be given for any subdivision

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of the appellant's land in particular would have been told there was no intention whatsoever of acquiring any of this type of land, and that any application for subdivision, "especially perimeter subdivision" would receive favourable consideration. I do not doubt that the first part of the answer would have been given if the form of the inquiry made it relevant, but I am satisfied on the evidence as a whole that a move towards turning any part of the appellant's land to residential uses would have received the county council's most unfavourable consideration, and would not have been permitted if that council had found itself able to prevent it. In particular, I find it impossible to believe that the council would have received with anything but the strongest disapproval a suggestion for selling off residential building blocks (with a depth of one hundred and fifty feet each, which is what Mr. Jackson envisaged) along the whole length of the street frontages. A comparison of exhibit 5 (Mr. Jackson's subdivision plan) with exhibit D (showing the existing lay-out of the two golf courses), especially when these plans are understood in the light of a view, is enough to dispose of the notion that Mr. Jackson's proposal is one for "perimeter subdivision" in the limited sense in which Mr. Davis used the expression. The proposal would involve a very serious subtraction from the area in fact being used for recreation, and a substantial diminution of the recreational opportunities which the land affords. It could not have been acquiesced in by the county council without a radical departure from the course which, in its considered view, the public interest demanded that it should follow. It may be a possible view—and I have not heard argument on the point—that while the appellant's land is subject to "interim development" provisions the power to grant or refuse permission for residential use belongs to the local municipal council and not to the county council. In any case, the former's consent would be required to any proposed subdivision. It is therefore material to mention that although there is no evidence before me as to the probable fate of an application for such consent, there is a factor in the situation which might fairly be expected to weigh heavily against its success. That is a factor to which *Roper* J. drew attention in 1938 in the case of *Royal Sydney Golf Club* v. *Valuer-General* (1) when he said that if a large part of the appellant's land had come on to the market the nature of the district would have been considerably altered. His Honour mentioned this for the purpose of pointing out that if regard were had to actual sales which had taken place in the district in estimating the prices which might be obtained on a

(1) (1938) 13 L.G.R. 217.

sale of subdivided portions of the appellant's land, allowance would need to be made for the fact that the prices realised on those actual sales had reflected the benefit which the district derived from the existence of the appellant's land as an open space and as a golf course. This is a consideration which the local council might be expected to regard as important from its own point of view. In an area which is populous but large parts of which are occupied by high-class residences, it is a matter of real importance to a body concerned at once with preserving the amenities of the locality and with maintaining values for rating purposes, that if a tract of land such as the appellant's is kept under an embargo against use otherwise than as a golf course, the consequential detriment to the owner of that land must be considered in the light of the consequential advantage accruing to the owners of the lands in a large surrounding area. Reduce the one and you reduce the other. The resulting increase in the value of the appellant's land might easily be much less than the resulting decrease in the combined values of other lands. Accordingly, I think that a purchaser of the appellant's land on 30th June 1951, even if he had foreseen the proclamation of 24th October 1952 and even if the power to give permission for the erection of residences were a matter for the local council until a varying scheme should be brought into effect, would not have been justified in feeling at all optimistic about the prospects of getting such permission.

In the result my opinion is that a notional intending vendor and purchaser, treating about the appellant's land on 30th June 1951, and fully informed as to all relevant considerations, would have proceeded, in discussing price, on the footing that there was only a slender chance that it would ever become permissible to use any part of the land for other than recreational purposes. For that reason, I do not think that a method of valuation can be supported which aims first to ascertain what value the land would have had on the relevant date if it had been free from the restrictions of the Ordinance, and then to fix upon a deduction to be made from that value in order to reflect the depressive effect of the restrictions. That may be an acceptable method of allowing for restrictions which operate merely for a limited period; but it is not with restrictions of that kind that this case is concerned. I think the proper course is to inquire first what was the value of the land on the footing that there was no possibility of its ever being turned to other than recreational purposes, and then how much extra should be allowed for such chance as there was of securing permission for residential use at some future time.

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At each of these stages the case presents difficulty, because the evidence provides very little material upon which to work. Each side called only one valuer as a witness. The appellant called Mr. Litchfield of the firm of Richardson and Wrench, a valuer of considerable experience, who, treating the restrictions on the use of the land as permanent, offered as a solution of the problem certain calculations designed to show how much a purchasing golf club, or an entrepreneur intending to conduct a golf course as a business, could probably afford to pay for the land in an unimproved state. Mr. Litchfield's figures, if accepted, would establish that the unimproved value attributed to the land in the assessment now appealed against was much higher than the price an incoming golf club or entrepreneur could venture to pay. He worked out that the price would be in the region of £100,000. An accountant, a Mr. Wheeler, was also called, and on a similar basis he reached the conclusion that the value was between £89,000 and £100,000. I do not feel satisfied to act on these calculations. They are open to many criticisms, and not least that they require several hypotheses which the evidence does not enable me to verify or check and upon which the witnesses were not in a position to speak with any authority. In particular I am not able on the evidence either to accept or to correct their assumptions as to how many members and associates a club might be expected to have, what initial and annual contributions to a club's finances they might be expected to make, or how many rounds of golf per annum would be played and at what green fees. It seems to me, too, that a sound application of the method would require careful consideration of the auxiliary means of getting revenue (such as a bar and poker machines) which would probably be adopted. As to all these matters the evidence leaves me unable to form any satisfactory opinion.

The only valuer called on behalf of the commissioner was Mr. Jackson, an officer of the Taxation Department very experienced in matters of valuation. He had participated in the making of the assessment, and he candidly described the process which led up to it as a calculation rather than a valuation. In making the calculation, Mr. Jackson took as a commencing figure a value which had been attributed by the Valuer-General in 1949 to the whole of the appellant's land, exempt and non-exempt. The figure was £271,000. He considered that values generally in the locality had risen by 75% in the interim, but he increased the value of the appellant's land by only 50%. This gave him £406,500. Of that figure he took 89.59%, a percentage which, he says, had been agreed upon

in earlier proceedings as attributable to the non-exempt land. This gave him £364,176, and the assessment was based on that figure. I am not assisted by this calculation. The steps involved in it cannot be supported in principle : cf. *Deputy Federal Commissioner of Taxation* v. *Gold Estates of Australia* (1903) *Ltd.* (1). In addition it fails to make any discoverable allowance for the effect of the restrictions under the County of Cumberland Planning Scheme. Mr. Jackson told me that the effect of the scheme was discussed in the department, and that it was taken into account " in a general way " and allowed for in the reduction of the 75% to 50%. The report written at the time, however, accounted for this reduction by reference only to the fact that the cost which subdivision of the appellant's land would involve rendered inappropriate the percentage which it was thought proper to adopt for the generality of lands in the locality. The report made no mention of the effect of the scheme as an obstacle to selling residential lots in subdivision. That was an effect which it could not be satisfactory to allow for in some hazy " general way ". In fact it invalidated the acceptance of the commencing figure of £271,000, for that was a figure reached on a subdivisional basis.

Mr. Jackson, it is only fair to repeat, made no attempt before me to support the calculation as a valuation. He proceeded to offer valuations which he had made for the purposes of this appeal. Unfortunately they were based on his assumption that permission could certainly be obtained with no very great delay for the subdivision and use of large areas of the appellant's land for residential purposes. Since, for the reasons I have given, I regard the assumption as one which could not have been adopted by a vendor and purchaser considering the land on 30th June 1951 who were fully apprised of every aspect of the situation which then existed, I must necessarily reject the valuations based upon it. I must remark in passing, however, that Mr. Jackson appears to have applied comparable sales in the neighbourhood without allowing for the fact which has already been mentioned in referring to an observation of *Roper* J. in *Royal Sydney Golf Club* v. *Valuer-General* (2) that sales of subdivided portions of the appellant's land could not be expected to realise prices of the same order as those which had been paid for neighbouring lands while the appellant's land was a golf course.

But one aspect of Mr. Jackson's evidence does seem to me of assistance. As a step in making his valuations, he had to deal with the internal area which he envisaged as remaining for recreational purposes after the subdivided building lots had been sold.

(1) (1934) 51 C.L.R. 509.

(2) (1938) 13 L.G.R. 217.

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In one valuation it was an area of one hundred and eleven and three-quarter acres, in the others only fifty-one acres. These areas he valued at £1,600 per acre. (Although he reduced his over-all figure by 10% in the one case and 20% in the others by way of allowing for such difficulty as there would be in getting permission for subdivision, he realised that this did not really apply to the residual recreational lands, so he translated the percentage into 16.23% of the subdivision lands.) He adopted the value of £1,600 per acre on the basis of two pieces of information. One was that seven acres four and one-half perches of the poorest part of the appellant's land (poorest because of drainage difficulties) had been sold by the appellant to the Woollahra Council for £470 an acre in 1948 while land sales control was in force, and he thought that on the basis of local sales at later dates this was equal to about £900 an acre in 1951. This land was portion of an acre of swampy land covered by a proclamation under the *Public Health Act* which forbade its being built upon in its existing state. The poor quality of this swampy land and the nature of the burden placed upon it by the proclamation were such that in 1938 *Roper* J. had held it to be valueless except as a park : (1). Such value as it had in 1948 must have been referable to a similarly limited use. The second piece of information (upon which I do not think that I should myself place any weight) was that the Valuer-General had valued the Kensington golf links at £1,000 per acre in 1950, before the County of Cumberland Planning Scheme took effect but during a period of interim planning. A knowledge of certain sales in the vicinity of the Kensington course led him to think that the £1,000 was not a value arrived at on the basis of the best use of which the land was capable. Mr. Jackson could find no other information to assist him, and applying his mind to the matter as best he could he fixed on his £1,600 per acre. It may be added that Mr. Litchfield mentioned (though it was for another purpose) a sale in 1951 or 1952 of a golf course at Liverpool for a price which he took to give an unimproved value of £125.6 per acre. He thought that, " leaving out the higher-class areas of Rose Bay and Bellevue Hill and taking a broad average ", land values in the Rose Bay area were six times those in the Liverpool area. This would give £750 per acre, for the appellant's land ; but six times seems a very conservative estimate for use in comparing the two golf courses.

It is on this very scanty material that I must form the best judgment I can, applying the definition of " unimproved value " in the

(1) (1938) 13 L.G.R., at p. 218.

Land Tax Assessment Act and the principles laid down in *Spencer's Case* (1) and *Commissioner of Land Tax* v. *Nathan* (2). I think Mr. Jackson was probably not far out in treating the 1948 sale of the seven acres four and one-half perches of poor land to the Woollahra Council as suggesting a value for that land, as recreation land only, of £900 per acre in June 1951. I am not here concerned with the obvious fact that the rest of the land would have to be regarded as much more valuable than this if it were being considered as building land; but even considered as golf course land its desirability and therefore its monetary value must have been substantially higher. How much higher, the evidence does not enable one to say with any precision. Mr. Jackson picked on his £1,600 an acre more, I think, as a matter of feeling than of reasoning. If one starts with his £900 and increases it by fifty per cent for the purpose of getting an average value per acre for the whole of the land considered as one tract of land reserved for golf, it seems to me that sufficient allowance will thereby have been made for differences between its several parts in point of quality for golfing purposes. That gives an average value of £1,350 per acre.

£1,350 per acre is £183,262 for the entire area of one hundred and thirty-five acres three roods, before making any allowance for the chance that sales of building lots in subdivision might become possible at some future date. How much should be allowed under that head is necessarily a matter of guesswork, for the hypothetical vendor and purchaser would have to engage in sheer speculation. They might perhaps consider what net profit might be realised in the event of subdivision becoming possible, working along the lines discussed in *Turner* v. *Minister for Public Instruction* (3) and include in the price they agreed upon a percentage of that sum, chosen so as to reflect what chance they thought there was that the price might be realised and what delay in realising it they thought should be provided for. But there would be so many incalculable factors in this method of approach that I think they would more probably agree on the addition to the amount otherwise arrived at of a percentage of that amount. From what I have said it will be apparent that I regard the chance to be allowed for as one which negotiating parties would acknowledge but would not treat as more than a very speculative item in their deliberations. I think an increase of five per cent is as near the mark as one can get.

This brings the unimproved value which I attribute to the land as at the relevant date to £192,425.

(1) (1907) 5 C.L.R. 418.
(2) (1913) 16 C.L.R. 654.
(3) (1956) 95 C.L.R. 245.

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I should add that both sides attempted to apply to the case the proviso to the definition of "unimproved value" in s. 3 of the *Land Tax Assessment Act*, but the results were not satisfactory and I see no reason to think that the value I have found is less than the sum which the proviso describes.

The appeal must be allowed, and the assessment remitted to the commissioner to be amended by altering the unimproved value of the land to £192,425 and by making all consequential alterations.

The appellant should have its costs of the case stated to the Full Court, in which it was successful. Having regard both to the degree of its success in the ultimate result and to the proportions in which the hearing was devoted to the several aspects of the case, I think the appellant should receive one-half of its other costs of the appeal.

Appeal allowed. Assessment remitted to the commissioner to be amended by altering the unimproved value of so much of the land included in the parcels numbered 1 *and* 2 *respectively in the return as is not exempt to* £192,425, *and by making all consequential alterations.*

Order that the commissioner pay the appellant's costs of the case stated to the Full Court and one-half of its other costs of the appeal.

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

J. B.