IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV 2011-441-222
[2012] NZHC 658

IN THE MATTER OF	an appeal pursuant to s 26 of the Land Valuation Proceedings Act 1948
BETWEEN	NAPIER CITY COUNCIL Appellant
AND	MARIST HOLDINGS (GREENMEADOWS) LIMITED Respondent

Hearing: 19, 20 March 2012

Coram: Ronald Young J
Mr Graeme Horsley (lay member)

Counsel: J O Upton QC and M B Lawson for Appellant
P Cavanagh QC and S Trafford for Respondent

Judgment: 4 April 2012

JUDGMENT OF RONALD YOUNG J

Introduction

[1] The respondent, Marist, owns 295 hectares of land near Napier bordered on the east by Church Road and with Puketitiri Road to the north. Before 2000 the respondent had been interested in subdividing part of its land into residential sections. In 2000 the appellant, Napier City Council, zoned 50 hectares of Marist's land as "Western Hills Residential" but with a deferred zoning. Before the deferred status could be lifted and the residential zoning become operative, the 50 hectares required Council approved roading access. This could be through the development of Puketitiri Road which bordered the land or through the development of an internal road on the Marist land exiting into Church Road. Development of Puketitiri Road

by the Council required land to be taken from Marist. In its 2000 plan the Council did not anticipate this even as a possibility until near the end of their ten year plan (no capital funding was allocated to the project and so development even, within 10 years, was uncertain).

[2] In 2003 the Napier City Council, Marist and another land holder, Summerset (from whom land was also required to realign Puketitiri Road), entered into an agreement. The Council agreed to bring forward the realignment of Puketitiri Road. Marist and Summerset agreed the Council could take the land necessary for the realignment. One and a half hectares of the appellant's land was involved. Compensation for the taking of the land was to be assessed pursuant to the Public Works Act 1981. Marist would then apply to remove the deferred zoning so that its 50 hectares would be zoned for residential lot development. The development of Puketitiri Road would inevitably lead to the lifting of the deferred zoning relating to the 50 hectares.

[3] The one and a half hectares of the respondent's land was taken for roading purposes by the Council in January 2004. The parties could not agree on appropriate compensation. And so the dispute was referred to the Land Valuation Tribunal. The Tribunal had competing valuations. Marist's valuer said the land taken was valued at $310,000. The Council's valuer concluded that the increase in value of Marist's remaining land (the 50 hectares arising from realigned Puketitiri Road) marked for subdivision, vastly exceeded the value of the one and a half hectares. This "betterment"[1] figure calculated, pursuant to s 62(1)(e) of the Public Works Act 1981, meant according to the Council's valuer that no compensation would be payable to Marist for taking the one and a half hectares.[2] The Tribunal favoured Marist's valuer and concluded there was no betterment. It assessed the compensation for the one and a half hectares under the Act at $306,000.

[4] In this appeal the Council says the Tribunal wrongly rejected its claim that there was an increase in value of Marist's remaining land arising from the taking of the one and a half hectares for the development of Puketitiri Road. It submits no

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1 A term used by both valuers to describe the situation in s 62(1)(e) of the Public Works Act 1981.
2 The increase was $2.95 million.

compensation was properly payable. However, if we conclude there is no betterment there is no further challenge to the Tribunal's assessment of $306,000 compensation.

Approach to this appeal

[5] The appellant must satisfy us the Tribunal was wrong. In assessing the Tribunal's conclusions we will reconsider the evidence, identify the legal principles involved and reach an independent conclusion based on that analysis.[3] If that analysis convinces us the decision of the Tribunal is wrong, then their decision should be set aside.

[6] Rather than begin this judgment with a detailed analysis of the Tribunal's reasoning, we propose to take a different approach. Central to the Council's case is that the Tribunal failed to properly deal with its case; that the taking of Marist's land and the resulting road works increased the value of the rest of Marist's land well beyond any value given to the one and a half hectares.

[7] In this case the Tribunal had two valuations from Mr Penrose, the valuer instructed by the Council. His first valuation in 2006 concluded that there was no betterment as a result of the taking of the land and the development of Puketitiri Road. In his later valuation (2009) he concluded that there was betterment arising from the public works and that the increase in value of Marist's land was almost $3 million. This vastly exceeded any valuation of the one and a half hectares taken and would have meant no compensation was payable to Marist. Mr Spencer was the valuer who gave evidence on behalf of Marist. He concluded that there was no betterment. He valued the one and a half hectares at $310,000 and the Tribunal ordered the Council pay Marist $306,000.

[8] We are concerned that the approach of Mr Spencer seems to have let extraneous issues influence him as to whether or not there may have been betterment in this case. Further, Mr Penrose's valuation of betterment may not have applied accepted valuation principles in reaching his figure of $3 million. We consider,

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[3] Land Valuation Proceedings Act 1948, s 26(1); *Austin, Nichols & Co v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

therefore, the best approach to this appeal is firstly to consider whether the approach of the valuers was in accordance with s 62(1)(e) of the Public Works Act 1981 and accepted valuation principles. And then, whether in turn, the Tribunal took the correct approach in law to its assessment. If betterment is to be assessed we then consider the appropriate methodology.

Section 62 of the Public Works Act 1981 and the approach to valuation

[9] Where land has been taken for public works, s 62 requires the Tribunal take into account a list of factors in assessing the amount of compensation for (as relevant here) the land taken. The land taken should be valued on a willing seller/willing buyer basis (market value). That approach is then qualified in a number of different ways. One of the qualifying provisions is sub (e). That provides:

> (e) The Tribunal shall take into account by way of deduction from that part of the total amount of compensation that would otherwise be awarded on any claim in respect of a public work that comprises the market value of the land taken and any injurious affection to land arising out of the taking, any increase in the value of any land of the claimant that is injuriously affected, or in the value of any other land in which the claimant has an interest, caused before the specified date or likely to be caused after that date by the work or the prospect of the work:

[10] The first step for a valuer, therefore, will be to assess the value of the parcel of land actually taken.[4] The intent of sub (e) is that where the public work that is to take place on the land taken increases the value of other land (as relevant in this case) which the claimant has an interest in, then that increase in value is to be deducted from the value of the land taken. Subsection (e) requires that the increase in value, if any, must be caused either before the specified date[5] or, is likely to be caused after the specified date, by the work or the prospect of the work. The date on which such an assessment is to be made is the date on which the land was taken. In this case, January 2004.

[11] Both valuers in this case seemed to agree that the facts of this case required consideration of sub (1)(e) which the valuers described as "betterment".

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4 Public Works Act 1981, s 62(1).
5 Public Works Act 1981, s 62(2).

Facts

[12] We agree with the appellant that given the facts in this case there were prima facie grounds to think, as at the date the land was taken, January 2004, that there would be an increase in the value of the respondent's lands arising from the work done on Puketitiri Road encompassing one and a half hectares of land.

[13] We turn now, therefore, to the relevant facts. As the Tribunal observed:[6]

> From the early 1970s consideration has been given to the creation of a residential subdivision on land owned by the Claimant lying more or less west of Puketitiri Road in Napier.

[14] We take the subsequent history of the development of the proposed subdivision from the appellant's reply submissions in this way:[7]

> **Chronology**
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> (a) In 1997 the respondent, MHG sought a Private Plan change pursuant to the first schedule of the Resource Management Act 1991 to re-zone part of its land at the top of Puketitiri Road (then zoned Taradale Rural) to a residential zone. This was an MHG initiative, not the Council.
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> (b) Commissioners made a recommendation to Council to rezone the land for residential use. This was subsequently adopted by Council as the decision on the MHG request for a Private Plan change.
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> (c) A complete review of the Napier City District Plan was notified in October 2000. The MHG Private Plan change was brought forward and incorporated into the proposed plan as a Western Hills Residential Zone. The Mission Heights diagram (appendix 3 to Mr Holley's evidence) was included as appendix 26 in the proposed plan.
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> (d) The proposed plan drew submissions in opposition similar to the Private Plan that had been initiated by MHG. Hearings were held in front of a Hearings Commissioner (Michael Garland). The Council decided to include the land in question as a deferred residential zone pursuant to Ch.11A of the proposed District Plan. The deferred zone was dependant on an upgrade of Puketitiri Road being completed or MHG constructing an alternative road to access its development.
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> ...

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6 At para [3].

7 Submissions in Reply, Chronology at (a) to (d), (i) to (k), (m).

(i) By September 2003 the discussions had advanced to the point where heads of agreement were entered into (appendix 4 to the evidence of Mr Holley).

(j) In December 2005 MHG put in a draft Application for Resource Consent to subdivide its land for consideration by the Council, with access to the subdivision off a realigned Puketitiri Road.

(k) The realignment and development of the Puketitiri Road took place in 2005 and 2006 and was completed in March 2006.

...

(m) The realignment of Puketitiri Road having been completed, the deferred residential zone was made operative with the uplift of the deferred status of the zoning formally taking place in October 2007. Thereafter, residential development in the area the subject of the subdivisional plan submitted constitutes a controlled activity for which consent is available as of right subject only to addressing issues relating to the provision of services (drainage, roading and the like).

[15] The Council's case before the Tribunal was that the one and a half hectares was taken for the improvement of Puketitiri Road (the public work). The improvement of this road has, the Council says, meant Marist would be able to subdivide the 50 hectare block of land which runs off Puketitiri Road. This was because the only impediment to the deferred residential zoning as at January 2004 being lifted, and an operative zoning permitting residential subdivision, was the provision of adequate roading. Thus, an increase in the value of Marist's other land was likely to be caused by this roading improvement.

[16] Section 62(1)(e) of the Public Works Act 1981 requires a valuer as a first step to consider (as relevant to this case) whether there is any land in which the claimant has an interest which might increase in value as a result of the work done by reason of which the other land was taken. We emphasise the word "might" at this stage of the assessment process. This first stage should be to eliminate from sub (1)(e) consideration situations where there could not possibly be any betterment and thus no before and after valuation would be required. This will include the following situations: where there is no other relevant land; where no possibility that any increase in value of the other land arises from the public work; and where there cannot possibly be any increase in value of any other land.

[17] Where, however, an increase in value is a possibility within s 62(1)(e) (and perhaps only a remote one) the best course for a valuer in such a situation will be to undertake the valuations contemplated by s 62(1)(e). In undertaking such a before and after valuation, the valuer will need to understand the background objective facts relevant to the public work and the land both taken and potentially affected. The valuer will need to consider whether any increase in value is "caused before the specified date or likely to be caused after that date by the work or the prospect of the work".

[18] There is nothing to suggest that "the work" need be the only cause of an increase in value but it must be causally linked in a way that is more than minor. But what then must be kept in mind is that sub (1)(e) is concerned only with assessing an increase in value caused or likely to be caused by the work. And so in reaching a figure for any increase in value it is only the increase that is caused or likely to be caused by the work which should be valued. Any increase in value caused by other factors would need to be discounted.

[19] The assessment of before and after values, based on the facts known, is an objective assessment. It is the willing buyer/willing seller test. The assessment therefore requires consideration of what the objective price a well informed vendor and purchaser would reach in an agreement for the land both before and after the completion of the public work.

[20] The assessment of values is to be made on the specified date (here the date the one and a half hectares was "taken" was January 2004) but with the objective observer looking forward to assess any likely increase in value caused by the work. (We comment later in this judgment on the application of the willing buyer/willing seller methodology.)

[21] And so in this case the valuer's initial assessment,[8] to identify if a full valuation was required, needed to encompass the circumstances which led up to the taking of the land. Here, broadly the evidence showed Marist was very interested in subdividing the land adjacent to Puketitiri Road. It entered into an agreement with

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[8] As described in [17].

the Council in which one and a half hectares of its land was taken for road realignment to facilitate the subdivision. The Council undertook the realignment many years before it had planned. The agreement was to facilitate Marist's intention to subdivide the 50 hectares. There was evidence that the public works, the widening of Puketitiri Road, would facilitate the subdivision of the joining Marist land through the change in zoning which resulted from this widening. In turn, this change in zoning could *prima facie* be seen as having the capacity to increase the value of the 50 hectares.

[22] These background facts, therefore, easily provided sufficient reason for a valuer to undertake a s 62(1)(e) valuation of Marist's remaining land. Indeed the facts illustrated such an assessment had to be undertaken if a true assessment of betterment, if any, was to be obtained.

[23] With this background we turn, therefore, to consider the approach of the two valuers.

The valuations

Mr Spencer

[24] Firstly, the evidence of Mr Spencer. Mr Spencer's conclusion was that there was no betterment in terms of s 62(1)(e). We are satisfied that Mr Spencer's approach to betterment as revealed in his report and his evidence was wrong. Mr Spencer provided a brief of evidence and what were two reply briefs, and his valuation report. He gave evidence and was cross-examined before the Tribunal.

[25] Mr Spencer made a number of statements which identified why he did not consider the value of Marist's land had increased in value arising from the realignment of Puketitiri Road.

[26] In his statement of evidence as to betterment he said:

> [52] The realignment was planned by NCC, but not expected to occur for a number of years. Construction of the extension of Prebensen Drive effected an opportunity for enhanced traffic management for the Napier City/Taradale commuter traffic and to provide for any future development of land to the west including Mission Poriati as well as the Citrus Grove subdivision which immediately adjoins the principal road realignment.
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> [53] I understand that there was no betterment contribution obtained for the Citrus Grove land.
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> [54] The proposed development of Mission land will attract a comprehensive range of development contributions and levies including contributions for roading, all of which are provided for within the Plan.
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> [55] MHL have contributed a sum of $73,152.65 to the construction of the road to accommodate a future access point to the future Residential land not zoned at the date of taking. This contribution was to modify the road alignment to accommodate future access.
>
> [56] The increasing intensity of rural residential development to the west of the subject land benefits significantly from the realignment as will the proposed future development beyond the NCC boundary.
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> [57] At the date of taking the adjoining MHL land with the deferred residential zoning was not subdivided and is still not subdivided.
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> [58] There is no betterment to MHL from the road realignment as at 15 January 2004 or upon completion of the works, understood to be early 2006, or indeed now.

[27] The fact that the improvement to Citrus Grove land as a result of the Puketitiri Road realignment was not the subject of a betterment assessment is irrelevant in assessing the question of betterment with respect to the Marist land. The focus should be solely on Marist's land. The fact that any development of the Marist land has or might attract Council levies, by itself, is irrelevant in the broad sense identified by Mr Spencer. However, the total cost of a subdivision (including Council levies) may be relevant.

[28] We note that at [56] of his statement of evidence Mr Spencer appears to support the possibility of an increase in value of the Marist land arising from the realignment. This conclusion should have been the trigger to carry out an appropriate before and after valuation of the 50 hectares. Mr Spencer's comments at

[57] are in conflict with this approach and wrong. He was required to make an assessment of increase in value of the remaining land as at January 2004 but looking ahead at future prospects.

[29] In his rebuttal brief in reply to the Council's evidence before the Tribunal and in support of his rejection of betterment Mr Spencer notes that even if the local market was ready for such a subdivision Marist may not have proceeded with it. Further, he says that Marist's initiatives for subdivision were about the future rather than any current subdivision. And that there is quite a difference between preparing land for subdivision and affecting the subdivision. He observed that the opportunity to subdivide the land compulsorily taken had been lost and compensation ought to be payable given land has been taken.

[30] An assessment under s 62(1)(e) is objective. It is not to be based on Marist's subjective intent for the land. Section 62(1)(e) is concerned not just with current value (as at the date the land is taken) but likelihood of a future increase in value arising from the public work. The degree of certainty of development of the subdivision will be relevant to an assessment of what increase in value if any has occurred. However, Mr Spencer inappropriately uses the fact that the subdivision of the Marist land is not a certainty to reject any increase in value in the land. This is not the correct approach. His assessment fails to take into account that an increase in value of the remaining Marist land may well occur simply by the increased likelihood of subdivision arising from the change from deferred to operative zoning.

[31] Cross-examination before the Tribunal focussed on Mr Spencer's claim that there had been no betterment. Mr Spencer said that in assessing "betterment" of the remaining land the whole of the remaining land needs to be considered. The current 295 hectares included a well known winery, restaurant and function centre, a vineyard, some forestry land and farming land. He said that although there may be betterment by increasing the potential for subdivision, other aspects in other parts of the property might need to be considered. While this may be correct it required a proper assessment of before and after value.

[32] Mr Spencer confirmed that his view was that he could not see "that there was betterment arising from the situation". He, therefore, did not undertake any assessment of the before and after value of the existing land.

[33] Further, cross-examination focused on Mr Spencer's valuation report. In his report he identified a series of factors which he said were relevant when assessing betterment. The first was the fact that the upgrade of the Puketitiri Road was for the benefit of the Napier City and surrounding residents. However, in cross-examination Mr Spencer agreed that this was an irrelevant consideration in deciding whether or not there was betterment.

[34] The second reason given for rejecting betterment was that the land continued to be used for grazing activities. Mr Spencer accepted this was not relevant in assessing value.

[35] Mr Spencer in his report said that there was no specific benefit to the balance of the land at the date the land was taken (January 2004). However, he accepted that s 62(1)(e) also required consideration of any increase in value after the date of taking.

[36] Further, Mr Spencer had said that land owned by other land owners serviced by Puketitiri Road might also have benefited from its realignment but none had claimed betterment. Mr Spencer accepted when questioned that the position of other land holders was irrelevant in assessing any increase in value with respect to Marist's land. Mr Spencer accepted that the road did increase the potential for subdivision of the respondent's land.

[37] We conclude, therefore, Mr Spencer did not adequately focus on the statutory requirements of s 62(1)(e) and considered irrelevant matters in his rejection of betterment. As we have noted we are satisfied that there was *prima facie* evidence requiring a valuer to undertake a s 62(1)(e) assessment in this case.

[38] There was reason to suppose that the value of the respondent's land and in particular the 50 hectares identified for potential subdivision may have increased in value as a result of the provision of the road. Puketitiri Road provided proper and adequate access for the proposed subdivision. This in turn was sufficient to satisfy the Council that the deferred residential status should be lifted and that the land would become formally zoned as residential. That was a substantial change in the status of the land. While the formal change did not occur until 2007 we are satisfied the well informed observer would have known in January 2004 that with the realignment of Puketitiri Road the deferred zoning would inevitably have been lifted. The change in status would have allowed subdivision as of right subject to obtaining consent to infrastructure requirements such as stormwater. We consider this was easily sufficient evidence of a likelihood of an increase in value of the land to require a full before and after valuation pursuant to s 62(1)(e). It follows, therefore, we consider Mr Spencer's rejection of betterment was premature, based on irrelevant matters, failed to adequately consider s 62(1)(e), and therefore was in error. In this conclusion we differ from the Tribunal.

[39] At [14] and [15] of their decision, the Tribunal noted in Mr Spencer's evidence why betterment was not relevant in this case.

[40] The Tribunal went on to say:[9]

> The approach taken by the Respondent in this case is encapsulated in paragraph [22] of Mr Lawson's opening submissions when he said:
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> > "The reality is that the works undertaken on Puketitiri Road by the Respondent dramatically enhanced the value of the Claimant's land as it enables residential development of the Claimant's land which had not previously been possible due to roading constraints on Puketitiri Road."
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> The difficulty with that submission is that the evidence simply does not support it. An assumption has been made that because the road has been improved that in itself leads to a significant increase in the value of the Claimant's adjoining property. At the time the issues of compensation were being negotiated around 2006 and 2007 neither Mr Penrose nor Mr Spencer considered betterment was relevant. Mr Lawson's submission in that regard also does not accord with his own client's view at the time. The senior officers of the Respondent obviously did not consider there was any betterment to the Claimant otherwise the offer of 3 July 2006 would not

[9] At [26].

have gone to the Claimant in the form that it did. It is the case for the Respondent that the realignment of Puketitiri Road has provided the opportunity for the Claimant to subdivide a large quantity of its existing land to its obvious benefit. It is around this proposition that the Respondent's argument on betterment has been founded. We are satisfied from the evidence in this case that for economic and other reasons the Claimant has not, and does not intend in the near future, to proceed with a subdivision of the land and neither is the land ripe for subdivision within any realist time frame. There is other access available from Church Road into any potential subdivision that would not require the use of Puketitiri Road at all. While the Respondent submits that such access should be discounted on the basis of cost it is still a factor that has to be considered when the Respondent asserts betterment as a result of the realignment.

[41] And further:[10]

In his final submissions Mr Cavanagh QC cites *Squire Speedy Land Compensation* at page 88:

> Finally when there is a major improvement particularly when the character of the road and locality is changed, and there is clear, comparable sales evidence of increase in land value, a clear cut case for a betterment claim may be sustained.

In light of those comments Mr Cavanagh QC submits that before betterment can be established it must be supported by market evidence that proves the Claimant's land has sustained a significant increase in value directly attributable to the public work which is the basis of the claim.

We agree with that assessment. In our view there is no evidence in this case of betterment. The Heads of Agreement entered into between the parties in September 2003 accepted that the Respondent would pay the Claimant compensation in accordance with the Public Works Act 1981. In July 2006 based on the valuation provided by Mr Penrose the Respondent made an offer of compensation which the Claimant did not accept. It was only after the Claimant rejected the initial offer of compensation that the Respondent sought to revisit the entire basis upon which the original offer was made and then concluded that no compensation should be paid because a subsequent valuation assessed betterment at close to $3 million thus wiping out any potential compensation.

[42] And finally:[11]

We prefer what Mr Penrose had to say in May 2006 and what Mr Spencer said in his report. As a result of those reports the parties were endeavouring to resolve not whether compensation was payable but how much that compensation should be. We do not accept Mr Penrose's subsequent valuation that there was betterment and that that value of that was nearly $3 million. Accordingly we hold there was no betterment and the second issue to determine is the amount of compensation payable.

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10 At [27] to [29].

11 At [31].

[43] We think the Tribunal erred in not focussing on why Mr Spencer rejected betterment. It was not in our assessment simply a question of preferring one valuer over another in this case. The correct approach was to consider what the law required in assessing betterment and test that against each valuers report and evidence.

[44] We accept that part of the Tribunal's reasoning was that, having rejected Mr Penrose's evidence of betterment, they found there was no evidence on which they could rely to conclude there was betterment. We accept this conclusion did not require an assessment of Mr Spencer's evidence. It was based on what the Tribunal considered was a lack of credible evidence supporting betterment. However, the Tribunal did, in part at least, rely upon Mr Spencer's report rejecting betterment when it came to consider whether there was an increase in value arising from the public work. We are satisfied for the reasons given the Tribunal were wrong to rely upon Mr Spencer's evidence regarding betterment.

Mr Penrose

[45] Whatever the rationale for the change in stance by Mr Penrose we accept the circumstances justified the Tribunal in looking with suspicion on his claim that there was betterment (to almost $3 million) in his 2009 report given his rejection of betterment in his 2006 report. Mr Penrose's change of view was relevant to the Tribunal's assessment. It is equally relevant to our assessment of his evidence. The Tribunal made discrete findings with respect to Mr Penrose's evidence. They rejected his evidence based on their assessment of his credibility arising from his change in valuation from 2006 to 2009. Although "credibility" was used it was not suggested that Mr Penrose had given untruthful evidence. The real issue was his reliability given his change in stance. Further, the Tribunal concluded Mr Penrose could not explain this change.

[46] Counsel for Marist submitted that we should not differ from the Tribunal's assessment of Mr Penrose. He said they were in the best position to assess Mr Penrose's evidence given they had heard him give evidence in person. We reject that submission. The Tribunal's conclusion about Mr Penrose was based on his

change in valuations and the Tribunal's view that he could not explain either his change or why he concluded in 2009 there was betterment. We consider we are in as good a position as the Tribunal to make that assessment.

[47] In his evidence Mr Penrose said the reason for the change was that his initial instructions from the Council with respect to his first valuation did not "specifically request that betterment be assessed".

[48] Mr Penrose went on to say that he was not aware of the agreement signed in 2003 between the City Council and Marist. Thus, he said his 2006 valuation centred on the value of the land to be taken for the road.

[49] However, in his 2006 report Mr Penrose did address betterment. He said:[12]

> The realignment of Puketitiri Road and Oaks Road has improved vehicle access to the general locality however we do not consider this to convert any significant betterment on the remaining landholding.

[50] As the Tribunal observed the betterment observation in his 2006 report was difficult to reconcile with his brief of evidence that he was not specifically requested to consider or assess betterment. The 2006 report makes it clear that he did assess betterment and concluded there was none. The Tribunal concluded that Mr Penrose:[13]

> ... does not explain how the application of the same principles to the same set of facts led to such a diametrically opposed results in each of the two valuation reports.

[51] And further:[14]

> Mr Penrose did not go on to explain in his report or in his evidence before us why he considered the realignment of Puketitiri Road caused an increase in the value of the claimant's adjoining land. He seemed to assume in his report that there was betterment ....

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12 At [2.13].
13 At [18].
14 At [19].

[52] The appellant says that Mr Penrose accepted in his evidence before the Tribunal that he had made an error in his 2006 report. It may be that the explanation for the change is, as now suggested, that Mr Penrose did not fully understand what was required to be assessed as betterment. Certainly the contents of the 2003 agreement was a vital aspect of the reasons behind any increase in value. In any event Mr Penrose accepted that his 2006 report was in error in its rejection of betterment.

[53] However, we differ from the Tribunal when it said Mr Penrose did not explain why he considered there had been betterment in his 2009 report. We consider that Mr Penrose illustrated he understood the task required of him pursuant to s 62(1)(e) in his 2009 report and that the evidence shows that he brought the correct principles to bear on his assessment of betterment.

[54] However, we consider that Mr Penrose's methodology used to calculate the before and after valuations of the 50 hectares of Marist's land was in error. We return to this point later in this judgment.

[55] As we have said at the beginning of this judgment, we are satisfied there were *prima facie* reasons to embark on a valuation of the respondent's landholding before and after the one and a half hectares was taken (January 2004).[15]

[56] Mr Penrose's evidence was that there was an increase in value of Marist land arising from the realignment of Puketitiri Road (the public work) because this work unlocked the zoning covering the 50 hectares.

[57] In his 2009 report Mr Penrose said he considered as an initial point that there may be betterment because of the lifting of the deferred zoning and therefore bringing forward the subdivisional potential of the land.[16] This is the equivalent of our suggestion that a valuer first must be satisfied that there is some *prima facie* evidence of betterment before embarking on the s 62(1)(e) assessment.

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15 See [37].
16 See 2009 Report at [4.0], pg 5.

[58] Mr Penrose said to assess betterment he had to identify any increase in value of Marist's other landholding arising from or as a result of the work or the prospect of the work. This was clearly correct and in accordance with s 62(1)(e).

[59] Mr Penrose said his valuation had to consider the value of the whole of Marist's landholding in the area. However, he concluded that the only portion of Marist's land potentially affected by the public work was the 50 hectares. We agree with his approach. It was in accordance with the legislation. It was possible that while there was an increase in value of the 50 hectares, as a result of the realisation of its subdivisional potential the remaining land could have dropped in value. And so it was proper for Mr Penrose to consider potential effect on the whole of the land.

[60] Mr Penrose also appropriately considered in his report the demand for any residential sections in the area. After doing so he then undertook a before and after valuation.

[61] Mr Penrose was strongly cross-examined about his 2009 report. We are satisfied having reviewed the evidence, that Mr Penrose understood and properly maintained the appropriate valuation principles applicable to s 62(1)(e). He exhibited in his answers to the cross-examination that he had an accurate appreciation of the statutory criteria for public works compensation.

[62] It was put to Mr Penrose that:[17]

> Despite the specified date being in 2004 as at today we are no closer to Marist Holdings showing an indication of a desire to develop its land for residential purposes.

[63] Mr Penrose correctly said that his function as a valuer was to identify the hypothetical seller and purchaser (both willing) at the relevant date. He then had to assess what price would be agreed upon by those persons. This did not (correctly) involve becoming entangled in the reasons why Marist may or may not have developed the subdivision.

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[17] Notes of Evidence at 167.

[64] Mr Penrose was challenged on his claim that he had valued the land in January 2004 given he had taken into account the lifting of the zoning which in fact had not happened until 2007.

[65] He said (also correctly) that he had valued the property in 2004 on the basis that the chance of the deferred zoning being lifted was very high at that date given the land had been taken and the intention was to proceed with the realignment of Puketitiri Road. This would remove the only impediment to the lifting of the deferred zoning. He, therefore, assessed the "aftervalue" taking into account the "potentialities that existed".[18]

[66] Mr Penrose was cross-examined on several occasions about what Marist had or had not done with the land or they intended to do with the land over the intervening time from 2004 to 2011 when the case was heard before the Tribunal. Mr Penrose's responses can be summarised by his constant refrain that he was not dealing with Marist's intent or otherwise but with the hypothetical seller. He came back to the correct principle that he was required to assess before and after value on an objective basis and that the difference between those figures, if any, was betterment if the increase arose from the work done.

[67] We are satisfied that Mr Penrose's evidence and his 2009 report illustrate that he correctly understood the task he was required to undertake in s 62(1)(e). We, therefore, think the Tribunal was wrong to dismiss his evidence even taking into account, as we have, the differences between his 2006 and 2009 valuations. We are satisfied that Mr Penrose adopted the correct principles in his 2009 valuation of betterment.

Other reasons to support the Tribunal's decision

[68] The respondent's case on appeal is that although Mr Spencer's reasons for rejecting betterment may not be able to be justified the Tribunal adopted a different and correct approach when considering betterment. The respondent submits that the

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[18] Notes of Evidence at 178.

Tribunal's conclusion as to betterment are properly identified in [10], [26], [30] and [31] of its decision. We repeat these paragraphs:

> [10] The effect of this section requires a deduction to be made from the total amount of compensation that would otherwise be awarded if the effect of the particular public work increased the value of any other land in which the Claimant had an interest. If such a situation occurs it means there has been betterment to the other land belonging to the Claimant. However it is vital to note that betterment only applies where the increase in value is either caused by or likely to be caused by the work itself or the prospect of its being done. Therefore in this case the betterment can only apply if the realignment of Puketitiri Road in itself caused an increase in the value of the Claimant's adjoining land.
>
> ...
>
> [26] The approach taken by the Respondent in this case is encapsulated in paragraph [22] of Mr Lawson's opening submissions when he said:
>
> > "The reality is that the works undertaken on Puketitiri Road by the Respondent dramatically enhanced the value of the Claimant's land as it enables residential development of the Claimant's land which had not previously been possible due to roading constraints on Puketitiri Road."
>
> The difficulty with that submission is that the evidence simply does not support it. An assumption has been made that because the road has been improved that in itself leads to a significant increase in the value of the Claimant's adjoining property. At the time the issues of compensation were being negotiated around 2006 and 2007 neither Mr Penrose nor Mr Spencer considered betterment was relevant. Mr Lawson's submission in that regard also does not accord with his own client's view at the time. The senior officers of the Respondent obviously did not consider there was any betterment to the Claimant otherwise the offer of 3 July 2006 would not have gone to the Claimant in the form that it did. It is the case for the Respondent that the realignment of Puketitiri Road has provided the opportunity for the Claimant to subdivide a large quantity of its existing land to its obvious benefit. It is around this proposition that the Respondent's argument on betterment as been founded. We are satisfied from the evidence in this case that for economic and other reasons the Claimant has not, and does not intend in the near future, to proceed with a subdivision of the land and neither is the land ripe for subdivision within any realist time frame. There is other access available from Church Road into any potential subdivision that would not require the use of Puketitiri Road at all. While the Respondent submits that such access should be discounted on the basis of cost it is still a factor that has to be considered when the Respondent asserts betterment as a result of the realignment.
>
> ...
>
> [30] Both sides have referred us to a large number of authorities dealing with many aspects of land compensation. It is not out of disrespect for their efforts in doing so that we have not referred to them during the course of this decision. We are of the view that it is a matter for factual assessment based

> on the evidence and our acceptance or rejection of what witnesses have said to us that leads to our conclusions that betterment has no place in this case. In his initial valuation report of May 2006 Mr Penrose rejected betterment. In his valuation report Mr Spencer rejected betterment. It was only years later without any explanation as to why he had changed his views Mr Penrose concluded that not only had he been in error in terms of excluding betterment in his original report he was now able to conclude that he had been in error to the tune of about $3 million.
>
> [31] We prefer what Mr Penrose had to say in May 2006 and what Mr Spencer said in his report. As a result of those reports the parties were endeavouring to resolve not whether compensation was payable but how much that compensation should be. We do not accept Mr Penrose's subsequent valuation that there was betterment and that that value of that was nearly $3 million. Accordingly we hold there was no betterment and the second issue to determine is the amount of compensation payable.

[69] Marist submits that the evidence established there were four main reasons why betterment should be rejected. Firstly, the land was not ripe for subdivision as at 2004; secondly, there was no demand for residential sections at this time; thirdly, there was alternative access to the subdivision so that Puketitiri Road was not required; fourthly, the impediment to stormwater disposal meant no subdivision was possible.

Ripe for subdivision

[70] The first point to be made with respect to the Tribunal's remarks in [26] is that, as we have noted, the claimant's subjective intention with respect to the land is irrelevant in assessing value.

[71] Secondly, the Tribunal raises the issue of whether the land is "ripe for subdivision within any realist (sic) timeframe". It concluded it was not. The Tribunal did not identify specifically why it reached such a conclusion. Presumably ripe is used as a pseudonym for "ready". We disagree with the Tribunal's conclusion. The important point to remember is that the assessment must be made by the informed observer as at January 2004 and that no doubt varying stages of ripeness or readiness for subdivision can properly be reflected in variable values for the land.

[72] What was known in January 2004 was the background efforts of Marist to facilitate a subdivision of its 50 hectares including the agreement of September 2003. This meant that as at January 2004 the observer could reasonably assume the appropriate zoning would be in place which would permit subdivision. There would still be impediments, however. Marist would have to obtain consent (if that was necessary) for drainage and stormwater and other work associated with the subdivision.

[73] The informed observer will be likely to know, given the agreement acknowledged the realignment of Puketitiri Road was in part to facilitate the subdivision, that the realignment work would likely incorporate the Council's obligations for connection of stormwater and other services for the subdivision.

[74] And so in terms of the Council requirements for subdivision approval, the major hurdle had been crossed (the existence of the appropriate zoning). Other less important consents may have been required and these were hurdles still to cross. Thus, the ability to subdivide at that stage could be seen as probable but not guaranteed.

Demand for sections

[75] In the second part of the equation the informed observer needed to ask, as at January 2004, looking to the future, is there a market for these sections within a reasonable time? This was strongly contested by Marist. Their submissions were that there was no demand for sections for such a subdivision and indeed there was an oversupply of sections in the Napier area at this time and in the years following.

[76] Thus, they submitted, the chance of a subdivision of the Marist land proceeding to market within a reasonable time was so remote as to be able to be totally discounted. If accepted this would mean there was no increase in value of the land as a result of the Puketitiri Road realignment and thus, no betterment.

[77] Marist says that the Tribunal concluded there was no demand. They say this conclusion was supported by the evidence. Marist relied in part on Mr Spencer's evidence as to lack of demand.

[78] In his report when valuing the one and a half hectares of land, Mr Spencer said:[19]

> The land has significant appeal as a rural residential lot and its marketing as a single parcel in April 2005 would have been met with strong demand and would have been a straightforward compliant, single lot subdivision. We note that 1.5Ha is the minimum average lot size for a rural residential subdivision, but that the minimum lot size is 5,000m^2.

[79] While "increasingly" is a comparative word, as Marist submitted, we consider that the paragraph read as a whole clearly shows that Mr Spencer thought that residential and rural development subdivision of the Marist property had a number of potential purchasers and would have strong interest. Mr Spencer noted Marist's keen interest in subdividing the land. Mr Spencer identified real purchaser interest in the land for residential development coinciding with Marist's interest in developing the land (although a subjective matter). These factors were identified by Mr Spencer to support his valuation of the one and a half hectares. They equally support the proposition that there was very real demand for the proposed residential development of the 50 hectares although we accept they have their obvious differences.

[80] Marist also relied upon a 2009 report of the Heretaunga Plains Urban Development Study prepared for the three local bodies in the area; the Hastings District Council; the Napier City Council; and the Hawke's Bay Regional Council. We note that Mr Penrose who gave evidence in this case was one of the author's of the study.

[81] The purpose of the study was, in part, to provide information regarding urban growth in the local authority areas. The report assesses residential section demand in the 2009 to 2015 period and beyond.

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[19] Statement of Evidence, Appendix B, Valuation Assessment, at 16.

[82] The report also considered the history of recent residential section sales in the area which Marist says, is relevant to the question of demand and therefore to the likelihood of the proposed subdivision proceeding within a reasonable period.

[83] In particular the report says:[20]

> Subdivision consent activity for the past ten years has been at a significantly higher level than the projected growth levels for the study period (total consent including lifestyle average 482 per annum for the last ten years). Growth projections for the study period are forecast at 267 per annum or 55 per cent of the level of subdivision consents for the last ten years.

[84] The study period is, as we have identified, the period 2009 to 2015 and beyond.

[85] Further, Marist says that there were subdivisions at Parklands and Te Awa in the Napier area which easily accounted for section demand at the time its land was taken to realign Puketitiri Road.

[86] In considering the report as well as the other evidence relating to demand, we keep in mind that we are concerned with the well informed person as at January 2004 making an assessment of residential section demand. It is therefore only that information relating to the demand for sections available to this well informed observer that can be properly taken into account.

[87] There was significant evidence given at the hearing relating to section demand. Mr Penrose was cross-examined at the hearing in relation to the 2009 study. He was asked about residential section demand, he said:[21]

> In the after situation it was zoned for residential development. There was strong demand in the market place in 2004/2005 as evidenced by the figures in the research we did for the Heretaunga Plans Urban Development strategy. There was a hole in the section demand in Napier causing development to go to Hastings and Havelock North which because of that hole and because the fact that this subdivision didn't proceed Napier City Council advanced Parklands and Te Awa got off the ground. In my view Marist was in a position to get off the ground before those two developments.

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[20] Heretaunga Plains Urban Development Study Phase 2 – Market Demand Brief (Sept 2009) at [2.2].

[21] Notes of Evidence at 164–165.

[88] And further, Mr Penrose was challenged about the subdivisions at Parklands and Te Awa which were Napier City Council developments. In response he said:[22]

> I didn't say they advanced to, I said my understanding is the Parklands subdivision was promoted by Napier City Council because of the shortage of sections in Napier and concern over the loss of development to Havelock and Hastings and that is supported by the Greenfield sections statistics provided in the HPUDS report. The second development, the Te Awa, which is the Serpentine Creek development area, if you'd gone back to the earlier part of the 2000's that would have been seen as far more remote a possibility that the Marist Holdings land.

[89] And further, he said:[23]

> ... but in 2005 which I had taken as the date of valuation (in fact it was 2004) I saw strong market place activity both in section prices, section uptake and purchase of development land which at that time indicated to me that that land with the appropriate zonings all but in place was ripe for development.

[90] Mr Thompson, the planning manager for the Napier City Council, was also questioned about section demand. Counsel for Marist put details of the 2009 Heretaunga Plains report to Mr Thompson and in particular the figures relating to the supply of residential lots from 2000 to 2009.

[91] There was then the following exchange:[24]

> Q Well I put it to you that a reading of this report makes it clear that Marist is acting prudently in not choosing to pursue a subdivision of its land at this present time. The market just doesn't justify that and you have no evidence to refute that do you?
>
> A There is a market of this type of land. There are two subdivisions in Napier at the moment – Parklands and Te Awa. Both of those are subdividing earlier and more than they proposed to because the lack of land. If The Mission land was available it would be taken up.

[92] Mr McWatt was the Works Assets Manager for the Napier City Council, a position he had held since January 2000. Prior to that he had worked in other positions for the Napier City Council and had 20 years experience in local body engineering.

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22 Notes of Evidence at 165.
23 At 167.
24 At 130.

[93] He was cross examined about a volume of sections on the market in the relevant period around 2004. He considered that the Parklands development was a different development than the Marist development. Parklands was pitched at low cost housing and therefore the section prices were modest. Marist was a proposed prestigious subdivision with higher cost sections. They serviced different markets.

[94] Mr McWatt said the Parklands subdivision was developed at around about the same time as the Marist land was taken. Mr McWatt's view was that the residential section market was then buoyant. He said, with respect to the Parklands development:[25]

> We sold more sections in the first two or three years than we had planned for and we got off to a very good start because the market seemed to be quite buoyant.

[95] He confirmed that the supply of sections was difficult and that in his view there was "an urgent need for development to supply sections to the Napier market" at this time. He noted that Napier people had been buying sections in Havelock North and Hastings because there were no suitable sections available in the Napier area.

[96] As far as the development of Puketitiri Road was concerned, he said that Marist were keen to upgrade the road so that it could lift the deferred consent. Although the upgrading of Puketitiri Road had been mentioned as part of a ten year plan, because the upgrading was not in the capital plan, he thought it unlikely that the roading would have been improved within the ten year period from 2000. He said that the Council did not particularly want to spend the money on upgrading Puketitiri Road when approached to do so by Marist. However, the Council "was really quite desperate to try and get some development up and running in Napier because there was a total lack of sections and people were leaving Napier in droves to houses in Havelock North".

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[25] Notes of Evidence at 107.

[97] We are satisfied based on an overall consideration of this evidence, that an objective informed observer in 2004 would have been satisfied that there was a reasonable level of demand for residential sections in the type of development proposed by Marist.

Alternative access

[98] The other factor the Tribunal said was relevant to betterment was that there was other access available to the subdivision through the development of an internal road (within Marist's 295 hectares) connecting the subdivided land onto Church Road. This alternative route would not require Puketitiri Road and so it could not be said the widening of Puketitiri Road had resulted in any increase in value to Marist's land.

[99] To consider the alternative access point it is necessary to return to the informed observer as at January 2004. We are satisfied on the evidence available to that observer as at this date the only realistic option for subdivision of the 50 hectares was the development of Puketitiri Road.

[100] The contents of the 2003 agreement and the background to the subdivision strongly favoured Puketitiri Road. Marist had paid the $73,000 roading contribution to the city to facilitate both the planned realignment and the planned subdivision. Once Puketitiri Road was realigned then the only further roading cost for Marist was the internal roading to serve the subdivision. The Puketitiri Road realignment ensured that there was sufficient roading capacity to serve the subdivision.

[101] In contrast the development of an internal road from the subdivided land to Church Road, had, on the evidence presented, an additional cost of over $1 million for Marist. Whether Church Road, as a consequence of the development of such an internal road and the consequential increased traffic, had to be improved and therefore whether approval to access the subdivision via Church Road would be given by the Council is unknown. It could be, as Marist claims, that access via Church Road provided a more exclusive private entrance to the subdivision. But that possibility is swamped, in our view, by the clear advantage and preference to use

Puketitiri Road as the access for the subdivision. We do not consider the possibility of Church Road access for the subdivision is of any real moment in the assessment of betterment in this case.

[102] The Tribunal's decision at paras [30] and [31] provides no further reasons for its conclusion. It emphasises the inadequacies of Mr Penrose's evidence but does not more fully assess its reasons for rejecting betterment.

Stormwater and other consents required

[103] Marist's case is that there was and remains a complete impediment to the subdivision proceeding. This impediment, Marist says, is a lack of a practical solution to the treatment and removal of stormwater discharge from the subdivision. It is common ground that any subdivider of the 50 hectares would require either Council's consent to any proposal to deal with stormwater drainage or a stormwater disposal proposal within the Council criteria. Thus, a subdivision could not be said to be a 100 per cent certainty while matters such as stormwater disposal remained outstanding.

[104] On the other hand it would be known to the objective observer in January 2004 that the Council had a set criteria for stormwater disposal (a Code of Practice). If the subdivisional plan met that criteria then the stormwater disposal plan would be granted as of right. If, however, the plan did not meet the criteria identified, then the proposal in the plan would be a discretionary activity and consent would be required.

[105] Marist's case is that the Regional Council suggested that stormwater be detained in ponding as a resolution to stormwater disposal in the Marist subdivision. However, Marist says this solution was unacceptable to the Council. An alternative which involved access over an adjoining landowner's property could not be agreed upon. Thus, there was no "solution" to the stormwater problem and the subdivision could not proceed, Marist says.

[106] As at January 2004 the impediments to stormwater disposal now identified by Marist were unknown. No agreement or consent with respect to stormwater disposal had been resolved at that stage. That fact is likely to be relevant in assessing land value. A subdivision could not be said to be a 100 per cent certainty while matters such as stormwater disposal remain outstanding.

[107] On the other hand it would be known that the Council had a set of criteria for the stormwater disposal. And, as we have noted, if the subdivisional plan met that criteria then stormwater disposal would be permitted.

[108] As the Council observed, developers will likely do all they can to bring the stormwater proposal within the Council's Code of Practice and thereby avoid any consent application. There was no reason to suppose in January 2004 that a developer's approach to stormwater disposal would be different in this case.

[109] Further, as Mr McWatt pointed out in his evidence when realigning Puketitiri Road, the Council consulted with Marist to ensure that the Council had all its required infrastructure in place for the stormwater disposal proposed by Marist before it completed the Puketitiri Road realignment. This avoided the need later for the Council to excavate Puketitiri Road for stormwater disposal.

[110] Finally, Mr Penrose in his evidence said that as at January 2004 there were no known problems for stormwater disposal in the area. We, therefore, reject Marist's claim that as at January 2004, looking to the future, stormwater disposal created an insolvable problem effectively preventing subdivision of the 50 hectares.

What was the increase in value of Marist's land?

[111] We are satisfied there was ample evidence upon which a valuer should have proceeded to undertake a before and after valuation of Marist's remaining land. There was reason to suppose the remaining land might have increased in value. In summary, the previous deferred zoning was almost certain to be lifted, and the permissive zoning confirmed. The Puketitiri Road realignment provided appropriate vehicle access to the development. There was a good demand for such sections at

the relevant time. The provision of services to the subdivision (e.g. stormwater) had still to be authorised by the Council but there were no known insurmountable impediments. We, therefore, now consider Mr Penrose's 2009 valuation methodology and his conclusion that there was an increase in value of Marist's 50 hectares of just under $3 million.

[112] Mr Penrose appears to have used two approaches to his valuation. Firstly, he adopted a hypothetical subdivision approach to his before and after value of the land. His second approach was described by him as a valuation of the 50 hectare block before the Puketitiri Road development and after that development. The second method was said to be a check on the result from the first method of valuation.

[113] We have concluded that neither method used by Mr Penrose was reliable in the way it was used by him. However, we are satisfied there is sufficient evidence of the likelihood of betterment in this case such that the proper course is to refer the matter back to the Tribunal to reconsider.[26] We will set out the detail of the orders at the end of our judgment.

[114] We consider the correct before and after valuation of the 50 hectares when valued on the basis of a before and after block of land is relatively straight forward. As we have identified the key difference arising from the public work (the development of Puketitiri Road) was the lifting of the deferred zoning for the 50 hectares. And so a valuer would need to identify comparable sales of land analysed on a per hectare basis before the Puketitiri Road development. The comparative sales would have to include the fact that the land had a deferred residential zoning land.

[115] The "after" valuation similarly would need comparative sales data to support it. Again it would need to factor in the relevant facts we have identified relating to certainty of subdivision and demand. No further adjustment to the before and after figures would be required.

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[26] Land Valuation Proceedings Act 1948, s 26(4).

[116] As to Mr Penrose's before and after valuation, he said that he applied a block land valuation of $200,000 per hectare as his before valuation. This figure multiplied by the 50 hectares gave a figure of $10 million "as rezoned residential". He then said:

> As this rezoning was effectively dependent upon the Puketitiri Road upgrade, we deferred this three years using present value discounting. This gave a block value of $7,572,090.

[117] This methodology is wrong. All that was required of a valuer was to value the block (based on comparative sales of deferred residential zoning land) before Puketitiri Road realignment. There is nothing to justify the $200,000 per hectare in any comparative sales data from Mr Penrose's report. Secondly, present value discounting was irrelevant to this exercise. What was being valued was this 50 hectare block of land with its deferred zoning at January 2004 as the before value.

[118] As to the after valuation of the block Mr Penrose said he applied a figure of $230,000 per hectare. He said this value was at the lower end of block values in appendix 6 to his report. This aspect of the valuation report therefore did purport to rely on comparative sales.

[119] However, appendix 6 to Mr Penrose's report provided little in the way of comparative sale data. It was not clear from the information in appendix 6 whether the sales information was truly comparative to the Marist land. We note the per hectare prices contained in appendix 6 varied between $128,650 to $1,027,687.

[120] Nor did Mr Penrose appear to factor into his assessment of the after valuation any issues relating to the 50 hectares. For example, although he correctly assumed the deferred zoning had been lifted there was still to be complete agreement on the subdivision infrastructure, for example, stormwater, with the Council. We therefore consider Mr Penrose's before and after block valuation to be unreliable.

[121] Mr Penrose's primary valuation seemed to be based on a hypothetical subdivision model. This model had a number of weaknesses. Firstly, the model was based on a subdivision involving 250 sections. The plan lodged by Marist with the

Council had 183 sections. We acknowledge the 183 section plan did not encompass all of the 50 hectares. However, we consider that to simply assume a subdivision of 250 sites, as Mr Penrose did by apparently upscaling the 183 site proposal, was wrong.

[122] Secondly, in his before valuation Mr Penrose applied a 45 per cent profit and risk factor. This is extremely high and could indicate that in Mr Penrose's view the subdivision was not viable at that time. This however would be in conflict with Mr Penrose's other evidence that the subdivision was viable and indeed potentially highly profitable.

[123] Further, there are other apparent inaccuracies in this aspect of his valuation report. He uses a five year realisation period for the rates and a different three and a half year realisation period for interest without explanation. His internal roading costs are based on a 183 lot subdivision when his model uses 250 lots.

[124] Finally, his subdivision model effectively values the 50 hectares before and after as having the same value but with an adjustment only for the one and a half hectares of land taken for the road realignment. The net block value before is said to be $10.962 million and the net block value after is $11.382 million. The $2.95 million difference between the before and after valuations only then arises because Mr Penrose applied a three year time period for resource consent and upgrading of Puketitiri Road. This he said deferred the before value for three years or nine per cent per annum reducing the value of the "before" land accordingly.

[125] The result, therefore, was that he considered the 50 hectares before the upgrading of Puketitiri Road was worth $14.806 million and after the upgrade $17.763 million, a difference of almost $3 million.

[126] This analysis discounted the before valuation of the land by nine per cent per annum to reflect the time delay in obtaining consent to the subdivision and the realignment of Puketitiri Road. The nine per cent discount appears to be based on a yearly bank interest rate calculated over the three year period.

[127] We consider that a potential purchaser would apply a far greater discount to the before price for the uncertainty of the lifting of the differential zoning to permit residential development. Mr Penrose's discount of nine per cent per annum reflects only the cost of capital and ignores other risks and uncertainties in such a process.

[128] We are therefore satisfied this method also has fatal flaws. However, as we have said we are satisfied there are strong grounds to believe there is betterment in this case. What is lacking is a valuation based on accepted valuation principles and in accordance with the Public Works Act.

[129] Mr Cavanagh submitted that if we came to this point of rejecting the reliability of Mr Penrose's valuation then the proper course was to dismiss the appeal because the appellant would not have established betterment. Thus, Marist would be entitled to judgment for the value of the one and a half hectares of land taken based on Mr Spencer's valuation. We reject that approach.

[130] As we have said there are strong reasons to believe there is betterment in this case. Given that conclusion the proper course is for us to send this proceeding back to the Tribunal for rehearing as we have identified.[27]

[131] We therefore allow the appeal, set aside the order of the Tribunal and return the proceeding to the Tribunal to rehear Marist's application for compensation based on this judgment. It may be that the appropriate course is both for the appellant and respondent to instruct new valuers to undertake the necessary valuations based on this judgment.

[132] We see no reason why the evidence previously given other than the evidence of the two valuers should not form the substance of the evidence for the Tribunal together with any new valuations. The Tribunal's assessment of the value of the one and a half hectares has not itself been challenged.

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[27] At [111], [113].

Costs

[133] Should the appellant seek costs they should file memorandum within 21 days. The respondent has a further 14 days within which to respond.

Additional observations

[134] The following comments are not intended to be read as part of this judgment but may assist the valuers who must now undertake this valuation task.

[135] We consider that the correct methodology to reflect the deferred zoning status is as follows:

(a) value the 50 hectares as if the deferred status was lifted;

(b) value the land on the underlying zoning;

(c) deduct the value of the underlying zoning to establish the difference;

(d) assess the chance of the deferral being uplifted in percentage terms;

(e) modify the difference by this percentage;

(f) add back the underlying zoning.

[136] This will then be the deferred zoning valuation. We recommend that any new valuations in assessing market value should have regard to PINZ Valuation and Property Standards and International Valuation Standards and in particular the provisions of the PINZ Practice Standard 1; Valuations for Compulsory Acquisition and the PINZ Valuation Guidance Note 5; Valuations for Compulsory Acquisition should be referred to.

Ronald Young J	Graeme Horsley

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