

Waterfront or Not?

By Malcolm Garder, Dip TCP, FVLE (Val & Econ)

A recent compensation valuation looks at some of the problems associated with valuing old waterfront properties. This paper highlights the difference between waterfront and waterfront reserve property, shows what searches should be made and outlines the consequences of failure to make a full investigation.

A residential property located in an old inner suburb of Sydney was advertised and sold under contract as a waterfront property. The property did not, in fact, have a waterfrontage.

As a valuer specialising in the Inner West area of Sydney, I was approached by a prominent solicitor to value the property. The valuation was to determine the extent of compensation payable to the purchaser under contract for the mis-description of the subject property. The instructions called for two valuations of the subject property at the same date but based on two different assumptions: one, that the property had a waterfrontage, and two, that the property had no waterfrontage.

As legal proceedings are still under way, I am unable to be more specific about location and price. This is unfortunate as I know readers would prefer to know all the details. It is also unfortunate not to know the final outcome of the legal proceedings.

THE CIRCUMSTANCES

The subject property was advertised before auction by a local estate agent as a single dwelling with waterfrontage. The property was zoned Waterfront Industrial under the local planning scheme and the cottage had existing use rights as residential.

The property was listed to be auctioned in the early 1990s which was a depressed time for waterfront properties. However, because of the general shortage of affordable waterfront properties on Sydney Harbour, there was a good level of interest from purchasers throughout Sydney.

At a well-attended auction, the property was passed in without a bid. Subsequently, the property was listed for sale by private treaty by the auctioning agent and a local professional entered into a contract to purchase it for his family home.

The purchase price was not particularly



high price for a waterfront property. This was due in part to the state of the luxury end of the market at the time and the industrial nature of the waterfront location. The area is still predominately industrial with container terminals, old industrial buildings, concrete batching plants, Maritime Services Board (MSB) depots, etc.

The cottage (if waterfront) would have been the only waterfront cottage in the area, making comparable sales difficult to find. The closest areas with residential waterfront properties are Balmain and Birchgrove. There are many sales in these areas of waterfront and waterfront reserve properties both on the main harbour and Parramatta River. In these areas, waterfront of this size generally would sell for more than \$1 million.

The fact that the cottage did not have a waterfrontage was discovered before settlement by the purchaser. The purchaser made inquiries at the Maritime Services Board about building a jetty and was told the property had no riparian rights and therefore he was not entitled to apply for a marine lease. The land in front of the High Water Mark (HWM) had been sold and he

would have to consult the new owner of the waterfrontage.

At this stage the lack of waterfrontage had not been detected by the estate agent, searcher, surveyor or solicitor. Had this lack of waterfrontage not been detected by the purchaser under contract before settlement would these professionals be subject to a professional negligence claim? It is also likely that had the property been subject to a mortgage, the valuer would also have failed to note the lack of legal waterfront.

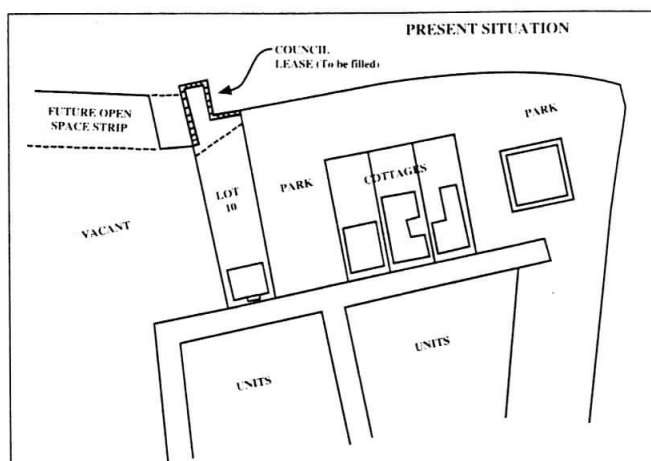
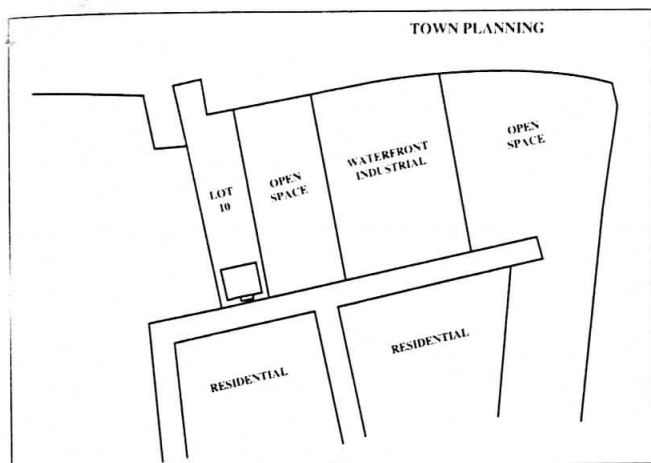
On inspection the property could be described as a three-storey, free standing, double-fronted brick Victorian house built to the street frontage. A number of improvements and extensions had been made to the house over the years.

The rear of the land sloped away gently to a sandy beach and old sandstone block sea walls that were in disrepair. The sea walls on adjoining properties were in a similar state. In the past, the land apparently had been used industrially. On inspection it was obvious that the property had a waterfrontage as one could "put the proverbial foot in the water" on the rear boundary. The survey also showed that the land extended to High Water Mark. A title search shows the same information.

The Valuer-General's information shows 18/HWM X 50.

What none of the searches showed was that there was a MSB lease about 10-15 metres wide in front of the HWM. Land Titles Office plans generally show to HWM only. The sea wall had fallen and the land had long since eroded back into the bay. Only some old sandstone block foundations could be seen under water. The lease, however, still existed. The sketches on page 201 show what was revealed by each search. The photographs on page 202 show the old sea wall and the sandy beach.

The only other search that was of use was a drainage diagram which showed the existence of a lease and a lot number. This



search most likely would have alerted the solicitor to make further inquiries. A valuer may not have made a Water Board search in this instance.

Further investigation revealed that the lease had been purchased by the local council for \$1. The land had been purchased to extend the adjoining foreshore park across the frontage of the subject property to connect with future open space purchases. The council proposes to refill the land subject to the old lease. The council's concept is for a foreshore walkway around the municipality linking existing open space and transport.

What is the loss of value now that the land does not have a waterfront? What are the benefits that appertain to waterfront properties in this area? What rights have been lost?

RIPARIAN RIGHTS

A solicitor for the Maritime Services Board provided the following information.

A riparian owner has, at common law, as a natural incident of his ownership, certain riparian rights. The most important and perhaps fundamental of these rights is the right of access to the water from the land of the riparian owner. Since riparian rights exist *ex jure naturae* they do not have to be expressly conveyed, nor is it expected that any reference to them will be found in the documents of title of the riparian owner.

In the subject case, the purchaser would not be able to have a slipway, jetty, pontoon, pole mooring, saltwater pool, boat house or MSB lease to extend his property. This could be critical for many purchasers, particularly a purchaser with a large yacht, or an industrial user.

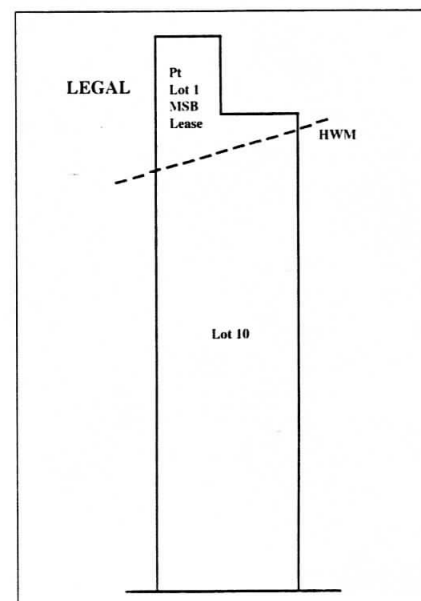
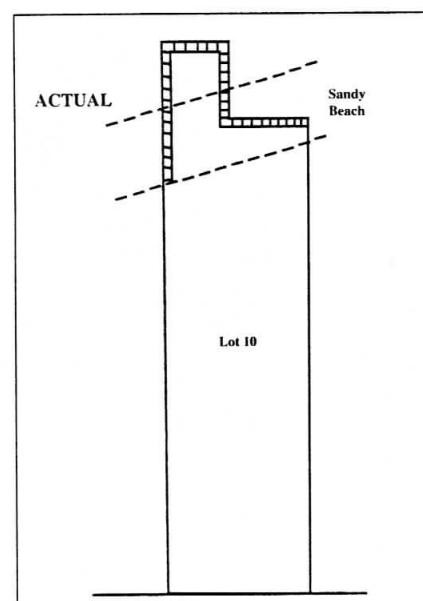
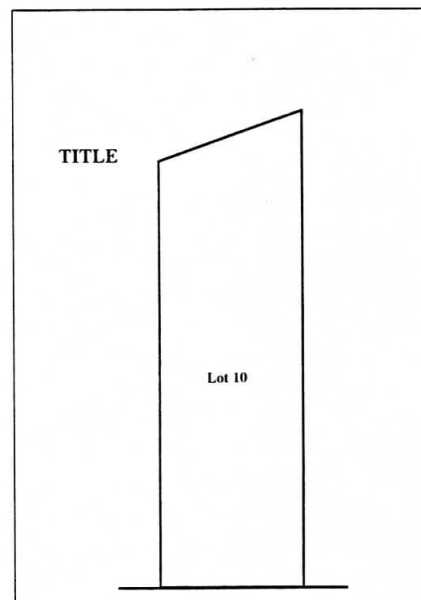
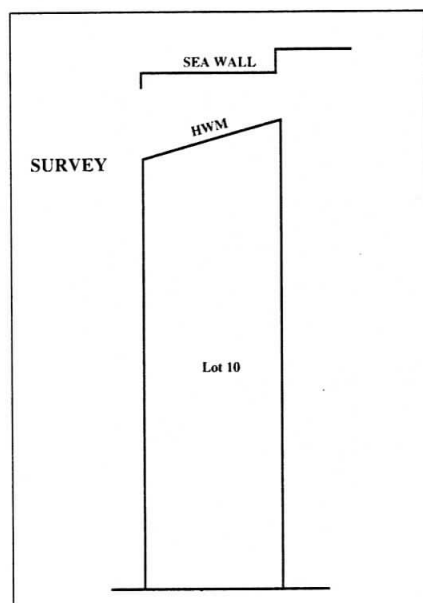
The purchaser in this instance has purchased a waterfront reserve property. However, it could have been worse: the adjoining boat yard may have owned the lease and have intended repairing boats or building a large boatshed on the land, thus denying the property any waterfront access.

The final result is that the purchaser, instead of having the yacht at the end of the

yard sitting on a secured pontoon ready for immediate use, has, with the council's permission, the right to have a gate into the reserve and carry a canoe over the reserve between the picnickers to the water. An owner of a waterfront reserve property will also have to put up with anglers at all hours of the day and night as well as courting

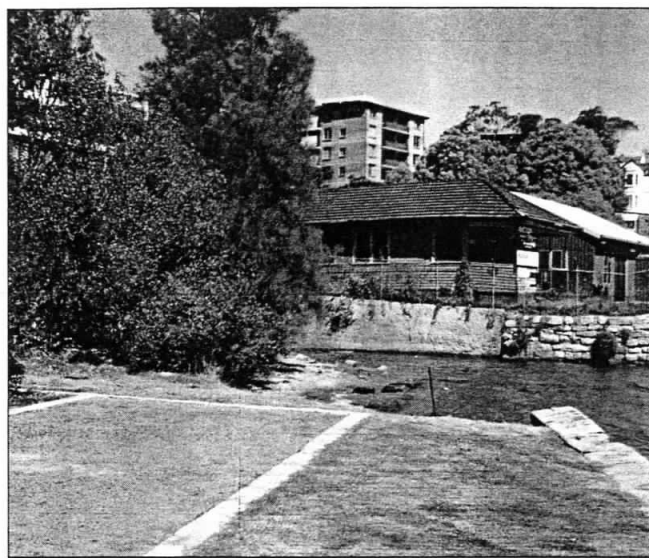
couples, waterfront parties, straying children and their balls. In other words, there would be a security problem from the rear which normally would be the most secure boundary. Not the quiet enjoyment one would usually expect from an exclusive waterfront property!

Valuers undertaking valuations of





Beach showing the old sea wall.



Council's waterfront walkway to be extended over the beach.

waterfront properties should not rely on solicitors or other professionals to make inquiries. A MSB search is not one of the standard searches made by a purchasing solicitor. The solicitor may not be aware that the property has a waterfrontage; after all, he will not be inspecting the property, the valuer will.

Valuers should make their own inquiries of the relevant authorities that control the waterway. This could be the Lands Department, Maritime Services Board, Port Authority, etc.

Most of the ports are controlled by the Maritime Services Board and the lands controlled in the ports are zoned. Sydney Harbour is classified in seven zones. Five of these relate to residential use; Zone 1 permits fairly open development options; and Zone 5 restricts all further development. There is a general graduation in between. The plan is referred to as the Sydney Harbour and Tributes Waterside Control Plan 1990.

The Maritime Services Board also has maps showing all leases and structures. Property inquiries should be made to the Board in person or in writing.

It should not be presumed that existing structures may stay or be conveyed. There have been several cases where the MSB has insisted that old wharfage, even if in good repair, be removed by the owners at their expense. Generally the MSB will not allow old industrial wharfage to remain in front of residential properties, even if the owner will pay lease fees.

Land Board Office searches should be by letter accompanied by a search fee of \$65.

In this instance the purchase was completed with the parties being aware that some compensation would be paid for the mis-description. Each party had the opportunity to rescind before the settlement as set out in the contract, *Agreement for Sale*

of Land – 1988 Edition, Clause 7, Errors and Misdescriptions, limiting claims for compensation to 5% of the contract price or Clause 8, Vendors Right to Rescind.

The initial mis-description action has proved difficult to establish and action is now being taken under the *Trade Practices Act*.

However, if the lack of waterfrontage had been discovered after settlement, the purchaser could have claimed damages far in excess of the five percent provided for in the contract. A valuer who had valued the property as a waterfront property, would be a likely target.

Other sales of waterfront and waterfront

reserve properties I have investigated have shown a difference of 50%. In the exclusive Eastern Suburbs of Sydney such a mistake could result in the loss of millions of dollars.

The author is a self-employed valuer and town planner practising in the Inner Western suburbs of Sydney. He is concerned with inner city issues, historic buildings and medium density developments, and as well as general valuations, he undertakes compulsory acquisition matters, town planning feasibility studies and estimates for public works such as freeways and ports. □

Developing Your Business

Continued from page 196

Take steps to establish and follow a business plan. Involve the manager, and never forget to include the entrepreneur.

Seek outside help or advice, remember to continue learning; above all, be passionately determined to get it right.

A BUSINESS BLUEPRINT

The following guidelines are imperative if you are planning to set up or grow your business.

- Your personal aims: how do you want your life to be.
- Your strategic objective: a very clear statement of what your business has to do to achieve your personal aims.
- Your organisational strategy: organise around functions (not personalities). Plan it for the mature business, ie managing director, valuations manager, marketing manager, etc.
- Your management strategy: the management system will orchestrate the process by which management decisions

are made, ie an automatic system, a routine.

- Your people strategy: create an environment where people will want to do what you want.
- Your marketing strategy: what your customer wants is what matters.
- Your systems strategy: the glue that holds your prototype together.

These are totally interdependent on, not independent of, one another.

As I mentioned, this is only one aspect of developing your business. I hope it will save you some heartache as it really is the only means by which your business can be made to work for you.

Good luck, and above all, "enjoy" and "prosper".

The author is Managing Director of Ron Newton & Associates, a Melbourne firm which specialises in commercial real estate and is well known for its expertise in relation to service stations and associated properties. As well as operating the business, Mr Newton works full time as a valuer. □