

m3 Dimensions

Community Use Leases
Rental Reviews

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m3property has been involved in the assessment of ground rentals for a number of community use groups around Port Phillip Bay.

Governments very frequently grant leases of Crown land for community (non-commercial) use by organizations in furtherance of those organisations stated community objects. This is in recognition of the fact that governments have a vested interest in supporting such organisations with long-term and low-rent leases. If the organisations did not exist the provision of these community use services would either cease or fall on the government to provide directly and at a far greater cost than the foregone rents which are at present its primary contribution.

Victorians in particular are well aware of this connection. It was the Victorian Government that, with the introduction of the 8 hour day, first confronted the potential cost of providing facilities for the populace to enjoy the weekly 12 hours recreation time it had just acquired. Government's answer was to reserve Crown land and make it available to genuine organisations with community (non-commercial) purposes as their stated objects.

To protect its 'investment' in public recreation, governments impose restrictive terms on their community use tenants. The use to which the tenant can put the land and its right to assign or sub-let the lease or to license the use of any part of the land is tightly restricted. The genuineness of the organization's purposes and its not-for-profit status rigorously tested. Crown leases require tenants to hand over gratis, ownership of their improvements and impose many other restrictive conditions in addition. In the result, these leases have never been of interest to commercial users. For the reasons given, they constitute a market of their own, quite separate from the markets for rental of residential, commercial or industrial properties.

For these reasons it follows that it is just as unsafe to assess the market rent for community (non commercial) use properties on the basis of (say) rents in the industrial property market as it would be to assess residential rents on the basis of the commercial property market.

The award under the Commercial Arbitration Act 1984 handed down recently by Mr Mark Derham QC in respect of a dispute between Parks Victoria (the landlord) and The Royal Victorian Motor Yacht Club Inc and Hobsons Bay Yacht Club Inc (the tenants), for whom I acted, is of particular significance in explaining this area of law and in suggesting how valuers might approach the task of assessing rents in this market and of adequately understanding and taking into consideration restrictions in existing leases that devalue rents that might otherwise be charged.

The case arose in respect of two leases granted at the commencement of 1996 by the former Port of Melbourne Authority to the tenants. (replacing previous leases by it and its predecessors to the same tenants) of land in Nelson Place, Williamstown with a rear frontage to the estuarine Yarra River.



The leases provided for biennial rent reviews to market rent. Valuers engaged by the landlord resorted to the prevailing market rent for industrial land in the area as their prime source in determining the market rent on the fourth anniversary of the leases (the first rent review have apparently been ignored).

Mr Derham found, on all questions posed to him, in favor of the tenants (including on the landlord's right, under the leases to charge rent on tenant improvements that had reverted to the landlord). He was asked specifically in the arbitration what meaning should be given to the phrase "market rent" as it was used in the leases. His response, which makes particularly interesting reading, was as follows:

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"The rent that a willing but not anxious lessor would accept, and a willing but not anxious lessee would pay, for a lease of the premises on the same terms, covenants and conditions as this lease, in the market for land for recreational (non-commercial) use, under the state of things for the time being in question and taking into account any covenants materially affecting the value of the land and any interest in it".

Two issues therefore that prudent valuers need to take away from this decision are the need for a valuer in assessing market rent in these cases:

1. **To resort to the market for land for community (non-commercial) use rather than to any other market; and**
2. **To take into account all covenants that materially effect the value of the land and any interest in it and the full extent of that effect imposed by each covenant (condition).**

As to the first of these issues it is also fair to add that lawyers responsible for leases in this area should have greater regard to the fact that 'markets' are not always easy to ascertain. If a reliable market is unlikely it is desirable that leases, in a variety of ways, offer greater assistance to valuers asked to review the rent. Having said this, however, valuers in any case would be most unwise to incur the substantial risks involved by reviewing the rent under an existing lease by reference to a market other than the market into which the land is placed by virtue of the restrictive nature of the conditions of the lease.

The other issue is that valuers need to look at the extent to which each condition of a lease restricts the tenant in exactly the same way as a lawyer does. In substance the leases under review in the arbitration:

- **Restricted land use strictly to that of a Yacht Club thereby drastically reducing its highest and best use;**
- **Prohibited assignment or subletting of the lease or licensing of the land;**
- **Required ownership of tenant improvements to revert gratis to the landlord; and**
- **Required tenants to maintain and insure those improvements even after reversion of ownership.**

Community (non-commercial) use leases contain these, and frequently many other, restrictive conditions that not only 'brand' the leases as belonging to that category of lease and collectively to the resultant market but also need to be considered, condition by condition, by a valuer in reaching his or her conclusions as to the revised rent. In considering any lease on behalf of a client, a lawyer is required to draw the client's attention to the possible detrimental effects that each of its clauses may create. Valuers assessing market rent under existing community (non-commercial) leases (and possibly other complicated and restrictive leases as well) need to have exactly the same approach and, to avoid error, to have available to them an independent legal assessment of the effect each condition may have. That assessment should preferably be given by a lawyer experienced in this area of law.

Mr Ross Blair of McKean & Park was the instructing Solicitor in this matter.