

**STANDING COMMITTEE ON PUBLIC ADMINISTRATION
AND FINANCE**

LAND INQUIRY

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON MONDAY, 19 AUGUST 2002**

SESSION 5

Members

**Hon Barry House (Chairman
Hon Ed Dermer (Deputy Chairman)
Hon Murray Criddle
Hon John Fischer
Hon Dee Margetts
Hon Ken Travers
Hon Sue Ellery**

BARNAO, MR DAVID
Principal, David Barnao and Co,
examined:

The CHAIRMAN: On behalf of the committee I welcome you to the meeting. You will have signed a document entitled "Information for Witnesses". Have you read and understand that document?

Mr Barnao: I have.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones. 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 be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

David, would you like to make an opening statement?

[2.00 pm]

Mr Barnao: I have been a property consultant for 36 years and wish to address the committee on the component of its hearing into government activities on property matters. I presume that the committee has a copy of my written submission.

The CHAIRMAN: Yes, we do.

Mr Barnao: I will quote from a summary I have made. I know I must table documents, but I have summarised my submission for briefing notes to speak to. No additional information is contained in those notes.

My contention is that there should be a single acquiring authority to handle all acquisitions or resumptions of property on behalf of the State of Western Australia. I also submit that the leading authority involved in such acquisitions - the Department for Planning and Infrastructure - has a conflict of interests in that it is also the ultimate zoning authority. From my experience in the case study I quote, the department has used its authority, in my opinion, to deny affected parties proper compensation. I will refer to that in more detail later. I also submit that there should be a tribunal, possibly along the lines of the Valuation Tribunal or the Town Planning Appeals Tribunal, which is a totally independent body which can make judgments on important matters such as the acquisition or resumption of property. At the present time, the Department for Planning and Infrastructure, which has recently taken over a significant part of the role of Main Roads in this area, is the leading government acquiring or resuming authority, and has not, in my opinion been seen to be independent or even-handed. That is the broad thrust and summary of my submission.

The CHAIRMAN: Just by way of example, can you refer to some specific incidents which might illustrate why you might come to those conclusions?

Mr Barnao: In my submission, I have referred to a matter, from page 4 onwards. I have detailed the negotiations that took place over a seven-year period, and were finalised not through their acceptability to the clients for whom I acted, but out of frustration, time and costs. The situation was that they were worn out. It was a case of battling Big Brother. They spent \$100 000 trying to prove their point, and the only option at the finish was to go to the Supreme Court, which would take two years and another \$100 000. So Big Brother won.

There must be a fairer, more equitable, and more economic method for people to seek fair and just compensation when land is required for the community good.

Hon KEN TRAVERS: Was the land zoned urban at the time?

Mr Barnao: No, it was zoned rural.

Hon KEN TRAVERS: Why would you argue that the price should be base on urban values?

Mr Barnao: Zoning, at the time, was not the only indicator of value. In effect, many parcels of land that were zoned rural have been rezoned urban. It could be a 10 or 15-year time frame. Three-quarters of our client's land was zoned rural, and the other quarter was zoned urban. In its original response, the department advised that because the land was not in Metroplan - the study released in 1990 indicating the guidelines for future development - and the balance of the land was not zoned urban, it could not be considered. In my research, I ascertained that the department itself owned land at Port Kennedy that was also not zoned urban; it was zoned parks and recreation. The department had taken upon itself to rezone the land to residential and then sell it. There is one rule for the department and another rule for the public. When I raised this issue with the department, it then dropped the argument and accepted my contention that the zoning itself did not preclude recognition of the potential of the land. Any number of parcels of land were zoned rural five years ago but have now been rezoned urban. This land was close to the freeway, and was surrounded by land that was zoned urban, but a selective process was used to say that it could not be urban. That process involved changing the rules after the game had started. I have dealt with that as well in my submission.

There is a ground water development area called the Jandakot ground water protection zone, which was introduced in 1992 as a result of a study, and a standing committee of Parliament recommended that land that was reserved for the Jandakot botanic park and other government holdings in the area should be included in this ground water protection zone. I made a submission to the select committee of the Western Australian Planning Commission that it was inappropriate to include my clients' land in that zone, simply because it was not in public ownership and there was a fear that if it were included in that zone, that inclusion would be used as an argument to deny compensation. My submission was not accepted, and what I predicted happened. The department turned around and said that the land was in the zone, and could not be developed for urban purposes, and therefore the value could reflect only what it might be developed for as an alternative. Basically, that is a denial of right. To change the designation of the land was inappropriate. We therefore had to fight the battle on other grounds. The interesting thing there was that the land directly west of my clients' land was owned by LandCorp, a State Government instrumentality. That land was deemed fit for urban development, yet it had on it an extraction bore used to

supplement Perth's water supply. I raised this issue, but again it was Big Brother. It simply was not appropriate. That land is now being subdivided, with an extraction bore on it. They used that argument to say that my clients' land could never be developed, but the land over the road, with identical physical characteristics, and owned by the State, was developed. This really draws into question the confidence the public can have in the actions and attitudes of the Department for Planning and Infrastructure.

Hon KEN TRAVERS: The watertable there would be running east to west, would it not?

Mr Barnao: Yes. There are some arguments about the scientific accuracy of these projections on water flow. In effect, the boundary between urban and rural, or land that could be developed and that which could not be developed, was a line drawn by a planner, not by a scientist or a ground water expert. Again, I made that contention - that someone had drawn a line above the ground when talking about what would apply below the ground.

Hon KEN TRAVERS: Part of the aim of the parliamentary committee you referred to was to base the boundaries on scientific evidence, which is why, in places like Gngangara, instead of cadastral boundaries, proposed boundaries now relate to the extraction of the water resources. I would not disagree that in the case of Jandakot, there was probably a bit of related planning for the protection of the mound, and some areas have been developed that would not have otherwise been developed.

Mr Barnao: That is correct. In essence, before this ground water zone came in, there were three priority areas. Priority 1 areas could not be developed for urban purposes, while priorities 2 and 3 could be.

Hon KEN TRAVERS: Priority 1 land was also in crown ownership.

Mr Barnao: That is right, and the Government had no objection; it was promoting the scheme, so it put its land in the priority 1 area. Our client's land was in the priority 2 area, which meant that there was a debate about whether it could be developed, as was LandCorp's, land subsequently bought and developed by Peet and Company, and other land around the area. Selectively, some of the land was placed in priority 3, which meant it could be developed for urban purposes, and other land, including my clients' land, was placed in priority 1, which meant that it could not be developed. That is okay, but to then use that as an argument against paying proper compensation flies in the face of democracy. The only reason my clients capitulated was that, after seven years, spending so much money, the age of the major syndicate member and the friction being caused amongst them by so much frustration, they decided that they could not fight any more. They were worn out.

Hon JOHN FISCHER: Were any hydrological reports put out on any part of that area?

Mr Barnao: There may have been. We had environmental reports of all sorts. We had engineering reports prepared by Wood and Grieve Engineers, stating that the land could be developed. Topographically, the land was no different to the land that has since been developed, or land nearby that was being developed. The crowning glory was that in initial negotiations, we claimed that the land was urban, while the Department for Planning and Infrastructure instructed its valuers to value it on the basis that the department saw fit. In other words, the valuers were fettered, or told to value according to instructions.

[2.15 pm]

The ground water sensitivity was such that the land could not be developed for urban purposes. They made an offer of \$1.9 million, which my clients rejected. More than two years after research, investigation, negotiation, argument and further expenditure, my clients decided they had had enough and we went back and said that we would negotiate on the basis of special rural zoning. They then reduced their offer by \$50 000 from \$1.9 million to \$1.85 million. If ever there was an act designed to destroy confidence in the system, I would suggest that that was it. The market was improving and subsequently only after settlement, or at the time of settlement, we were advised that they had had two valuations done - one came in at \$1.85 million and the other at \$1.91 million. It was hardly reasonable to go below the original offer, particularly when one valuation came in at more than that.

I am expressing frustration. I do not know whether anyone else has made submissions to this committee. The ministry does some good work and some of my negotiations have had satisfactory outcomes. However, this is an example of its perceived omnipotence and how it has used the system or changed the rules to suit the purpose. It is public money and it must be protected and used wisely, but not to the point at which people are denied a fair and equitable assessment of their situation. It will not happen while the Department for Planning and Infrastructure, which is the zoning authority, makes the rules. In essence, if a piece of land is reserved or the ministry feels that it might need it in the future and someone applies to have the zoning changed from residential to commercial, which would be an enhancement of value, one would normally expect that to happen. It will not agree to that because it will cost more money. Although it should remain involved in the zoning side of things, the ministry should not be involved in the acquisition or hold resumptive powers. In my opinion, there is a conflict or a potential conflict of interest with numerous acquisitions.

Hon MURRAY CRIDDLE: You have suggested a single acquiring authority - obviously not the Department for Planning and Infrastructure - and an independent tribunal. First of all, with your valuing or purchasing authority, are you happy with the current valuations? What process would you want put in place that would facilitate a reasonable outcome? .

Mr Barnao: The main thrust of my submission is that the instructions to the valuer - in my case to the valuers because they had several valuations done - were that the land be valued on the basis that it had no urban potential. The Western Australian Planning Commission is the ultimate decision maker. However, the valuer must call it as he sees it. If he sees that the land could have urban potential in the medium term, he should value it accordingly with an appropriate qualification. However, when a valuer is told by the acquiring party that he must not regard those elements of potential, he will not fly in the face of that. The client is telling him that that is how he should value the land; it is not an unfettered approach. Therefore, he must discard all the normal principles - that is, highest and best use, both immediate and potential.

Hon MURRAY CRIDDLE: We have a valuation based on what may be the potential of the property. Do you believe the independent tribunal should have a time frame for decisions?

Mr Barnao: The independent tribunal would be no different from the Land Valuation Tribunal or the Town Planning Appeal Tribunal. They will hear arguments on both sides and make a decision. The Town Planning Appeal Tribunal hears many

a matter relating to an application for approval of a subdivision that has been rejected. People take those matters to the next phase. However, they have the opportunity to make a submission to an impartial and independent tribunal to decide. The ministry makes the decision at the moment. If a party does not agree, the next step is to go to the court system. We all know about the Mt Lawley case.

Hon MURRAY CRIDDLE: I thought you were saying you wanted to get away from litigation or going to the courts.

Mr Barnao: That is right.

Hon MURRAY CRIDDLE: You want a tribunal that will provide the least-cost avenue.

Mr Barnao: Parties can appear before the Land Valuation Tribunal without a solicitor. A solicitor may be necessary, as is the case with the Town Planning Appeal Tribunal. It generally takes six to nine months to have the matter heard. Therefore, it could be up to 12 months before it is resolved. If the matter goes to the Supreme Court, it can take anywhere between two and four years.

I do not know whether members are aware of the Mt Lawley case. It has been going on for 10 years. It involves ground water and environmental issues. It started in 1992. It has cost the landowner in excess of \$1 million, and it has cost the State in excess of \$500 000. We are still awaiting a decision. Fortunately, or unfortunately for the landowner, he can afford to pay that sort money to protect his interests; the average person cannot.

Hon MURRAY CRIDDLE: Would this process overcome that?

Mr Barnao: To a significant extent, yes.

Hon MURRAY CRIDDLE: Do you regard appeal to the minister as the final step?

Mr Barnao: No, I do not. The minister is in charge of the department and has a perceived level of independence, but her advisers are generally departmental officers. I do not think we can achieve the level of independence that is required in a matter of this nature. This is no criticism of the minister; it is the system.

Hon MURRAY CRIDDLE: You mentioned the framework. I am trying to find out how you would like the outcome put in place.

The CHAIRMAN: Who should be the final arbiter?

Mr Barnao: It should not be the department. I believe that Mr Birmingham is the chairman of the Land Valuation Tribunal. I read in the newspaper last week that Les Stein formerly of the University of Western Australia is now the chairman of the Town Planning Appeal Tribunal. They are independent parties. We will not all like their decisions, but they have no vested interest at the moment. If parties cannot agree with the department, they can go to the court, depending on the nature of the claim. My clients were forced to capitulate because they were faced with a further two-year wait after seven years and another \$100 000 in costs. At the end of the day, this matter was agreed reluctantly at a figure of \$2.1 million, which reflected some reimbursement for the expenditure and the pain. However, in essence, they lost, because they did not have the will or time to spend more money to fight the battle. The reason the battle started was that the rules were changed and they were unfairly dealt with.

The CHAIRMAN: The body making the rules was the body doing the valuations.

Mr Barnao: The acquiring or resuming authority. It had resumptive powers.

The CHAIRMAN: You mentioned in your opening remarks that the amalgamation of Main Roads Western Australia under the Department for Planning and Infrastructure will make the situation worse. Will that be because of the sheer volume of acquisitions Main Roads does?

Mr Barnao: I understand that DPI is not taking over all of Main Roads' activities. Main Roads will continue to handle the immediate acquisition process, such as for a Northbridge tunnel-type project. DPI will handle the longer-term acquisition processes. It will have a greater role because it will take over a significant part of Main Roads' land acquisition or resumption processes. The situation will remain the same; it is the zoning authority and has the power to determine what the ultimate outcome will be, and that dictates the value. It cannot be prosecutor and judge at the same time.

Hon KEN TRAVERS: New South Wales has a single land acquisition authority.

Mr Barnao: I believe so. Several States and other countries have established them.

Hon KEN TRAVERS: Have you had a look at any and seen whether there are any problems?

Mr Barnao: I have had enough trouble on the local front; I have not travelled interstate.

Hon KEN TRAVERS: I wonder whether, from an industry perspective -

Mr Barnao: I stand corrected; there may be one in Queensland.

[2.30 pm]

Hon DEE MARGETTS: In the cases and clients that you have handled, have you dealt with acquisitions over a wide range of government entities? I will put you on the spot here. If that is the case, which government entities handled it in the best way, and what are the good sides of that, and which handled it the worst?

Mr Barnao: I do not undertake a lot of compensation negotiations and, quite frankly, I do not look for them. I do them for clients who ask me to do them. I have conducted several negotiations with Main Roads, and I have found Main Roads quite easy to deal with. When we have not reached agreement, we have been to arbitration. If the arbitration did not go all our way, I was more than satisfied with the process. The process was economic and relatively quick. The process associated with the Northbridge tunnel was all resolved within 12 months. All that Main Roads wanted to do from my perspective was to pay a fair market value. We had some arguments about the approach to that. The arbitrator found in a manner that I do not think upset either party. I certainly had no criticisms of Main Roads.

I have had satisfactory negotiations with the Department for Planning and Infrastructure, but I have had more that have been unsatisfactory than have been satisfactory. In my view, the Department for Planning and Infrastructure in recent times has tended to use a new set of rules. There is a perception in the industry that the fellows in the department think that it is their money rather than the State's, so they are fairly tough with it. They must be tough; there is no argument about that and no-one is looking for Father Christmas, but they must be fair and even-handed, and that is where I have had some difficulties.

Hon DEE MARGETTS: Are you saying that the situation may have got worse in recent years, perhaps associated with budget constraints?

Mr Barnao: I do not know that they are associated with budget constraints. My understanding is that the metropolitan region improvements tax goes to fund the acquisitions. That tax comes with the land tax statement; in other words, it is a tax paid by investors and owners of commercial and industrial property, not the average taxpayer. That is fixed at a rate of 0.15c in a dollar. Basically, it continues to increase as values escalate, so an ever-increasing payment of those amounts would be passed over to the department. I do not think that the money is coming out of revenue, although I do not have access to the figures. I believe that it comes from a levy that is collected with land tax. I imagine that fairly substantial funds are available. It is not a question of trying to eke it out.

Hon DEE MARGETTS: Are you saying that in your opinion those negotiations are getting tougher or more inequitable?

Mr Barnao: I believe that extremes breed extremes. If extreme positions are taken on one side, extreme negotiations will be evident on the other side. If everyone took a moderate approach, I believe that the situations could be resolved more readily. That would happen if they conformed to the normal guidelines but there are now departures from the guidelines, which really cause the frustrations and the difficulties that I see getting worse rather than better.

Hon KEN TRAVERS: Going back to the \$6 million versus the \$1.8 million, I do not have a problem with the process arguments that you raised. There is the question of how land is valued. I take the point about the whole range of ways of doing it. If land is not zoned for urban development, whether it may be in the future is speculative. There may be a whole range of reasons that the land will not be rezoned urban. Without going into the arguments about conflicts of interest and the fact that the Government can zone land wherever it likes, and to some extent I do not disagree with that, if a piece of land is zoned rural, that land can be used only for rural pursuits.

Mr Barnao: That is correct. Valuation is an art, not a science. I believe that we have learnt that during the last couple of years. In essence, however, prior to our lodging a claim on this, we obtained independent reports from town planning consultants, engineers and environmental consultants - the disciplines that one would use in the development process. Our instruction was that we wanted to take this up with the Government and we wanted to know whether it was achievable.

Hon ED DERMER: You wanted to know if the rezoning was achievable?

Mr Barnao: Yes, and if it were not, there would be no point in pursuing it. We engaged Chappell and Lambert, a very prominent planner; Wood and Grieve Engineers, one of the largest engineering firms in Perth; and ATA Environmental, one of the major environmental consultants. They all agreed that the land had potential for urban development. It is no different from other parcels of land that adjoin the urban front. A major development is proposed at Forrestdale on the southern side of Ranford Road. Until recently that land was zoned rural. It had similar qualities; it was near transport routes and major transport corridor growth areas. The growth of Perth means that land must be rezoned to accommodate people. For example, Byford has been a rural hamlet for years but now some of that will be developed for urban purposes.

Hon KEN TRAVERS: I understand there is a constantly changing process in which land is rezoned from rural to urban, and that it gets an enhanced value as a result of that rezoning. While the land is zoned rural, any value above that would be speculative, would it not?

Mr Barnao: That is so to some extent, but developers endeavour to buy land at rural prices. In the same way a vendor, if he sees a potential for urban zoning, albeit distant, is more likely to want to sell the land based on its urban potential, and developers are prepared to buy the land on the same basis.

Hon KEN TRAVERS: That is a speculative value, is it not?

Mr Barnao: Yes, but there is sufficient established evidence to justify that.

Hon KEN TRAVERS: If someone buys a share in a goldmining company that has a prospective lease next door to Bronze Wing or whatever, that will have the value. If the mining company never finds gold on that site, the share value may fall through the floor once the exploration is complete.

Mr Barnao: It is a matter of expectation - expectation in mining and expectation in property - but reasonably and soundly based.

Hon KEN TRAVERS: The final arbiter is whether lines are drawn on the map. Are you saying that all land in the metropolitan area, no matter what its current zoning, is potentially urban land?

Mr Barnao: I am not saying that. This land is adjacent to the urban front. I have some maps with me that I did not know I needed to submit, but I have 10 copies that may be of use in showing the committee the pattern.

Hon KEN TRAVERS: I am reasonably aware of the Jandakot mound. As I commented earlier, I also accept that some decisions were probably made earlier the piece, and it may not be good that the land was rezoned urban in the first place.

Mr Barnao: These maps may help. The fronts are shown alongside the words "subject land" and in relation to existing development. The maps will probably illustrate the points I am making. One could argue that perhaps the land should not be zoned urban, but the part that was not acquired for the Jandakot Botanic Park has now been developed as urban land. It is surrounded by urban land, and I maintain that it was a selective process whereby government, by drawing the boundary for the ground water, ignored reasonable planning issues. I have outlined in green on the larger map the land that was acquired. The land to the left with the subdivision drawn over it was the balance of Woodum's land. Over the road is the LandCorp land. I have put red dots where the water extraction bores are located.

The CHAIRMAN: I cannot read the number, but what has happened where the extraction bore is now?

Mr Barnao: There is sand on that land and it is being subdivided. Someone mentioned to me the other day that the Water Corporation may cease to use that for water extraction, but as at the relevant date of the acquisition of the land, it was being used for the extraction of Perth's ground water supply. It flies in the face of reason that the Water Corporation will permit development where it is extracting water, and say that it wants to keep our clients' land as it is because of ground water sensitivity and that my clients cannot develop it.

The CHAIRMAN: Is it subdivided into 500 square metre lots or something like that?

Mr Barnao: LandCorp is subdividing it at the moment.

Hon KEN TRAVERS: Does the larger map represent the corner block?

Mr Barnao: The land in green is my clients' land, the subject of this submission today. The land to the left of it shown in black and white is the balance of their land which has been bought by Peet and Co and subdivided. Over to the left of that is the LandCorp land where the colours are. The red dot adjacent to the freeway reserves is the approximate location of the ground water extraction bore. There is one further to the south and one further to the north.

Hon KEN TRAVERS: A scientific argument based on the direction of the flows of the water could be made for protecting the recharge areas of the mound. The more land that is zoned urban, the greater the reason for the zoning of the area. If your clients' land was allowed to be zoned urban and your clients developed the whole of that area, an argument could be made for allowing the owners of the adjoining pieces of land to do the same, could it not?

Mr Barnao: The counterargument to that is that if my clients are denied the right, why should LandCorp have the right to develop its land.

Hon KEN TRAVERS: Which LandCorp land is being developed?

Mr Barnao: The top half of the coloured section represents LandCorp's land.

Hon KEN TRAVERS: That is again to the west, so it would be the same as the western portion of your clients' land.

Mr Barnao: It could be. In essence, it was in the same priority area as my clients' land before the ground water protection zone was introduced. Therefore, at that time there was no distinction; both parcels were of similar quality. What I maintain is that because my clients' land was to be acquired for the Jandakot Botanic Park, it was simple or expeditious for the Department for Planning and Infrastructure to say that it would have it and put the restriction on it, and then use that as its argument for denying proper compensation.

The CHAIRMAN: That illustrates very well the points you are trying to make. I am sure that we will take it on board, together with all the other issues and examples that come before us during the next month or two. Is there anything you would like to say in conclusion?

Mr Barnao: No, I have made my case.

The CHAIRMAN: Thank you.