

AN ANALYSIS OF THE IMPACTS OF
STATUTORY CONSERVATION COVENANTS
ON LAND VALUES IN SOUTH EAST
QUEENSLAND

Case Study Report

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This report constitutes part of a research project to assess the impact of Statutory Conservation Covenants on improved and unimproved property values and is for no other purpose.

NOTE: This report has been modified by SEQ Catchments for public distribution. All case study details and location references have been removed for confidentiality.

An Analysis of the Impacts of Statutory Conservation Covenants on Land Values in South East Queensland

1.0 TABLE OF CONTENTS

1.0	TABLE OF CONTENTS	2
2.0	PROJECT BRIEF	3
3.0	INTRODUCTION	4
4.0	EXECUTIVE SUMMARY	6
5.0	PRESENTATION STRUCTURE	10
6.0	METHODOLOGY	10
7.0	CASE STUDY PROPERTIES	11
8.0	VALUATION CONCEPTS – MARKET VALUE.....	12
9.0	VALUATION CONCEPTS – HIGHEST AND BEST USE	13
10.0	UNIMPROVED VALUE – THE VALUATION OF LAND ACT 1944	14
11.0	UNIMPROVED VALUE – LAND COURT DECISIONS.....	16
12.0	TAX DEDUCTIBILITY OF ANY DIMINUTION OF VALUE	18
13.0	LEGAL FRAMEWORK OF VOLUNTARY CONSERVATION COVENANTS.....	19
	CASE STUDIES REMOVED FOR CONFIDENTIALITY	
28.0	SUMMARY OF IMPACT ON MARKET VALUE.....	21
29.0	SUMMARY OF IMPACT ON UNIMPROVED VALUE	22
30.0	CONCLUSION	23
31.0	REFERENCES.....	25

2.0 PROJECT BRIEF

The purpose of this report is to examine the effect of a Statutory Conservation Covenant on the unimproved value and market value of Case Study properties in South East Queensland.

The following extract from the Project Brief sets the background and terms of reference for this report.

PROJECT BRIEF

1.0 INTRODUCTION

Currently eight local governments in South-East Queensland use statutory conservation covenants as part of Conservation Agreements to protect significant ecological values on private land. These agreements are voluntary in nature and require a willing landholder to participate. In return for the landholders commitment most Councils offer financial incentives such as annual grants for on-ground management and/or rate rebates.

2.0 PROJECT BACKGROUND

The uptake of voluntary covenants by landholders has been slow in some local government areas. A common concern raised by landholders interested in placing a statutory covenant on their property is the perception that statutory covenants negatively impact land valuations.

Concerns have also been raised by potential covenantors about the re-salability of a property that has a statutory covenant registered on title. In the event that a property is subject to a mortgage, consent is also required from the lending agency. Some financial institutions have also expressed concern about the impact of a covenant on land values.

3.0 AIM

A regional working group made up of Local Government and SEQ Catchments Officers seeks to engage an independent, professional land valuer to provide a report which examines the impact of statutory conservation covenants on land values in South-east Queensland. The report will present a range of Case Studies examining the impact that statutory conservation covenants have on both market value and unimproved values in SEQ.

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A current land valuation will be determined with the existing conservation covenant. A comparative (hypothetical) valuation will also be determined for the same land parcel with no conservation covenant. In both instances the valuations will be provided for both the unimproved valuation and the market value.

3.0 INTRODUCTION

Voluntary Statutory Conservation Covenants (VCCs) are used in Queensland to facilitate the conservation and protection of natural assets on private land through programs implemented by Local Governments. The VCC provides the highest level of conservation on private land with a perpetual covenant registered on the title by the provisions of the Land Title Act and a complementary Management Agreement between the Local Authority and the landowner.

The Land for Wildlife (LFW) program and the Voluntary Conservation Agreement (VCA) are lower levels of agreement providing protection of natural assets on private land.

Land for Wildlife (LFW):

- is the entry level agreement of the Wildlife Conservation Partnerships Program (WCPP)
- is a voluntary agreement that encourages and assists property owners to provide habitat for wildlife on their property
- is a non-legally binding agreement that can be exited upon request
- prevents landowners from conducting detrimental activities, for example grazing stock, within the habitat area
- provides advice on:
 - integrating wildlife conservation with other land management uses
 - local and introduced plants and animals
 - threatened species and ecosystems and their management
 - creating, protecting and improving wildlife habitat ¹

Voluntary Conservation Agreement (VCA) is a legal agreement which:

- states the landowner's intention to conserve and enhance the natural assets of their property's habitat area until they sell
- **expires on change of ownership**
- prevents landowners from conducting detrimental activities, for example grazing stock, within the habitat area
- states that ownership and control of the property remains with the landowner ²

Brisbane City Council has adopted a Higher Voluntary Conservation Agreement (HVCA), a VCA which includes the additional agreement to rezoning the land to 'Conservation' which affects future owners of the land. ³

The Voluntary Conservation Covenants (VCCs), the subject of this study, are legal agreements which are registered on the property title by the provisions of the Land Titles Act in perpetuity making them **binding on all subsequent owners of the land**.

It is the impact of the VCC, secured by a Local Government, on the market value and unimproved value of properties that has been examined in the Case Studies, the subject of this report.

The seventeen Case Studies examined represent 39% of all 43 voluntary statutory conservation covenants with Local Governments in South East Queensland (as of July 2008). The Case Studies were chosen as representative examples of Voluntary Conservation Covenants (VCCs) by Local Government region. ⁴

The covenanting program by Local Governments is not the only vehicle for the conservation of natural assets on private land. Many such programs exist.

In Victoria the Trust for Nature has had a covenanting program operating under the *Victorian Conservation Act (1972)* since 1987. Trust for Nature now has 800 conservation covenants on private property totalling an area of over 35,000 hectares.

In 1989 Trust for Nature established a 'revolving fund' to acquire properties with significant conservation values, secure appropriate covenants and then re-sell the properties with the covenant in place. The proceeds of the sale then return to the revolving fund. Trust for Nature's Revolving Fund to date has on-sold a total of 41 properties and at value of \$3.4million.⁵

The revolving fund strategy and the re-sale of the properties will ensure that covenants are structured to ensure a minimal impact on the market value of the property. Trust for Nature markets covenanted properties through their website and this has helped create a market for conservation properties.

There is little general awareness of conservation covenants in the real estate market of South East Queensland as covenants are few and any market for such properties is in its infancy.

In the United States conservation covenants are known as "conservation easements".

There is much controversy regarding the valuation of conservation easements, even within the appraisal profession. Some claim that any easement-encumbered property has to be worth less than if there were no easement, but others point to the reality of the market place – many conserved properties actually sell for more.

The only clear case for a loss in market value is when the easement prevents or limits an immediate economic use. When the easement does not clearly limit a current economic use, it may be difficult or impossible to support any loss in market value.⁶

As the number of properties with conservation covenants grows in South East Queensland the property market will become more sophisticated in discerning whether the conservation values protected have added monetary value to the property.

4.0 EXECUTIVE SUMMARY

Seventeen properties were inspected and valued across the Local Government areas of the Gold Coast City Council, Brisbane City Council, Logan City Council, Redland City Council, Moreton Bay Regional Council (former Caboolture Shire Council), Sunshine Coast Regional Council (former Caloundra City Council and former Maroochy Shire Council).

A conservative level of values was applied to each property with the covenant and hypothetically without the covenant based on sales in the locality. The value added by improvements on the land was assessed. Engineering estimates were not conducted for properties with subdivisional potential. The valuations should not be relied on for any commercial purposes.

The Market Value of five of the seventeen properties was significantly negatively impacted by the conservation covenant. Of those three were considered to have lost potential for subdivision, one was considered to have agricultural activity curtailed and the other had a separate saleable portion totally covenanted without a residential envelope. In some of these cases the land owners were cognisant of the potential impacts prior to entering the covenant.

The Market Value of the other twelve properties reflects negligible impact due to the covenant.

The unimproved value of the properties was not affected by the conservation covenant because they generally had concessional values under Section 17 of the Valuation of Land Act. One property had a 7% reduction in unimproved value due to the covenant as determined by the Land Court. Land Court decisions set a precedence to allow up to 25% reduction in value due to a conservation covenant but suggest allowance is made on a case by case basis.

A summary of the reasons for the impact on the Market Value of the Case Study properties is provided in the following table:

Case	Value	ex VCC	Impact	Land Use
5	\$ 927,000	\$ 927,000	0.0%	No impact
The covenant affected only a small portion of the land and subdivision potential was maintained.				
14	\$ 620,000	\$ 625,000	-0.8%	Negligible Impact
A vacant parcel of land in a locality favoured for bush-land living. The covenant did not affect the way a purchaser would use the land but put some obligation on the landowner.				
15	\$ 620,000	\$ 625,000	-0.8%	Negligible Impact
A vacant parcel of land in a locality favoured for bush-land living. The covenant did not affect the way a purchaser would use the land but put some obligation on the landowner.				
16	\$ 570,000	\$ 575,000	-0.8%	Negligible Impact
A vacant parcel of land in a locality favoured for bush-land living. The covenant did not affect the way a purchaser would use the land but put some obligation on the landowner.				

Case	Value	ex VCC	Impact	Land Use
3	\$1,080,000	\$1,105,000	-2.2%	Negligible Impact
The covenant affected only half of the property over land that a prudent owner would leave untouched for aesthetic and ecological reasons.				
13	\$1,700,000	\$1,740,000	-2.2%	Negligible Impact
The residential envelope was substantial in area allowing for residential use, horses and stabling in an area popular for horse. The covenant is over land with no higher economic use and provides a buffer against adjoining land uses.				
7	\$ 710,000	\$ 730,000	-2.7%	Negligible Impact
The covenant lies over the rear half of the property leaving an adequate residential envelope. The land protected has aesthetic value and would not be impacted on by a prudent landowner.				
9	\$ 870,000	\$ 900,000	-3.3%	Negligible Impact
The residential envelope is relatively small but the property is in an area where the community values the environment and the covenanted land has no higher potential use.				
1	\$1,000,000	\$1,040,000	-3.8%	Negligible Impact
The residential envelope is relatively small but the property is an area where the community values the environment and the covenanted land has no higher potential use.				
2	\$1,280,000	\$1,230,000	-4.0%	Negligible Impact
The covenant affected only half of the property over land that is steep and that a prudent owner would leave untouched for aesthetic and ecological reasons.				
17	\$1,050,000	\$1,100,000	-4.5%	Negligible Impact
The property is residential with an adequate area outside the covenant. The covenant area is steep and the impact of neighbouring properties increases the obligations of the owner under the covenant conditions.				
8	\$ 743,000	\$ 783,000	-5.1%	Negligible Impact
The residential envelope is a little small to conduct rural residential activities common to the locality. The covenanted area requires considerable weed control.				
6	\$ 530,000	\$ 600,000	-11.6%	Significant Impact
Some potential to subdivide a lot from the rear of the property has been lost due to the covenant.				

Case	Value	ex VCC	Impact	Land Use
10	\$ 600,000	\$ 700,000	-14.2%	Significant Impact
Subdivision potential has been lost by virtue of the covenant. The impact of eight adjoining residential properties increases the owners obligations under the covenant conditions.				
11	\$ 476,000	\$ 576,000	-17.3%	Significant Impact
Some small agricultural enterprise potential has been lost in an agricultural locality.				
4	\$735,000	\$1,410,000	-47.0%	Significant Impact
A separate otherwise saleable portion is fully covenanted without a residential envelope making separate sale unviable. The covenant obligations are high.				
12	\$ 470,000	\$1,000,000	-53.0%	Significant Impact
The land lies adjacent to suburban development. Subdivision potential has been lost by virtue of the covenant. Adjoining homes increases the owners obligations under the covenant conditions.				

** An impact of less than about 5% is deemed negligible because it is below the margin for error generally accepted in assessment of the market value of residential properties.*

The Case Studies show that to secure a Voluntary Conservation Covenant (VCC) has minimal impact on the market value when:

- The property is rural land where clearing will not improve its productivity
- The property is residential property without the potential to become commercial or industrial land.
- The covenant lies over parts of the property that a prudent owner would not be inclined to clear or improve for economic gain.
- The property is not ripe for subdivision into smaller lots. (If it is capable of subdivision then covenants could be a condition of approval or a plan of subdivision negotiated with the owner that includes covenants.)
- The covenant is as small a proportion of the total land area as is reasonable.
- The property is larger than surrounding properties.
- The covenant design provides for a residential envelope that enables the property to be used in the same manner as other entire properties in the locality.
- Where the land is a multi-lot aggregation a building envelope is provided on each lot.
- If the property is a smaller acreage it is in a locality where the community is sensitive to the natural environment.
- If it is rural property the area of the property outside the covenant is capable of supporting some agricultural business or other enterprise.

To reduce market resistance the covenant documents should not be daunting and should reduce the obligations on the landowner whilst maximizing the concessions and services to the owner.

If property valuation expertise is sought early in the voluntary conservation covenant process by the landowner or the Local Government, then design changes could possibly be made that would reduce or remove any impact on market value.

The impact of the VCCs on unimproved values among the Case Studies is not generally significant because of concessions provided under Section 17 of the Valuation of Land Act. Valuers assessing unimproved values can approach each property on a case by case basis.

A perusal of unimproved values in localities where statutory conservation covenants have been imposed as a condition of residential subdivision resulting in covenants on some lots and not other adjoining lots doesn't reveal any significant difference in values. It must be assumed then, that the valuers in preparing those valuations cannot find any market based evidence to justify a different level of unimproved values for lots with covenants against those without.

Where a VCC causes a reduction in market value of the property that loss may be tax deductible and in the event the landowner is eligible for a means tested pension then the VCC may provide grounds for a revaluation of their assets for the purposes of the means test.

5.0 PRESENTATION STRUCTURE

The project is presented in the following way.

- The Case Study Report (this document).
- The Case Study Report key findings presentation (PowerPoint).

Underlying the Case Study Report are:

- A detailed Valuation Report for each of seventeen Case Study properties.
- A compact disk containing underlying documentation and photographs.
- A web-browser based interface to access the compact disk.

This report, the Case Study Report, presents the relevant information for each property in a concise format to enable an appreciation of the property as a Case Study without undue technical information and to protect the privacy of Case Study participants.

The information for each Case Study is extracted from the underlying reports. To review the valuer's methodology or for those seeking more detailed information then reading the supporting Valuation Reports and reference material on the compact disk is recommended.

6.0 METHODOLOGY

Details of seventeen properties were provided by six local Councils in South East Queensland from the Gold Coast in the south to Maroochydore in the north. The properties constitute the Case Study properties.

Each property was inspected in detail and all improvements noted and measured. Sales of comparable properties in the locality were also inspected to provide a basis for comparison to determine Market Value.

The Market Value of each Case Study property was assessed in the first instance and then the Market value of each Case Study property was assessed as if there was no covenant in existence.

The terms and conditions of each covenant and the associated management agreement were examined to determine the highest and best use of the property with and without the covenant.

The difference in Market Value with and hypothetically without the covenant, having regard to the highest and best use of the property is the measure of the impact of the VCC on the market value of the property.

A short interview was conducted with most of the landowners comprising ten questions in order to establish any consistencies or common profile among those landowners voluntarily entering into a VCC.

Specific identification of the properties and the name of the owner have been omitted from this report for privacy reasons but the real property descriptions are specified in the valuation reports. Copies of the survey plans, covenants and management agreements are contained in supporting documentation.

7.0 CASE STUDY PROPERTIES

This report presents Case Studies on seventeen properties across South East Queensland where the owners or past owners have set aside an area of land within their property for conservation by voluntarily registering a Statutory Conservation Covenant on the title.

Table 2: Case Study properties showing Land Use and %age covered by covenant.

Case Name	Land Area	Covenant	%	Land Use
1	31.020ha	15.600ha	50%	Dwelling
2	19.720ha	9.484ha	48%	Dwelling
3	21.250ha	11.608ha	54%	Dwelling
4	207.480ha	202.066ha	97.3%	Dwelling
5	8.901ha	1.481ha	16%	Dwelling*
6	4.340ha	Abt 2ha	46%	Dwelling*
7	1.897ha	0.990ha	52%	Dwelling
8	4.118ha	2.983ha	72%	Dwelling
9	44.840ha	41.860ha	93%	Dwelling
10	4.765ha	3.560ha	75%	Dwelling*
11	11.110ha	10.040ha	90%	Dwelling*
12	1.943ha	1.632ha	84%	Dwelling*
13	26.360ha	18.480ha	70%	Dwelling
14	4.000ha	3.840ha	96%	Vacant land
15	4.280ha	4.080ha	95%	Vacant land
16	4.000ha	3.770ha	94%	Vacant land
17	17.990ha	15.750ha	87%	Dwelling

* denotes that the property has a potential higher use.

8.0 VALUATION CONCEPTS – MARKET VALUE

Underlying the methodology of assessing the value of the Case Study properties are two fundamental concepts of property valuation. They are **Market Value** and **Highest and Best Use**.

Market Value:

High Court Justice Isaacs definition of Market Value as laid down in *Spencer v The Commonwealth* (1905) 5 CLR 418 has long been a long standing basis for defining **Market Value**:

*"To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to person best capable of forming an opinion, of a rise or fall for whatever reason in the amount which one would otherwise be will to fix as the value of the property."*⁷

The Spencer Case definition creates a willing buyer and a willing seller for any property, each aware of all factors affecting the property. A more contemporary definition embodying the willing buyer, willing seller concept is the definition of market value adopted by the International Valuation Standards Committee:

*"Market value means the estimated amount for which the property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion."*⁸

The Superannuation Industry (Supervision) Act 1993 also adopts a similar definition of market value in Subsection 10(1)

"the amount that a willing buyer of the asset could reasonably be expected to pay to acquire the asset from a willing seller if the following assumptions were made:

(a) that the buyer and the seller dealt with each other at arm's length in relation to the sale;

(b) that the sale occurred after proper marketing of the asset;

*(c) that the buyer and the seller acted knowledgeably and prudentially in relation to the sale"*⁹.

The occurrence of sales of properties containing a VCC is quite insignificant in the overall volume of property sales that occur in SEQ. The general public buying properties and agents selling properties have not established a well defined market approach to VCC's and are generally not familiar with them. In the absence of a market to provide empirical data, the valuer in assessing the Market Value of the Case Study properties has to determine how, in his opinion, the hypothetical prudent buyer will quantify the advantages and disadvantages of the VCC.

9.0 VALUATION CONCEPTS – HIGHEST AND BEST USE

Highest and Best Use:

Inherent in any market value estimation is the concept of the highest and best use.

You should assess market value at the ‘highest and best use’ of the asset as recognised in the market. The concept of ‘highest and best use’ takes into account any potential for a use that is higher than the current use. The current use of an asset may not reflect its optimal value.¹⁰

The following definition of highest and best use is generally accepted:

The highest and best use of a property, more than anything else, is what determines its value. Highest and best use is defined as that use, from among reasonably probable and adequately supported alternative uses, which is:

- *legally permissible,*
- *physically possible,*
- *financially feasible, and*
- *maximally productive.*

Property is always valued on the basis of its highest and best use, which may or may not be its present use. Land value is based on the highest and best use of the property as if vacant and ready for development to that use. Improvements are valued according to how they contribute to (or detract from) the value of the land. The highest and best use must occur within the reasonably near future and can't be remote or speculative.¹¹

This additional paragraph is noted from the Californian source making specific reference to conservation as a highest and best use.

Although there is growing support of conservation as a highest and best use, there are no widely-accepted methods for estimating its value. Current appraisal practice still requires that properties be appraised based on their conventional economic use (residential, commercial, industrial, etc.) regardless of their conservation potential.¹²

That does not of course preclude eco-tourism or some similar eco-based venture from being the highest and best use of land set aside for conservation. It does however preclude a method of assessing the market value of land based on quantifying in dollar terms the broader social or environmental benefit of preserving the conservation values of the land.

If a willing but not over anxious purchaser in an arms length transaction acting knowledgeably and prudently bids a higher price for a parcel of land for conservation purposes than any other buyer proposing some alternative use, then conservation would apparently be the highest and best use of that land. There are no properties among the Case Studies that are held exclusively for conservation. Generally they are used for residential purposes with a specified area set aside for conservation.

In South East Queensland the SEQ Regional Plan ¹³ provides some preliminary guidance as to whether a covenant may inhibit the highest and best use of land. The plan is periodically reviewed but land designated as “Urban Footprint” or “Rural Living” is likely to be more severely impacted by a covenant than land designated “Regional Landscape and Rural Production Area”.

10.0 UNIMPROVED VALUE – THE VALUATION OF LAND ACT 1944

The assessment of Unimproved Value of the land for the levying of Local Government rates and the assessment of State Land Tax is regulated by the Valuation of Land Act 1944 (The Act)..

Section 3 (1) of the Valuation of Land Act defines unimproved value for the purposes of The Act:

Section 3 Meaning of unimproved value

(1) For the purposes of this Act-- unimproved value of land means--

(a) in relation to unimproved land--the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require; and

(b) in relation to improved land--the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that, at the time as at which the value is required to be ascertained for the purposes of this Act, the improvements did not exist.¹⁴

The Act requires that in order to ascertain the unimproved value of the land, the assumption be made that none of the improvements on the land exist at the time of valuation but all improvements, services and facilities external to the land do exist.

The Act does not require land to be valued according to its highest and best use in all circumstances. Inequities might occur, for example, where a farm has potential for subdivision. If the higher subdivisional value was adopted the Land Tax or Local Government Rates may impose an unreasonable financial burden on the farming operation. Similarly a residence on industrial land may pay inordinately high Local Government Rates.

To address possible inequities provision is made under Section 17 of The Act for concessional valuations when the land is used exclusively for a single dwelling or farming purposes. In these circumstances the highest and best use of the land may be ignored and the land valued as either a site for a single dwelling or as farming land.

Section 17 (1) of the Valuation of Land Act:

17 Exclusive use for single dwelling house or farming

(1) In making a valuation of the unimproved value of land exclusively used for purposes of a single dwelling house or for purposes of farming, any enhancement in value because the land has been subdivided by survey or has a potential use for industrial, subdivisional or any other purposes shall be disregarded irrespective of whether or not, in case of potential use as aforesaid, that potential use is lawful when the valuation is made.¹⁵

Where land is used for the purpose of a single dwelling house it will be valued under the Valuation of Land Act as a single residential site regardless of any higher potential. Similarly where the land is used for farming it will be valued as farming land regardless of any higher potential.

Coincidentally all of the improved Case Studies are eligible to have the unimproved value assessed under Section 17 of The Act as they are exclusively used for purposes of a single dwelling house or for purposes of farming. The three vacant residential sites are incapable of further subdivision. If entering into a VCC has prevented some higher and better use among the

Case Study properties, the loss of potential alone will not impact on the assessment of unimproved value because Section 17 requires the potential to be ignored.

It must be concluded for all the Case Studies that the VCC does not impact on the unimproved value of the property when considering only the loss of potential use for industrial, subdivisional or any other purposes. That conclusion cannot be extended to properties not used for farming or a single dwelling.

The next section considers the impact of a VCC on the residential or farming unimproved value of the property.

11.0 UNIMPROVED VALUE – LAND COURT DECISIONS

There appear to have been only two cases where the quantum of unimproved value has been challenged in the Land Court on the grounds that a VCC encumbered the property.

These cases are:

- Ian H Herbert and Catherine C Herbert v. Chief Executive, Department of Natural Resources (unreported); and
- Stevens v Department of Natural Resources and Mines [2004] QLC 0108

The Stevens Case challenged the unimproved value in the Land Court. The owner sought a reduction in unimproved value by virtue of the covenant. The member of the Land Court, NG Divett said

Mr Jones notes that in his valuation he has allowed a discounted 30% for the impact of the VCA, in line with the directions of the President of this Court in a similar situation in IH and CC Herbert v Chief Executive, Department of Natural Resources (AV98-288), 6 August 1999, unreported. Mr Jones advises that it is now the departmental policy when dealing with VCAs, or natural conservation arrangements, to allow a deduction of about 25% from the valuation if it had not been impacted by a VCA.¹⁶

The appeal against the unimproved value was lost as the Land Court Member seemed satisfied that adequate allowance had already been made for the encumbrance of the VCC by the DNR valuer, Mr Jones.

The property was valued under the single dwelling concessional provisions of Section 17 of The Act. The DNR valuer calculated the valuation making an allowance on the part of the land affected by the covenant. A total reduction of 7% in value of the unimproved value of the whole property was applied.

The Herbert case referred to in the Stevens case was vacant land and so not eligible to be valued under Section 17 of The Act. In that case J J Trickett, President of the Land Court said:

I have come to the conclusion that the conservation agreement must affect the market value of the subject land. It is common ground that the agreement removes any element of potential for subdivision and imposes certain obligations on the landholder.¹⁷

The Court reduced the unimproved value 25%. The comments made by the Land Court Member in the Stevens case encourages consideration of each property on a case by case basis.

Under the practice procedures in respect of NCAs or VCAs, the departmental valuer is to treat each so affected parcel on a case by case basis on the individual merits of each property. Issues to be addressed include the advantages achieved under the agreement, and whether comparable sales evidence dictates any diminution in value because of the agreement. Where there is no market evidence to indicate the level of impact of a VCA, then guidance should be taken from this Court's decision in IH and CC Herbert v Chief Executive, Department of Natural Resources (AV98-288), 6 August 1999, unreported, where a reduction of 25% in the unimproved value may be appropriate.¹⁸

A perusal of unimproved values in localities where statutory conservation covenants have been imposed as a condition of residential subdivision resulting in covenants on some lots and not other

adjoining lots doesn't reveal any significant difference in values. The lots were generally less than one hectare. Any variations in unimproved value may have been better explained by elevation, aspect or other features. It must be assumed then, that the valuers in preparing those valuations cannot find any market based evidence to justify a different level of unimproved values for lots with covenants against those without.

Where a property is used primarily for residential purposes in localities favoured for bush-land residential use, then there is no reason to justify a reduction in unimproved value because of a covenant, provided the landholder's obligations under the covenant are not onerous.

It is likely that should an appeal against an unimproved value be made to the Land Court on any lot with a statutory conservation covenant the Court will expect some allowance to have been made on the basis of the following reasoning from the Herbert case:

The legislation ensures that such an agreement cannot be lightly set aside and once in place is intended to bind successors in title to the present owners. While it may be possible to find purchasers who would be prepared to live with those restrictions and obligations, I doubt that an informed prudent purchaser as envisaged by the High Court in Spencer v. The Commonwealth (1907) 5 CLR 418, would be prepared to pay the same price that such a purchaser would pay if there were no such restrictions and obligations. The purchaser of a rural residential site without such an agreement encumbering it would have the option of clearing and developing the land, or allowing most of it to remain in its natural condition. Such a purchaser would have that element of choice. In this case, any purchaser would be bound by the restrictions contained in the agreement. The element of choice is removed.¹⁹

In considering the impact of a VCC on statutory unimproved values prepared under the Valuation of Land Act 1944 we contend:

- The impact of the VCC on the unimproved value will be minimal where the property is used as a single dwelling or for farming and valued under the provisions of Section 17 of the Valuation of Land Act as the potential for any higher use will be ignored.
- The impact of the VCC on the unimproved value will be minimal where the property is a vacant residential site in an area favoured for bushland residential purposes.
- The impact of the VCC on the unimproved value may be substantial where the property is not eligible to be valued by the provisions of Section 17 of the Valuation of Land Act and the land has potential for industrial, commercial or subdivision uses.
- In instances where an appeal against the unimproved value is made to the Land Court sufficient precedents exist for the Court to make an allowance of up to 25% reduction in value due to the covenant in the absence of sales evidence to substantiate any lesser allowance.

12.0 TAX DEDUCTIBILITY OF ANY DIMINUTION OF VALUE

The Australian Taxation Office makes provision for the tax deductibility of any loss in value of properties where the landowner has entered into conservation covenants. The provisions are summarized below and reference made to the full details available from the Australian Tax Office.

Conservation covenant concessions

Tax concessions are available to land owners who enter into conservation covenants to protect areas of high conservation value.

Am I eligible to claim an income tax deduction?

To qualify for an income tax deduction, all of the following conditions must be met.

- *The covenant must be entered into on or after 1 July 2002.*
- *The covenant must be entered into over land that you own – leased property is not eligible.*
- *The covenant entered into must be perpetual.*
- *You must not receive money, property or any other material benefit for entering into the covenant.*
- *The covenant must be entered into with a deductible gift recipient (DGR); the Commonwealth or a state, territory or local governing body; or an authority of the Commonwealth or a state or territory.*
- *The market value of the land must decrease as a result of you entering into the covenant.*
- *The change in the market value of the land must be more than \$5,000 due to the covenant. If the decrease in value of the land is less than \$5,000, you will only be eligible for a deduction if you acquired the land not more than 12 months before entering into the covenant and you meet all the above conditions.²⁰*

Inquiry was not made with Case Study landowners as to whether a taxation rebate had been sought. Local Governments may wish to direct covenantors or potential covenantors to consult their tax agents where a diminution of value is expected.

In one instance the landowner offered the information that the Australian Valuation Office had deemed the value of the covenant area to be very low for the purposes of means testing the aged pension. It is outside the scope of this report to fully analyse pension means tests, however where a covenantor is receiving a pension the Local Government may wish to advise them to seek, through Centrelink, a revaluation of their assets by the Australian Valuation Office.

13.0 LEGAL FRAMEWORK OF VOLUNTARY CONSERVATION COVENANTS

A Voluntary Conservation Covenant is a statutory covenant registered under the provisions of the Land Title Act of 1994, Division 4A, Sections 97A to 97DA. Registration requires lodgement of Form 20 and Form 31 after the Council and the landowners have reached agreement on the terms of the covenant.

Division 4A Covenants

97A Covenant by registration

(1) A lot may be made the subject of a covenant by the registration of an instrument of covenant under this division.

*(2) An instrument of covenant may be registered under this division only if the covenantee under the instrument is the State or another entity representing the State, or a local government.*²¹

The covenant contains among other things the landowners obligations. Following is an extract of the Covenantor's Obligations from Form 20 of a typical covenant:

Covenantor's Obligations

2.1 The Covenantor shall unless otherwise agreed in writing by the Council undertake the Conservation Works and observe and comply with the following conditions:

- (a) comply with the Management Plan;*
- (b) in addition to the Covenantor's obligations to control declared plants pursuant to the Rural Lands Protection Act 1985, take reasonable measures to control exotic species as specified in the Management Plan;*
- (c) not by action or omission cause or allow any indigenous vegetation in the Conservation Area to be trimmed, pruned, lopped, cut down, moved, removed, damaged or destroyed other than as specified in writing by the delegated officer;*
- (d) not conduct or allow any extractive operations such as the removal of soil or timber.*
- (e) not carry out Development in the Conservation Area other than as specified in writing by the delegated officer;*
- (f) ensure that no fill, soil, rock, rubbish, ashes, garbage, waste or other material foreign to the Conservation Area is deposited in the Conservation Area;*
- (g) not do or permit another person to do anything on adjacent land which may adversely affect the Conservation Area;*
- (h) not introduce any non-indigenous fauna, domestic animals or non-indigenous vegetation into the Conservation Area;*
- (i) not allow vehicles in the Conservation Area except vehicles used for the purpose of undertaking conservation works agreed to in writing by a delegated officer or vehicles used for emergency services;*

- (j) *not carry out any act on or in respect of the Conservation Area which in the Council's reasonable opinion may have a detrimental impact on the Conservation Area;*

2.2 Notwithstanding the Conditions, if any living or dead vegetation on the Conservation Area poses a risk to human safety, such vegetation may be cut down or trimmed so as to remove the risk with the prior written consent of a delegated officer stating that the Conservation Works specified in the notice are to be undertaken.

The Management Plan referred to in 2.1(a) above specifies tasks and general objectives that must be complied with. This might include weed removal, habitat protection or re-vegetation dependent on the character of the land under covenant.

The Local Authority also agrees within the documentation on some level of concession to the landowner in the form of General Rates remission, Environment Levy exemption and/or a level of reimbursement for conservation works carried out. The amount and calculation of these concessions varies among Local Governments.

General Rates remission may equal the proportion of the property under covenant, sometimes with a maximum of 50%. Other methods of calculation include a proportional points system depending on the conservation values of the site. General rates remission may range from 20% to 98% of the General Rate depending on the property and the Local Government's calculation method.

The exemption from an Environment Levy may range from \$5 to \$60 depending on the amount levied by the Local Government.

Reimbursement for conservation works varies but about \$2,000 for the first year and \$1,500 in later years is typical. The work to be carried out is generally specified in the Management Plan and proof of expenditure is required.

The Form 20, Form 31 and Management Plans for the Case Study properties are contained in the supporting documentation.

14.0 SUMMARY OF IMPACT ON MARKET VALUE

The following table presents a summary of the impact of the conservation covenant on the market value of the Case Study properties ranked by increasing impact.

Table 3: The Case Study properties showing the VCC's impact on Market Value

Case	Value	Market ex VCC	Value Impact	% Impact
5	\$ 927,000	\$ 927,000	0.0%	No impact
14	\$ 620,000	\$ 625,000	-0.8%	Negligible Impact
15	\$ 620,000	\$ 625,000	-0.8%	Negligible Impact
16	\$ 570,000	\$ 575,000	-0.8%	Negligible Impact
3	\$1,080,000	\$1,105,000	-2.2%	Negligible Impact
13	\$1,700,000	\$1,740,000	-2.2%	Negligible Impact
7	\$ 710,000	\$ 730,000	-2.7%	Negligible Impact
9	\$ 870,000	\$ 900,000	-3.3%	Negligible Impact
1	\$1,000,000	\$1,040,000	-3.8%	Negligible Impact
2	\$1,280,000	\$1,230,000	-4.0%	Negligible Impact
17	\$1,050,000	\$1,100,000	-4.5%	Negligible Impact
8	\$ 743,000	\$ 783,000	-5.1%	Negligible Impact
6	\$ 530,000	\$ 600,000	-11.6%	Significant Impact
10	\$ 600,000	\$ 700,000	-14.2%	Significant Impact
11	\$ 476,000	\$ 576,000	-17.3%	Significant Impact
4	\$735,000	\$1,410,000	-47.0%	Significant Impact
12	\$ 470,000	\$1,000,000	-53.0%	Significant Impact

** An impact of less than about 5% is deemed negligible because it is below the margin for error generally accepted in assessment of the market value of residential properties.*

Five of the seventeen properties are significantly impacted by the conservation covenant.

Case Study 6, Case Study 10 and Case Study 12 have lost subdivisional potential because of the covenant. This impacts quite strongly on their market value.

Case Study 11 is considered to have been impacted because of the loss of potential to clear parts of the land for agriculture in a predominantly farming area.

Case Study 4 is a unique case where a large otherwise saleable separate lot is totally covenanted leaving no provision for a home-site. This results in that part of the property having theoretically no monetary value and in practice a nominal value only.

15.0 SUMMARY OF IMPACT ON UNIMPROVED VALUE

In section 9.0 of this report it was stated that coincidentally all of the Case Studies are eligible to have the unimproved value assessed under Section 17 of the Valuation of Land Act as they are exclusively used for purposes of a single dwelling house or for purposes of farming or are vacant residential land incapable of further subdivision.

If entering into a VCC has prevented some higher and better use among the Case Study properties that loss of potential alone will not impact on the assessment of unimproved value because Section 17 requires the potential to be ignored.

Of the seventeen Case Study properties there are only two instances where the VCC can be shown to have impacted on the unimproved value, one positively the other negatively.

[One example removed for confidentiality]

The unimproved value of Case Study 11 is assessed under Section 17 of the Valuation of Land Act as used for a dwelling. In the absence of a covenant the owner may be able to establish a small farming enterprise and seek a concession with the land being used for farming. This would result in a lower unimproved value to the value applied with the covenant in place as the greater farming concession would apply. The VCC therefore has therefore possibly caused a rise in the unimproved value applied.

Case Study 4 could present strong arguments to reduce the currently applied unimproved value on the basis that the land contained in the larger separate lot is fully covered by the conservation covenant with no provision for a building site making the land unusable for residential, farming or any other purpose. No appeal has been made by the owners against the assessment of the unimproved value.

Valuers assessing unimproved values approach each property on a case by case basis. A perusal of unimproved values in localities where statutory conservation covenants have been imposed as a condition of residential subdivision resulting in covenants on some lots and not other adjoining lots doesn't reveal any significant difference in values. The lots were generally less than one hectare.

Any variations in unimproved value may have been better explained by elevation, aspect or other features. It must be assumed then, that the valuers in preparing those valuations cannot find any market based evidence to justify a different level of unimproved values for lots with covenants against those without.

16.0 CONCLUSION

A statutory conservation covenant registered on the title of a property under the Land Title Act is an encumbrance on the Title. A prudent buyer is going to consider it an impediment to the free enjoyment of the property. The significance of that impediment will depend on the conditions of the covenant and what is required to comply with the Management Plan.

The prudent buyer will trade the impediment off against any concessions or grants that may flow from the covenantee Local Government and any enhancement in the property by virtue of the covenant.

Conservation covenants are not common in South East Queensland so most property buyers will not have encountered them. Anecdotal evidence suggests real estate agents are generally negative about them.

For the foregoing reasons a conservation covenant registered on a Title will, per-se, have a negative impact on the market value of a property. However it may not be substantial.

The Case Studies reflect that the impact of a VCC on market value is less where:

- the covenant is a small proportion of the total land area.
- the land has no potential for higher use.
- the land is principally residential or rural land.
- the residential envelope is large enough to cater for the land use common in the locality.
- the land is steep and inaccessible or low-lying and wet.
- the land is infertile or of low productivity.

The Case Studies reflect that the impact of a VCC on market value is greater where:

- the land has subdivision potential
- the land has potential for some other higher use.
- the residential envelope is small or non-existent

In the five cases where the market value was significantly impacted, the original covenantor seems to have been unconcerned by any potential reduction in value. All five were motivated to preserve some environmental values for the future.

It is reasonable to assume that a prudent person would not deliberately reduce the value of their property. The owners in those five Case Studies were fully cognisant of the implications of granting the covenant. It must be concluded they received a personal non-monetary benefit by the conservation of the land equal to the reduction in market value of the property.

To envisage the circumstances where a VCC will have no impact on the market value of a property it is necessary to consider under what circumstances a buyer would be indifferent between purchasing either of two physically identical properties side by side, one with a VCC and the other without.

Case Study 5 (0.0% impact) is the only property among the Case Studies to perfectly demonstrate the application of indifference analysis to market value. A hypothetical prudent buyer would not vary the price he would be willing to pay for the property whether the VCC was in existence or removed. The buyer would view the property's highest and best use as a subdivision opportunity and would be aware that a covenant could be imposed on the remnant vegetation as a condition of development. The existing covenant would therefore not affect the price offered.

Case Studies 14 and 15 (0.8% impact) also serve to demonstrate the application of indifference analysis because they are minimally impacted. A hypothetical prudent purchaser would find very little to distinguish between Case Study 14 and Case Study 15 if one had the VCC and the other didn't. Each lot has a small building envelope determined not by the covenant but by topography. The balance area on each is steep forest providing an aesthetic surrounding. The only difference between the two lots is the written obligation to keep the covenanted land free from the invasion of weed species. For this obligation \$5,000 or 0.8% was considered an adequate allowance to make the buyer indifferent between the two lots. The hypothetical prudent buyer would be indifferent between paying \$620,000 for the lot with the VCC or \$625,000 for the unencumbered lot.

At the other extreme is Case Study 12 (- 53% impact) where the VCC has removed potential for subdivision into small residential lots. The prices at which a hypothetical prudent buyer would be indifferent between the Case Study property and an identical property in the same location without a covenant are significant. One property may be used as a single home-site and the other may possibly yield twenty residential lots in subdivision. The valuation process assesses that the buyer would be indifferent between the property encumbered by the VCC for \$470,000 or the same property unencumbered and capable of subdivision for \$1,000,000.

To reduce market resistance the covenant documents should not be daunting and should reduce the obligations on the landowner whilst maximizing the concessions and services to the owner.

If property valuation expertise is sought early in the voluntary conservation covenant process by the landowner or the Local Government, then design changes could possibly be made that would reduce or remove any impact on market value.

The impact of the VCC's on unimproved values among the Case Studies is not generally significant because of concessions provided under Section 17 of the Valuation of Land Act. Valuers assessing unimproved values can approach each property on a case by case basis.

A perusal of unimproved values in localities where statutory conservation covenants have been imposed as a condition of residential subdivision resulting in covenants on some lots and not other adjoining lots doesn't reveal any significant difference in values attributable to the covenant.

It must be assumed then, that the valuers in preparing those valuations cannot find any market based evidence to justify a different level of unimproved values for lots with covenants against those without.

17.0 REFERENCES

- ¹ Brisbane City Council web-site http://www.brisbane.qld.gov.au/BCC:BASE::pc=PC_679 last accessed Dec 5 2008
- ² Brisbane City Council web-site http://www.brisbane.qld.gov.au/BCC:BASE:1173144702:pc=PC_3044 last accessed Dec 5 2008
- ³ Brisbane City Council [http://www.brisbane.qld.gov.au/BCC:BASE:1173144702:pc=PC_682 last accessed Dec 5 2008
- ⁴ SEQ Catchments advices.
- ⁵ Trust for Nature, Victoria <http://www.trustfornature.org.au/content.asp?PageId=30> las accesses Dec 8 2008.
- ⁶ Land Trusts and Conservation Easements by Chet Boddy <http://www.chetboddy.com/Pages/landtrusts.html>
- ⁷ *Spencer v The Commonwealth* (1905) 5 CLR 418 available at <http://law.atolaw.gov.au/atolaw/view.htm?DocID=JUD%2F5CLR418%2F00004> last accessed Nov 20 2008.
- ⁸ Valuation Under International Financial Reporting Standards, International Valuation Standards Committee (IVSC) Issued by the IVSC 26 March 2007 http://www.ivsc.org/pubs/papers/070300valuation_rpt.pdf last retrieved Nov 3 2008.
- ⁹ Commonwealth Superannuation Industry (Supervision) Act 1993 s10(1)
- ¹⁰ Australian Taxation Office, *Market Valuation for Tax Purposes*. <http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/00161737.htm&page=3> Last retrieved Nov 20 2008.
- ¹¹ Highest and Best Use by Chet Boddy available at <http://www.chetboddy.com/Pages/highestbest.html> Last retrieved Oct 24 2008
- ¹² *Ibid*.
- ¹³ South East Queensland Regional Plan <http://www.dip.qld.gov.au/regional-planning/regional-plan-3.html> last accessed Dec 6 2008
- ¹⁴ Queensland Statute, *Valuation of Land Act 1944*
- ¹⁵ *Ibid*
- ¹⁶ *Stevens v Department of Natural Resources and Mines* [2004] QLC 0108
- ¹⁷ *Ian H Herbert and Catherine C Herbert v. Chief Executive, Department of Natural Resources* (unreported)
- ¹⁸ *Stevens v Department of Natural Resources and Mines* [2004] QLC 0108
- ¹⁹ *Ian H Herbert and Catherine C Herbert v. Chief Executive, Department of Natural Resources* (unreported)
- ²⁰ Australian Taxation Office A summary of Taxation Laws Amendment Bill (No. 2) 2001 Taxation Laws Amendment Act (No. 2) 2001 which are fully detailed at <http://law.atolaw.gov.au/atolaw/view.htm?docid=NEM/SM200118/NAT/ATO/00003> Last retrieved November 27 2008.
- ²¹ Queensland Statute, *Land Title Act 1994*
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