STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS

TRANSCRIPT OF EVIDENCE TAKEN
AT BUNBURY, WEDNESDAY, 16 FEBRUARY 2000

SESSION 1 OF 4

Hon M.D. Nixon (Chairman)
Hon Ray Halligan
Hon Ken Travers

Committee met at 6.28 pm

DIX, MR TERENCE ROY,
Licensed Land Valuer,
2-238 Stirling Highway,
Claremont, examined:

WATT, MR JOHN,
Lot 6 Runnymede Road,
Wellesley, examined:

CHAIR—I thank everybody for attending this meeting. This is an formal meeting of the Standing Committee on Constitutional Affairs of the Legislative Council. The committee is a standing committee of the parliament. It is not a government committee. Both of the major parties are represented by their members. One of the responsibilities of this committee is to consider petitions presented to the Legislative Council. Petitions which are provided to the Legislative Council in the right order and fulfil a few rules and regulations eventually finish up on this committee's desk. At that stage, the committee does two things: it writes to the tabling member and ask him or her for a short description of the problem and it writes to the principal petitioner asking him or her to provide a one or two page submission. From those the committee decides how it will proceed. It does not set itself up as a planning commission or an environmental protection commission because there are statutory bodies set up for that purpose. However, if the committee believes that the petition is something on which it can deliberate and report, it goes down that track. It has reported on a number of issues including, recently, ADD and it suggested way of dealing with that problem. It has also dealt with a petition relating to shipping around Esperance — it has done a wide range of reports.

This petition, which was provided in the right form, states —

> To the President and Members of the Legislative Council of the Parliament of Western Australia in Parliament assembled.
>
> We the undersigned residents of Western Australia respectfully draw attention to the erosion of private property rights without compensation due to Acts, Regulations and Policies including:
>
> Bushplan
> South West Wetlands EPP
> Swan Coastal Plain Lakes EPP
> Agricultural and Rural Land Use Planning Policy
> Conservation Category Wetlands
> Remnant Vegetation Protection MOU
>
> Your Petitioners therefore humbly pray that the Legislative Council will give consideration to how property rights can be protected.

Because we knew that some people in the south west had concerns about this matter, we rounded up three or four petitions from the area and are doing a tour of the area. We were in

Albany on Monday, Denmark on Tuesday and Margaret River on Wednesday, and today we have been to the Kemerton area to get a real view of what is the problem. We will be considering some of the problems in the Peel region which have been created for property owners by the Harvey dam and then we will work our way back to Perth.

On behalf of the committee I welcome you to today's meeting. Would you please state the capacity in which you are appearing before the committee.

Mr Dix—I appear as a representative of Mr and Mrs Short. The property in question is Lot 7, Runnymede Road, Wellesley.

Mr Watt—I am the owner of the above address.

CHAIR—You both will have signed a document entitled "Information for Witnesses". Have you read and understood that document.

The witnesses—Yes.

CHAIR—These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence is given in closed session. However, even if your evidence is given to the committee in closed session, the committee can still report your closed evidence to the Legislative Council if it considers it necessary to do so in which case your closed evidence will become public. That gives you parliamentary protection, which is why it is done that way.

Would either of you like to make an opening statement to the committee?

Mr Dix—I am representing Martin and Jenny Short who are Bunbury residents, and who are the registered proprietors of Lot 7, Runnymede Road, Wellesley. Mr and Mrs Short are two of many landowners effected by government indecision on the expansion of the Kemerton industrial area. There is insufficient time for me to give very much detail about the problems affecting people subject to a resumption of their properties or in this case, a statutory planning blight, which is the insidious infringement of the rights of an individual in Western Australia. I will however, make some attempt to explain the position faced by Mr and Mrs Short.

It is interesting to note that the Australian Constitution provides that the Australian Government shall acquire land on just terms. What is staggering to most Western Australians is that this fundamental principle does not apply to them. In fact, they are second-class citizens because the lawmakers in this State have not bothered to remove from our statutes the archaic assumption that we are all convicts and any grant of land is at the behest of the English monarchy and it can be taken back on terms other than that which the community considers to be just terms. Other legislatures in other states similarly affected because of the origins of the Australian federation have adopted the concept of just terms. New South Wales introduced the Land Acquisition (Just Terms Compensation) Act in 1991 which, as its title suggests, specifically introduced the term "just terms compensation" in the new act on repeal of the Public Works Act 1912. In March 1998, the new Western Australian Land Administration Act 1997 was

proclaimed. That act contains no reference to the concept of just terms, and if it were not for the Australian Property Institute vigorously lobbying the Department of Land Administration over a period of three years, there would have been widespread negative changes to the provisions relating to compensation. I recall some years ago speaking to a former Speaker of the Legislative Assembly after I had discussed the multitude of statutes relating to the compulsory acquisition of land in this state. I was informed that I was wrong as there was only one act that handled all compensation in this state, and that was the then Public Works Act 1902. In fact, there are in excess of 120 statutes that contain a power to resume land for public works. You may ask what this has to do with Mr and Mrs Short; their land has not been resumed. LandCorp has the power of compulsory acquisition which it has exercised to acquire land in the Kemerton industrial area. It has acquired the land so that it has become unsaleable to anyone other than LandCorp. It says that the land may be required for a buffer area around the expanded Kemerton area. This situation is similar to that occurring at Kwinana. You will all be well aware of the lobbying that has been going on between the Government and the Kwinana industrial group. The industry does not want any development within what is quaintly called the Kwinana clean air zone. The reference to "clean air" does not mean that the air is in any way polluted; it means that industry does not want to have to pay to move people as the industrial area expands. This is a reasonable view from a planning point of view, but what about the owners of land like the Shorts? Are they expected to carry the cost of the Kemerton buffer area on behalf of the community, or more particularly in the first instance, on behalf of the industrialists.

Mr and Mrs Short purchased lot 7 in April 1980 with the intention of living on the land and subdividing the balance of the land to fund development of their own dwelling or simply to make a profit. In 1988, the Shire of Harvey acknowledged the owners' request to be included in a potential rezoning of the area under the shire's local rural strategy. Over the next three years, money was expended on preparing the draft plan subdivision which culminated in the preparation by the shire of the draft district zoning scheme No. 1 which identified the subject land as special rural in proposed policy area No. 8.

On 14 October 1992, the Ministry for Planning and Urban Development advised the Shire of Harvey that it did not support the proposal, in part because of the potential impact of the industrial area. It is noted that the letter from the department stated that the land, which was then outside the proposed buffer, would nevertheless be impacted by the industrial activity. Research undertaken by my office indicates a direct role by the then Minister for Planning who was intimately involved in negotiations with the shire and made his decision quite clear, which was that Kemerton would expand and the government had no intention of raising property values in the area in case it was faced with a resumption.

We can see then that the Short's land has been blighted for at least the last eight years. During that time it would have been impossible for them to sell the land because of the widespread knowledge in the market place of the proposed extension to the buffer. The shire planning officers were well aware of this intention by the government and would have had a duty of care to disclose that fact to any inquiry by a potential purchaser.

Where does that leave the Shorts and other affected landowners? The answer is simple. They have nowhere to go and they have to sit and wait for 10 or 15 years until governments decide to implement some change to the Kemerton project. This is unfair and inequitable. This

responsibility for proper planning and sterilisation of land required for a public work is clearly a community responsibility, not one for individual owners.

This leads me to the next problem. There is a lack of understanding, in my opinion at least, by members of Parliament of the procedure for acquiring property under planning legislation or compulsorily under the Land Administration Act 1997. That leads to a misunderstanding of the role played by acquiring authorities. In the case of LandCorp, it actively promotes the view that it would acquire property within the buffer area at market value. Such a statement would seem quite reasonable. Why should anyone expect more than market value? The problem with selling at market value is that the evidence of value is invariably reflecting a depressed value as a result of the activity of the acquiring authority. In the Shorts case, LandCorp may well be prepared to buy the property at some time in the future, but at what price? In the case of the extension of the Premier mine in Collie, Western Collieries conducted negotiations with affected landowners with the Minister for Resources Development standing behind it with the threat of compulsory acquisition. In one case, a single mother with two children received what she thought were threatening telephone calls at 11.00 pm. Not surprisingly, Western Collieries got what it wanted. Similar tactics are being conducted in the Harvey dam project.

I find it absolutely unbelievable that a state government can allow a private company to conduct negotiations to acquire land for a private project, notwithstanding the fact that there is a statute that provides for that project to proceed - in effect, a compulsory acquisition of land.

Hon KEN TRAVERS—Are you talking about the Harvey situation?

Mr Dix—No, I am talking about the Collie situation. I do not see why Western Collieries should be given the power, effectively, to threaten people with compulsory acquisition.

CHAIR—Is that being negotiated currently?

Mr Dix—No, that happened last year. There are others where there is a resumption and they are yet to be resumed, which is another issue.

CHAIR—Thank you for raising it with us. It is one that we did not have on the list.

Mr Dix—However, you will find that the same thing is applying in the case of the Harvey dam. The last time that the Legislative Council considered the question of the resumption of land, which is at the centre of the erosion of property rights, as far as I am aware was when the Standing Committee on Government Agencies under the chairmanship of Hon Mark Nevill published the ninth report in August 1986 and the thirteenth report in June 1987. Many of the recommendations of the committee have been incorporated in the new Land Administration Act 1997 and DOLA should be commended for its work in putting together the new act. Many areas require further review and I am aware that it intends to revisit sections of the act over the next few years. I also respectfully suggest that this committee could have a major impact on the way DOLA would handle the proposed amendments to the act. Hopefully, this issue of just compensation is an important issue.

If the community wishes to protect private property rights, citizens like the Shorts should be

given the right to compensation under the provisions of a single land acquisition act and that act must require the acquisition of land to be taken on just terms. There should be a constitutional right to receive compensation. At the moment there is no right in this state to compensation per se, other than that provided by statute. Other statutes remove or limit an owner's right and the worst case is governments increasingly using planning legislation to limit compensation. Thank you for giving me the time to speak to you tonight.

CHAIR—John, you are one of the ones affected. Will you give us a picture of how you are affected. How do you believe the process can be improved and the problems solved?

Mr Watt—It all started when we purchased lot 6, Runnymede Road, Wellesley in 1989. By 1991 we had built a very nice architect designed home there. In 1995 we decided that we needed to be closer to schools and colleges and in turn the much more diverse employment area, namely, Perth, to cater for our three sons who were at that time aged seven, nine and 11. We presented to purchase a large block in Perth and by the later part of 1995 our house was on the market with Century 21. By January-February 1996, a buyer was found and everything was ready to proceed. That is precisely when we were informed, verbally first and by a letter in March, that our house and land had been included in this Kemerton expansion program. Before building, we checked the possibility of Kemerton expanding and we were informed that the then present government had promised, in writing I thought, that no further expansion would ever take place in a statement that was required by the then residents of Australind allowing the present Kemerton industrial park to be established. From that point our dreams were shattered. Not only had we lost quite a lot of money on the land in Perth; we were unable to sell our home. Many promises of a quick resolution were make by government officials but gradually, and calculatedly I believe by the government, it was demonstrated that there was no intention of a quick settlement as the expansion would be completed in 2030. We sent several letters to the government copies of which I submit to the committee.

Since 1996 we have been continually given promises that settlement would happen soon. In desperation I wrote to Hon Richard Court on 27 June and he took precisely four months to answer the letter, again indicating that the matter would be resolved by Cabinet in October. That was just another lie.

We are now beginning a fifth year and we are very bitter because of the sheer amount of time taken and our three sons now aged 12, 14 and 16 have missed their big opportunity of a better education. I also add that they spend two and a half hours each day travelling to and from school and there is no part time work in the area that they would like to do and they are therefore very unhappy also. We believe that their education has seriously suffered because of this and soon their work prospects will suffer too. We have many times requested a meeting at which to speak personally with both Hon Richard Court and Hon Colin Barnett, but they do not want to see us. We believe that our rights, both in property and as human beings living in Australia, have been seriously eroded.

The most devastating thing in all of this is that this is just the start of the government’s very calculated plans to profit from or erode our hard earned rights, as the next part - if and when we get to it - will be to agree on a true and reasonable value for our house and land which is to reflect also our pain and suffering over the past four horrible years.

CHAIR—Mr Dix, you mentioned earlier that John had visions of subdividing. One of the things the committee must grapple with is the definition of "property right". If somebody owns a property, what can their property rights reasonably be expected to be? Suppose somebody owns a property zoned rural, have they an expectation that one day they will be able to subdivide and, therefore, it will be worth money? Is that claiming a right that does not exist because it does not have the appropriate zoning at that stage? What is your view on that?

Mr Dix—I think the owner is entitled to realise the potential of the land at the time. If at the time he buys it, it is zoned rural, and it is resumed in the short term he would be paid rural land values. Discussions were held with the shire, which indicated its support for the land to be subdivided. I am not suggesting at this point in time that I can give any indication of the value of the land; that is not the issue. The issue is the procedure that is undertaken by statutory authorities by delaying and frustrating owners and giving them nowhere to go. That becomes a statutory blight. We can take the value into consideration in the valuation process provided we have a statutory base. There is no resumption, so we do not get the benefit of the provisions of the Land Administration Act; nor do we get the benefit of the planning act in terms of a right to compensation because this is at an early stage where the land is simply blighted by inactivity. This blight has been going on for years.

In the metropolitan area there is the metropolitan region scheme, which was deliberately set up by government to delay compensation. There is absolutely no argument about that from anyone - to my knowledge. Stephenson looked at the problem, said it was a massive problem to provide sufficient public open space, road reserves and so on within the metropolitan area and, therefore, the government needed to introduce some mechanism to delay. That has been done through the MRS. The Ministry for Planning and the WA Planning Commission intend to expand that to nine or 13 regions in the state. Greater Bunbury is one of them, and they are looking at Leeuwin. Peel is a current problem, and I suspect it is very close to being gazetted. Once that happens, there will be a statutory base. But, in the case of Kemerton we are talking simply about delay. The bureaucrats forget that these people have 10 to 15 years of their lives when they cannot make progress. That is wrong.

CHAIR—Do you have any solutions, or suggestions about what the guidelines should be? Should there be only certain lead times or anything of that nature? How would you solve it if you had a magic wand?

Mr Dix—There is no argument that the planning process is necessary and, as a general statement, I would say it is conducted by professional people at the Ministry for Planning and there is no problem with that. They are very professional; they do their job very well. The problem is the missing link between the bureaucratic process and the rights of the individual. No individual rights are protected by statutes in this state. If you told people that there is no inherent right to compensation, they would be staggered. This is the problem I had in 1986 or thereabouts. I made representations to the then government and I was to appear before a cabinet subcommittee. That was cancelled because there was to be no discussion about it.

CHAIR—What do you suggest? How do you solve this problem of the balance between the two?

Mr Dix—There are in excess of 120 statutes in this state that refer to compensation. There should be one land acquisition act and there should be a connection between the planning acts. No compensation should be provided for in planning acts. There should just be a reference to one single statute so that we could then incorporate the heads of claim that we have - there is a common law base that goes back 200 or 300 years. It is the use of planning legislation that is causing the problem.

CHAIR—I will go to the next step. There are many ways that people can lose their property rights. One is that they have a property in an industrial area and it is resumed. They lose their property right but at least they get compensation. They might lose half their property and that creates another problem, because the other half may not be viable.

Mr Dix—That is simply a valuation problem. If you have the statutory base, the valuer can look at the problem and can compensate or provide an assessment that compensates the owner for diminution in the value of the remainder of the property. As long as there is a statutory basis for it, it is not a simple process but it is something we do every day.

CHAIR—I am told that in the Harvey Dam case - I have not been there but I have heard about it - people whose properties are well above the dam have modified their farming practices and they cannot use the fertilisers they used to use and that sort of thing. Would you like to list some of the ways that you see people's private property rights can be eroded?

Mr Dix—The failure to give them a statutory right to compensation. That is the first thing. Secondly, there should always be the opportunity to negotiate a settlement without resumption. The problem is the owner's rights are contained in the compensation act, so my recommendation to all my clients is that they must force the acquiring authority to go to resumption because that is where their rights are protected.

CHAIR—Then you can do it early in the process also.

Mr Dix—Yes. The acquiring authorities do not want to do that. Harvey is a classic example, and the proposal to classify land P1,P2 is, to a certain extent, hidden from the average person. It is only the professionals who are aware of what is going on. The tendency on the part of the Water Corporation appears to be that it will do the deal now rather than allow a statutory process to be followed in which the farmer can pick up the loss of farming rights. That is the major problem with Harvey.

CHAIR—We heard evidence this morning of a white bellied frog that turned up and caused all sorts of hazards. We also heard evidence of a rare and endangered species which was found on the property and changed property rights.

Mr Dix—I have hundreds of those properties. Bushplan is exactly that. I think the government has provided $100 million over five years. My estimate was that between $1.5 and $1.8 billion was needed. I think the Ministry for Planning if asked for its estimate would probably say it is close to $1 billion. That is what is needed, but this is the problem with these planning issues; they consume so much money that governments need to defer them. Our problem is the loss of property rights that are not even considered as part of the equation.

Hon KEN TRAVERS—According to the planning bureaucrats, there is a right to compensation under many of the planning acts through injurious affection. Am I right in thinking that you are saying that is not real compensation until you go down the path of the formal resumption process? It is a view that has been put to me before and I want to clarify it.

Mr Dix—I am sure you can get the proper legal advice.

Hon KEN TRAVERS—I tried to get the advice and it took two years waiting for the letter to come back.

Mr Dix—The problem with the planning legislation is that you are talking about a claim for compensation for injurious affection. The power for that comes from the Town Planning and Development Act 1928, which is incorporated in the case of the metropolitan region scheme in the scheme act under which people have a right to compensation. The problem is that the right to compensation for the making of the scheme that created the problem expired six months after the scheme was proclaimed in 1963 or thereabouts. It is no good talking to somebody in Perth and saying you had a right to compensation; they probably did not own the property at the time and any right they had has expired. The only other right they have is the right on the basis of the refusal to permit development. This is not a statutory right; it is not a resumption.

Hon KEN TRAVERS—Are you saying that any settlement through injurious affection would be significantly less?

Mr Dix—Yes, significantly less.

Hon KEN TRAVERS—When the MRS was established in 1963, was there an immediate right if you claimed within six months?

Mr Dix—Yes.

Hon KEN TRAVERS—Obviously, when the MRS amendments have gone through that same provision has not applied.

Mr Dix—The amendment may also be the making of the scheme. It depends in a technical sense on whether one particular amendment would give rise to a claim for the making of a scheme. That is a question of law, and I am not qualified to answer that.

Hon KEN TRAVERS—But those people are given six months under the current legislation?

Mr Dix—The MRS is a town planning scheme. I am currently lodging claims for injurious affection under the Shire of Busselton's new scheme. That right to claim expires on 7 March.

Hon KEN TRAVERS—Is that still a claim under injurious affection?

Mr Dix—Injurious affection for the making of a scheme. We must lodge that claim within six months, otherwise that right is extinguished.

Hon KEN TRAVERS—Are you able to briefly outline what you see are the differences between injurious affection and compulsory acquisition? I am aware of some of them, but I would be interested in your perspective.

Mr Dix—The problem is that there are two separate definitions for injurious affection. Injurious affection in the town planning scheme has a different meaning from injurious affection as a compensation issue. Injurious affection from a compensation point of view involves a number of issues. Under the Land Administration Act you must first look at the value of the land; secondly, you look at what is known as severance damage; and thirdly, you look at injurious affection and consequential losses, disturbance and so on. The disturbance provisions include businesses. Injurious affection in the compensation sense is the diminution in the value of the retained land caused by the activity on the land taken. A classic example is that if you take land for a road, there is noise, vibration, fumes and those sorts of things. Severance damage is the diminution in the value of the retained land caused by the taking. That is exactly as the chairman suggested earlier, in that where a part is taken there is always a claim for severance damage. Very rarely is there a claim for injurious affection. Even if there were, it would extremely difficult to pursue it, whereas in the town planning sense injurious affection has a different meaning. It means damage, but in a global sense.

The problem in town planning legislation is that injurious affection is limited to a number of properties, whereas in a compensation sense it is limited to one property; that is, the property that is the subject of the claim. There can be damage to other properties, but the right to compensation comes from the taking of part of the land. There are some unfair situations where neighbours are treated differently. That is because the common law provides that the right to compensation comes from the taking of somebody's land, so a person can lose one square metre and have a right to compensation which could involve a substantial amount of money because the damage is substantial. In a simple sense you might have a duplex site. If you lost one square metre of that land, it could go back to single residential.

Hon KEN TRAVERS—Would you pick that up only under a compulsory acquisition?

Mr Dix—Yes, only under a compulsory acquisition. Planners do not do that and they do not want it because it brings an immediate right to compensation, and they are trying to defer it all the time.

Hon KEN TRAVERS—Under compulsory acquisition, if you have already started a business, for instance, but still have plans for expansion, would you be eligible to pick up some compensation for the potential of the property, whereas under injurious affection you would obviously get only the market value?

Mr Dix—That is right. I have just completed valuation of a partial take for a road diversion that involves going straight through the middle of a vineyard. As part of the valuation process, you must look at the age of the vines, the yield from each variety, the amount of money per tonne, and all those issues. They are business losses and they form part of the claim for severance damage. In a planning sense you may not be able to do that. There is only a claim for injurious affection.

Hon KEN TRAVERS—In the Kemerton situation, are any of the people in the potential site or buffer zone eligible to access anything at the moment for injurious affection?

Mr Dix—A number of people in the buffer zone have had their properties resumed.

Hon KEN TRAVERS—That is in the current buffer zone.

Mr Dix—Yes. Outside that, no.

Hon KEN TRAVERS—At the moment they have absolutely no mechanism.

Mr Dix—None whatsoever. That is the basis of these two submissions. You are hearing it from me on a technical basis, but these are real people who are affected. This applies right across the whole state.

CHAIR—I am mindful of the time, but I had a feeling the first two speakers may take more time because they have covered new ground that may not need to be covered again.

[The witnesses retired]